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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 21, 1992 and JULY 9, 1992

IN THE

Supreme Court of Nebraska

VOLUME CCXL

STEVEN R. SCHROEDER

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By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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[1]Until May 31, 1992
[2]Appointed June 1, 1992

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
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		Michael McGill	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett O. Inbody	Wahoo
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	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin	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	John J. Battershell	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock		
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 Robert Steinke	Columbus Columbus

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
		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
		Edna R. Atkins	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Mary C. Gilbride	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	Gary G. Washburn	Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gerald E. Rouse Gary F. Hatfield Lyle Winkle	Columbus Central City Columbus

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-85-365: **Olson v. Energro-Olson, Inc.** By order of the court, appeal dismissed.

No. S-87-265: **Adams Bank & Trust of Brule v. Ballentine Bros.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-89-677: **Eickmeier v. Vernon.** Appeal dismissed. See Rule 7A(2).

No. S-89-849: **Hallam Grain Co. v. Performance Enterprises.** Pursuant to stipulation of the parties, appeal dismissed as moot; each party to pay own costs.

No. S-89-890: **Lower Colorado River Auth. v. Nebraska Bd. of Equal.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-89-1167: **Ray Bower Land Co. v. Jameson.** Appeal dismissed. See Rule 7A(2).

No. S-89-1178: **Foree v. School Dist. No. 7 of Holt Cty.** Appellant having declined to respond to court's order to show cause, appeal dismissed.

No. S-89-1269: **P-D Corp. v. Spire.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-89-1387: **Lich, Herold & Mackiewicz v. Prentice Hall.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-89-1416: **Gallion v. State.** Affirmed. See Rule 7A(1).

No. S-89-1417: **Sutton v. Sutton.** Stipulation allowed; appeal dismissed.

No. S-90-257: **McDaniel v. Baer.** Stipulation allowed; appeal dismissed.

No. S-90-630: **Braunger Institutional Foods v. Dahl.** Stipulation allowed; appeal dismissed.

No. S-90-948: **Ryan v. Omega Chem. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-90-1186: **Ryan v. Lix Corp.** Stipulation allowed; appeal dismissed.

No. S-90-1218: **Pope v. Nebraska Dept. of Corr. Servs. Appeals Bd.** Appeal dismissed. See Rule 7A(2).

No. S-91-008: **Golus v. St. Paul Mercury Ins. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-91-090: **Ryan v. Oakite Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-91-164: **State v. Carlson.** Stipulation allowed; appeal dismissed.

No. S-91-242: **Smith v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-244: **Shin v. Frank's Fruit House.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-91-264: **State v. Foster.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-370: **Ryan v. Dubois Chemicals.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-91-535: **In re Interest of Gibney.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-549: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-550: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-551: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-552: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-589: **Taylor v. Taylor.** Stipulation allowed; appeal dismissed.

No. S-91-600: **Federal Land Bank of Omaha v. Hubka.** Motion of appellee to dismiss appeal sustained; appeal dismissed for appellant's failure to comply with court's order of

February 12, 1992, and the rules of the court.

No. S-91-653: **State v. Aviles.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-661: **Parker v. Parker.** By order of the court, appeal dismissed for failure to file briefs.

No. S-91-678: **County of Sarpy v. State.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-756: **State v. Falaq.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-91-768: **State v. Bradley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-773: **Paquette v. Lohmeier.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-91-775: **State v. Maser.** Affirmed. See Rule 7A(1).

No. S-91-777: **State ex rel. Nebraska Equal Opp. Comm'n v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. S-91-779: **State ex rel. Collier v. Haase.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-780: **Cole v. Shortridge.** By order of the court, appeal dismissed for failure to file briefs.

No. S-91-785: **State ex rel. Miller v. Scott.** By order of the court, appeal dismissed for failure to file briefs.

No. S-91-790: **State v. Rouse.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-812: **State v. Britt.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-91-813: **State v. Holman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-815: **State v. Hatfield.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-817: **Merwald v. F.J. Merwald and Sons, Inc.** Stipulation allowed; appeal dismissed.

No. S-91-855: **In re Interest of Gibney.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-856: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-857: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-858: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-859: **In re Interest of Parsons.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-870: **State v. Merchant.** Affirmed. See Rule 7A(1).

No. S-91-881: **State v. Joubert.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-1179: **State v. Betke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-92-174: **Cline v. Hall.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-89-1418: **King Henry VIII, Ltd. v. Evertson Well Serv.** Petition of appellant for further review overruled.

No. A-89-1418: **King Henry VIII, Ltd. v. Evertson Well Serv.** Petition of appellee for further review overruled.

No. S-89-1492: **Hanson v. General Motors Corp.** Petition of appellant for further review sustained.

No. A-89-1496: **Swanco Trust Co. v. Nebraska Nat. Bank.** Petition of appellant for further review overruled.

No. A-91-035: **State v. Thomas.** Petition of appellant for further review overruled.

No. S-91-247: **State v. Tasich.** Petition of appellant for further review sustained.

No. A-91-922: **Hogel v. Nugent.** Petition of appellant for further review overruled.

No. A-91-1024: **Kerndt v. Ronan.** Petition of appellant for further review overruled.

No. A-91-1049: **State v. Manuel.** Petition of appellant for further review overruled.

No. A-91-1179: **State v. Betke.** Petition of appellant for further review overruled.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

HAWKINS CONSTRUCTION COMPANY, APPELLEE, V. DIRECTOR OF THE CITY OF OMAHA HUMAN RELATIONS DEPARTMENT ET AL., APPELLANTS.

480 N.W.2d 183

Filed February 21, 1992. No. S-89-670.

1. **Courts: Ordinances: Judicial Notice: Records: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal.
2. **Courts: Ordinances: Appeal and Error.** Without the benefit of the applicable municipal ordinances involved, neither a district court nor an appellate court is in a position to declare the rights of the parties under the ordinances, any more than a court could declare the rights of parties to a contract without the benefit of the contract.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Herbert M. Fitle, Omaha City Attorney, and Jo A. Cavel for appellants.

Dean G. Kratz, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

FAHRNBRUCH, J.

This appeal involves an employment race discrimination award in favor of Fred Cooper, a black truckdriver, who was not recalled to work by Hawkins Construction Company of Omaha following a seasonal layoff.

The case was originally instituted before the Omaha Civil Rights Hearing Board (Hearing Board), pursuant to ordinances

contained in chapter 13 of the Omaha Municipal Code. The Hearing Board determined the rights of the parties by applying applicable ordinances from the Omaha Municipal Code to the evidence adduced by the parties before the board's hearing officer.

Dissatisfied with the Hearing Board's ruling, Hawkins filed a petition in error in which it asked the district court for Douglas County to overturn the board's order. Following a hearing, the district judge reversed the decision of the Hearing Board. The district court's order in favor of Hawkins was timely appealed to this court. We reverse the district court's ruling and order that court to affirm the order entered by the Hearing Board.

The applicable ordinances of the City of Omaha under which the rights of the parties to this action were determined were not introduced in evidence before the Hearing Board. Therefore, they were not before the district court for Douglas County, nor are they before this court. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal. See *Brunken v. City of Omaha*, 225 Neb. 410, 405 N.W.2d 595 (1987).

Without the benefit of the applicable municipal ordinances involved, neither a district court nor an appellate court is in a position to declare the rights of the parties under the ordinances, any more than a court could declare the rights of parties to a contract without the benefit of the contract. See *Vrana Paving Co. v. City of Omaha*, 220 Neb. 269, 369 N.W.2d 613 (1985).

The ruling of the district court for Douglas County is reversed, and that court is directed to set aside its ruling in favor of Hawkins and affirm the order of the Omaha Civil Rights Hearing Board.

REVERSED AND REMANDED WITH DIRECTIONS.

CITY OF LAVISTA, NEBRASKA, APPELLANT, V. DONALD G. ANDERSEN AND GREG ARMSTRONG, INC., APPELLEES.

480 N.W.2d 185

Filed February 21, 1992. No. S-89-708.

1. **Proximate Cause: Negligence: Words and Phrases.** Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause.
2. **Emergency Vehicles: Right-of-Way.** Emergency vehicles operating audible sirens and visible warning lights are privileged to exceed posted speed limits and enter intersections against red lights if done safely.
3. **Emergency Vehicles.** Drivers of emergency vehicles are under a duty to drive with due regard for the safety of others.
4. **Emergency Vehicles: Negligence.** In an action involving allegations that the driver of an emergency vehicle acted negligently, the driver's actions are measured against those of a reasonable person exercising due care under the same emergency circumstances.
5. **Evidence: Negligence.** When the evidence conflicts such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.
6. **Appeal and Error.** On appeal of a law action tried without a jury, the trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly wrong.
7. **Judgments: Appeal and Error.** In reviewing a trial court's judgment in an action at law tried to the court, the Supreme Court 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 reasonably deducible from the evidence.
8. **Political Subdivisions Tort Claims Act: Municipal Corporations: Appeal and Error.** Findings of fact by the trial court in a proceeding against a municipality under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
9. **Political Subdivisions Tort Claims Act: Appeal and Error.** In reviewing a bench trial held under the Political Subdivisions Tort Claims Act, the appellate court considers the evidence in the light most favorable to the successful party, resolving any conflicts in favor of the successful party, who is entitled to the benefit of all reasonable inferences deducible from the evidence.
10. **Emergency Vehicles: Right-of-Way.** Upon immediate approach of an emergency vehicle with its lights or siren activated, drivers are under a duty to yield the right-of-way until the emergency vehicle passes.
11. **Motor Vehicles: Negligence.** Failing to see one favored under the rules of the road generally constitutes negligence as a matter of law.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Fred H. Brown and John P. Steichen, of Nye, Fellman, Moylan & Brown, for appellant.

Robert C. Doyle and Daniel D. Walsh, of Walsh, Fullenkamp & Doyle, for appellees.

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

WHITE, J.

This case arises out of a collision at the intersection of 84th Street and Highway 370 in Sarpy County, Nebraska, between an ambulance owned by the plaintiff-appellant, City of LaVista, Nebraska, and a truck owned by defendant-appellee Greg Armstrong, Inc. (Armstrong). The ambulance was driven by Robert Amweg, and the truck was driven by defendant-appellee Donald G. Andersen. The parties pled that both drivers were at all times acting within the scope and in the course of their employment with the City of LaVista and Armstrong, respectively.

The City of LaVista brought suit, alleging negligence on the part of Andersen and seeking $11,682.81 for damages to the ambulance. The defendants answered, denying any negligence and in the alternative alleging contributory negligence more than slight on the part of Amweg. Armstrong also filed a counterclaim under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), alleging negligence on the part of Amweg and seeking $12,500 for damages to the truck and lost profits.

The case was tried without a jury in the Sarpy County District Court. The trial court found that Amweg violated his duty of care by failing to maintain a proper lookout and failing to observe the traffic signal as he approached the intersection. The court offered no finding as to Andersen's violation of any duty of care. The court entered judgment against the City of LaVista on its petition and in favor of Armstrong on its counterclaim, awarding the company $9,113.57 for damage to the truck and $1,250 for lost profits due to loss of use of the

truck, for a total award of $10,363.57 plus costs.

FACTUAL BACKGROUND

On April 29, 1987, at approximately 11:30 a.m., Amweg, a member of the LaVista Volunteer Fire Department, received an emergency call to assist a juvenile having trouble breathing. The call was described as a "Code 3," which indicates a situation involving a person with a life-threatening problem. In response, Amweg drove a city ambulance to pick up the victim. In accordance with department procedures, Amweg activated the ambulance's emergency lights and siren.

After picking up the juvenile at LaVista Junior High School, Amweg proceeded to Midlands Hospital. He drove south on 84th Street with his lights and siren still activated. At the point where 84th Street intersects with Highway 370 there are three lanes for southbound traffic: a left-turn lane, a through lane, and a right-turn lane. As Amweg approached this intersection, there were cars in the left-turn and through lanes obstructing his path. However, a white van located in the right-turn lane pulled over to the shoulder to allow the ambulance by, and Amweg drove the ambulance into that lane.

A traffic signal governs traffic in all directions at the intersection of 84th Street and Highway 370. As Amweg approached the intersection, the light governing southbound traffic turned red. Amweg testified, however, that he was unaware of the light's color when he crossed the intersection. Amweg slowed the ambulance to approximately 5 m.p.h. as he drove between the stopped cars and the white van, then paused to observe the traffic east and west before proceeding across the intersection. Amweg testified that there were cars at all four sides of the intersection and that they had all stopped as he approached. Two other witnesses also testified that traffic east and west on Highway 370 stopped as the ambulance approached, though one witness did state that another car went through the green light ahead of Andersen's truck. After he checked the intersection, Amweg accelerated the ambulance through the intersection and was struck by the truck just as the ambulance was leaving the intersection. He testified that he did not see or hear the truck approaching prior to impact.

Andersen was traveling eastbound on Highway 370 when the accident occurred. He was driving a fully loaded 1984 Mack dump truck with a "pup trailer." The entire rig weighed approximately 95,000 pounds. There is evidence in the record that the speed limit on Highway 370 at 84th Street is 55 m.p.h. Andersen testified that he slowed for a red light as he approached the 84th Street intersection, but that the light turned green when he was approximately 200 to 250 feet from the crossing. He testified that he then accelerated to 35 to 40 m.p.h., though there is evidence in the record suggesting he was going as fast as 50 m.p.h.

Because it was a hot, sunny day, Andersen had the truck's windows rolled up and air conditioner on. At the time, he was listening to three separate radios: an AM/FM radio, a CB radio, and a company radio. Andersen also testified that when he accelerated the truck, the exhaust pipes near the cab of the truck made "a lot of noise." Andersen testified that he looked north on 84th Street just as the light turned green, but thereafter did not look again because he was concentrating on a car in the left-turn lane of westbound Highway 370. Andersen testified that he did not see the ambulance coming until the collision. Other witnesses at the intersection testified that they either saw the ambulance's flashing lights or heard its siren as it approached.

Also significant is the testimony of Clair Morgan. At the time of the accident he was stopped for the red light governing the through lane going south on 84th Street. He testified that the ambulance pulled alongside his car before proceeding through the intersection. Morgan testified that he could see a quarter of a mile west on Highway 370 and that he saw the truck approaching "a couple hundred feet" from the intersection as the ambulance pulled alongside him. Morgan further testified that

> the ambulance slowed down . . . then he pulled up and almost stopped, then stomped on the foot feed and just shot out there just right in front of that other truck that was coming with the exhaust . . . . I mean, I knew he was going to get hit. . . . I thought, he's almost stopped. He's going to gain two seconds, and stomp on the foot feed to

go in front of that big truck? I couldn't believe it.

Another witness also testified that from the south side of the intersection of 84th Street and Highway 370, she saw the truck approaching and was surprised that the ambulance tried to cross in front of it.

The record reveals that the stretch of Highway 370 as it approaches 84th Street from the west is relatively level. There is photographic evidence suggesting that a tree located at the northwest corner of 84th Street and Highway 370 may have obstructed Amweg's view of the truck or Andersen's view of the ambulance, and Andersen specifically testified that the tree did in fact obstruct his view of the intersection.

ASSIGNMENTS OF ERROR

On appeal, the City of LaVista argues that the trial court erred in (1) finding that Amweg violated a duty of due care in his operation of the ambulance and (2) failing to find that Andersen was negligent in the operation of the truck and that such negligence contributed in a degree more than slight to the occurrence of the accident.

THE CITY'S CLAIM

The trial judge in this case found that Amweg violated his duty of care by failing to observe the traffic signal and by failing to keep a proper lookout for east-west traffic. In finding against the City of LaVista on its claim, the judge made no finding as to the propriety of Andersen's conduct. However, as is more fully discussed below, Andersen acted negligently as a matter of law in failing to see or hear the ambulance. Therefore, we review the trial court's determination that Amweg's negligence was more than slight when compared to that of Andersen and that Andersen's negligence was less than gross when compared to that of Amweg. See *Gatewood v. City of Bellevue*, 232 Neb. 525, 441 N.W.2d 585 (1989). The first issue for this court, then, is whether the trial court erred in finding that Amweg was negligent to a degree sufficient to bar the city's claim.

Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and

which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause. *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986). In Nebraska, emergency vehicles operating audible sirens and visible warning lights are privileged to exceed posted speed limits and enter intersections against red lights if done safely. Neb. Rev. Stat. §§ 39-602(5) (Cum. Supp. 1986) and 39-608 (Reissue 1988). However, the driver of such an emergency vehicle is under a duty to drive with due regard for the safety of others. § 39-608(5). In an action involving allegations that the driver of an emergency vehicle acted negligently, the driver's actions are measured against those of a reasonable person exercising due care under the same emergency circumstances. *Gatewood, supra*; *Maple, supra*; *Lee v. City of Omaha*, 209 Neb. 345, 307 N.W.2d 800 (1981).

When the evidence conflicts such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations. *Maple, supra*, citing *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981). On appeal of a law action tried without a jury, the trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly wrong. *Metropolitan Utilities Dist. v. Pelton*, 236 Neb. 66, 459 N.W.2d 193 (1990). Moreover, in reviewing such cases this court considers the evidence in the light most favorable to the successful party, resolving all conflicts in that party's favor and giving that party the benefit of every inference reasonably deducible from the evidence. *Id.*; *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988). Therefore, in reviewing this case the court must consider the evidence in the light most favorable to the appellees, Armstrong and Andersen.

This case is very similar to *Gatewood, supra*. There, an accident occurred between the plaintiff's automobile and a cruiser driven by a member of the Bellevue Police Department. The police officer entered an intersection against a red light with his lights and siren activated after first making eye contact with the drivers of vehicles in the nearest three of four lanes of cross-traffic. He collided with a vehicle driven by the plaintiff in

the fourth lane. The officer was traveling at 20 to 50 m.p.h. as he crossed the intersection, and his view of the intersection was unobstructed for approximately one block in the direction from which the plaintiff's car came.

The trial court found in favor of the plaintiff, and the City of Bellevue appealed. This court held the evidence sufficient to support a finding that the officer acted negligently. The court explained that a fact finder could conclude that the officer breached his duty of care by entering the fourth lane of traffic at a speed that might not allow him to avoid a collision, especially given his failure to first make a visual survey of that lane before entering.

Here, Morgan testified that from his position alongside and somewhat behind Amweg's ambulance he could see west on Highway 370 for a quarter mile and that he saw Andersen's truck approaching from "a couple hundred feet" away. This testimony is important because it tends to negate the inference that either the tree or the white van interfered with Amweg's ability to see the approaching truck. There is also evidence that Amweg accelerated very rapidly after pausing to check the east-west traffic. Both Morgan and another witness expressed their surprise at Amweg's attempt to beat the truck across the intersection. As in *Gatewood*, there is evidence from which a trier of fact could conclude that Amweg acted negligently in failing to adequately survey the intersection before attempting to cross at a high rate of speed. We do not think the trial court erred in finding that Amweg failed to maintain a proper lookout.

The trial court also found Amweg negligent in failing to observe the traffic signal before crossing the intersection. Though Amweg had the right-of-way despite the red light, the duty of care imposed by § 39-608(5) implies that drivers of emergency vehicles cannot simply careen through intersections oblivious to conditions around them. A court could conclude that Amweg might have checked the cross-traffic more carefully had he known his light was red. Because the appellees are entitled to the resolution of conflicting inferences in their favor, we cannot say the trial court clearly erred in finding that Amweg was negligent in this regard. We therefore conclude that

there is sufficient evidence in the record to sustain a finding that Amweg's negligence contributed in a degree more than slight to causing the accident. Appellant's first assignment of error is without merit.

ARMSTRONG'S COUNTERCLAIM

The standard of review for findings of fact by the trial court in a proceeding under the Political Subdivisions Tort Claims Act has been previously set forth. That is, such findings will not be set aside unless clearly incorrect, and the evidence is considered in the light most favorable to the successful party, with the court resolving all conflicts in the evidence in favor of the successful party and giving that party the benefit of every reasonable inference deducible from the evidence. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Gatewood v. City of Bellevue*, 232 Neb. 525, 441 N.W.2d 585 (1989). Therefore, in analyzing the city's second assignment of error we will again review the evidence in the light most favorable to Armstrong and Andersen.

The parties in this case pled that the ambulance was owned by the City of LaVista and stipulated that the ambulance driver was responding to a legitimate "Code 3" emergency call at the time the accident occurred. It is also clear from the evidence that the ambulance's emergency lights and siren were activated at the time of the accident. As mentioned earlier, under these circumstances an ambulance is privileged to safely exceed posted speed limits and proceed past red lights and stop signs. See §§ 39-602(5) and 39-608(3). Upon the immediate approach of an emergency vehicle with its lights or siren activated, drivers are under a duty to yield the right-of-way until the vehicle passes. Neb. Rev. Stat. § 39-640(1)(a) (Reissue 1988).

Andersen testified that he did not see the ambulance until the collision. It is settled in this state that failing to see one favored under the rules of the road constitutes negligence as a matter of law. *Gatewood, supra*; *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986); *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985); *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981), citing *Bonnes v. Olson*, 197 Neb.

309, 248 N.W.2d 756 (1976). Therefore, Andersen was negligent as a matter of law in failing to see or hear the ambulance prior to his entering the intersection.

As discussed above, by entering judgment against the City of LaVista on its claim, the trial court necessarily found Amweg contributorily negligent in a degree more than slight. Similarly, by entering a judgment in favor of Armstrong on its counterclaim despite Andersen's negligence, the trial court necessarily found that such negligence was slight when compared with that of Amweg, whose negligence was gross. See, *Gatewood, supra*; Neb. Rev. Stat. § 25-21,185 (Reissue 1989).

Again, the decision in *Gatewood* is helpful in analyzing appellant's second assignment of error. The evidence regarding the plaintiff's conduct in that case revealed that the light governing her lane of traffic turned green prior to her arrival at the intersection and that she proceeded through without slowing down, having not seen or heard the police vehicle until seconds before the collision. There was also evidence that traffic in the lanes adjoining hers had stopped for the cruiser despite the green light. The trial court found in favor of the plaintiff in her claim against the city, concluding that the woman's negligence did not contribute in a degree more than slight to causing the accident. This court affirmed, holding that the trial court's findings were not clearly erroneous.

There is little to distinguish Andersen's conduct in this case from that of the plaintiff in *Gatewood*. Both approached an intersection as the traffic signal governing their lane turned green, and both proceeded through the intersection without slowing down. Neither saw the approaching emergency vehicle, though its lights and siren were activated. Here, the city relies on evidence that other east-west vehicles were stopped at the intersection, a fact which should have put Andersen on notice of potential danger. However, there is evidence in the record that at least one vehicle proceeded through the green light ahead of Andersen.

As for Andersen's failure to see or hear the ambulance's emergency lights and siren, there is evidence that Andersen looked north on 84th Street upon approaching the intersection, but thereafter concentrated on a vehicle he feared might

attempt to turn left in front of him. A fact finder could reasonably conclude that Andersen did not breach his duty of care in diverting his attention from the north side of the intersection under these circumstances. Finally, of the three witnesses who testified to hearing the siren, one testified that she heard it when the ambulance was only three to four car lengths away, and Morgan testified that he heard the siren just as the traffic signal turned from yellow to red, which was just prior to his observing the truck approaching from "a couple hundred feet" away. From this evidence, the trial court might have concluded that by the time Andersen heard the siren, he could not have stopped in time.

Bearing in mind that it is not the province of this court to resolve evidentiary conflicts or to reweigh the evidence, *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 456 N.W.2d 474 (1990), we cannot say that the trial court clearly erred in finding that Andersen's negligence did not contribute in a degree more than slight to causing the accident.

However, under the statute governing this case, when the plaintiff in a personal injury suit engages in negligence contributing to the injuries sustained, but not to a degree sufficient to bar the suit, the plaintiff's contributory negligence "*shall* be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff . . . ." (Emphasis supplied.) § 25-21,185. Cf. Neb. Rev. Stat. §§ 25-21,185.01 to 25-21,185.06 (Supp. 1991) (revising law regarding contributory negligence for actions accruing on or after January 1, 1992).

Here, the trial court awarded Armstrong the stipulated amount for damage to the truck, $9,113.57, plus $1,250 for loss of use of the truck. In so doing, the court awarded Armstrong the full amount of damages it proved resulted from the accident. Thus, it is clear the trial court did not reduce Armstrong's award in an amount proportional to the degree to which Andersen's negligence contributed to causing the accident. Because § 25-21,185 requires such mitigation, we reverse and remand for a comparison of the respective percentages of fault and a reduction of Armstrong's award accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

DOROTHY P. LARIMORE, APPELLEE, V. FAY D. LARIMORE, APPELLANT.
480 N.W.2d 192

Filed February 21, 1992. No. S-89-796.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Kathleen M. Schmidt for appellant.

Robert V. Dwyer, Jr., of Dwyer, Pohren, Wood, Heavey & Grimm, for appellee.

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

PER CURIAM.

This is an appeal from a decree entered in the district court for Douglas County, dissolving the marriage of petitioner and respondent. Respondent appeals, contending that the trial court erred in dividing the parties' property.

The division of property in dissolution cases is a matter initially entrusted to the discretion of the trial judge. *Qualley v. Qualley*, 235 Neb. 841, 457 N.W.2d 812 (1990); *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988).

In an appeal involving an action for dissolution of marriage, an appellate 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. *Qualley, supra.*

We have reviewed the record de novo. There is no abuse of discretion. The district court's decree is affirmed.

AFFIRMED.

VICTORIA L. BAKER, APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT.

480 N.W.2d 192

Filed February 21, 1992. No. S-89-835.

1. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of evidence in the plaintiff's case in chief and who, when the court overrules the directed verdict motion, proceeds with trial and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for directed verdict.
2. **Directed Verdict: Evidence.** In order to sustain a motion for 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. In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
3. _____: _____. On a motion for directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
4. **Presumptions: Proof.** The presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was properly addressed, stamped, and mailed.
5. **Trial: Notice: Proof.** Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.
6. **Insurance: Contracts.** The continuance of the insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased.
7. _____: _____. The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments.
8. **Insurance: Contracts: Notice.** The burden of establishing an effective cancellation before a loss is on the insurer, and notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and peremptorily explicit and unconditional.

9. **Insurance: Contracts: Liability: Public Policy.** The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
10. **Contracts.** As a general rule, the proper construction of a written contract is a question of law.
11. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with directions to dismiss.

William H. Selde, of Sodoro, Daly & Sodoro, for appellant.

Barbara Thielen, of Taylor, Fabian, Thielen & Thielen, for appellee.

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

FAHRNBRUCH, J.

St. Paul Fire & Marine Insurance Company (St. Paul) appeals a Douglas County jury verdict awarding Victoria L. Baker $24,850 under a homeowner's insurance policy issued by St. Paul. The insurer claims that the policy had lapsed before fire damaged Baker's home, because Baker failed to pay the final installment on the policy premium.

As a matter of law and based on facts upon which reasonable minds can reach only one conclusion, Baker's homeowner's policy had lapsed before the fire damaged her home. We, therefore, reverse the jury award and direct that Baker's case be dismissed.

In November 1984, Victoria L. Kardell (now Victoria L. Baker) purchased a homeowner's insurance policy on her residence in Omaha, for the period of November 15, 1984, to November 15, 1985. The premium for the policy was to be paid in four equal installments. The first three premium installments were timely paid by Baker.

The record reflects that the fourth installment was due July 28, 1985. Baker testified that she mailed her check in the amount of $128.25 to St. Paul on July 15, 1985. She said she

would typically mail her quarterly payment and the installment statement to St. Paul in the insurer's preaddressed envelope which accompanied the premium statement. Baker testified that she placed a stamp on the envelope containing her check and a portion of the statement and dropped the envelope into a mail chute in the hallway of the Livestock Exchange Building, where she worked. She stated that the mail chutes "run down to the basement where the mailroom is."

On September 26, 1985, Baker's residence was extensively damaged by fire. When Baker's mother contacted the office of Baker's insurance agent, she was told that there was no coverage for the fire. Baker was subsequently informed that there was no coverage because the policy had lapsed due to nonpayment of premium.

Thereafter, Baker filed this lawsuit in the district court for Douglas County, alleging she had not received notice from St. Paul that the insurer had not received the premium installment, nor had she received notice of St. Paul's intention to cancel her homeowner's policy. St. Paul filed a motion for summary judgment, which was denied, and the case proceeded to trial. After Baker adduced evidence and rested her case, each of the parties moved for a directed verdict. Both motions were overruled.

Because St. Paul produced evidence following the court's overruling of its motion for directed verdict at the close of Baker's case in chief, any error in regard to that ruling was waived. A defendant who moves for a directed verdict at the close of evidence in the plaintiff's case in chief and who, when the court overrules the directed verdict motion, proceeds with trial and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for directed verdict. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

After both parties rested, Baker and St. Paul renewed their respective motions for directed verdict. Both renewed motions were overruled. The jury found for Baker in the amount of $24,850, which represented $25,000 damage less $150 deductible under the policy. St. Paul's motion for judgment notwithstanding the verdict and its motion for a new trial were

overruled.

On appeal, St. Paul complains that the trial court erred by (1) overruling its motions for (a) summary judgment, (b) directed verdict, (c) judgment notwithstanding the jury's verdict, and (d) new trial and (2) awarding Baker an attorney fee.

Because we find that the trial court erred in failing to sustain St. Paul's motion for a directed verdict at the close of all the evidence, it is necessary to discuss only that assignment of error and the award of attorney fees to Baker.

> In order to sustain a motion for 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. . . . In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. . . .
>
> On a motion for directed verdict . . . " 'the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.' "

McCune v. Neitzel, 235 Neb. 754, 762, 457 N.W.2d 803, 809 (1990).

The key to resolving the issues in this case centers on the answers to two controlling questions: (1) whether Baker adduced sufficient evidence to prove that she made the final premium installment payment on her homeowner's policy and (2) whether Baker's homeowner's policy lapsed when she failed to make the final installment payment of premium.

There is no direct evidence in the record that St. Paul received the final installment of premium payment from Baker. To create a question of fact for the jury, Baker necessarily had to rely upon the presumption of receipt of mail by an addressee to prove that St. Paul received the final premium installment

payment on her homeowner's policy. As a matter of law, Baker's evidence did not entitle her to the receipt-of-mail presumption, nor was the evidence sufficient to submit the issue of payment to the jury.

This court has held that the presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was *properly* addressed, stamped, and mailed. *Troy & Stalder Co. v. Continental Casualty Co.*, 206 Neb. 28, 290 N.W.2d 809 (1980).

In this case, the receipt-of-mail presumption in Baker's favor against St. Paul did not arise, because Baker failed to show that her claimed mailing containing her alleged installment of the premium payment was properly mailed. Baker testified that she placed the envelope containing the premium payment in a mail chute which led to a mailroom in the Livestock Exchange Building. There is no evidence that the mailroom was operated under the auspices of the U.S. Postal Service or that it was a U.S. Postal Service depository. Neither was there any evidence adduced showing that an authorized individual invariably collected and placed all outgoing mail collected from the mailroom in a regular U.S. mail depository or that such a procedure was actually followed on July 15, 1985. Baker failed to prove all the elements necessary to show that there had been a proper mailing of the premium payment, as required by *Troy & Stalder Co., supra*, and by *Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990), which holds:

> [A]bsent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository . . . proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.

Absent the presumption of receipt of mail by St. Paul, there

is no relevant evidence in the record that even tends to prove St. Paul ever received Baker's alleged final premium installment payment on her homeowner's policy. Neither Baker's testimony nor her records indicate that the check she allegedly sent to St. Paul for the fourth premium installment on her homeowner's policy was ever received or cashed by St. Paul. As a matter of fact, a search of the records at Baker's bank reflects that the alleged check was never presented to Baker's bank or charged against Baker's account. There being no presumption in favor of Baker that St. Paul received mail containing Baker's final premium installment and there being no other relevant evidence that St. Paul ever received Baker's final installment of premium payment, reasonable minds can come to only one conclusion. That conclusion is that Baker failed to meet her obligation under the policy to pay St. Paul the final installment of premium payment.

Since Baker failed to show that she made the installment of premium payment, we now consider St. Paul's contention that Baker's homeowner's policy lapsed before the fire at Baker's home.

The continuance of the insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased. *St. Paul Mercury Ins. Co. v. Hurst,* 207 Neb. 840, 301 N.W.2d 352 (1981). The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments. *Id.*

The burden of establishing an effective cancellation before a loss is on the insurer, and notice of cancellation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and peremptorily explicit and unconditional. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). By the terms of the policy, St. Paul needed only to mail a notice of cancellation, which would become effective 20 days after it was mailed. The relevant statute required only that a policy contain an appropriate provision for cancellation. See Neb. Rev. Stat. § 44-379 (Reissue 1984). The

parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989). As a general rule, the proper construction of a written contract is a question of law. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

The cancellation clause contained in Baker's policy (in reality, a lapse clause) provided that "[i]f you fail to pay your premium when it's due, we'll mail cancellation notice to you that's effective 20 days from the date we mailed it." St. Paul adduced uncontroverted evidence that it mailed a provisional notice of cancellation to Baker on August 9, 1985. That provisional notice warned Baker that the final premium payment due July 28, 1985, had not been paid and that if it was not paid by September 1, 1985, her policy would be cancelled effective on that date. (In reality, the policy would lapse and Baker would have no insurance.) Reasonable minds can come to only one conclusion: The provisional notice was properly addressed to Victoria L. Kardell (Baker) at her then current address and properly deposited in the U.S. mail. A copy of the provisional notice bearing a U.S. postmark of August 9, 1985, and receipt of that provisional notice for mailing by U.S. postal authorities was received in evidence. Baker did not deny receiving the provisional notice, but testified that she did not remember whether she received the notice. She testified that her local insurance agent and First Federal of Lincoln, which held the mortgage on her home, each received a copy of the provisional notice.

By properly mailing the provisional notice of cancellation of Baker's homeowner's policy, warning her that her policy would lapse if the final premium installment was not paid, which mailing was proved to be in compliance with the rules set forth in *Troy & Stalder Co. v. Continental Casualty Co.*, 206 Neb. 28, 290 N.W.2d 809 (1980), St. Paul became entitled to the presumption that Baker received notice of cancellation of her policy if she did not timely make the final installment premium payment. The mailing was in accord with the terms of Baker's

policy.

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992). In our independent judgment, as a matter of law, there was insufficient evidence to submit Baker's case to the jury and the contractual relationship between Baker and St. Paul ceased on September 1, 1985, leaving Baker with no coverage for the fire damage to her home on September 26, 1985. Thus, the trial court erred in overruling St. Paul's motion for a directed verdict at the close of all the evidence.

Because we are reversing the judgment entered in favor of Baker and ordering the district court to dismiss her petition, she is not entitled to attorney fees, and the district court's award of those fees is also vacated. Baker's application for attorney fees in this court is also denied, as she has not recovered under her St. Paul homeowner's policy.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. MILTON MOSS, APPELLANT.

480 N.W.2d 198

Filed February 21, 1992. No. A-90-397.

1. **Convictions: Proof.** To sustain a conviction under Neb. Rev. Stat. § 29-908 (Reissue 1989), the State must establish that (1) defendant was charged with a felony; (2) defendant was released from custody under bail, recognizance, or a conditioned release; and (3) defendant willfully failed (a) to appear before the court when legally required or (b) to surrender himself within 3 days thereafter.
2. **Criminal Law: Sentences: Words and Phrases.** If a convicted defendant, released under recognizance or a conditioned release, willfully fails to comply with a sentencing court's order to report to a court-designated officer who is legally authorized to take custody of convicted defendants, so that the defendant may commence serving an imposed sentence, the defendant's noncompliance is failure "to appear before the court" which sentenced and released the defendant and constitutes a violation of Neb. Rev. Stat. § 29-908 (Reissue 1989).

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

Curtis L. Maschman, of Kotouc, Fankhauser & Maschman, for appellant.

Robert M. Spire, Attorney General, Donald A. Kohtz, and, on brief, LeRoy W. Sievers for appellee.

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

SHANAHAN, J.

Milton Moss appeals from the judgment of the district court for Richardson County, which denied Moss' request for postconviction relief under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989).

MOSS' CONVICTION

Initially, Moss entered his "not guilty" plea to the charge of escape, a Class III felony. See Neb. Rev. Stat. § 28-912 (Reissue 1989). On December 15, 1988, pursuant to a plea agreement, Moss pled guilty to the amended charge of failure to appear before the court which had authorized Moss' release from custody on his personal recognizance, that is, a violation of Neb. Rev. Stat. § 29-908 (Reissue 1989), which states in part:

> Whoever is charged with a felony and is released from custody under bail, recognizance, or a conditioned release and willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter, shall be guilty of a Class IV felony, in addition to any other penalties or forfeitures provided by law.

In exchange for Moss' guilty plea to the charge of failure to appear, the State agreed not to seek enhanced punishment for Moss pursuant to Nebraska's habitual criminal statute. See Neb. Rev. Stat. § 29-2221 (Reissue 1989).

Before the court accepted Moss' plea, the court informed Moss concerning the nature of the charge against him and explained Moss' rights in accordance with the requisites of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986) (information and

admonition prerequisite to a defendant's valid plea of guilty or nolo contendere). The court also interrogated Moss and established that Moss understood the information required by *Irish*, including the possible penalty for a conviction for failure to appear. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985) (penalty for a Class IV felony). Additionally, the district court inquired into Moss' understanding of the plea agreement under which Moss was entering his plea of guilty.

The State offered a factual basis which established that Moss had twice been convicted of being an accessory to commission of a felony and that, on January 14, 1988, he was sentenced to 2 years' imprisonment on each of those convictions, with sentences to be served concurrently. However, on the convictions for being an accessory to commission of a felony and at Moss' request, the district court had "suspended" execution of the sentences to allow Moss' attendance at an inpatient alcohol rehabilitation program and ordered Moss to "[r]eport to the Sheriff of Richardson County for delivery to the Department of Corrections" on May 1, 1988, to begin serving the sentences imposed on January 14. Although Neb. Rev. Stat. § 29-2202 (Reissue 1989) allows a court to suspend execution of a sentence for 90 days after imposition of sentence, none questions the period of suspension in Moss' case. Moss was released on his own recognizance, presumably for the rehabilitation program, but failed to present himself to the sheriff of Richardson County on May 1, 1988, in accordance with the court's January 14 order. On May 4, 1988, Moss was charged with escape, and a warrant was issued for his arrest on that charge. Subsequently, Moss was arrested in the State of Utah and was returned to Richardson County, Nebraska.

Moss did not contest or complain about any aspect of the factual information which the State presented as a basis for the failure to appear charge against him. The court accepted Moss' guilty plea to the charge of failure to appear and found Moss guilty as charged.

At the sentence hearing, Moss contended that the January 14, 1988, order, which required him to report to the Richardson County sheriff on May 1, 1988, was confusing, and accordingly, Moss requested that the court consider his

"confusion" as a factor affecting any sentence to be imposed. Specifically, Moss stated that the language regarding "suspending" his sentence until May 1 led him to believe that he needed to "commit another crime or something to violate a suspended sentence." However, after extensive questioning by the district court concerning Moss' understanding of the order entered on January 14, Moss stated: "Well, I understand I was supposed to be back the first of May. I understand that part of it, Your Honor." The court thereafter sentenced Moss to imprisonment for 20 to 60 months, to be served concurrently with the sentences previously imposed for Moss' two felony convictions as an accessory to commission of a felony.

On direct appeal to this court, Moss' sole assignment of error was excessiveness of the sentences imposed. However, this court affirmed Moss' convictions and sentences. See *State v. Moss*, 233 Neb. xxxi (case No. 89-669, Nov. 9, 1989).

POSTCONVICTION PROCEEDINGS

Subsequently, Moss filed a motion for postconviction relief and claimed that his conviction for failure to appear was constitutionally invalid. See § 29-3001 et seq. Moss asserted that before entry of his guilty plea to the charge of failure to appear, he had not been informed of a possible defense, hereinafter described, to the charge of failure to appear and, therefore, was denied his constitutional right to effective assistance of counsel concerning his conviction for failure to appear.

In an evidentiary hearing on Moss' postconviction motion, the evidence, for the most part, related to Moss' claim that he was never supplied with information about a possible defense to the charge of failure to appear. Specifically, Moss claimed that because the district court had ordered him to "report to the Sheriff of Richardson County" rather than personally "appear" before the court, an essential element of the failure to appear charge, as defined by § 29-908, was missing, namely, willful failure "to appear before the court granting such release." Moss argued that since he was not ordered to "appear" personally and directly before the court on May 1, 1988, he did not violate § 29-908. Evidence on Moss' ineffective

assistance of counsel claim pertained to the fact that before Moss pled guilty, his lawyer failed to recognize the possible defense to the charge of failure to appear, as reflected above in Moss' argument, and advise Moss accordingly. Also, Moss contended that his appellate counsel in the direct appeal failed to raise the issue of ineffectiveness of counsel who had represented Moss at the time of conviction and that, therefore, appellate counsel also rendered ineffective assistance in representing Moss in the direct appeal.

The district court denied postconviction relief to Moss and expressly found that the evidence demonstrated that (1) trial counsel diligently and effectively represented and advised Moss; (2) Moss knowingly, voluntarily, and intelligently entered his plea of guilty and waived his right to object to the sufficiency of the factual basis of the charge; and (3) Moss' appellate counsel diligently and effectively represented and advised Moss in his direct appeal to this court.

ASSIGNMENTS OF ERROR

In his brief, Moss contends that his "assignments of error all center upon two main contentions," viz, (1) Moss had a valid defense to the charge of failure to appear and (2) Moss' trial and appellate counsel "never advised" him of the defense before entry of his guilty plea or during Moss' direct appeal. Brief for appellant at 5.

Although Moss has also claimed that his guilty plea to the failure to appear charge was not knowingly, voluntarily, and intelligently entered and has further claimed that the State failed to present a factual basis for his guilty plea, Moss has not supported those two claims, as assignments of error, by argument in his appellate brief.

" 'To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.' " *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 754-55, 472 N.W.2d 391, 397 (1991). Accord, *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1991). For the foregoing reason, we do not address Moss' two

unargued claims as assignments of error.

STANDARD OF REVIEW

> "In an evidentiary hearing, as a bench trial provided by §§ 29-3001 et seq. for postconviction relief, the trial judge, as the 'trier of fact,' resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. [Citation omitted.] In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous."

State v. White, 238 Neb. 840, 844-45, 472 N.W.2d 720, 724 (1991). Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

DISCUSSION

Moss contends that defense counsel who represented Moss at the hearing which resulted in Moss' conviction, and the lawyer who represented Moss in his direct appeal, failed to represent Moss competently because counsel failed to advise him of the defense suggested by Moss to the failure to appear charge, i.e., the court's order that Moss present himself to the Richardson County sheriff rather than personally appear before the court.

"In a proceeding under the Nebraska Postconviction Act, the movant, in custody under sentence, must allege facts which, if proved, constitute a denial or violation of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable." *State v. Start*, 229 Neb. 575, 577-78, 427 N.W.2d 800, 802 (1988). Accord *State v. White, supra*.

> [T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633

(1988). Accord, *State v. White, supra*; *State v. Dixon, supra*. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"To determine whether counsel's performance is deficient in representation of a criminal defendant, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case." *State v. Dixon*, 237 Neb. at 634, 467 N.W.2d at 402. "In order to satisfy the prejudice requirement in the context of a plea, the defendant must show there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial." *State v. Rehbein*, 235 Neb. 536, 538, 455 N.W.2d 821, 824 (1990). Accord, *State v. White, supra*; *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990).

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

State v. Hawthorne, 230 Neb. at 347, 431 N.W.2d at 633 (quoting from *Strickland v. Washington, supra*). Accord, *State v. White, supra*; *State v. Dixon, supra*; *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989).

Although Moss' counsel at trial and on direct appeal did not raise the "defense" now urged by Moss, the factual basis offered by the State supplied adequate information to sustain Moss' guilty plea to the charge of failure to appear. In *State v. Valdez*, 236 Neb. 627, 630, 463 N.W.2d 326, 328-29 (1990), we stated:

> To sustain a conviction under § 29-908, the State must establish that (1) defendant was charged with a felony; (2) defendant was released from custody under bail, recognizance, or a conditioned release; and (3) defendant willfully failed (a) to appear before the court when legally required or (b) to surrender himself within 3 days

thereafter.

Consequently, the issue in Moss' present appeal is whether failure to "report to the Sheriff" pursuant to the court's order is equivalent to failure to "appear before the court" and, therefore, is conduct which is condemned and penalized under § 29-908.

The federal "failure to appear" statute, presently 18 U.S.C. § 3146 (1988) and formerly 18 U.S.C. § 3150 (1982), is similar to § 29-908 and provides:

> (a) OFFENSE.—Whoever, having been released under [18 U.S.C. § 3141 et seq.] knowingly—
>
> (1) fails to appear before a court as required by the conditions of release; or
>
> (2) fails to surrender for service of sentence pursuant to a court order;
>
> shall be punished as provided [in this act].

Federal courts construing the "failure to appear" provision in the federal Bail Reform Act have consistently held that a defendant's willful failure to appear before a U.S. marshall to commence serving a sentence imposed does constitute a failure to appear before a court, a violation of the federal act; see, e.g., *United States v. Harris*, 544 F.2d 947 (8th Cir. 1976) (one released under the Bail Reform Act is under the continuing jurisdiction of the court, which is empowered to designate the time and the place for the defendant to report to a U.S. marshall as the person to take custody of the defendant). In *United States v. West*, 477 F.2d 1056, 1058 (4th Cir. 1973), the court stated:

> The essence of the crime of bail jumping is willful failure to appear before "any court or judicial officer as required." As a condition of defendant's bond, the court ordered him to report to the United States Marshal at a specific time to begin serving his sentence. An unnecessary waste of judicial time and energy would result if we were to require that each person in West's position appear before the court itself. No discretionary action at all is involved.

See, also, *United States v. Wells*, 766 F.2d 12 (1st Cir. 1985) (a person's willful failure to report at a designated place and time

to begin serving a prison sentence constitutes a violation of the federal Bail Reform Act); *United States v. Burleson*, 638 F.2d 237 (10th Cir. 1981) (requiring a defendant to appear personally before a court, solely for delivery into custody of a U.S. marshall, is an unnecessary waste of judicial time; therefore, a court's direction that a defendant appear before the marshall, rather than personally before the court which has entered the order for the defendant's appearance, does not prevent sanctions under the federal Bail Reform Act). Cf. *Foster v. State*, 372 N.W.2d 468 (S.D. 1985) (a defendant's willful failure to appear before a law enforcement officer as required by a lawful court order constitutes a violation of the South Dakota statute requiring a defendant's appearance before the court which authorized the defendant's release from custody and later surrender to commence serving a sentence imposed).

It is, of course, a settled principle of statutory construction that "[a] penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence." *State v. Crowdell*, 234 Neb. 469, 473, 451 N.W.2d 695, 698 (1990). Accord *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987).

Accordingly, the fact that a court, in conjunction with sentencing a defendant, orders the defendant to report or appear before a designated officer legally authorized to take custody of the defendant, rather than to personally appear before the sentencing court, does not preclude sanctions for noncompliance with the court's order concerning the defendant's release on personal recognizance and later surrender into custody to commence serving a sentence imposed. Cf. *United States v. Harris, supra*. We do not state or imply that a sheriff is a judicial officer who acts as an alter ego or agent for the sentencing court. We hold, however, that if a convicted defendant, released under recognizance or a conditioned release, willfully fails to comply with a sentencing court's order to report to a court-designated officer who is legally authorized to take custody of convicted defendants, so that the defendant may commence serving an imposed sentence, the defendant's noncompliance is failure "to appear before the court" which sentenced and released the defendant,

and constitutes a violation of § 29-908. Consequently, Moss' failure to surrender himself to the sheriff on May 1, 1988, as ordered by the district court, was a failure to appear before the court and, therefore, was a violation of § 29-908.

Since Moss' suggested defense to the charge of failure to appear was legally untenable under the circumstances and would have been a frivolous defense if asserted, any alleged failure on the part of Moss' lawyers to raise the issue of the defense suggested by Moss did not result in prejudice to Moss. Most assuredly, we recognize that Moss has sustained prejudice by restricted liberty as the result of his imprisonment in the Nebraska Penal and Correctional Complex, but, in view of Moss' allegation regarding a constitutionally invalid conviction, it is prejudice from ineffective assistance of counsel which Moss must demonstrate to sustain his claim for postconviction relief. Therefore, Moss has failed to show prejudice, one of the requirements to sustain a claim based on ineffective assistance of counsel. See, *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991); *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Accordingly, we cannot conclude that the trial court was clearly erroneous in its conclusion that Moss is not entitled to postconviction relief; hence, we affirm the district court's judgment.

AFFIRMED.

JEFFREY R. HANSEN, APPELLANT, V. SUSAN R. HANSEN, APPELLEE.
480 N.W.2d 204

Filed February 21, 1992. Nos. S-90-909, S-90-1208, S-91-721.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Appeal in Nos. S-90-909 and S-90-1208 dismissed. Judgment in No. S-91-721 affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Debra Stangl for appellee.

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

PER CURIAM.

Acting on the application of the respondent-appellee mother that custody and physical possession of her 9-year-old son be taken from the petitioner-appellant father and awarded to her, the trial judge, through a series of three orders, ultimately granted the mother's prayer and specified a schedule of visitation for the father.

The first two appeals are dismissed: the first (case No. S-90-909) because it was taken from a nonfinal order and the second (case No. S-90-1208) because there is no controversy as to the order appealed.

In the third appeal (case No. S-91-721), the father asserts that the district court erred in failing to consider the child's preference to live with him and in otherwise determining that the mother sustained her burden of proof.

Although in dissolution proceedings determinations as to custody are reviewed on appeal de novo on the record, such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. Where credible evidence is in conflict on a material issue of fact, the appellate 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. See, *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *LeDoux v. LeDoux*, 234 Neb. 479, 452

N.W.2d 1 (1990); *Rice v. Rice*, 231 Neb. 428, 436 N.W.2d 518 (1989).

We have reviewed this matter in accordance with the foregoing principles and cannot say that the district court abused its discretion. Accordingly, the order which is the subject of the third appeal is affirmed.

APPEAL IN NOS. S-90-909 AND S-90-1208 DISMISSED.
JUDGMENT IN NO. S-91-721 AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE J. CRANE, APPELLANT.
480 N.W.2d 401

Filed February 21, 1992. No. S-90-1085.

1. **Prior Convictions: Collateral Attack.** As a procedural matter, a criminal defendant cannot collaterally attack a prior conviction in an enhancement proceeding.
2. **Prior Convictions: Collateral Attack: Appeal and Error.** Challenges to the constitutional validity of a prior plea-based conviction offered for enhancement purposes may be raised only in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.
3. **Prior Convictions: Records: Right to Counsel: Waiver.** A criminal defendant may challenge a prior plea-based conviction in an enhancement proceeding based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the plea was entered.
4. **Prior Convictions: Evidence: Waiver: Collateral Attack.** A challenge to a prior plea-based conviction based on a lack of evidence that the defendant voluntarily and intelligently waived his rights to confront his accusers, to exercise his privilege against self-incrimination, and to a trial by jury constitutes a collateral attack on the prior conviction.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JACK B. LINDNER, Judge. Judgment of District Court affirmed.

Rex R. Schultze and Maureen L. Allman, of Perry, Guthery, Haase & Gessford, P.C., for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, AND SHANAHAN, JJ.

PER CURIAM.

This is a criminal case in which the State alleged in a three-count complaint that on July 25, 1988, the defendant-appellant, Wayne J. Crane, committed the crimes of second-offense driving while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988); driving left of center, in violation of Neb. Rev. Stat. § 39-620 (Reissue 1988); and improper passing, in violation of Neb. Rev. Stat. § 39-624 (Reissue 1988). Crane pled not guilty to all three counts and waived his right to a jury trial. His case was tried to the Lancaster County Court on a set of stipulated facts. On August 10, 1989, the trial court found Crane guilty of the driving left of center and improper passing charges, as well as guilty of the underlying offense of driving while under the influence.

The trial court held an enhancement hearing on September 29, 1989, at which the State offered evidence that Crane had pled guilty to driving while under the influence in 1979. The State's evidence revealed that the incident occurred on February 13, 1979; that the Lancaster County Court received Crane's plea on April 17, 1979; and that Crane was represented by counsel at the time.

The trial court in this case received the evidence regarding Crane's 1979 conviction over his objection that it could not provide the basis for enhancing his current conviction because the 1979 record lacks any showing that he voluntarily and intelligently waived his rights, as required by the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Having overruled Crane's objection, the trial court found Crane guilty of second-offense driving while under the influence and entered a judgment of conviction accordingly.

On April 3, 1990, the trial court overruled Crane's motion to vacate the September 29, 1989, ruling and sentenced him to 30 days in the county jail, revoked his operator's license for 1 year, and imposed a $500 fine on count I; imposed a $25 fine on count II; and imposed a $25 fine on count III. Crane appealed to the Lancaster County District Court, which affirmed the judgment and sentences of the trial court.

Crane perfected an appeal to this court and argues that the trial court abused its discretion by (1) enhancing his driving while under the influence sentence based on a prior conviction, where the record fails to show that he voluntarily and intelligently waived his rights, as required by *Boykin, supra*, and (2) enhancing his sentence when there is presently no procedure in place to challenge the constitutional validity of the conviction on which the enhancement is based.

Before discussing Crane's assignments of error, we note that during oral argument, questions from the bench strongly suggested that Crane's 1979 conviction occurred more than 10 years prior to his current conviction and thus could not provide the basis for enhancement of the current charge. See Neb. Rev. Stat. § 39-669.07(b)(i) (Reissue 1988). A closer reading of the statute reveals, however, that the 10-year period is measured as of the dates the offenses occurred and not the dates of conviction. See Neb. Rev. Stat. § 39-669.07 (Reissue 1988). Because the offenses in this case occurred on February 13, 1979, and July 25, 1988, respectively, the 10-year limitation is not implicated.

Crane argues that because the record of his 1979 plea lacks any indication that he voluntarily and intelligently waived his rights, as required by *Boykin*, it cannot provide the basis for enhancement of his current conviction. For this proposition he relies primarily on a decision of the U.S. District Court for the District of Nebraska granting the habeas corpus petition of a person convicted of third-offense drunk driving based on two prior plea-based convictions violative of *Boykin*. See *Oliver v. Spire*, No. CV89-L-149 (D. Neb. Sept. 10, 1990). Crane further argues that his inability to challenge the constitutional validity of the prior conviction at the enhancement hearing because of our earlier holding in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d

293 (1989), which limits collateral attacks on prior plea-based convictions to direct appeals of those convictions or separate proceedings instituted for that purpose, violates his due process rights. In short, Crane argues that the federal court's holding indicates that our decision in *Oliver* is incorrect and should be overturned. We disagree.

We believe the federal court misread our decision in *Oliver* in granting the habeas corpus petition of the defendant in that case. The federal court concluded that *Oliver* did not "clearly and expressly" rest on a state procedural bar. Instead, the court suggested that *Oliver* stands for the proposition that proof of the presence or waiver of counsel is sufficient to establish the constitutional validity of a guilty plea offered for enhancement purposes. That is not what we held in *Oliver*.

We have repeatedly held that, as a procedural matter, a defendant cannot collaterally attack a prior conviction in an enhancement proceeding and that challenging a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack. See, *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984). We do, however, allow challenges to prior plea-based convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered. See *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). We do so because we do not regard such a challenge as a collateral attack on the former judgment. *Id.* One could also challenge the constitutional validity of a prior conviction through a separate proceeding, such as an action for declaratory judgment.

In *Oliver*, the State's evidence showed that the defendant was represented by counsel during each of his prior convictions. Therefore, his only basis for challenging the validity of those convictions for enhancement purposes was the lack of a *Boykin*-type colloquy. In affirming the trial court's decision, we simply reaffirmed our procedural rule barring such a collateral attack in an enhancement proceeding.

Here, Crane's attempt to challenge the 1979 plea based on the lack of any indication that he voluntarily and intelligently waived his *Boykin* rights constitutes a collateral attack on the prior conviction and is thus barred by our holding in *Oliver*. The State's evidence indicates that Crane pled guilty to driving while under the influence of alcoholic liquor in 1979 and that he was represented by counsel at that time. Based on that evidence, the trial court could reasonably conclude that Crane's current conviction is his second such conviction, and therefore, the trial court did not abuse its discretion in entering the judgment and sentence it did. The decision of the Lancaster County District Court is affirmed.

AFFIRMED.

GRANT, J., participating on briefs.

FAHRNBRUCH, J., not participating.

WHITE, J., dissenting.

Today, the majority continues its refusal to recognize any legitimate or practical procedure for challenging, in an enhancement proceeding, the constitutional validity of a prior plea-based conviction. Because this refusal renders illusory the fundamental rights recognized in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), I renew my dissenting opinion previously stated in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989).

SHANAHAN, J., dissenting.

What the majority characterizes as a procedural bar, that is, "our procedural rule barring" inquiry into a defendant's prior plea-based conviction, is actually a very real denial of a substantive right of constitutional stature. The majority maintains that since inquiry into constitutional validity of a defendant's prior plea-based conviction is a procedural matter, a defendant's inquiry into a prior conviction may be barred by procedural default, that is, failure to invoke and adhere to a procedure available to examine the constitutional validity of a prior conviction. Can there be a procedural default, namely, noncompliance with a prescribed and valid procedure, when in fact no procedure exists? Is it possible to have procedural noncompliance or default concerning a nonexistent procedure?

Procedural default is not the same as procedural deficiency, because a defendant cannot fail to employ and comply with a procedure unless the procedure first exists. Presently, beyond limited inquiry into representation by counsel at a prior plea-based conviction, Nebraska law provides no procedure whereby a defendant may assert and establish constitutional invalidity of a prior conviction. See *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989) (Shanahan, J., dissenting). Consequently, failure to provide a procedure for assertion of a constitutional right is essentially and effectively an absolute and complete denial of the constitutional right and, hence, a denial of due process.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the U.S. Supreme Court held that a defendant's guilty plea is constitutionally invalid unless the record affirmatively shows that the defendant voluntarily and intelligently waived the rights to trial by jury, to remain silent, and to confront accusers. From *Boykin*, one must conclude that a conviction based on a constitutionally invalid guilty plea is equally invalid and, therefore, lacks constitutional effect.

Also, in *State v. White*, 238 Neb. 840, 848-49, 472 N.W.2d 720, 726 (1991), we stated, "As a matter of due process in the Nebraska criminal justice system, a defendant's guilty or nolo contendere plea must satisfy the requirements expressed in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986)." In *Irish*, this court recognized that "to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly," the court in which the defendant enters the plea must inform the defendant concerning "(1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination . . . ." 223 Neb. at 820, 394 N.W.2d at 883.

Thus, in accordance with due process and pursuant to *Boykin* and *Irish*, a defendant's plea of guilty or nolo contendere is constitutionally valid only if the defendant, prior to entry of the plea, has been informed concerning the constitutional rights to confront witnesses against the

defendant, have a trial by jury, and exercise the privilege against self-incrimination. True, *Irish* goes beyond *Boykin* regarding additional information which a defendant must have for a constitutionally valid conviction based on the defendant's plea; for example, *Irish* requires that a defendant must be informed concerning the constitutional right to assistance of counsel, whereas that information concerning counsel is not required for a valid plea under *Boykin*.

Nevertheless, this court indulges in a semantical smokescreen from which there emerges an illusory distinction: inquiry into the question of counsel in a prior plea-based conviction is characterized as a direct attack, while, simultaneously, inquiry into a prior plea-based conviction in light of *Boykin* and *Irish* is characterized as a "collateral attack." That approach ignores that, under *Boykin* and *Irish*, the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers, which the majority maintains cannot be the bases for an inquiry into a prior plea-based conviction, are the constitutional coequals of a defendant's right to representation by counsel in a criminal case and, consequently, have the same stature and identity of import in constitutional law. Indeed, the Supreme Court, in *Boykin*, specifically equated a defendant's right to counsel with his rights to trial by jury, to remain silent, and to confront accusers, requiring that the same standard must be applied concerning a waiver of each of those constitutional rights. See *Boykin, supra*. Moreover, both the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution express a criminal defendant's rights to counsel, to confront accusers or witnesses against the defendant, and to have a jury trial. Yet, in the majority's view, a defendant can inquire whether the defendant was represented by counsel or waived that representation in a prior plea-based conviction, but cannot inquire whether the defendant was informed concerning the rights to confront accusers or adverse witnesses and have a jury trial, rights which are specifically expressed within the same constitutional provision for assistance of counsel. There is no constitutional hierarchy or other order of preference or priority for the rights to counsel, to confront accusers, and to have a

jury trial. Why exploration of the counsel question is permissible, but inquiry concerning the other rights in the same constitutional provision is impermissible, remains unexplained and indefensible. Thus, the majority's approach to the problem is a classic illustration of a "[d]istinction without a difference."

Because there is no rational basis for this court's disparate treatment of a defendant's constitutional rights as subjects for inquiry into a prior plea-based conviction, this court has used its power of definition and classification without a constitutional basis and, therefore, in an arbitrary and impermissible manner. As this court expressed regarding the Legislature, classification of " 'persons, places, objects or subjects . . . must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class.' " *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 370, 466 N.W.2d 461, 470 (1991) (quoting from *State, ex rel. Cone, v. Bauman*, 120 Neb. 77, 231 N.W. 693 (1930)). Moreover, a

> legislative definition must be reasonable, and cannot be arbitrary and unfounded. . . . "[T]here is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word." . . . "*Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.*"

(Emphasis in original.) *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 571, 573, 575, 471 N.W.2d 734, 739-41 (1991) (quoting from *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934), and *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980)). What this court has previously chided as arbitrariness and a distinction without a substantial difference in perceived infirmity of legislative action is now all too obviously and painfully present in the judicial action taken today by the majority in Crane's case, for this court has unfortunately applied its definitional powers to achieve an arbitrary classification which lacks a rational and legitimate basis in the Constitutions of the United States and Nebraska and

circumvents due process required by the Constitutions. "Physician, heal thyself."

One notably peculiar feature of the majority's opinion is the expression "challenging a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack," which is soon followed by an afterthought without much thought: "One could also challenge the constitutional validity of a prior conviction through a separate proceeding, such as an action for declaratory judgment." Let's run through that again. A *Boykin* claim and, correspondingly, an *Irish* claim raised in an enhancement proceeding constitute a collateral attack on a prior plea-based conviction used in the enhancement proceeding, but a declaratory judgment outside the enhancement proceeding, that is, a separate proceeding to determine the constitutional validity of the prior conviction used in an enhancement proceeding, is not a collateral attack. In *Moore v. Black*, 220 Neb. 122, 127, 368 N.W.2d 488, 492 (1985), this court stated:

> [A]n original action which does not state a valid, independent cause of action apart from the appeal of a lower tribunal's decision constitutes an impermissible collateral attack on that decision and is not maintainable as an action for a declaratory judgment unless the decision was procured by fraud or the lower tribunal lacked jurisdiction, thus rendering its decision void.

See, also, *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981); *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980).

> A declaratory judgment action is not a substitute for a new trial or appeal; a method of destroying proper exercise of power in a former action; authority for a second trial by the same parties on identical issues in different forums; or a justification for an unnecessary decision; and does not approve collateral attacks on former adjudications or operate to supersede former adjudications or proper proceedings already pending in court. See, *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985); *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976); *Phelps County v. City of Holdrege*, 133 Neb. 139, 274

N.W. 483 (1937).
State v. Oliver, 230 Neb. 864, 878, 434 N.W.2d 293, 302 (1989) (Shanahan, J., dissenting).

Thus, while the majority emphatically denounces a *Boykin* or *Irish* claim as a collateral attack in an enhancement proceeding, in the same breath the majority suggests recourse to a declaratory judgment action, which is itself an action collateral to the enhancement proceeding and, therefore, a collateral attack on the prior conviction used for enhancement. Consequently, in the majority's view, a collateral attack is impermissible to test the constitutionality of a prior plea-based conviction, but a collateral attack in the form of a declaratory judgment action is available to contest the constitutional validity of the prior conviction. What a colossal contradiction! For that reason, a declaratory judgment action under the circumstances is feckless, a forensic phantom for rectification of a wrong.

Also, were a declaratory judgment available to test constitutionality of a prior plea-based conviction, why would it be necessary to engender such inquiry in an action entirely and procedurally separated from an enhancement proceeding? Judicial economy and efficiency, as well as an avoidance of burgeoning litigation, require an uncomplicated and direct approach in an enhancement proceeding, namely, allowing a defendant to contest the constitutional validity of a prior conviction in the proceeding wherein the prior conviction is sought to be used against the defendant. That procedure would comport with the Constitutions and common sense. Otherwise, the more twists and turns one puts in a pipeline, the more one slows the flow. Nevertheless, under the approach adopted by the majority, the situation is hopeless but, in the majority's view, not serious.

Even if a *Boykin* or *Irish* inquiry into Crane's prior conviction is a collateral attack, such inquiry is available in accordance with due process, for, as the U.S. Supreme Court has clearly stated in *Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), " 'Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore

void.' " Although this court declares that a collateral attack on a prior plea-based conviction is procedurally barred, the longstanding rule in Nebraska is that " 'a void judgment is subject to collateral attack.' " *State ex rel. Ritthaler v. Knox*, 217 Neb. 766, 768, 351 N.W.2d 77, 79 (1984). Accord, *Schilke v. School Dist. No. 107, supra*; *State ex rel. Southeast Rural Fire P. Dist. v. Grossman*, 188 Neb. 424, 197 N.W.2d 398 (1972). Moreover, "a void judgment may be attacked at any time in any proceeding." *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 249, 328 N.W.2d 759, 763-64 (1983). Accord *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988). " 'A void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral.' " *Stanton v. Stanton*, 146 Neb. 71, 75, 18 N.W.2d 654, 656 (1945). " 'It is a general rule of law that a judgment which is null and void is subject to collateral attack.' 31 Am. Jur. 181, sec. 583. 'A void judgment may be impeached in a collateral proceeding.' 34 C.J. 510." *Drainage District No. 1 v. Village of Hershey*, 139 Neb. 205, 211, 296 N.W. 879, 882 (1941). See, also, *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979); *County of Douglas v. Feenan*, 146 Neb. 156, 18 N.W.2d 740 (1945). Consequently, rather than barring an inquiry into the constitutional validity of Crane's prior conviction, the real rule recognized in Nebraska permits and demands just such inquiry into the constitutional validity of a prior plea-based conviction used for enhancement purposes.

In what is a constitutionally indefensible position, and, for that reason, what will undoubtedly and eventually become an exercise in futility, this court tries to avoid the effect of *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989):

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " 'clearly and expressly' " states that its judgment rests on a state procedural bar. *Caldwell* [*v. Mississippi*], 472 U. S., at 327, quoting [*Michigan v.*] *Long*, 463 U. S., at 1041.

Today, this court had the opportunity to identify the Nebraska procedure in which a defendant can raise and litigate a *Boykin* or *Irish* claim, an epiphanic enunciation that, much to the disappointment and frustration of many, continues to elude expression in this court's decisions. Rather, in its action today this court stubbornly ignores all previous federal decisions which have rejected the majority's renewed approach to a constitutional inquiry into a plea-based conviction for enhanced penalty purposes in Nebraska. See, *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), *writ of habeas corpus granted, Gonzales v. Grammer*, 655 F. Supp. 1147 (D. Neb. 1987), *aff'd* 848 F.2d 894 (8th Cir. 1988); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), *writ of habeas corpus granted, Oliver v. Spire*, No. CV89-L-149 (D. Neb. Sept. 10, 1990). To persist on a course now thoroughly discredited by the federal courts comports with neither judicial economy nor reality.

Under the approach expressed by the majority today, Nebraska procedure lacks a method to judicially process a *Boykin* or *Irish* claim as an inquiry into the constitutional validity of a prior plea-based conviction used for enhancement of penalty and, hence, fails due process. Thus, notwithstanding today's decision in *Crane*, there is still "no new twist to *Oliver*. . . ." *State v. Johns*, 233 Neb. 477, 482, 445 N.W.2d 914, 918 (1989) (Shanahan, J., dissenting; renewal of dissent in *State v. Oliver, supra*). As matters now stand under Nebraska procedure with its continued cryptic means to litigate a *Boykin* or *Irish* claim, if Crane files an application for habeas corpus relief through federal court, that relief will be granted before the ink from the filing stamp dries on Crane's application.

Accordingly, the sentence imposed on Crane should be set aside, and these proceedings should be remanded for a sentence hearing at which Crane may challenge the constitutional validity of his prior plea-based conviction. In such a procedure, the State may demonstrate the constitutional validity of Crane's prior conviction and thereby constitutionally justify an enhanced sentence.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM WOUNDED ARROW, APPELLANT.

480 N.W.2d 205

Filed February 21, 1992. No. S-90-1210.

1. **Sentences: Appeal and Error.** Where the record as a whole discloses that the sentencing court correctly understood and applied the law, extraneous remarks do not impeach the court's determination.
2. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors; the appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing judge.
4. **Sentences.** The seriousness of the offense and the amount of violence used in the commission of a crime are important factors in determining the appropriateness of a sentence.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Michael T. Varn for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

Pursuant to an agreement whereunder the plaintiff-appellee, State of Nebraska, dismissed its use of a weapon in the commission of a felony charge and reduced its first degree murder charge to one of second degree murder, the defendant-appellant, William Wounded Arrow, pled no contest to the amended murder charge and was thereupon so adjudged and later sentenced to life imprisonment. The defendant urges the district court erred by (1) considering improper factors in determining the sentence and (2) imposing an excessive sentence. We affirm.

The defendant and the victim, Donna Wounded Arrow, were married and produced a son, who is now approximately 3 years old. The couple separated in the spring of 1990, and in April of

that year the victim filed a petition for dissolution of the marriage. That action was pending at the time the events described below took place.

During the evening of May 29 and the early morning hours of May 30, 1990, the defendant and the victim were cruising the streets of Gordon in separate vehicles. The victim had been drinking and was alone in her own vehicle. The defendant was a passenger in an automobile he owned, which was being driven by his niece, Gwendolyn Hollow Horn. According to Hollow Horn, the defendant had asked her to go along with him because he was going to finally "catch [the victim] in the act with Jim," referring to Officer Jim Demicell of the Gordon Police Department. The defendant was convinced that Demicell and the victim were having an affair, a claim Demicell denied. Hollow Horn drove because the defendant had been drinking.

Bobbie Schott was also driving his truck around Gordon that night, accompanied by Amy White, the victim's niece, and Sheldon Ballinger. The victim had told them she was having problems with the defendant; he would not leave her alone, and, apparently, they had argued earlier that evening. The three agreed to watch out for her and to keep an eye out for the defendant.

At approximately 12:50 a.m. on May 30, 1990, Demicell, who was monitoring the Gordon streets in a patrol vehicle, noticed an automobile stopped at a stop sign with its headlights turned off. He pulled up alongside the vehicle and rolled down his window, at which time he recognized the victim as the driver. Demicell told the victim to turn on her lights, which she did, and Demicell then drove away. The defendant saw this encounter and made statements to the effect that he had finally caught them.

A short time later, while the victim was stopped at a stoplight, Hollow Horn pulled the vehicle alongside that of the victim, and the defendant stated, " 'Thats adultry [sic] dear.' " The parties then apparently went their separate ways, but from that encounter on, the defendant appears to have become quite disturbed and kept making statements to the effect that the victim must think he was stupid that she would do something

right in front of him and think she could get away with it. The defendant told Hollow Horn to find the victim so that he could ask her what she was "trying to pull."

Shortly thereafter, apparently by coincidence, just as Hollow Horn had stopped the defendant's automobile at the stop sign of an intersection, the victim, traveling in the same direction, stopped her automobile close behind that of the defendant. The defendant told Hollow Horn that he was going to get into the victim's automobile, at which time he left his automobile and headed toward the victim's. At about the same time, someone in the Schott truck noticed the defendant heading toward the victim. Schott thereupon drove to the intersection and pulled his truck behind the victim's automobile.

The occupants of the Schott truck stated they saw the defendant seated in the front passenger side of the victim's automobile. The three witnesses described what followed in various ways, but in summary stated that the defendant grabbed the victim around the neck or the shoulder with his left arm, after which a struggle ensued. White saw the defendant's right hand come down in a striking motion on the victim's neck. White also reported seeing a glint of something in the defendant's hand during the struggle, but could not identify the object. After being struck, the victim got out of her automobile, staggered toward the Schott truck, and, bleeding from wounds to her neck, collapsed on the ground. Ballinger and Schott put her in the back of the truck and took her to a hospital, where she was pronounced dead on arrival.

Hollow Horn, who had also seen the struggle and had watched the victim get out of her vehicle, approached the vehicle and found the defendant still seated in the passenger seat. He had a cut on the left side of his throat and was bloody. Hollow Horn went to get the defendant's sister, and an ambulance was called. When Hollow Horn returned to the scene, the defendant asked for some paper. He then wrote a note reciting that he had caught the victim and Demicell in their affair, and as they now could not deny it, he "cut her." The defendant was subsequently transported to the hospital.

Upon a search of the crime scene, investigators discovered a folded and bloodied Buck knife on the floor of the victim's

automobile. A search of the defendant's clothing at the hospital revealed another folding knife, which was also bloodied.

An autopsy revealed that the victim's throat had been cut at least three times. One incision ran 6 1/2 inches across the front of the neck, severing all the major blood vessels.

Second degree murder is punishable by imprisonment for a period of from 10 years to life. Neb. Rev. Stat. §§ 28-105 and 28-304 (Reissue 1989). First degree murder is punishable by either life imprisonment or death. Neb. Rev. Stat. § 28-303 (Reissue 1989); § 28-105. The use of a weapon in the commission of a felony is punishable by imprisonment for a period of from 1 to 25 years, a $25,000 fine, or both such imprisonment and fine. Any sentence imposed for this offense must be consecutive to any other sentence imposed for the underlying crime. Neb. Rev. Stat. § 28-1205 (Reissue 1989); § 28-105. Thus, by accepting the State's plea bargain, the defendant foreclosed the possibility of being sentenced to death and of confronting a prison sentence of up to 25 years to be served consecutively to any sentence imposed for the murder.

The defendant first asserts that in imposing its sentence, the district court erroneously applied the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1989), which defines the aggravating and certain of the mitigating circumstances to be considered in sentencing first degree murderers.

As a point of reference, it is noted that § 29-2523 lists the following mitigating circumstances: the lack of prior criminal activity by the defendant, whether the defendant was under unusual pressures or influences or domination by a third person, whether the defendant had extreme mental or emotional disturbance, the defendant's age, whether the defendant was an accomplice and his participation was insignificant, whether the victim was a participant or consented to the defendant's conduct, and whether the defendant's capacity to appreciate the wrongfulness of his conduct, at the time of the crime, was impaired due to mental illness, mental defect, or alcohol.

In sentencing the defendant, the district court observed:

> The Court shouldn't just automatically impose a maximum sentence, otherwise there wouldn't be any

> reason to consider any mitigating factors, and the Supreme Court justly has said to consider mitigating factors. But to say, that this case, this event, this murder was a result of mishandling a situation, does a terrible disservice to the English language. While it is not directly comparable, the Legislature has laid out a set of aggravating and mitigating factors that a Court is to follow in cases where it has to decide whether or not to impose the death penalty. That is not happening in this case, but this is a time when some of these aspects have to be considered when imposing a life sentence, which is a maximum . . . .
>
> . . . Suffice it to say, that as far as the factors under 29-2523 mitigating factors apply here, none of them would apply if I was considering a sentence of death. So, at least, as far as that takes us, the Legislature isn't telling me in some indirect way to impose less than a maximum sentence here. But it has set out four mitigating circumstances in other situations . . . .

The district court then proceeded to examine any possible mitigating factors present, for example, consideration of the defendant's past criminal record, whether he had been under any unusual pressure, whether he was under the domination of another person, and his intelligence, education, life experiences, and mentality.

Thus, it is obvious that although the district court referred to § 29-2523, it did not rigidly apply its provisions but merely used the mitigating circumstances outlined in the section as a guide in discussing the mitigating factors present here. Indeed, the district court considered the very factors *State v. True*, 236 Neb. 274, 460 N.W.2d 668 (1990), states should be considered in sentencing one for second degree murder: the accused's age, mentality, education, experience, social and cultural background, past criminal record, and motivation for the offense, and the nature of the offense.

Where the record as a whole discloses that the sentencing court correctly understood and applied the law, extraneous remarks do not impeach the court's determination. See, e.g., *People v. Beasley*, 5 Cal. App. 3d 617, 85 Cal. Rptr. 501 (1970)

(Sims, J., dissenting); *People v. Cartier*, 54 Cal. 2d 300, 353 P.2d 53, 5 Cal. Rptr. 573 (1960). As further noted in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991), in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

The defendant's second contention is that life imprisonment is excessive. As we repeatedly state, a sentence imposed within statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing judge. *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992). Moreover, the seriousness of the offense and the amount of violence used in the commission of a crime are important factors in determining the appropriateness of a sentence. See, e.g., *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990).

Here, the defendant murdered his wife in accordance with a premeditated plan. Notwithstanding the fact that the defendant has no other serious crime of violence in his past, it cannot be said that the sentence imposed constitutes an abuse of discretion.

The record sustaining neither of the defendant's assigned errors, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. WILLIAM F. PAPKE, APPELLANT AND CROSS-APPELLEE.

480 N.W.2d 209

Filed February 21, 1992. No. S-91-193.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

PER CURIAM.

In the county court for Douglas County, defendant, William F. Papke, pled no contest to a city complaint charging him with assault and battery. After a presentence investigation, the county court sentenced defendant to probation. The general probation terms required, among other things, that defendant "[m]aintain gainful employment or attend school," abstain from alcoholic beverages and narcotics, and pay a fine of $200.

Additional special conditions of probation were added as follows:

> 1. The defendant shall be required to obtain alcohol evaluation at an accredited agency within the first 30 days of this probationary period, shall be required to promptly follow all recommendations including any recommended treatment, counseling, educational classes, AA meetings or aftercare meetings . . . .
>
> 2. The defendant shall be required to continue participation in Spouse Abuse of the YWCA . . . .
>
> 3. As a term and condition of probation the defendant shall be required to serve 60 days in the Douglas County Corrections Center to be served immediately.

4. As a term and condition of probation the defendant shall be required to serve 30 days in the Douglas County Corrections Center beginning 2-7-91.

5. Pay restitution to the victim.

In addition, at the time of sentencing, the court stated, "I don't want house arrest or work release. I want him to serve the time in the Correction Center." Those restrictions are not included in the written probation order.

Defendant appealed to the district court, contending the county court erred "in ordering a probation which by the court's denial of work release and house arrest was impossible and impreeticable [sic] for the defendant to complete." The district court affirmed the conviction and sentence of the county court, but recommended "approval for work release or house arrest if screening Committee at DCDC [apparently the Douglas County Corrections Center] gives favorable report."

Defendant then appealed to this court, assigning as error only the action of the district court "in affirming the sentence of the Douglas County Court since the record demonstrates that the sentence was arbitrary and capricious." Appellee State of Nebraska has cross-appealed, assigning as error the action of the district court in modifying defendant's sentence to permit the 60-day jail term to be served with work release and/or house arrest.

The record before us shows the following: On June 11, 1990, in Douglas County Court, defendant pled not guilty to a city complaint charging him with assault and battery alleged to have been committed on May 1, 1990. On July 27, 1990, defendant appeared with counsel and pled no contest to the charge. He had previously been advised of his rights at arraignment when he pled not guilty. Defendant makes no complaint as to the procedure followed, so the matter is before us on the sentencing issue only.

The county court accepted defendant's plea and ordered a presentence investigation. The report showed that the defendant and the victim were not married, but had lived together for 11 years. Defendant's statement to the probation officer was that prior to the incident he played golf in the "Swing for the Retarded" outing, came home about midnight,

and discovered his roommate was not home. He searched for her and found her car at a bar. There, he was told that his roommate had been in the bar, was very drunk, and had left with another man. Defendant continued to look for her, returned to their residence about 4 a.m., and found she had returned. A shouting match and fight ensued. The police were called, and they took the victim to the hospital. The police report shows the victim had "black eyes" and a "possible fracture[d] nose." There is nothing further in the report concerning the injuries.

The sentence is too contradictory to be enforced. The county court has ordered that defendant spend 60 days in jail, to be served "immediately," and then has ordered that defendant obtain an evaluation and "promptly" follow all recommendations, including attendance at educational classes or AA meetings "within the first 30 days." The county court, at the time of sentencing, denied work release or house arrest. The court also fined defendant $200, provided for an additional 30 days in jail beginning February 7, 1991, and ordered defendant to "[p]ay restitution to the victim." There is nothing to show what amount constitutes restitution.

Defendant is 43 years old and has, in effect, no prior record. The presentence investigation report states, "The defendant's prior record dates back to 1979 when he was charged with Assault and Battery." The more correct way to state defendant's record would be that in 1979, defendant was charged with assault and battery, and the charge was dismissed 8 days later. Defendant had two $10 traffic tickets in 1986 and a $15 ticket in 1990. Defendant had no other record until this charge. Defendant drinks, but works. His girl friend also drinks.

We find that defendant's assignment of error has merit and that the cross-appeal of the State is without merit. We affirm the judgment of conviction, but determine that the trial court erred in imposing probation conditions which were confusing and impossible for defendant to perform and which constitute a sentence in excess of the trial court's discretion. We remand the cause to the district court for remand to the county court, where we direct a sentence of 30 days in the county jail be imposed, together with court costs.

No restitution is ordered because there is nothing in the record indicating any amounts. Defendant, of course, may be liable for the damages he has inflicted but, in the absence of any proof as to the amount of damages in this case, those damages must be determined in a different proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

LORI A. STEWART, APPELLANT, V. AMIGO'S RESTAURANT, APPELLEE.

480 N.W.2d 211

Filed February 21, 1992. No. S-91-464.

1. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
2. **Workers' Compensation.** The Nebraska Workers' Compensation Court may adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act and shall administer and enforce all of the provisions of such act, except such as are committed to the Supreme Court.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Motions for Continuance: Affidavits: Good Cause.** An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings.
5. **Depositions: Rules of the Supreme Court.** Pursuant to Neb. Ct. R. of Discovery 32(a) (rev. 1989), use of a deposition is not restricted to the party taking the deposition; rather, any party who was present or represented at the taking of the deposition may use the deposition.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert R. Moodie, of Friedman Law Offices, for appellant.

Michael K. High, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

SHANAHAN, J.

In her appeal from an award against Amigo's Restaurant, Lori A. Stewart contends that the Nebraska Workers' Compensation Court abused its discretion by not allowing Stewart to obtain a second posthearing deposition of her physician and in permitting Amigo's to use her doctor's deposition as evidence for the award.

Before the injury involved in her compensation claim, Stewart had two orthopedic surgical procedures to her right knee. In 1984, Stewart underwent arthroscopic surgery by Dr. Patrick E. Clare to remove "facette chondromalacia" at the site of her right kneecap and surgically achieve bilateral releases on both of her knees. In February 1989, Dr. Matthew C. Reckmeyer performed arthroscopic surgery on Stewart's right knee regarding a "medial femoral condylar fracture" (a break in the middle of the rounded projection of the femur, or thigh bone).

On December 5, 1989, Stewart, as an associate manager at Amigo's Restaurant, was carrying food products at the restaurant when her right foot slipped on a wet floor, causing Stewart to fall and strike her right knee on the floor. Stewart immediately experienced pain and stiffness in her right knee, but continued to work. Stewart's knee problems persisted intermittently until she became unable to walk, sought medical attention on February 16, 1990, and underwent arthroscopic surgery by Dr. Reckmeyer on February 26. According to Dr. Reckmeyer, Stewart's knee injury consisted of "chondromalacia of the right lateral tibial plateau" (deterioration and softening of cartilage on the surface of the inner bone of the leg, i.e., shinbone) with "medial and lateral synovial plica" (a fibrous band of tissue affecting the lining of the knee joint). Stewart was unable to work from February 26 to April 11, but resumed some light duties in her employment from April 12 to 19. When Stewart continued to have discomfort with her right knee, Dr. Reckmeyer suspected "peroneal nerve symptoms from irritation, possibly scarring"

and believed that surgery was justified for "exploring the peroneal nerve" regarding Stewart's "tib-fib joint." Exploratory surgery was performed on April 30. Later, in view of Stewart's continued knee problem, and after another orthopod examined Stewart, Dr. Reckmeyer, on January 25, 1991, performed surgery on Stewart, namely, a " 'proximal fibular resection and reconstruction [of the] lateral/collateral ligament [of the] right knee.' "

Rehearing commenced in Stewart's case on February 5, 1991. At the rehearing Stewart described her accident and disability, and the court received various hospital records and doctors' notes concerning Stewart's care and treatment for her knee problem, including records pertaining to Stewart's knee surgeries before she fell at Amigo's Restaurant. At the conclusion of the evidence on February 5, Stewart's lawyer requested time to obtain and file the deposition of Dr. Reckmeyer and estimated that the deposition would be filed on March 7 inasmuch as the doctor's deposition had already been scheduled at the time of counsel's request. Also, the lawyer for Amigo's Restaurant asked for Stewart's examination by an orthopedist for the defense. Without objection, both requests were granted.

On February 28, 1991, Stewart obtained Dr. Reckmeyer's deposition. In the course of questioning on direct examination, the following occurred:

> Q Dr. Reckmeyer, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not any causal connection exists between the direct fall on the knee which Ms. Stewart reported to you as occurring two or three months prior to your February 16th appointment and the diagnosed conditions which you have described to us that existed in February of 1990?
>
> . . . .
>
> A . . . I'm sorry. I cannot make a direct association between those two.
>
> . . . .
>
> Q . . . All right, why not?
>
> A Several reasons. From the medical standpoint, the findings were consistent with normal use, wear and

tear of the knee, although they could be associated with some element of trauma. The actual findings, three months — two to three months after the injury cannot be necessarily directly related to the reported fall. And the changes that — Some of the changes that were found can also be associated with postarthroscopic evaluation. In other words, her knee had been injured technically from the operation. In other words, an operation does cause some injury of any kind. And she had had two previous arthroscopic operations, including one that involved a lateral release which can cause significant internal scarring, several years before that.

. . . .

Q Now, Doctor, do you have an opinion to a reasonable degree of probability, medical probability, as to whether or not any type of connection exists between the peroneal nerve obstruction that you treated in April of 1990 and the fall directly on the knee that she had reported happened two or three months prior to your February 1990 appointment?

. . . .

A That based on the change in the symptoms postoperatively that she was not, at least to my awareness, complaining of those types of problems prior. The fall was not directly related to the peroneal nerve.

. . . .

Q Now, before February of 1990, Ms. Stewart had had other surgeries with her knee. You've already testified to that. Is that right?

A That's correct.

Q And did these prior surgeries render the knee unstable or prone to additional injury?

. . . .

A Her prior procedures, I do not believe rendered her knee unstable or more susceptible to injury.

Q Do you have an opinion, Doctor, to a reasonable degree of medical probability, as to whether or not the accident where she fell directly on her knee two to three months prior to February 1990 caused, either by

producing a new injury or by aggravating an old injury, any of the injuries for which you have performed surgeries since February of 1990?

. . . .

A I cannot state within a reasonable degree of medical certainty whether that fall contributed to or caused those problems.

Stewart's lawyer then filed a motion on March 7, 1991, for an extension of time to obtain a second deposition from Dr. Reckmeyer and, as support for that request, offered counsel's affidavit which included:

> Dr. Reckmeyer gave testimony which contradicted previous statements and medical records and were surprises to the affiant inasmuch as they were different than answers and information previously supplied by Dr. Reckmeyer.
>
> . . . [S]ubsequent to said deposition, the undersigned reported the results of the deposition to the plaintiff. The plaintiff conferred with Dr. Reckmeyer and Dr. Reckmeyer contacted the undersigned affiant, explaining that he had been confused by several questions and that his testimony would have been significantly different had said confusion not occurred.

Dr. Reckmeyer's deposition was filed with the compensation court on March 8, 1991. Amigo's Restaurant objected to any allowance of time for Stewart's obtaining another deposition from Dr. Reckmeyer and declined to pursue the medical examination previously authorized by the court.

Regarding Stewart's request for time to obtain Dr. Reckmeyer's second deposition, the compensation court, on March 15, 1991, ruled on Stewart's motion and noted:

> The thrust of the plaintiff's position to retake the deposition of Dr. Reckmeyer as set forth in the affidavit is that the plaintiff's attorney was surprised by the answers Dr. Reckmeyer gave at the deposition and that the deponent was confused. The Court has reviewed in detail the arguments of the parties and the deposition of Dr. Reckmeyer and can find no evidence that the plaintiff's attorney was surprised by Dr. Reckmeyer's answers or

> more importantly that Dr. Reckmeyer was confused. In addition the Court notes that there were numerous off the record discussions during the taking of deposition which allowed the plaintiff to alleviate any confusion the deponent may have had which again is not indicated by the record. There are also several examples of the deponent being asked to explain his answers which he does with clarity.

The compensation court, therefore, concluded:

> The Court finds based upon its review of all the evidence and arguments of the parties that there does not exist sufficient reason to allow the plaintiff to retake the deposition of Matthew C. Reckmeyer, M.D., and that the plaintiff's Motion For Extension Of Time to retake the deposition of Dr. Reckmeyer is denied.

In view of the court's refusal to allow Dr. Reckmeyer's additional deposition, Stewart, on March 21, objected to the court's receiving the Reckmeyer deposition as evidence for the rehearing, and, as a basis for that objection, stated:

> Lori A. Stewart . . . objects to the offer, as evidence, of the deposition . . . of [Dr. Reckmeyer] which has been or may be made by the defendant.
>
> . . . After taking said deposition . . . plaintiff has elected and chosen not to offer said deposition into evidence.
>
> The deadline for submission of said deposition was March 7, 1991. Said deadline came and went without the submission of said deposition.
>
> Furthermore, said deposition was requested by the plaintiff and was taken at the plaintiff's expense. Its use as trial testimony should be at the plaintiff's discretion.

On April 17, 1991, the compensation court, after considering Stewart's motion to exclude the Reckmeyer deposition, determined that "the deposition of Doctor Reckmeyer was taken for evidentiary purposes and as one of the plaintiff's treating physicians would have information beneficial to a full consideration of the plaintiff's claim." Noting that Amigo's Restaurant "now would offer the deposition testimony of Dr. Reckmeyer," the compensation court ordered that "the deposition of Dr. Matthew Reckmeyer shall be received in

evidence at the rehearing."

In its "Award on Rehearing," after awarding Stewart benefits for her temporary disability, the compensation court referred to Dr. Reckmeyer's deposition testimony that he was unable to medically determine any cause-and-effect relationship between Stewart's fall on December 5, 1989, and the diagnosed condition in February 1990, which was the basis for Stewart's knee surgery in April 1990 and January 1991. Further in its award, the court stated that Stewart had "failed to meet her burden of proof" for compensability of her medical expenses from the knee operations in April 1990 and January 1991. Also, the compensation court concluded that Stewart had failed to prove that she sustained "any permanent impairment" of her right knee.

ABUSE OF DISCRETION

> [A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *Bump v. Firemen's Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

PROCEDURE IN THE WORKERS' COMPENSATION COURT

Neb. Rev. Stat. § 48-163 (Reissue 1988) provides in part:

> The Nebraska Workers' Compensation Court may adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act and shall administer and enforce all of the provisions of such act, except such as are committed to the Supreme Court.

Also, Neb. Rev. Stat. § 48-168 (Reissue 1988) states: "The Nebraska Workers' Compensation Court shall not be bound

. . . by any technical or formal rules of procedure . . . ."

Stewart's Request for a Continuance.

Rule XXIII of the Nebraska Workers' Compensation Court's Rules of Procedure (1991) includes the following provision for a continuance: "No continuance will be granted in any event unless good cause is shown and none within two weeks of the date of hearing unless an emergency arises."

As we expressed in *Wachtel v. Beer*, 229 Neb. at 402, 427 N.W.2d at 63: "[A] motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion." See, also, *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986).

Although we realize that Nebraska statutes prescribing procedure for a civil action are inapplicable to an action in the Nebraska Workers' Compensation Court, see § 48-168, Rule XXIII clearly requires a showing of "good cause" for a continuance. As an analog for Stewart's case, we refer to Neb. Rev. Stat. § 25-1148 (Supp. 1991) concerning the procedure for a continuance in Nebraska courts other than the Workers' Compensation Court. Construing § 25-1148 and its requirement of a showing to justify a continuance, we have stated: "An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings." *Williams v. Gould, Inc.*, 232 Neb. 862, 884, 443 N.W.2d 577, 591 (1989).

The affidavit offered by Stewart for a continuance does not identify the questions that engendered, and answers that reflected, Dr. Reckmeyer's purported confusion. Rather than expressing a specific statement about particular questions and answers, the affidavit contains a somewhat indefinite characterization of the situation: "[Dr. Reckmeyer] had been confused by several questions and . . . his testimony would have been significantly different had said confusion not occurred." Which questions were confusing, and, correspondingly, which of Dr. Reckmeyer's answers show the physician's confusion? Perhaps definite information, imparted directly by Dr. Reckmeyer's affidavit rather than through the conduit of

counsel's affidavit, might have more graphically presented Dr. Reckmeyer's problematic confusion. Nevertheless, it becomes apparent that the area of Dr. Reckmeyer's claimed confusion relates to the questions and answers concerning the physician's opinion on causation, that is, whether Stewart's fall on December 5, 1989, caused an injury which resulted in disability and medical expenses compensable under the Nebraska Workers' Compensation Act. From a review of Dr. Reckmeyer's deposition, our conclusion is substantially the same as that reached by the compensation court: Counsel's questions on causation were unequivocal. Dr. Reckmeyer answered the questions asked, and even articulated cogent reasons for his answers. If there was any confusion surrounding the doctor's answers, counsel had the opportunity to eliminate any confusion and elicit clarification by additional questions, either immediately in the course of direct examination of the physician or after a recess during which the doctor might have collected his thoughts or thoughts from someone else. Under the circumstances, we are unable to conclude that the compensation court abused its discretion in denying additional time for Stewart's obtaining a second deposition from Dr. Reckmeyer.

Defendant's Use of Deposition Obtained by Plaintiff.

Rule XXI of the Nebraska Workers' Compensation Court's Rules of Procedure (1991) states in part:

> Without limiting the Compensation Court in any manner as to the taking and furnishing of evidence, the Compensation Court will recognize and accept depositions, interrogatories, requests for admissions and discovery proceedings which are in conformance with the Nebraska Discovery Rules For All Civil Cases provided they do not delay the holding of hearings or rehearings.

Neb. Ct. R. of Discovery 32(a) (rev. 1989), regarding use of depositions in court proceedings, provides in pertinent part: "Any part or all of a deposition . . . may be used against any party who was present or represented at the taking of the deposition . . . ."

The language of Rule 32(a) itself, with its express and

unambiguous provisions, is sufficient authority that, pursuant to Rule 32(a), use of a deposition is not restricted to the party taking the deposition; rather, any party who was present or represented at the taking of the deposition may use the deposition. The Nebraska Discovery Rules, generally, have counterparts in the Federal Rules of Civil Procedure. In considering the question of prompt filing required by Fed. R. Civ. P. 30(f) for use of a deposition, the court stated in *McVay v. Cincinnati Union Terminal Company*, 416 F.2d 853, 856 (6th Cir. 1969):

> Any party may use a deposition, not merely the party taking it. While appellant relies on the absence of prompt certification and filing under Rule 30(f) of the Federal Rules of Civil Procedure, the failure of such prompt certification and filing should be of no controlling importance when the counsel for the party taking the deposition is fully aware of its contents. The failure promptly to file is harmless where the adverse party saw the deposition prior to trial. The knowledge of the contents of the deposition . . . nullifies the requirement of prompt filing under Rule 30(f) . . . .

See, also, *Green v. Williams*, 90 F.R.D. 440 (E.D. Tenn. 1981) (any party may use a deposition).

Stewart sought Dr. Reckmeyer's deposition to supply the compensation court with the physician's testimony concerning Stewart's injury and subsequent condition; hence, the Reckmeyer deposition was the means of presenting evidence to the compensation court on issues involved in the litigation between Stewart and Amigo's Restaurant. Under the circumstances, we find nothing which indicates that the Nebraska Workers' Compensation Court abused its discretion in allowing Amigo's Restaurant to use the Reckmeyer deposition.

CONCLUSION

We find that Stewart's assignments of error are without merit; consequently, the award of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.

DONNA R. MORTON, APPELLANT, V. HUNT TRANSPORTATION, INC., AND AETNA CASUALTY & SURETY COMPANY, APPELLEES.

480 N.W.2d 217

Filed February 21, 1992. No. S-91-571.

1. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party.
2. **Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
3. **Workers' Compensation: Expert Witnesses.** The test of whether an expert's opinion is sufficient to support a workers' compensation claim is that when a physician's testimony gives rise to conflicting inferences of equal degree of probability, so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained.
4. **Workers' Compensation: Expert Witnesses: Proof: Words and Phrases.** Medical testimony as to causation expressed in terms of possibility generally is not sufficient to support an award of compensation, though such testimony couched in terms of probability may be sufficient.
5. **Workers' Compensation: Expert Witnesses.** The sufficiency of the expert's opinion is judged in the context of the expert's entire statement.
6. **Workers' Compensation.** Carpal tunnel syndrome may be recognized as a compensable work-related injury if the use of the hands and wrists by an employee constituted repeated trauma to the hands and wrists.
7. **Workers' Compensation: Words and Phrases.** An occupational disease is defined as a disease which is due only to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment, and it excludes all ordinary diseases of life to which the general public is exposed.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Julie A. Frank, of Frank & Gryva, for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

HASTINGS, C.J.

The plaintiff, Donna R. Morton, has appealed from an order of dismissal of her claim by the Nebraska Workers' Compensation Court. She assigns as error (1) the court's failure

to find that her carpal tunnel syndrome was work related, (2) the court's application of a standard of causation which did not distinguish between legal and medical causation, (3) the court's failure to award her temporary total disability benefits and medical expenses, and (4) the court's failure to award permanent partial disability benefits. We affirm.

Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). Determination of causation is, ordinarily, a matter for the trier of fact. *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991).

Morton worked for Happy Cab, a subsidiary of Hunt Transportation, Inc., in Omaha. She was employed by Happy Cab for unspecified periods between 1976 and 1979, and continuously from 1981 to January 22, 1990. During all this time she worked as a taxicab dispatcher, and from 1988 until her employment terminated, she was chief dispatcher.

Plaintiff's job required that she take order cards for taxicabs, handwritten by telephone operators on 3- by 5-inch cards, off a conveyor belt or a tabletop. Upon receipt of a card, she time-stamped the order card using a pressure-activated time stamp device. She would then direct a cabdriver by means of radio to the location of the order and would again time-stamp the order card, but on the reverse side. Time-stamping the face of the cards required a wrist motion, and time-stamping the reverse side of the cards required Morton to turn her wrist. She was also required to move magnetic chips representing individual taxicabs on a metal board representing the city of Omaha, in order that she and other dispatchers would be able to track the location of these vehicles.

Morton testified that she worked from 7 a.m. to 5 p.m. each weekday, and from 7 a.m. to 3 p.m. on Saturdays. The evidence showed that Happy Cab handled an average of 500 orders in the 7 a.m. to 3 p.m. shift, with a high on any single day of approximately 900 orders. Morton claimed to have regularly

dispatched more than half the orders processed during the time she was working.

In approximately January 1989, Morton began to have pain and numbness in her hands and arms. These symptoms gradually worsened until in January 1990 they began to wake Morton at night. She would have to run hot water over her hands and take medication to alleviate the symptoms. Time-stamping order cards and "the constant writing" at work "seemed to aggravate" Morton's symptoms. During November and December 1989 and January 1990, however, "almost any movement of [Morton's] hands would make them hurt."

Morton saw Dr. Thomas Ferlic on January 11, 1990, for the pain and numbness in her hands, and he diagnosed Morton as suffering from carpal tunnel syndrome in both wrists. Dr. Ferlic performed carpal tunnel release surgery on Morton's right wrist on January 23, and on her left wrist on March 26. He released her to return to work on May 8, and gave as his opinion that she reached maximum medical recovery on July 16.

The medical testimony given by Dr. Ferlic indicated that he was familiar with Morton's work, which he characterized as requiring her to use a "pegboard" to track taxicab movements. When asked whether, "with a reasonable degree of medical certainty or probability . . . Ms. Morton's work activities caused or aggravated her carpal tunnel problems," he stated, "I can state that they may have aggravated her carpal tunnel, but I can't say with any certainty that they caused her carpal tunnel." Dr. Ferlic also stated that some persons are born predisposed to carpal tunnel syndrome and that Morton's work activities were of a type that "might make [a person predisposed to carpal tunnel syndrome] symptomatic . . . depending on how many times a day that they might do them [and] on the severity of their predisposition." He agreed that Morton's work "could and possibly would aggravate carpal tunnel syndrome" and stated that "anyone with a carpal tunnel may have aggravation of that condition with repetitive use of their wrists, depending how severe the carpal tunnel is or anything of that nature." However, after making these statements, Dr. Ferlic stated, "I cannot determine whether or not this was necessarily the etiology of her [Morton's] carpal tunnel."

The compensation court found that the above-recited evidence "does not preponderate in favor of [Morton] and [Morton's] petition must be dismissed." The court observed, "While a medical expert's testimony need not be couched in the magic words 'reasonable degree of medical certainty or a reasonable probability,' the testimony must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability." The court also stated in its order of dismissal, "As we understand the plaintiff's duties, handling 100 cards per hour (1.67 per minute) does not seem a hectic or breakneck pace." It is from this order that Morton appeals.

Morton's assignments of error combine to present two issues to this court: What is the proper legal standard of causation to be applied, and was the evidence sufficient to support the compensation court's findings and order under that standard? Because we find that the compensation court was not clearly wrong in its findings supporting its order of dismissal, it is unnecessary for us to consider the plaintiff's remaining assignments of error relating to the failure of the compensation court to award benefits.

In *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 532, 476 N.W.2d 854, 860 (1991), "this court enunciated the standard for determining whether an expert's opinion is sufficient to support a workers' compensation claim." The test, which originated in *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), reads that "when a physician's testimony 'gives rise to conflicting inferences of *equal* degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. . . .' " (Emphasis in original.) *Miner*, 239 Neb. at 532, 476 N.W.2d at 860, quoting *Welke, supra*. Based upon this test, "medical testimony expressed in terms of 'possibility' is not sufficient, though such testimony couched in terms of 'probability' is sufficient." *Miner*, 239 Neb. at 532, 476 N.W.2d at 860. "[T]he sufficiency of the [expert's] opinion is judged in the context of the expert's entire statement." *Miner*, 239 Neb. at 533, 476 N.W.2d at 860.

Morton argues that the test of causation requires separate

consideration of legal and medical causation, citing *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991), for this proposition. However, her attempted application of the rule of *Leitz* is out of context here. In *Leitz*, this court adopted a split test of causation, as Morton urges us to do here, from 1B Arthur Larson, The Law of Workmen's Compensation § 38.83(a) (1987). However, *Leitz*, Larson, and *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991)—the only other case in which this court has applied the split standard plaintiff here urges—all applied the standard in cases where a heart attack is alleged to have arisen out of employment activity. See, *Leitz, supra*; 1B Arthur Larson, The Law of Workmen's Compensation § 38.81 (1991); *Rosemann, supra*. See, also, *Clobes v. Nebraska Boxed Beef*, 238 Neb. 612, 472 N.W.2d 893 (1991) (Fahrnbruch, J., concurring).

This distinction is vital because of the purpose underlying the split standard: The " 'generalized nature' " of heart attack cases " 'makes it difficult factually to attribute the attack to the work.' " 1B Larson, *supra*, § 38.81 at 7-308. By separating legal and medical cause, it is possible to compensate those heart attack victims whose work placed a greater strain on their hearts than would ordinary nonemployment life. *Leitz, supra*.

Carpal tunnel syndrome, on the other hand, shares none of the difficulties of etiology that surround heart attacks. Those cases in which this court first recognized carpal tunnel syndrome as a compensable work-related injury relied on the fact that the use of the hands and wrists by the plaintiffs in those cases constituted "repeated trauma" to their hands and wrists. *Crosby v. American Stores*, 207 Neb. 251, 254, 298 N.W.2d 157, 159 (1980); *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982); *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). Injuries stemming from these "repeated traumas" carry with them none of the difficulties of detection of the work-related heart attack. Plaintiff's argument therefore urges an inappropriate standard of causation in this case.

Since issues of causation are issues of fact, *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991), the evidence of causation, taken in the light most favorable to

Happy Cab, must show that the compensation court's findings and order are clearly wrong, see *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). The sole evidence of causation in this case was provided by Dr. Ferlic. When the whole of his testimony is examined as previously set forth in this opinion, the evidence does not support the conclusion that the compensation court was clearly wrong in its finding that Morton failed to prove causation.

Read as a whole, Dr. Ferlic's testimony shows his refusal to give an opinion as to whether Morton's work activities caused her condition. The compensation court correctly observed that this is not a case where the expert physician improvidently chose to omit the "magic words" of causation—Dr. Ferlic here gave no indication at all that Morton's work caused her condition. The medical evidence establishes no more than the possibility that Morton's injuries were caused by her employment, and therefore the compensation court did not err in finding that she had not proved causation.

Morton argues that her case should be treated as one where work activity exacerbated a preexisting condition. She bases this argument on two portions of the record: first, Dr. Ferlic's use of the word "aggravated" in discussing the relationship between Morton's work and her injury, and second, Dr. Ferlic's statement that some persons are genetically predisposed to carpal tunnel syndrome. This argument finds no support either in the record or in law.

Plaintiff's argument seems to rest on the idea that given that her condition was aggravated by work, there must have been some preexisting condition to aggravate. This logic is destroyed if the record does not support the assumption that such aggravation in fact occurred. Again, Dr. Ferlic's testimony is the sole source of evidence on this point. Dr. Ferlic did allude to the aggravation of Morton's carpal tunnel syndrome by her work activity, but his statements in that regard are no less equivocal than his statement that he could not "say with any certainty that [Morton's work activities] caused her carpal tunnel." Dr. Ferlic stated that Morton's job activities "*may* have aggravated her carpal tunnel," that Morton's activities "*[c]ould* aggravate" carpal tunnel syndrome, and that "anyone with a

carpal tunnel *may* have aggravation of that condition with repetitive use of their wrists." (Emphasis supplied.)

The strongest evidence to which Morton can point is Dr. Ferlic's statement "It is safe to say, however, that it is work aggravated, if indeed it is found not to be caused by her work." This statement was, however, prefaced by the statement "The etiology of her [Morton's] carpal tunnel is undetermined at this point." Moreover, Dr. Ferlic later explained these statements to mean that "anyone with a carpal tunnel may have aggravation of that condition with repetitive use of their wrists." The evidence that Morton's work *aggravated* her carpal tunnel syndrome is no more definite and certain than is the evidence that it *caused* her carpal tunnel syndrome.

Furthermore, Morton's preexisting condition argument relies on the assumption that since Dr. Ferlic said that *some* persons are genetically predisposed to carpal tunnel syndrome, *she* must have been predisposed to carpal tunnel syndrome; this predisposition, in turn, was a preexisting condition in her case. However, the record is utterly devoid of any evidence that Morton was among those persons genetically predisposed to this condition.

Moreover, Morton's argument relies on flawed legal logic. As Morton would have it, evidence insufficient to prove causation in the absence of a preexisting condition somehow proves causation if one simply assumes a preexisting condition. While this court has disapproved those previous cases which stated the rule to be that a preexisting condition enhances the workers' compensation plaintiff's burden of proof as to causation, *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), this court has never stated that proof of a preexisting condition makes proof of causation easier.

Nor does the record support a finding of an occupational disease. An occupational disease is defined as a disease which is due only to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment, and it excludes all ordinary diseases of life to which the general public is exposed. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980).

The findings of fact made by the Workers' Compensation Court were not clearly wrong, and its order dismissing plaintiff's petition is affirmed.

AFFIRMED.

CITY OF NEWMAN GROVE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. DALE R. PRIMROSE AND ALICE H. PRIMROSE, APPELLEES.

480 N.W.2d 408

Filed February 28, 1992. No. S-89-734.

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. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
3. **Equity: Courts: Evidence: Appeal and Error.** In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for a new trial.

James F. Brogan for appellant.

Milo Alexander for appellees.

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

FAHRNBRUCH, J.

At the close of the plaintiff's evidence, the trial court directed a verdict against the plaintiff, City of Newman Grove (City), and dismissed its petition to enjoin Dale R. and Alice H.

Primrose from violating ordinances prohibiting storage of "junk" motor vehicles on their residentially zoned property. The City appeals.

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. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991).

Because we find that the City's evidence establishes a prima facie case that an ordinance was violated, we reverse the decision of the district court for Madison County and remand the cause for a new trial.

An action for an injunction sounds in equity. *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991).

> In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

Neb. Rev. Stat. § 25-1925 (Supp. 1991).

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Baker v. St. Paul Fire & Marine Ins. Co.*, *ante* p. 14, 480 N.W.2d 192 (1992).

The record reflects that the Primroses owned residential property, zoned R-2 for single-family dwellings, in Newman Grove. Since at least January 1984, the Primroses have stored a number of vehicles in their yard. In March 1988, the City filed an amended petition in the district court, which alleged, in part, violations by the Primroses of its ordinances regarding property zoned R-2 in that "the defendants continuously and habitually keep and store upon said premises, other than in an

enclosed building, unlicensed and inoperable motor vehicles." The City asked that the Primroses "be permanently enjoined from storing junk, unlicensed, and inoperable vehicles, and vehicle parts" upon their property, other than storage within an enclosed building.

Relevant portions of the zoning ordinances were received into evidence and made a part of the record. Section 5 of the Supplementary District Regulations in the R-2 zoning ordinance provides that:

> 1. It is the intent of this regulation to prevent the repair, remodel, assembly, disassembly or storage or standing of any inoperable vehicle other than in an enclosed garage other than in a district permitting and regulating such occurrence.
>
> 2. A motor vehicle shall be determined as inoperable when it does not have a current state license plate or when it has a current state license plate, but is disassembled or wrecked in part or whole and is unable to move under its own power.
>
> 3. Inoperable vehicles may be stored or may stand only in a legally conforming auto wrecking yard or in a fully enclosed storage structure in any District of these regulations where inside storage is permitted.

The uses listed in subsection 1 are not permitted in an R-2 district.

The City also alleged violations of two additional ordinances which were admitted into evidence but were not made a part of the record. Therefore, those ordinances are not before this court.

The evidence reflects that the City's zoning administrator made 8 to 10 inspections of the Primrose property from June 1985 to the time of trial, in May 1989. He testified that during those 8 to 10 inspections, he observed "parts of vehicles stored on the property, disassembled vehicles, vehicles that appeared to not have a current license plate." The observations were made from an alley and a street adjacent to the Primrose property. In the course of his inspections, the zoning administrator took a number of photographs of the Primrose property. The photographs were admitted into evidence. The

administrator testified that Dale Primrose met with him in September 1985, at which time they discussed the problem of inoperable vehicles on the Primrose property. The administrator testified that during the meeting, Primrose's primary concern was that there were others in town who also stored old vehicles. During the conversation, Primrose indicated that the vehicles appreciate in value and that if stored elsewhere, they become damaged by people jumping on them. The zoning administrator did not know how many of the vehicles stored on the Primrose property were unlicensed or how many, if any, were not in running condition.

The City's police chief testified that he regularly observed the Primrose property from October 1988 to May 1989. He said there were always eight or nine unlicensed vehicles on the property. He also testified that there were times when some of the vehicles had no motors in them. The chief was uncertain if the motor vehicles were in running condition on the date of trial.

As summarized, the City asserts that the district court erred in (1) dismissing the case, after the City adduced the foregoing evidence; (2) overruling its motion for a new trial; and (3) finding there was insufficient evidence that the Primroses were in violation of city ordinances prohibiting storage of "junk" motor vehicles.

The City's zoning ordinances prohibit, among other things, the storage of inoperable motor vehicles which *either* (1) do not have a current state license plate *or* (2) have a current state license plate, but are disassembled or wrecked and are unable to move under their own power. The amended petition alleged that the Primroses keep and store on their premises "unlicensed and inoperable motor vehicles." We do not interpret this language as alleging that the vehicles are both unlicensed and inoperable, as is urged by the Primroses, but, rather, that the Primroses keep and store on their property motor vehicles which are unlicensed and that they keep and store on their property motor vehicles which are inoperable.

There was testimony that at various times there were unlicensed cars and cars without motors on the Primrose property. It is also clear from the photographs taken between

1985 and 1989 which were received in evidence that the Primroses had on their premises vehicles which did not display a current license plate, vehicles which were filled with boxes and other materials for months or years at a time, and parts of vehicles and vehicle motors sitting outdoors. None of these were stored in an enclosed storage structure, as required by the zoning ordinances.

Upon our de novo review of the record, we find that the City of Newman Grove adduced sufficient evidence under the law and the facts to establish a prima facie case that the Primroses flagrantly and continuously violated its ordinances by illegally storing both unlicensed motor vehicles and inoperable motor vehicles on their residential property and that the trial court erred in directing a verdict and dismissing the case.

The decision of the district court for Madison County is reversed, and the cause is remanded for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DENNIS C. TIMMERMAN, APPELLANT.

480 N.W.2d 411

Filed February 28, 1992. No. S-90-460.

1. **Rules of Evidence.** In all proceedings in which the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
2. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), the "evidence of other crimes" statute, is a rule of relevance.
3. _____: _____. Neb. Evid. R. 404(2) is an inclusionary rule that permits the use of uncharged misconduct evidence if the evidence is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
4. _____: _____. The protection against unfair prejudice in the admission of uncharged misconduct evidence emanates not from a requirement of a preliminary finding by the trial court, but, rather, from four other sources: first, from the requirement of Neb. Evid. R. 404(2) that the evidence be offered for a

proper purpose; second, from the relevancy requirement of Neb. Evid. R. 402—as enforced through Neb. Evid. R. 104(2); third, from the assessment the trial court must make under Neb. Evid. R. 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Neb. Evid. R. 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

5. _____: _____. In the Neb. Evid. R. 404(2) context, similar acts evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.
6. _____: _____. Under Neb. Evid. R. 404(2), evidence of other crimes is not admissible unless there is sufficient evidence that the crimes were actually committed and that the defendant committed them, to warrant submission to a jury if the other crimes had been charged.
7. _____: _____. The judge admits the evidence of uncharged misconduct so long as the proponent's proof supports a rational jury finding (a permissive inference) of the defendant's identity. If the plaintiff or prosecutor presents substantial evidence or makes out a prima facie case of the defendant's involvement, the judge admits the evidence.
8. **Rules of Evidence.** In order to be admitted into evidence, documents must be identified or authenticated. Such authentication may be provided by testimony.
9. **Trial: Evidence: Convictions: Appeal and Error.** Improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction.
10. **Records: Appeal and Error.** It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, Mark D. Starr, and, on brief, Susan M. Ugai for appellee.

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

GRANT, J.

In this case defendant Dennis C. Timmerman, age 34, was charged, by amended information, with four counts of burglary and one count of possession of burglar's tools, as follows: count I: burglary on August 3, 1989, at the office of

Commercial Investment Properties at 225 North Cotner Boulevard, Suite 105, Lincoln, Lancaster County, Nebraska; count II: burglary on August 3, 1989, at the Robert Chapin, Jr., Law Office, 5625 O Street, Suite 2B, Lincoln; count III: burglary on August 10, 1989, at the offices of Security Mutual Life Insurance Company, 303 North 52d Street, Nos. 200 and 201, Lincoln; count IV: burglary on August 10, 1989, at the office of Integrated Resources, 303 North 52d Street, No. 301, Lincoln; and count V: possession of burglar's tools on August 10, 1989, in Lincoln.

After trial, a jury convicted defendant on each count. Defendant was sentenced to 18 months' to 3 years' imprisonment on each burglary conviction, "to be served consecutively to each other and consecutively to any other sentence already pronounced," and to 1 to 2 years on the conviction for possession of burglar's tools, to be served concurrently with the sentence on the fourth burglary count.

Defendant timely appealed. In this court, defendant assigns four errors, which may be consolidated into two: (1) that the trial court erred in admitting unsubstantiated evidence of other crimes and (2) that the trial court erred in admitting into evidence a letter addressed to defendant and handed to police by defendant's mother at the residence of defendant and his mother. We hold that the trial court erred in both respects, but affirm because of other overwhelming admissible evidence of defendant's guilt.

In reviewing a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). Viewed in that light, the record shows the following:

I.

With regard to counts I and II, the burglaries of August 3, the evidence shows that sometime between 11:30 p.m. on August 2 and the morning of August 3, the law office of Robert

Chapin at 5625 O Street, Suite 2B, Lincoln, was burglarized. Chapin left his office about 11:30 p.m. on the 2d. When he returned the next day, Chapin found that the doors to both the reception area and the inner office had been forced open, apparently with a screwdriver or pry bar. An Emerson stereo radio-cassette player, sometimes called a boom box, was missing from the office. The owner positively identified the boom box seized on August 4 from the defendant's home as the stolen box. When seized by police from defendant, the box still contained the tapes that were in it when the owner left it.

On the same night, about one block away, the office of Commercial Investment Properties (CIP) at 225 North Cotner Boulevard, Suite 105, was also burglarized. The burglar had kicked in the inside glass door to gain entry. There were some pry marks on the door about a quarter inch wide, consistent with marks which would be made by the screwdrivers later taken from the defendant. Some keys to businesses which had been listed for sale by CIP or were managed by CIP were taken from a desk. Address tags were attached to the keys. A CIP employee positively identified keys later taken from the defendant's home as the keys stolen from the CIP office.

On August 4, 1989, an officer of the Lincoln Police Department investigated a call received by the police department. The caller, later determined to be defendant's mother, stated that stolen goods, particularly watches and keys, might be found at 600 South 56th Street, the residence of defendant and his mother. The officer told the defendant that he was at the residence to look for stolen goods. Both defendant and his mother consented to a search of the house. Defendant accompanied the officer during the search.

The officer found a brown vinyl bag containing three screwdrivers and sets of keys with tags with the names of various businesses on them. Defendant voluntarily told the officer he had worked for "Topper Cleaning Company" and had the keys because the locks to those businesses had been changed. After defendant volunteered to give the keys to the officer, the officer took them.

An employee of CIP testified that CIP did not contract with any cleaning companies to clean premises listed or managed by

CIP and that the defendant had never worked for CIP. The officer investigated and was unable to locate a Topper Cleaning Company in Lincoln.

The officer also saw in the defendant's room the Emerson boom box that had been reported stolen in the Chapin burglary. Later that day, August 4, a search warrant for defendant's residence was issued and served. During the search, the officers took into custody the brown vinyl bag containing screwdrivers and a paper with addresses written on it, one of which was the address of the Chapin law office. The officers also seized the Emerson boom box.

On August 6, 1989, the officer who had executed the search warrant interviewed defendant in his home about property seized on August 4 pursuant to the search warrant. Defendant was not under arrest at this time. The officer asked defendant about the Emerson boom box which was reported stolen from the Chapin law office. Defendant said that he had purchased the boom box from someone at a tavern.

The officer told defendant that the keys which had earlier been taken into custody had been reported stolen in a burglary. Defendant insisted that the keys had been in his possession for several months and that they could not have been taken in a burglary.

The officer also asked defendant about a list of addresses that had been in the zippered brown bag. The defendant stated that they were addresses of attorneys. Included on the list was the address of the Chapin law office, from which the boom box was stolen.

II.

With regard to the August 10 burglaries, the record shows that in the very early hours of August 10, 1989, the office of Integrated Resources at 303 North 52d Street, No. 301, was burglarized. The office door and some desk drawers had been pried open, and a coin collection and some petty cash were missing.

At about the same time, the offices of Security Mutual at 303 North 52d Street, Nos. 200 and 201, were also burglarized. The office doors had been pried open, and a VCR was missing, as

well as the remote control and cable, a roll of stamps, and some petty cash. A secretary at Security Mutual was able to identify a roll of stamps taken from a black bag found with defendant when he was arrested as the stamps stolen from Security Mutual, because she had written on a slip of paper that was tucked inside the roll. The secretary also identified the remote control that the police took from the defendant at the same time as that missing from the office. The police did not recover the VCR from defendant, but later on the morning of August 10, another employee of Security Mutual found it and another VCR, which had been stolen from another business in the building, in a creekbed behind the building.

On August 8, a police broadcast had been initiated for defendant to be picked up. Defendant's mother spoke with a police officer on August 9, 1989, at about 11:10 p.m. After this conversation, the officer broadcast a description of defendant and his companion, Royce Hilbers, both of whom were on bicycles. Defendant was described as wearing white shorts with a black T-shirt and Hilbers was wearing blue denim shorts and a green shirt.

Hilbers had been involved in the two August 10 burglaries, and the State had agreed to prosecute him for only one Class IV felony if Hilbers testified for the State and satisfied other conditions.

Hilbers testified for the State at the defendant's trial as part of the plea bargain. Hilbers testified that he was acquainted with defendant when both were incarcerated in the Lancaster County Jail early in 1989. On August 9, Hilbers met the defendant early in the evening, and the two ate and talked at the house of a friend of Hilbers' until about 10 or 10:30 p.m.

Hilbers testified that he and defendant then rode their bicycles to the defendant's mother's house, where the defendant packed a black bag with tools, including screwdrivers and a hammer; knit gloves; and a flashlight. About 11 or 11:30 p.m. the two left the house on bicycles. Defendant took the black bag with his equipment and a crowbar, which he held across the handlebars of his bicycle. After going down alleys and back streets, the two arrived at 303 North 52d Street. Defendant looked around for a point of entry and entered through an

underground garage door to the building. Defendant put the gloves on and took the black bag of tools and the crowbar with him into the building. Hilbers was to watch for police and ride or walk through the parking lot and wave if he spotted anyone. Defendant was in the building for over an hour, and when he came out, he was wearing the gloves and carrying two VCR's, as well as his various tools. Hilbers testified he met defendant in the basement at the door defendant had entered. Hilbers held the VCR's while defendant closed the door. They hid the VCR's in a creekbed behind the building. Hilbers put a cable from one VCR in his pocket.

Defendant and Hilbers rode their bicycles to Cotner Boulevard and Vine Street and then hid in bushes on the west side of Cotner. The two waited to see if they were being followed. Hilbers left the bushes and walked down the street, where he almost immediately saw a police cruiser. The cruiser officer picked him up at Cotner and Vine, at approximately 1 a.m. on August 10, as a person meeting the description of one of the two men described in the police broadcast. The police arrested Hilbers and found in his pocket the VCR cable taken from Security Mutual.

The police searched the area and found defendant nearby, hiding in the bushes. Defendant was dressed as the other person described in the police broadcast. Next to defendant were two bicycles. The reflectors of both of them had been covered by the knit gloves. A black bag was on the ground, and a crowbar was hanging from one of the trees. The black bag contained a small hammer, wire, several screwdrivers, a small amount of cash, the commemorative coins taken from Integrated Resources, a flashlight, and the stamps and remote control taken from Security Mutual.

Defendant did not testify at the trial and in this appeal does not challenge the facts as set out above, nor does he contend that such evidence is not sufficient to support his five convictions. Nor indeed could he successfully so contend.

III.

Defendant's allegations of error are concerned with other evidence adduced by the State, apparently in an

overenthusiastic effort to bolster its already strong case against defendant and, in effect, to swat a fly with a sledge hammer, shoot a mouse with an elephant gun, or mash an ant with a diamond-studded baseball bat. In connection with the challenged evidence, the record shows as follows:

Defendant's companion Hilbers testified that he met defendant in the evening of August 9, ate with him, and bicycled with him to the scene of the two August 10 burglaries as described above. There apparently was much conversation between the two, particularly at the time they were eating.

Before Hilbers testified before the jury as to the conversations between him and defendant, a hearing was held outside the presence of the jury as to those conversations, pursuant to Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1989). See *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). At the conclusion of this hearing, defendant's counsel objected to the conversation, as follows:

> I do object to Mr. Hilbers relating these conversations with my client before the jury on the grounds that they are irrelevant and immaterial. They are unreliable. They are very vague. There's nothing that is definite or certain as to place or time about these. The prejudice will outweigh the probative value if admitted into evidence. I would assert a denial of my client's right to have a fair trial and due process of law in accordance with the due process clause. I think, too, Your Honor, that if this evidence is admitted, I think it opens a collateral matter, if I might say that. I think it goes into collateral matters that I'm going to have to do investigation on and try to establish the truth or falsity of those things and that's going to be difficult because of the vagueness, but I object for all of those reasons.

Counsel for the State responded that the testimony

> goes directly to the motive and intent of Mr. Timmerman and his activity of August 10, 1989 and also of August 3rd of 1989. If the information that he gave Mr. Hilbers is vague, it's because Mr. Timmerman was vague, but it is sufficient enough to allow us to see that he was committing burglaries and did have a common scheme or

plan.

The court overruled defendant's objections and permitted all questions concerning the conversations of August 9, but not concerning conversations during the time Hilbers and defendant were incarcerated in April, May, or June 1989.

Hilbers then testified before the jury that during their conversation, defendant discussed his criminal activities during the time defendant was released on bond from the county jail up to August 9. Part of the conversation was as follows:

> Q. And that night you talked was August 9th of 1989?
>
> A. Yes, it was.
>
> Q. What did Mr. Timmerman tell you about the criminal activity he was involved in during that two-week time period?
>
> A. He just told me that he had been into a lot of different business buildings and he had been into a lot of pharmacies and anything that he could get in and out was his.
>
> Q. When you say he had been into, what did that mean?
>
> A. Burglarized.
>
> Q. Did he tell you anything about the number of such activities he had been engaged in?
>
> A. He bragged like there were 60 or 70 different places he had burglarized in the last two or three weeks.
>
> Q. Did he indicate to you any amount of money that he had obtained from those burglaries?
>
> A. Yes.
>
> Q. And what amount did he indicate to you he had obtained?
>
> A. He thought 8 or $9,000, if not more.
>
> Q. And do you recall any specific items that he had told you that he had obtained as a result of any of these burglaries.
>
> A. Yeah, there was a gold watch, a gold woman's watch. I guess it was supposed to be pretty expensive. It turned out to be inexpensive.
>
> . . . .
>
> Q. Did Mr. Timmerman tell you about any other incidents that he had been engaged in, burglaries, during

that two-week period?

A. Yeah. He said he had been into a place on 56th Street. He named no business, no name of any person. That he thought it was a business building and when he had opened the door, finally got the door open, he saw a dog or cat or something inside the door and after he had been in there awhile, he noticed he had caught a woman asleep in an apartment.

Q. Did that conversation take place that night or some other time?

A. That conversation took place a couple days after we were locked up in jail. [This specific evidence, of course, violated the court's announced ruling.]

Q. Going back to the night of August 9th of 1989, do you recall any other burglaries that he told you about?

A. Yeah, he told me about Rolf Shasteen.

Q. And what did he tell you about that?

[Answer stricken because the alleged Shasteen burglary had not been discussed in the hearing outside the presence of the jury. The following question was then asked about the Shasteen burglary:]

Q. . . . Do you recall if Mr. Timmerman told you what he had obtained from the burglary?

A. Yes, two pistols and $500 in cash.

Hilbers testified that he believed about 50 to 75 percent of the defendant's story.

On August 9, 1989, at about 11:10 p.m., the defendant's mother spoke with a police officer at defendant's residence. As stated above, the officer was given information by defendant's mother; in addition, the mother also gave the officer a letter addressed to the defendant. The return address gave the name "Faulkerson" and the address of the city-county jail. It was postmarked August 3. The court sustained the defendant's hearsay objection when the officer testified that the mother told him she had found the letter in the defendant's bathroom.

The first page in the envelope was a letter signed "J." The author stated he sensed "a potential for serious $." The second page contained a list of addresses, broken down into five different areas. Included within the listed areas were the Chapin

law office, Security Mutual, and Integrated Resources—the locations of three of the charged burglaries. At the bottom of the list is the notation "Theres no sense lookin where the $ aint an this is where it is!"

The letter was admitted into evidence. The defendant specifically objected to the admission at the time on grounds of hearsay, lack of foundation, irrelevancy, prejudice, and a violation of the right to confront.

The State contends in its brief that "the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court . . . ." Brief for appellee at 7. We have previously held that is an inaccurate statement of the law. See *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991), wherein we said:

> [I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence . . . . Although the word "discretion," in one form or another, does not appear in either Rule 401 or Rule 403, nevertheless, judicial discretion, as a factor in admissibility, is implicit in Rule 401, concerning the admission of relevant evidence, and Rule 403, regarding exclusion of relevant evidence. Consequently, one might correctly conclude that we expressly disapprove of the all-inclusive and categorically unrestricted evidential proposition "The admission or exclusion of evidence is a matter within the discretion of the trial court," notwithstanding this court's previous use of that expression.

"In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility." *State v. Schwartz*, 239 Neb. 84, 95, 474 N.W.2d 461, 468 (1991).

Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989), provides, in part, "Evidence which is not relevant is not admissible." Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2)

(Reissue 1989), the "evidence of other crimes" statute, is a rule of relevance. See *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). Rule 404(2) states:

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

The list of exceptions in rule 404(2) is illustrative only, not exclusive. It is an inclusionary rule that permits the use of uncharged misconduct evidence if the evidence is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

In connection with the conversations and the admissibility of those conversations as they relate to evidence of other crimes, the provisions of rule 404 control. It must be noted, however, that in this case we do not reach a full-blown decision on the issue whether the evidence in question, while probative, is not admissible because "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989).

In *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), the U.S. Supreme Court set out the requirements for a trial court's preliminary finding as to the probative prejudicial issue:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). . . . We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; *second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b)*; third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair

> prejudice . . . and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

(Emphasis supplied.)

The concern in this case ends with the determination as to the relevancy requirements, and we need go no further into the weighing process.

In *Huddleston v. United States*, 485 U.S. at 689, the Court discussed the relevance of similar testimony when it said:

> We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant. . . . In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. . . . In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

The application of that test to the facts in the case before us leads to the conclusion that the proffered "similar acts" are not relevant to the four specific burglaries in this case. The relevancy of the "60 or 70" burglaries depends on whether the burglaries actually occurred and whether the defendant committed them. In this case, the State attempted to prove particular burglaries by evidence of defendant's overall character as a burglar. That is not allowed by rule 404.

We do not even have allegations of specific burglaries. The only evidence we have of any uncharged burglaries is Hilbers' statements that the defendant told him about them. Hilbers has no direct knowledge that the burglaries occurred, and he even testified that he did not believe that they all occurred. If the

uncharged burglaries had been charged as crimes against defendant, the evidence as to the committing of such burglaries would be insufficient to warrant submission to the jury. Under rule 404(2), evidence of other crimes is not admissible unless there is sufficient evidence that the crimes were actually committed and that the defendant committed them, to warrant submission to a jury if the other crimes had been charged. If there is insufficient evidence to permit the jury to find that those conditions are fulfilled, *Huddleston* tells us the other similar acts are not relevant.

Professor Imwinkelried states:

> Rule 104(b) procedures govern proof of the defendant's identity as the actor. . . . [T]he judge admits the evidence [of uncharged misconduct] so long as the proponent's proof supports a rational jury finding (a permissive inference) of the defendant's identity. If the plaintiff or prosecutor presents substantial evidence or makes out a prima facie case of the defendant's involvement, the judge admits the evidence. The defense submits any controverting evidence directly to the jury; and on request, the judge instructs the jury that they must finally decide the question of the defendant's identity.

Edward J. Imwinkelried, Uncharged Misconduct Evidence § 2:08 at 21 (1984).

In the case before us, we have nothing other than Hilbers' statements, made as a result of a plea bargain, that the defendant had said he had committed 60 or 70 burglaries. Hilbers himself admitted that he did not believe much of the defendant's statements. The statements give no details as to time, place, circumstances, or method of operation. We have said that "evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question." *State v. Kern*, 224 Neb. 177, 185, 397 N.W.2d 23, 29 (1986). In this case, there are no details about the circumstances that could make these prior crimes relevant, for example, whether the defendant used burglar's tools similar to those he is charged with possessing in the commission of the

prior offenses. The statements of the witness referring to uncharged misconduct were inadmissible and were improperly admitted into evidence.

The letter given to the police by the defendant's mother was also inadmissible. In order to be admitted into evidence, documents must be identified or authenticated. See Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 1989). Such authentication may be provided by testimony. See rule 901(2)(a). However, Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1989), requires that a witness may not testify to something of which the witness has no personal knowledge. The officer on whose testimony the letter was admitted could testify only that the defendant's mother gave him the letter. Such testimony does not authenticate the letter. We still do not know who wrote the letter, where the mother found the letter, whether the defendant had read the letter, or whether the defendant had ever been in possession of the letter. Without knowledge of at least some of these facts, we cannot even begin to determine whether the letter was possibly relevant.

An erroneous admission of evidence is not prejudicial if it is harmless beyond a reasonable doubt. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). "[I]mproper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction." *State v. Rowland*, 234 Neb. 846, 853, 452 N.W.2d 758, 763 (1990); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990).

"Since there was, however, other overwhelming evidence to conclusively establish the defendant's guilt, the error was harmless beyond a reasonable doubt." *State v. Sullivan*, 236 Neb. 344, 349, 461 N.W.2d 84, 87 (1990). In the case before us, the evidence of the defendant's guilt was overwhelming. Defendant was found hiding in the bushes at 1 a.m., with the stolen goods and the burglar's tools, near the location of the August 10 burglaries. Defendant's companion testified to the actual commission of the two August 10 burglaries. Other stolen goods, positively identified as stolen, were recovered from the defendant's home.

It is with reluctance that we affirm the judgment herein,

because the offending evidence was so unnecessary and so damning. In the light of the improper testimony, there was some danger of defendant's being convicted of being a burglar, and not of committing the four burglaries in this case. In *United States v. Hasting*, 461 U.S. 499, 509, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), however, the U.S. Supreme Court reversed a judgment of a court of appeals (which had reversed a judgment of conviction) and stated, "Since *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." See, also, *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Under our view of Nebraska law, the errors herein are harmless because of the overwhelming evidence of guilt, and the judgment must be affirmed.

AFFIRMED.

WHITE and FAHRNBRUCH, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. TONY D. DAWSON, APPELLANT.
480 N.W.2d 700

Filed February 28, 1992. No. S-90-756.

1. **Directed Verdict.** A defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with the trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
2. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
3. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving the issue to be determined.
4. **Convictions: Circumstantial Evidence.** In determining the sufficiency of

circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

5. **Proof.** Conjecture, speculation, or the choice of quantitative possibilities is not proof.
6. **Trial: Evidence: Proof.** The State may not rely alone on inferences that would support a finding of guilt where several inferences are deducible from the facts presented, which inferences are opposed to each other but are equally consistent with the facts proved.

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

Robert E. Zielinski, of Byrne, Rothery, Lewis, Tubach, Zielinski & Peterson, for appellant.

Don Stenberg, Attorney General, and Alfonza Whitaker for appellee.

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

PER CURIAM.

After a bench trial, the defendant, Tony D. Dawson, was convicted of theft by unlawful taking of property having a value of more than $1,000 and was sentenced to imprisonment for 3 to 5 years, with credit for 2 days. He has appealed and assigns as error the trial court's admission of certain exhibits, the trial court's overruling of the defendant's motion to dismiss at the close of the State's case, and the trial court's finding that the evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt.

The record shows that during the afternoon of February 3, 1990, the defendant was working as a courier for Midwest Armored Car Service in Omaha, Nebraska. As a courier, it was the defendant's responsibility to deliver change orders from banks to local merchants who had contracted with Midwest Armored Car Service. In addition, the courier would pick up deposits from the merchants to be delivered to area banks.

On the date in question, the defendant rode in the cab instead of the back of the armored truck because the driver, Clarence Curry, was new to the route. The defendant sat in the front of the vehicle to give Curry directions.

At approximately 2:40 p.m., the armored car stopped at the Albertson's grocery store located at 76th and Dodge Streets. The defendant got out of the cab of the armored car, and after obtaining a grocery cart from the store lot, went to the rear of the vehicle and removed the change order to be delivered to the Albertson's store.

The defendant entered the store and placed the change order on the ledge in front of the west window of the store's customer service counter. Then, the defendant was approached by Kenneth Efferding, the assistant grocery manager. While Efferding was taking the change order from the defendant, he began to cut open one of the change order packages. The defendant objected to this procedure and informed Efferding that he had to sign for the packages before he could open them. An argument developed between Efferding and the defendant over the procedure for receipting change orders, and Efferding contacted his superior.

After contacting his superior, Efferding agreed to sign for the change order before opening it. As Efferding signed the defendant's receipt book, he scribbled across the page. The defendant became upset with Efferding and exclaimed, "[Y]ou don't have to act like a asshole." The defendant informed Efferding that he had his rules and he had to work by them.

At that point, Efferding slammed the Plexiglas window down in front of the defendant and told the defendant to leave the store. The defendant refused to leave the store and demanded to talk to Efferding's supervisor.

James Tworek, the assistant store director, was called. Tworek asked the defendant what the problem was, and the defendant attempted to explain the situation. During his explanation, the defendant stated that Efferding should not act like such an asshole. Tworek became disturbed with the defendant's language because there were numerous customers in that area of the store. Tworek asked the defendant to leave the store, and the defendant requested to go elsewhere in the store to discuss the problem. Tworek refused to discuss the matter further and escorted the defendant to the front door of the store.

The defendant walked out of the store and climbed into the

cab of the armored car. The defendant explained to the driver, Curry, what had occurred in the store and told Curry that their supervisor, Brad Sotello, would have to return to the Albertson's store to pick up the deposit because the defendant was asked to leave before he got the deposit.

After finishing the remainder of their route, the defendant and Curry returned to the Midwest Armored Car Services building. The defendant told Sotello what had occurred at the Albertson's store, and after cleaning out the truck and securing the deposits, Sotello returned to Albertson's to pick up its deposit. Albertson's employees were unable to locate the deposit bags and believed that the defendant had taken them.

The deposit consisted of approximately $13,000 in cash and $62,000 in checks, charge card receipts, and food stamps. Albertson's deposit bags are about the same color of blue as Midwest's courier bags.

Efferding testified that when he approached the defendant at the customer service counter, the change order was on the counter. Efferding then got the deposit out of the safe and handed it and Albertson's receipt book to the defendant; however, Efferding failed to have the defendant sign Albertson's receipt book prior to handing him the deposit. After he handed the deposit bags to the defendant, Efferding began to cut open the change order.

Efferding further testified that after he finally signed for the change order, the defendant said, "[Y]ou don't need to be an asshole." Efferding asked the defendant to leave, and when the defendant refused, Efferding sent for Tworek. At this time the deposit bags were still on the customer service counter.

Although Efferding did not see the defendant do anything with the deposit bags or the receipt book, he noticed they were gone when the defendant left the store.

Tworek testified that he never saw Albertson's deposit bags on the counter. When the defendant left the store, Tworek said, the defendant was carrying a cream-colored courier bag.

Douglas Sheets, Albertson's grocery manager, testified that after Efferding went over to the customer service counter to receive the change order, he saw Efferding take two deposit bags out of the safe and put them on the ledge of the customer

service counter. Sheets saw the defendant's hands on the deposit bags after this and observed Efferding verifying the change order.

Sheets then heard Efferding and the defendant arguing. Sheets testified that Efferding then moved over to the east customer service window to relieve the woman who was working there so she could get Tworek. At that time, Sheets did not see the deposit bags. Sheets said the defendant left the store carrying a cream-colored bag.

Duane Ames, Albertson's drug manager, testified that he saw Efferding take the blue deposit bags out of the safe; however, he did not see what happened to them after that. Ames did not see the defendant with Albertson's deposit bags. He only saw the defendant carrying a beige bag when he left the store.

Curry testified that when the defendant left Albertson's, he returned to the cab of the armored car. Curry did not see any Albertson's deposit bags with the defendant or in the courier bag when the defendant returned to the vehicle.

The defendant continued to ride in the cab of the armored car until they finished the route. After the last stop, the defendant rode in the back of the vehicle.

The driver, Curry, testified that when they returned to Midwest Armored Car Services headquarters the defendant told him that he wanted to warm up his car; however, Curry never saw the defendant go to his car. The defendant testified that although he had intended to warm up his car, he did not get a chance to do so.

The defendant testified that when he went into the Albertson's store with the change order, he put the change on the customer service counter and then set his blue courier bag on the ledge. Nothing was ever given to him. He testified that he did not take Albertson's deposit bags, because if he had taken possession of them he would have signed for them.

The defendant and Curry testified that the defendant was using a blue courier bag. Sotello testified that Midwest's couriers use only blue courier bags.

The defendant was arrested on February 5, 1990. Police found two box cutters in a pocket of the defendant's blue jean jacket.

The box cutters were found to have some blue fibers on them. The fibers were analyzed by Jeffrey Patterson of the state crime lab.

Patterson compared the fibers found on the box cutters with fibers from exhibits 18 and 19, two of Albertson's deposit bags, which had been received into evidence over the defendant's objection. Patterson concluded that the fibers from the box cutters were similar in color and size to those from Albertson's deposit bags. All of the fibers tested were cotton.

The defendant testified he had purchased the box cutters on the day before his arrest for his girl friend to use in trimming cardboard backing from jigsaw puzzles she put together and mounted on cardboard. He had used one of the cutters to cut his keys loose from some threads inside his jacket pocket.

At the close of the State's case, the defendant made a motion to dismiss. After the trial court overruled his motion, the defendant presented his evidence. This waived any error in the ruling on his motion.

"A defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with the trial and introduces evidence waives any error in the ruling on the motion for a directed verdict." *State v. Morley*, 239 Neb. 141, 147, 474 N.W.2d 660, 666 (1991).

The defendant also contends that the trial court erred in admitting exhibits 18 and 19 into evidence over his objection as to foundation and relevancy. He claims the receipt of this evidence was prejudicial to his right to a fair trial because there was no evidence in the record that the exhibits were of the same fabric or color as the bags that were missing; however, the record does show that an Albertson's employee had placed the missing deposit into bags similar to exhibits 18 and 19.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1989). To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving the issue to be determined.

State v. Baltimore, 236 Neb. 736, 463 N.W.2d 808 (1990).

Since exhibits 18 and 19 had some slight relevance, the trial court did not err in admitting them.

For his final assignment of error, the defendant contends the evidence is insufficient to find him guilty of theft by unlawful taking. He argues there is no direct evidence of his taking or possessing the missing deposit bags. He relies on *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985), and argues that the circumstantial evidence is insufficient to establish a taking by him because the facts and circumstances are reasonably susceptible of two or more interpretations.

In *Trimble*, this court stated:

> " 'To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. . . . Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.' " . . . " '[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.' " *State v. Klutts*, 204 Neb. 616, 619, 284 N.W.2d 415, 418 (1979).
>
> The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. *State v. Costanzo*, 203 Neb. 586, 279 N.W.2d 404 (1979).

Trimble, 220 Neb. at 643, 371 N.W.2d at 305.

In *State v. Morley*, 239 Neb. at 149, 474 N.W.2d at 666, this court specifically disapproved of the statement in the *Trimble* case to the effect that circumstantial evidence is not sufficient to

support a conviction in a criminal case "unless the State disproved every hypothesis but that of guilt."

The defendant, however, is presumed to be not guilty and cannot be convicted until the State has proved the defendant guilty beyond a reasonable doubt. Thus, in a long line of cases we have held that in determining the sufficiency of circumstantial evidence to support a conviction, " '[a]ny fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.' " *State v. Earlywine*, 191 Neb. 533, 535, 215 N.W.2d 895, 896 (1974).

"Conjecture, speculation, or choice of quantitative possibilities are, of course, not proof." *Mustion v. Ealy*, 201 Neb. 139, 145, 266 N.W.2d 730, 734 (1978).

The State may not rely alone on inferences that would support a finding of guilt " '[w]here several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved . . . .' " See *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 5, 360 N.W.2d 488, 491 (1985).

"Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain its position by a reliance alone on the inferences which would entitle it to recover." *Ward Cattle Co. v. Farm Bureau Ins. Co.*, 223 Neb. 69, 73, 388 N.W.2d 89, 92 (1986).

In order for the State to prove a taking by the defendant in this case, it was necessary for the evidence to show that the defendant had the two deposit bags in his possession at the time he left the store. On this point the evidence of the State is extremely weak.

Although Efferding testified at one point that he "handed" the deposit bags to the defendant, in other testimony he stated he "set them down" in front of the defendant and the bags were lying on the counter when he closed the window. The defendant did not leave the customer service counter area until after he had talked to Tworek, the assistant store director. Tworek testified that he never saw the deposit bags.

None of the Albertson's employees explained why they allegedly turned some $75,000 in cash, checks, charge card

receipts, and food stamps over to an armored car service courier without taking a receipt for the deposit, especially since the "ledger" or receipt book had been placed on top of the deposit bags.

Although the circumstantial evidence in this case casts suspicion upon the defendant, we think the inference of guilt was not stronger than any reasonable inference of nonguilt. Consequently, it was not sufficient to overcome the presumption of innocence and will not support a finding of guilt beyond a reasonable doubt.

The judgment is reversed, and the cause remanded with directions to dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM K. SMITH, APPELLANT.

480 N.W.2d 705

Filed February 28, 1992. No. S-90-1152.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Homicide: Intent.** A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
3. **Homicide.** The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.
4. **Homicide: Intent: Words and Phrases.** The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse.
5. **Homicide: Intent: Circumstantial Evidence.** Malice and intent may be inferred from the words and acts of the defendant, from the facts and circumstances surrounding his or her conduct, and from the evidence relating to the circumstances of the criminal act.
6. **Homicide: Sentences.** Murder in the second degree is a Class IB felony, punishable by a term of imprisonment of 10 years to life.

7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
8. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

FAHRNBRUCH, J.

William K. Smith appeals his conviction and life sentence for the second degree murder of 15-year-old Raymond M. Witt, who died of multiple injuries after he was beaten, his head was banged against a guardrail, and he was thrown from a balcony to a concrete loading dock some 21 feet below the balcony.

Having waived a jury trial, Smith was tried by a judge of the district court for Douglas County.

On appeal, the defendant claims (1) that the evidence was insufficient to convict him of second degree murder and (2) that the sentence imposed by the trial judge is excessive. We affirm Smith's conviction and the sentence imposed by the trial judge.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

Five youthful eyewitnesses placed Smith, then 17 years of age, at the Westroads Shopping Center in Omaha on September

16, 1989, the date Raymond Witt was injured and died at the mall. All of the youths testified that while at the Westroads, the defendant was attempting to locate a "skinhead" named "Eric" whom he suspected of spreading rumors about Smith's involvement in a satanic cult. Three of the eyewitnesses testified variously that Smith was angry and "geared up for a fight," that he "wanted to beat . . . up" Eric, and that Smith stated he was going to "kick his ass." The defendant was unable to locate Eric.

Two of the eyewitnesses testified that a confrontation occurred between Smith and Witt, who was a stranger to the defendant. One witness testified that the defendant chased Witt to an outside second-floor walkway (the balcony) after Witt passed by the defendant inside the mall and hit him in the back of the head. The other witness denied seeing that incident and claimed that the defendant simply saw Witt on the outside walkway, approached him, and began "just throwing him [Witt] around." Asked if he were able to explain to Witt's parents why their son was dead, this witness answered: "A case of mistaken identity. . . . All I know is we went after one guy and ended up getting another."

Both eyewitnesses to the confrontation testified that at no time did Witt fight back or offer significant resistance. Both recalled that in the midst of Witt's beating, the defendant ordered them to leave the area. One of them obeyed the defendant. The other, a 12-year-old boy, remained at the scene, hidden from the defendant's view. He testified that he saw the defendant strike Witt in the chest and stomach, slam Witt's forehead against a metal railing surrounding the walkway, and roll Witt's unconscious body over the railing to a concrete loading dock some 21 feet below the balcony.

A pathologist testified that Witt died from multiple injuries to his head and chest as a result of a "blunt impact" to the back of his head and the back of his chest. The doctor testified that Witt suffered extensive fractures in the back of his skull, which fractures extended up into the base of the midportion of the skull; multiple bruises to the brain; a ruptured aorta, with resultant extensive bleeding into both chest cavities; fractures of several ribs in the back of the chest; and multiple contusions

of the arms, hands, and legs.

Taking the view most favorable to the State, there is more than sufficient evidence from which a fact finder could find beyond a reasonable doubt that Witt received his fatal injuries when the defendant threw Witt's unconscious body from the Westroads balcony to a concrete loading dock below, a distance of 21 feet.

The pathologist testified that Witt's forehead and the bridge of his nose bore linear scrape marks which were consistent with impact against a blunt object such as the railing which surrounded the outside second-floor walkway. The doctor said that these facial injuries were severe enough to have caused unconsciousness. Although he believed that Witt had lived for a brief time after his fall, the doctor testified the boy's injuries were such that he could not ultimately have survived despite immediate treatment.

In his defense, Smith, his parents, and his sister each testified that he was at home on September 16, 1989, eating dinner until around 6:30 p.m., the approximate time that Witt was injured and died. Smith's girl friend testified that she and Smith attended a party around 7 p.m. The defendant's parents acknowledged that in the 8 months prior to trial, during which time their son remained in jail, they had not informed the police of his alibi.

The defendant claimed that all of the five eyewitnesses were incorrect or lying in their testimony that placed him at the Westroads on September 16, 1989. Although Smith himself initially told police that he was present at the Westroads on the day Witt was murdered, he testified at trial that he had been confused about the date. He said that he was at the Westroads looking for Eric in October and that all of the others were simply a month off in their calculations. Smith also testified that the others were "lying to just get back at me," although he was unsure why they would do so.

The defendant, in his first assignment of error, contends that the evidence is insufficient to sustain his conviction of second degree murder. "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).

> " 'The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.' " . . . ". . . 'The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse . . . .' "
>
> . . . [T]his court has stated that malice and intent may be inferred from the words and acts of the defendant, from the facts and circumstances surrounding his or her conduct, and from the evidence relating to the circumstances of the criminal act.

(Citations omitted.) *State v. Illig*, 237 Neb. 598, 614-15, 467 N.W.2d 375, 386-87 (1991).

The evidence shows that the defendant was present at the Westroads on September 16, 1989, anticipating a hostile confrontation with a "skinhead." While in this violent frame of mind, he encountered Witt. There is evidence from two eyewitnesses that the defendant began punching Witt and that Witt offered no significant resistance. The defendant interrupted his beating of Witt long enough to order the two witnesses to leave the scene. He then resumed his attack on the boy, unaware that one person remained behind to witness the assault to its deadly conclusion.

From the defendant's spoken words and from the evidence of his continuing assault on Witt, who did not fight back or offer any significant resistance; of the defendant's banging Witt's head against a railing; and of the defendant's throwing the unconscious Witt's body from an outside second floor walkway to a concrete loading dock 21 feet below the walkway, thereby inflicting the injuries from which Witt died, a fact finder could find beyond a reasonable doubt that Smith intentionally killed Witt without just cause or excuse and that therefore the defendant was guilty of second degree murder.

In his second assignment of error, Smith complains that the sentence imposed is excessive. The defendant was sentenced to life imprisonment and given credit for the 329 days which he served while awaiting trial.

Murder in the second degree is a Class IB felony, punishable

by a term of imprisonment of 10 years to life. See Neb. Rev. Stat. §§ 28-304(2) and 28-105(1) (Reissue 1989). A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991). In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

In sentencing Smith, the court referred to the deliberate and violent nature of the crime and to the danger the defendant posed to the community. Smith described himself as "high priest" of the "Imperial Order of Unholy," a satanic cult consisting of approximately 10 members. The defendant and some of the other cult members took part in vandalizing 13 area churches. Smith entered pleas of no contest to three felony charges in connection with these vandalizations, for which he was also sentenced to prison. An investigation into satanic activity led police to question the 12-year-old member of Smith's cult who was the eyewitness to Witt's murder. The 12-year-old's statements to police resulted in Smith's arrest for Witt's murder. Smith admitted to being a regular user of marijuana and stated that he had also used LSD and "mesc."

When we consider Smith's background, the nature of the offense of which he was convicted, the amount of violence involved, the viciousness with which the crime was committed, and the fact that any lesser sentence would depreciate the seriousness of the crime Smith committed, it cannot be said that the trial court abused its discretion in sentencing the defendant.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY L. TOWLER, APPELLANT.

481 N.W.2d 151

Filed February 28, 1992. No. S-90-1200.

1. **Convictions: Appeal and Error.** 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 the conviction.
2. **Drunk Driving: Prior Convictions.** In proceedings under Neb. Rev. Stat. § 39-669.07(2)(c) (Cum. Supp. 1990) for multiple violations of § 39-669.07, convictions rendered the same day, if imposed for separate offenses, may each constitute a prior conviction so as to warrant an enhanced penalty.

Appeal from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, DAVID A. BUSH, Judge. Judgment of District Court affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

GRANT, J.

On February 15, 1990, defendant, Rodney L. Towler, was charged by complaint in the county court for Hall County with driving a motor vehicle "on or about the 15th day of February, 1990" in Hall County while under the influence of alcoholic liquor or "when he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath." The complaint was captioned as "DUI 3rd Offense 39-669.07 W MO." The complaint also alleged that defendant had been convicted on July 2, 1987, of driving while intoxicated for an offense committed on January 24, 1987, in Hall County and convicted on July 2, 1987, of driving while intoxicated for an offense committed on March 23, 1987, in Hall County. The complaint alleged that "the offense

complained of is the third offense of unlawfully operating a motor vehicle . . . while under the influence of alcoholic liquor." It does not affect this case, but we take notice that the date of each prior conviction was May 11, 1987 (when defendant was found guilty of each charge), and not July 2, 1987 (when defendant was sentenced). See, e.g., *State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980). We further note that for the purpose of determining the 10-year period, the time "shall be computed from the date of the prior offense to the date of the offense which resulted in the current conviction." Neb. Rev. Stat. § 39-669.07(4) (Cum. Supp. 1990).

On May 2, 1990, after trial to the county court sitting without a jury, defendant was found "guilty of the offense of Driving Under the Influence." After further hearing, the county court determined the conviction was defendant's third such conviction in 10 years. Defendant was sentenced on June 22, 1990, when the court fined him $500, suspended his operator's license for 15 years, and sentenced him to 6 months in the Hall County jail.

This order was timely appealed to the district court for Hall County, where the order of the county court was affirmed. Defendant has timely appealed to this court, where he assigns three errors, contending that the trial court erred (1) in determining the evidence was sufficient to support his conviction, (2) in determining that the present conviction was defendant's third such conviction within 10 years, and (3) in imposing an excessive sentence. We affirm the order of the district court affirming the order of the county court.

The record shows that on February 15, 1990, at approximately 2:10 a.m., Officer Tim Meguire of the Grand Island Police Department observed car tracks in the snow on a Grand Island road, which tracks "appeared to be weaving all over the road." He followed the tracks, which led to a van parked in the middle of a hayfield.

Meguire investigated and determined that the driver, Karen Buller, was too intoxicated to drive, as she failed several field sobriety tests. Meguire believed the other occupant was intoxicated as well. The officer informed the occupants that

they were trespassing, but that he would allow them to stay in the field if they would stay long enough to sober up before driving. He also offered to take them wherever they wished to go, if they would leave the van and ride with him. Finally, he told Buller that if they drove the van before sobering up, he would probably see them, catch them, and arrest the driver for driving while intoxicated. Meguire testified that he waited about 5 minutes and determined that the two must have decided to sober up before driving home, so he left.

At 2:20 a.m., Meguire saw the van proceeding down a road, and he followed it. He observed the van weaving and testified it "crossed the white fog line a couple of times, off the right edge of the road once or twice." He then stopped the van.

Meguire discovered the other occupant was now driving and determined that this man was defendant. Meguire detected a strong odor of alcohol on the defendant's breath and observed that his eyes were bloodshot and his "speech appeared to be somewhat slurred." Meguire then asked defendant to step out of the van and perform several field sobriety tests. Defendant did not perform any of the tests satisfactorily.

Meguire then arrested defendant for driving while under the influence of alcohol and took him to the Hall County jail to administer an Intoxilyzer test. Meguire administered the test, following health department requirements, and at 2:56 a.m. defendant's breath sample was determined to have a concentration of .186 of 1 gram by weight of alcohol per 210 liters of breath. At trial, defense counsel objected to testimony regarding the test results because Meguire had not testified to the relationship of the test results at 2:56 a.m. to defendant's breath alcohol content at the time he was driving.

On cross-examination, Meguire stated that he could offer no opinion as to what defendant's breath alcohol content was at the time he was driving. The officer stated that he believed defendant was intoxicated at that time based on the officer's observations and the results of the field sobriety tests.

Defendant's first assignment of error alleges that the State did not prove that he was under the influence of alcohol at the time he was driving the van. Defendant's contention is based on his allegation that although his breath sample tested at .186 41

minutes after his arrest, "Officer Meguire could not relate [this to] the breath level at [the] time of driving." Brief for appellant at 7.

Defendant's contention in this regard is irrelevant to the issue before this court. The trial court did not find defendant guilty of the charge of operating a motor vehicle "when he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath," but found defendant guilty of "Driving Under the Influence."

Insofar as the evidence on the issue of driving while under the influence of alcoholic liquor is concerned, the evidence is more than sufficient. As set out above, defendant was first encountered when he was apparently a passenger in a van which was stopped in the middle of a field. He and the driver were told not to drive. Within a few minutes of this warning, the van, which defendant was operating, was observed "weaving back and forth" and driving off the right edge of the road several times. When Meguire spoke with the defendant after stopping the van, Meguire detected the "strong" odor of alcohol on defendant's breath and observed that his eyes were bloodshot. Of five field sobriety tests given to defendant, he failed all. There was more than sufficient evidence, if believed, to prove that defendant was under the influence of alcohol at the time he was operating the van.

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 the conviction. *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991). The evidence was sufficient to support a finding of guilty on the charge of driving while under the influence of alcohol.

We note that had the trial court found defendant guilty of driving a motor vehicle "when he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath," the evidence was also sufficient to support that finding. The case of *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990), directly addresses

defendant's contention in this regard. In *Kubik*, the defendant was administered an Intoxilyzer test 43 minutes after being stopped. The test showed an alcohol level of .139 of one gram per 210 liters of breath. In answer to Kubik's assertion that the State failed to establish the connection between the test result and the defendant's breath alcohol content at the time of his arrest, the court affirmed the admission of the test result, holding that tests administered in conformity with Neb. Rev. Stat. § 39-669.11 (Reissue 1988) " '*shall be competent evidence* in any prosecution under a state statute . . . involving operating a motor vehicle while under the influence of alcoholic liquor.' " (Emphasis in original.) *State v. Kubik*, 235 Neb. at 617, 456 N.W.2d at 492. The *Kubik* court concluded that evidence of delay between driving and testing is properly viewed as going to the weight of the test results rather than to admissibility.

Defendant's first assignment of error is without merit.

Defendant's second assignment of error alleges that the trial court erred in finding that defendant's conviction of May 2, 1990, was defendant's third conviction for driving while intoxicated. Defendant's position is posited on the fact that the two prior convictions offered by the State were based on guilty pleas and convictions on the same day—May 11, 1987. The convictions were for the offense of driving while intoxicated on January 24 and March 23, 1987.

With regard to the January 24, 1987, offense, the record shows the following: On February 11, defendant appeared for arraignment on the January 24 charge, which had been filed as "Driving Under the Influence-3rd Offense." Defendant was advised of all his rights as we have set them out in *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990). Defendant requested counsel, and counsel was appointed. The journal entry next reveals that the defendant, with counsel, appeared for trial on this charge on May 11. On that date, the prosecution moved to amend the charge in the complaint to reflect a charge of "Driving Under the Influence-2nd Offense." Defendant then withdrew his previous plea of not guilty and entered a plea of guilty to the amended complaint. The court found defendant guilty and then examined "exhibit #1" and determined "this to be the defendant's second offense of Driving Under the

Influence." The court ordered a presentence investigation and continued the sentencing to July 2.

Meanwhile, on March 23, 1987, defendant was arrested and charged with "Driving Under the Influence-3rd offense." A bond setting was held on the same day. Bond was set, and an attorney was appointed to represent defendant. On March 26, the defendant, with his counsel, appeared for bond review, and the same bond was continued. The next journal entry was dated May 11, when the defendant appeared with counsel "for preliminary hearing upon the defendant's written waiver of appearance." Pursuant to a plea bargain, the prosecution amended the complaint. After amendment, the charge remained as a third-offense drunk driving charge, but a charge of assault was dismissed. Defendant entered a plea of guilty. The court found defendant guilty, accepted "exhibit #1 and #2," and determined "this to be the defendant's third offense of Driving Under the Influence." The court ordered a presentence investigation and continued sentencing to July 2.

The record does not contain any of the exhibits offered to prove defendant's prior convictions in either conviction. The record does show, however, the complaints filed for the January 24 and March 23, 1987, offenses.

Both the complaint filed for the January 24, 1987, offense and the complaint filed for the March 23, 1987, offense alleged defendant had prior driving while intoxicated convictions on July 8, 1977, in the county court for Hall County and on August 6, 1982, in the district court for Hall County. The record does not show which conviction was used as a "prior" in connection with the conviction as a second offense for the January 24 incident. Either prior conviction would have qualified as being within 10 years of this May 11, 1987, conviction. On this conviction, defendant was not granted probation, and his sentence was within the statutory limits for a second-offense drunk driving conviction—a $500 fine plus costs, 30 days' confinement in the Hall County jail, and a license suspension for 12 months.

In connection with the March 23, 1987, offense, both of the "priors," as set out above, were properly used to determine that this conviction on May 11, 1987, was defendant's third drunk

driving conviction. On this conviction, defendant was sentenced, within the statutory limits, to probation with certain conditions for 36 months, to a fine of $500 plus costs, and to 15 days in jail, and was ordered not to drive for 12 months.

In the sentencing hearing on July 2, 1987, defendant was present with counsel, and as to both offenses, defendant had the statutory opportunity, as set out in § 39-669.07, "to review the record of his . . . prior convictions . . . and make objections on the record regarding the validity of such prior convictions." Defendant apparently did not appeal either of his May 11, 1987, convictions.

With that background, we turn to the conviction on May 2, 1990, the current conviction. As set out above, the complaint alleged that defendant had two prior convictions of drunk driving on July 2, 1987—one conviction for an offense on January 24, 1987, and the second for an offense on March 23, 1987.

Defendant contends that because the two prior convictions pled and proved in the case were rendered on the same day, those convictions should be counted as one conviction in determining the number of defendant's prior convictions.

The issue before us is whether these two prior convictions satisfy § 39-669.07(2)(c), in order to sentence defendant as a third-offense drunk driver.

Section 39-669.07 provides in part:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor . . . .
>
> (2) Any person who shall operate or be in the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows:
>
> . . . .
>
> (c) If such person . . . has had two or more convictions under this section in the ten years prior to the date of the current conviction . . . such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive

> any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years . . . .

Defendant urges the court to interpret § 39-669.07(2)(c) in the same fashion as we have interpreted Neb. Rev. Stat. § 29-2221 (Reissue 1989), which is Nebraska's habitual criminal statute.

The language which defendant urges this court to adopt is found in *State v. Ellis*, 214 Neb. 172, 175-76, 333 N.W.2d 391, 394 (1983):

> " 'Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders. * * * They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.' [Citation omitted.] 'It is the *commission* of the second felony *after conviction* for the first, and the *commission* of the *third* felony *after conviction* of the second that is deemed to make the defendant an incorrigible.' (Emphasis supplied.) . . ."

It is the emphasized language that defendant wishes this court to apply to § 39-669.07(2)(c). The language in *Ellis*, however, was applied to § 29-2221, a statute designed to provide a higher penalty to one convicted of committing a felony in Nebraska when that felony constitutes the third violation of the felony laws of this state or any other state, or of the laws of the federal government.

Rather than providing such a far-ranging effect on the sentence for widely disparate criminal activities, § 39-669.07 provides for specific penalties for repeated violations of the same statute. Under § 39-669.07 each repeated offense has a numerical classification, and each classification has a specific penalty.

Such penalty provisions are not subject to the analysis set out in *State v. Ellis* concerning § 29-2221. That statute applies to persons "twice convicted of crime, sentenced and committed to prison." Under that statute, a conviction, if it is to count, must be followed by commitment to prison. An added step, beyond the requirements of § 39-669.07, is necessary before conviction of a crime may constitute the basis for bringing a conviction within the meaning of § 29-2221. The additional requirement

of commitment to prison requires an analysis irrelevant to the purposes of § 39-669.07, which provides only for a counting of convictions.

In this case, the two convictions on May 11, 1987, were for two separate offenses. The offense of February 15, 1990, was the third such offense within 10 years. We hold that in proceedings under § 39-669.07(2)(c) for multiple violations of § 39-669.07, convictions rendered the same day, if imposed for separate offenses, may each constitute a prior conviction so as to warrant an enhanced penalty. Under § 39-669.07, defendant was properly sentenced. Defendant's second assignment of error is without merit.

Defendant, in his last assignment of error, contends his sentence is excessive. The contention is not only frivolous, but ludicrous. Defendant is a scofflaw—"[o]ne who treats the law with contempt, esp. a person who avoids various kinds of not easily enforceable laws." 14 The Oxford English Dictionary 663 (2d ed. 1989). In the record before us, defendant has pled guilty to drunk driving on January 24 and March 23, 1987. He has admitted drunk driving on July 8, 1977, and August 6, 1982. He has been found guilty of drunk driving on February 15, 1990. In addition, defendant's presentence investigation shows drunk driving convictions for May 11, 1976, and March 4, 1977, offenses. All of these offenses were committed in Hall County. The courts have tried, to excess, to give the defendant motivation, treatment, and solicitude to protect him from himself.

In the instant case, he was found drunk, trespassing in a field. He was warned not to drive, but was arrested 10 minutes later for drunk driving. It should be noted that this February 15, 1990, offense was committed while defendant was within his 36-month probation imposed on July 2, 1987, for his last drunk driving conviction, but his conduct was not in violation of probation because he was released early from that probation, on June 15, 1989.

The trial court did not abuse its discretion in sentencing defendant as it did. None of defendant's assignments of error have merit. The judgment of conviction and the sentence are affirmed.

AFFIRMED.

IN RE INTEREST OF L.P. AND R.P., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.P., APPELLANT.

480 N.W.2d 421

Filed February 28, 1992. No. S-91-253.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate 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: Juvenile Courts: Evidence: Records.** After an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan and thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. The evidence presented at such evidential hearing, and the juvenile court's specific findings of fact supporting the provisions of any parental rehabilitative plan, shall be contained in the record of proceedings in the juvenile court.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Reversed and remanded for further proceedings.

Lisa C. Lewis for appellant.

No appearance for appellee.

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

HASTINGS, C.J.

Following an adjudication by the juvenile court that the minor children herein were in a situation dangerous to life or limb or injurious to their health or morals, as provided by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), and a series of hearings, the court terminated its jurisdiction over the children. The mother has appealed.

In juvenile cases, this court's

> "review is de novo on the record, and we are required to reach a conclusion independent of the trial court's

> findings; however, where the evidence is in conflict, we 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 B.M., 239 Neb. 292, 475 N.W.2d 909, 910 (1991).

L.P., born June 17, 1986, and R.P., born June 14, 1983, are the biological children of D.P. and J.P. The parents were divorced in 1988, and the father then remarried. According to the mother's motion for review of placement, the district court awarded joint custody of the children to the father and mother.

On December 4, 1989, a juvenile petition was filed by the county attorney alleging the status of the children as previously stated, and further alleging that the Nebraska Department of Social Services had custody of the children. An order entered by the juvenile court on December 7, 1989, found further detention a necessity and continued the matter for a pretrial hearing, but retained temporary custody of the children in the Department of Social Services. Further hearings were held on December 20, 1989, and February 7, March 7, June 6, June 20, August 21, and October 15, 1990, in which the court ordered a chemical dependency evaluation of the father, family dynamics evaluations, a continuance of the children's custody with the Department of Social Services, anger control programs for the father, marriage counseling for the father and stepmother, therapy programs, codependency programs, attendance at Alcoholics Anonymous meetings by the mother, and a temporary restraint of visitation rights by the father. At the March 7, 1990, adjudication hearing the children were found to be children within § 43-247(3)(a).

Finally, following a hearing on February 11, 1991, an order was entered by the court restating the earlier adjudication of the children as being within § 43-247(3)(a), but concluding that it was in the best interests of the children that jurisdiction of the juvenile court be terminated. It is this order from which the mother appeals.

According to a "Family Dynamics Evaluation" done by a psychologist on January 24, 1990, and found in the "Confidential Social File," which the parties agreed the court

should consider and which is found in the record in this case, the father was accused of sexually molesting the younger of his two daughters. The father had also been physically abusive to both his former wife, the mother, and his present wife, the stepmother. As found in that evaluation, after being accused of sexual abuse, the father moved out of the house and the stepmother cared for the two girls and the young son of the father and stepmother. This would suggest that the district court had granted possession of the girls to the father and stepmother. The two girls were then placed with the maternal grandparents from November 30, 1989, to February 7, 1990, with the father from February 7 to an undisclosed date, and then with the mother from early July 1990, all according to statements made by the presiding judge and apparently concurred in by the parties.

On March 7, 1990, the mother stipulated to the allegations of the petition. Although the father and his counsel were present, nothing was offered by them. As stated by the trial judge at that time, "[I]t's pretty clear this has been pretty much a breakdown of post-divorce relationships between parents." At the August 21, 1990, hearing, the record discloses for the first time testimony by the mother that in November 1989 she suspected the father had sexually molested the younger daughter. This conclusion was based on strange activity on the part of this daughter, which included her saying "she was going out on a date, and she had five guys" and that "she was going to bed with them"—this from a girl a little over 3 years of age. The mother also told of an incident when a neighbor and her young son came to visit. The older daughter, according to the mother, alerted her and the mother of the boy; they went upstairs; and the boy and the younger daughter, without any of her clothes on, were found together. Upon further questioning, the daughter stated that her father had touched her in the vicinity of her sexual organs.

Gloria Gehrt, a therapist in private practice, had taken over treatment of the younger daughter, as suggested by the Department of Social Services. Gehrt was aware of the allegation of sexual abuse. Most of this information was furnished by the mother. Gehrt was informed of the incident of

the young girl's being naked in the bathroom with the young boy. There was information pointing to the fact that the younger daughter had been sleeping with the father and stepmother and was sleeping with her father before the stepmother joined the family.

Gehrt had a session with anatomical dolls with the younger child. On April 25, 1990, the child told Gehrt, "Daddy touches me here," and pointed to her vagina and to her anal area. Although Gehrt reached no conclusion with regard to whether the touching by the father involved sexual arousal, she concluded that such activity was inappropriate. She concluded that her findings were consistent with a child victim of sexual abuse.

The final hearing was held on February 11, 1991. At this hearing, the report from Stephen Skulsky, a psychologist, was received as part of the confidential social file. Dr. Skulsky concluded, apparently on the basis of no physical evidence of forceful sexual abuse and a denial by the father of such action, that sexual abuse did not occur.

The reports from the Department of Social Services and the child's therapist indicated that much progress had been made in her adaptability to normalcy. However, the trial judge found that the two children were not in danger and that he was "not getting in the middle of a custody dispute; that's not my job, it's another court's job." The trial judge went on to say, "In terms of battles over visitation or custody, or whatever, it's not my job. That's the job of district court handling the dissolution of marriage, and that's where it belongs. If you're going to continue playing those games, I'm not going to participate in it." The trial judge went on to say, "I think there's a likelihood this child was abused, but I'm not making, and I don't have to make, a formal declaration, judiciously, whether I believe the child was abused or who did it."

The record does not disclose where, by reason of the termination of jurisdiction by the juvenile court, custody of these two children will be. The record does not support the conclusion by the juvenile court that the two children are no longer in danger of abuse under the present circumstances of custody. We do not know from the record who will have custody or control over these children. The trial court cannot wash its

hands of the responsibility which it assumed in accepting jurisdiction in the first instance.

We have previously outlined procedures to ensure an adequate record which, if followed in this case, would have obviated the need to remand the cause and, possibly, the need to appeal in the first place:

> [A]fter an adjudication under § 43-247(3)(a) of the Nebraska Juvenile Code and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan and thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. . . . The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. The juvenile court's specific findings of fact supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 272-73, 417 N.W.2d 147, 161 (1987). "Without an adequate record reflecting the parental shortcomings or the parental conduct to be corrected, eliminated, or ameliorated through a rehabilitative plan, it is virtually impossible for this court to evaluate the efficacy of a rehabilitative plan . . . ." *Id.* at 272, 417 N.W.2d at 161. The separate juvenile court of Sarpy County failed to find facts which would have supported the rehabilitative steps ordered, and compounded this error by failing to find facts indicating that those rehabilitative steps had been completed. It is thus impossible for us to evaluate whether the rehabilitative plan had its desired effect of alleviating the danger to these children that predicated the juvenile court's jurisdiction.

The judgment of the juvenile court relinquishing jurisdiction is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE APPLICATIONS A-14137, A-14138A, A-14138B, AND A-14139.

CENTRAL NEBRASKA CONSERVATION ASSOCIATION, INC., AND CENTRAL PLATTE NATURAL RESOURCES DISTRICT, APPELLANTS, V. CITY OF FREMONT ET AL., APPELLEES.

480 N.W.2d 709

Filed February 28, 1992. No. S-91-315.

1. **Administrative Law: Waters: Appeal and Error.** On appeal, the Supreme Court reviews orders of the Director of Water Resources for errors appearing in the record and to determine whether the judgment conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable.
2. **Supreme Court: Jurisdiction: Appeal and Error.** The Supreme Court does not have jurisdiction to consider appeals from nonfinal orders.
3. **Waters: Final Orders.** Proceedings before the Department of Water Resources brought pursuant to Neb. Rev. Stat. § 46-209 (Reissue 1988) are special proceedings for the purpose of Neb. Rev. Stat. § 25-1902 (Reissue 1989).

Appeal from the Department of Water Resources. Affirmed.

James E. Doyle IV, of Cook, Wightman & Doyle, and Duane A. Burns for appellants.

Lyle B. Gill, Fremont City Attorney, for appellee City of Fremont.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Upper Big Blue Natural Resources District.

George E. Svoboda, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellees Lower Platte North Natural Resources District and National Audubon Society.

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

BOSLAUGH, J.

The Central Nebraska Conservation Association, Inc. (CNCA), and the Central Platte Natural Resources District (Central Platte) appeal the order of the director of the Department of Water Resources dismissing CNCA's applications for water appropriations and intentional ground

water storage.

On appeal, the Supreme Court reviews orders of the Director of Water Resources for errors appearing in the record and to determine whether the judgment conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable. *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989); *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988); *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987); *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987). See Neb. Rev. Stat. § 46-210 (Reissue 1988).

BACKGROUND

The record shows that CNCA is a nonprofit corporation organized by a group of farmers from the rural areas near Wood River, Cairo, and Shelton, Nebraska. CNCA's Prairie Bend project is a proposed water diversion project on the Platte River to replenish ground water supplies depleted due to irrigation. The proposed project is located within the Central Platte Natural Resources District.

On April 1, 1976, CNCA filed four applications for water appropriations for the project, as follows:

No.	Source	Use	Amt. Requested
A-14137	Platte River	natural flow for irrigation	1,000 cubic feet per second
A-14138A	Platte River	storage in Wood River Reservoir	280,000 acre-feet
A-14138B	Wood River	storage in Wood River Reservoir	280,000 acre-feet
A-14139	Platte River	storage in Twin Prairie Reservoir	72,000 acre-feet

On May 7, 1976, CNCA requested that the department hold these applications pending until the project was ready for construction, and the applications were placed in a pending status. Early in 1979, however, CNCA was informed that the department intended to either approve or dismiss the applications. On May 15, 1979, CNCA's applications were ordered approved on the conditions that maps be filed and construction commenced by November 15, 1979. The

approvals specified that construction was to be completed by November 15, 1989, with water being beneficially applied by October 1, 1995.

In the fall of 1979, CNCA filed a petition for a 6-year extension, requesting postponement of all the deadlines imposed by the May 15, 1979, approvals. The reasons given in support of the petition generally related to the size and complexity of the project and the need for a feasibility study. After a hearing, the director issued orders on January 7, 1980, granting a 2-year extension. In other words, maps were to be filed and construction begun by November 15, 1981.

However, on October 29, 1981, CNCA filed a second petition for extension of time, citing the same supporting reasons. Another hearing was held, and CNCA was given until December 31, 1983, to file evidence showing that a feasibility study had been initiated. CNCA filed these documents on December 6, 1983.

On January 5, 1984, CNCA was given until March 1, 1984, to file a plan and work schedule to complete the feasibility study. This order also required CNCA to file annual reports and to file the following items before December 31, 1987: (1) final report of the feasibility study, (2) assessment of the feasibility study recommendations as they would relate to CNCA's applications and other Platte River projects, and (3) a threatened or endangered species biological determination of nonjeopardy prepared by the Nebraska Game and Parks Commission (Game & Parks). CNCA complied with the directives to file a plan and schedule and to file annual reports.

On December 24, 1987, CNCA filed a third petition for extension of time. Notice was issued, and the following organizations filed requests to become parties: Central Platte, interested party; Lower Platte North Natural Resources District, objector; Twin Valley Conservation Association, interested party; Upper Big Blue Natural Resources District (Upper Big Blue), interested party; the City of Fremont, Nebraska, objector; and the National Audubon Society, objector.

A hearing was held on CNCA's petition, and on April 18, 1988, the director issued an order allowing CNCA until June

15, 1988, to file a feasibility study, a biological assessment of the project, and any necessary permit application amendments and to provide information needed for consultation with Game & Parks.

On June 15, 1988, CNCA filed (1) a petition to amend three of the permits previously granted and to dismiss application A-14138B; (2) new applications A-16659 through A-16663; (3) relocation petitions P-454 through P-456 concerning the amendment of applications A-14137, A-14138A, and A-14139; (4) application U-11 for intentional ground water storage; (5) a feasibility study; and (6) a biological assessment. The department initiated endangered and threatened species consultation on October 13, 1988, pursuant to the Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 through 37-438 (Reissue 1988).

ORDER OF MARCH 30, 1989

On March 22, 1989, CNCA filed an amended petition to amend its permits. A major amendment proposed by CNCA involved moving the point of diversion for the project from a site near Lexington, Nebraska, which is located upstream from the canal return for the Central Nebraska Public Power and Irrigation District's Johnson Hydro Unit No. 2 (J-2 return) to a site near Kearney, Nebraska.

On March 30, 1989, the director entered an order providing that CNCA would bear the burden of proving its amendments (1) would not cause harm, (2) were for the same use as the use in the original applications, (3) were in the public interest, and (4) were permitted by statutes or department rules. The director further ordered that notice be given in order to learn if there were other parties potentially affected by CNCA's proposed amendments and that "following an opportunity for and rulings upon admission of additional parties, a schedule for proceeding further shall be issued." The notice issued by the department provided, "Parties are notified that on July 7, 1989, at 9:00 a.m. in Room E, Lower Level, Nebraska State Office Building, 301 Centennial Mall South, Lincoln, Nebraska, arguments will be heard regarding whether [CNCA's] amendments to appropriations should be allowed."

Meanwhile, a report prepared by Game & Parks concerning threatened or endangered species was filed with the department on May 5, 1989. The Game & Parks report did not address any of the modifications contemplated in CNCA's March 22, 1989, filings. One conclusion reached in the report was that the Prairie Bend project would jeopardize the continued existence of four threatened or endangered species. As a means to avoid jeopardy and still satisfy CNCA's apparent goals, the Game & Parks report outlined an alternative operational schedule. Even though CNCA had not included it in any of its applications, the Game & Parks alternative included utilization of the Plum Creek Reservoir.

ORDER OF SEPTEMBER 22, 1989

On July 7, 1989, a hearing was held on all of CNCA's proposed amendments and relocation petitions. The director's order of September 22, 1989, concludes:

> By now officially proposing to move its diversion location from upstream of the J-2 hydropower return to downstream of it, [CNCA] effectively requests a location where a much larger quantity of water is available from the Platte River than was available under terms of its approved applications. Although [CNCA] contends it always intended to capture and utilize J-2 return flows, the location of its approved diversion location is upstream of the J-2 return.

Accordingly, the director denied CNCA's proposed amendments and relocation petitions; set aside the department's May 15, 1979, approvals of original applications A-14137, A-14138A, A-14138B, and A-14139; and set a date to show cause why these four applications should not be dismissed because they no longer reflected the project originally proposed.

ORDER OF JANUARY 5, 1990

CNCA requested a rehearing, and the order to show cause was temporarily stayed. CNCA's petition for rehearing was denied on January 5, 1990. CNCA then appealed to this court, but the appeal was summarily dismissed because it was not timely filed. See *In re Appropriations A-14137 et al.*, 235 Neb.

xxviii (case No. 90-126, Mar. 29, 1990). Thus, the September 22, 1989, order of the director became the law of the case. The stay was then rescinded, and CNCA was given until September 1, 1990, to show cause why its applications should not be dismissed.

ORDER OF MARCH 4, 1991

On August 31, 1990, CNCA filed a response to the show cause order, stating that CNCA originally intended to appropriate and impound water from the Platte River "for the purposes of irrigation and to offset groundwater depletions." The response acknowledged that CNCA originally proposed to divert water from the Platte River at a site near Lexington, located upstream from the J-2 return. CNCA's original applications also proposed delivering the water from the point of diversion to two reservoirs by way of a 71-mile canal.

The response to the show cause order further states that after the director entered the September 22, 1989, order denying CNCA's motions to amend its applications, CNCA examined its applications and consulted with various state and federal agencies, including Central Platte and the U.S. Bureau of Reclamation, and independent consultants to obtain the most recent information available concerning the availability of water in the Platte River, the needs for such water for ground water recharge, ground water quality, irrigation, fish and wildlife habitat enhancement, and the best use of Platte River water for the satisfaction of such needs. As a result of the studies, CNCA concluded that its original applications were "suitable and satisfactory to serve and meet the needs of the project area and that the reservoirs, canals and diverted water contemplated by the project will provide needed enhancement of endangered and threatened species habitat."

CNCA also informed the director that the Prairie Bend project, as originally proposed, was studied as early as 1983 by the U.S. Bureau of Reclamation as a means of providing augmentation flows. The project was not given further consideration in this regard until early 1990, after studies conducted by the U.S. Bureau of Reclamation and the U.S. Fish and Wildlife Service showed that certain flows were

required in the Platte River at specific locations near Kearney for whooping crane and sandhill crane habitat. The studies revealed that the flow requirements could not be provided in periods of low flow in the Platte River unless the flow was augmented by the release of water stored in manmade reservoirs. In its showing of cause, CNCA maintained that augmentation flows could best be provided from certain reservoirs located in the Prairie Bend project area, through the use of a floodway from the Wood River to the Platte River, and from the water supplied from the canals and water facilities proposed by CNCA.

The showing of cause further alleges that the needs for ground water recharge and ground water quality improvements in the project area have continued to increase; that there was a sufficient and adequate water supply above the J-2 return to accommodate the project and augmentation flows; that if CNCA's facilities were used to augment flows for habitat for threatened and endangered species, a significant portion of the cost of such canals and related water facilities would be paid for by the federal government; and that the use of CNCA's facilities for habitat enhancement made the project feasible under environmental criteria.

In light of the foregoing, CNCA claimed that its original applications were more suitable for the original purposes for which they were filed and that the canals and related water facility works as originally proposed by CNCA would provide the best method of efficiently and economically augmenting the flows required for the habitat of the sandhill crane and the whooping crane.

Pursuant to CNCA's request, a hearing was held on November 5, 1990. On March 4, 1991, the director ordered that CNCA's original applications be dismissed.

ASSIGNMENTS OF ERROR

CNCA and Central Platte timely appealed to this court, contending that the director's orders of March 30, 1989, September 22, 1989, January 5, 1990, and March 4, 1991, were arbitrary, capricious, and unreasonable and were contrary to law and the evidence in the case. The appellants also contend

that the director erred in treating Upper Big Blue as an appropriator, in connection with the September 22, 1989, order.

ORDERS OF MARCH 30, 1989, SEPTEMBER 22, 1989, AND JANUARY 5, 1990

As stated above, CNCA brought an earlier appeal in this case (the first appeal) challenging the director's order of September 22, 1989. (Although Central Platte became a party of record in early 1988, it was not an appellant in the earlier appeal.) The first appeal was summarily dismissed for lack of jurisdiction because it was not timely filed. See *In re Appropriations A-14137 et al.*, 235 Neb. xxviii (case No. 90-126, Mar. 29, 1990). In light of that ruling, the appellees contend that CNCA and Central Platte are precluded from raising issues related to that order in this appeal. The appellants now contend that CNCA's first appeal was premature and that the director's order of September 22, 1989, did not constitute a final order when the first appeal was filed; therefore, they now argue that the validity of the September 22, 1989, order is properly before the court in this appeal.

This court does not have jurisdiction to consider appeals from nonfinal orders. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Neb. Rev. Stat. § 25-1902 (Reissue 1989), defining the term "final order," provides:

> [1] An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, [2] and an order affecting a substantial right made in a special proceeding, [3] or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

As we said in *In re Interest of R.G.*, the three types of final orders described in § 25-1902 share the requirement that a substantial right be affected.

> In addition, the first category requires that the order arise in an "action" and that it "in effect determines the action and prevents a judgment." The second type requires only that the order affect a substantial right in a "special proceeding"; unlike the first type, there is no

> corresponding requirement that the order effectually determine the action and prevent a judgment.

In re Interest of R.G., 238 Neb. at 411, 470 N.W.2d at 786.

The appellants argue that the first appeal did not involve a final order because the case at bar was not completely disposed of by the September 22 order and the Department of Water Resources retained jurisdiction over the original applications. Upper Big Blue claims the orders were final because they affected a substantial right in a special proceeding.

In *In re Interest of R.G.*, we recognized that this court has, for over 100 years, construed the phrase "special proceeding" to mean every civil statutory remedy which is not encompassed in what is now chapter 25 of the Nebraska Revised Statutes. See, e.g., *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (effort to remove personal representative was a special proceeding); *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972) (summary judgment); *Ropken v. Ropken*, 169 Neb. 352, 99 N.W.2d 480 (1959) (divorce action); *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952) (suit for breach of promise of marriage and seduction); *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952) (accounting by personal representative); *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882) (order discharging garnishees).

We conclude that proceedings before the Department of Water Resources brought pursuant to Neb. Rev. Stat. § 46-209 (Reissue 1988) also are special proceedings for purposes of § 25-1902. Since the order of September 22, 1989, arose in a special proceeding, the issue is whether that order affected a substantial right of CNCA. See *In re Interest of R.G., supra*.

A substantial right is " 'an essential legal right as distinguished from a mere technical one.' " *In re Estate of Snover*, 233 Neb. at 202, 443 N.W.2d at 898 (quoting *Sullivan v. Storz, supra*).

Three of the orders referred to in the appellants' assignments of error pertained to the subject matter of the July 7, 1989, hearing on CNCA's proposed amendments and relocation petitions. As set forth above, the March 30, 1989, order provided that CNCA would bear the burden of proving its amendments (1) would not cause harm, (2) were for the same

use as the use in the original applications, (3) were in the public interest, and (4) were permitted by statutes or department rules. The dispositive order of September 22, 1989, denied CNCA's proposed amendments and relocation petitions and set aside the department's May 15, 1979, approvals of applications A-14137, A-14138A, A-14138B, and A-14139. CNCA's petition for rehearing was denied on January 5, 1990.

The effect of the September 22 order was to deny CNCA the right to go forward with its project as amended. The fact that the director retained jurisdiction over the original applications was only incidental to the findings in the September 22 order, since the only issue remaining was whether CNCA's original applications should be dismissed. Under the circumstances, we hold that the September 22, 1989, order affected CNCA's substantial rights.

The September 22 order which was the subject of CNCA's first appeal was final and appealable when it was entered; however, this court did not acquire jurisdiction over the first appeal because it was not timely filed. Thus, CNCA is in the same position in which it would have been if it had not previously attempted to appeal the September 22 order.

Neb. Rev. Stat. § 46-238(1) (Reissue 1988), provides, in part, "A failure to carry on the construction of either an irrigation or water power project as outlined in this section shall work a forfeiture of the appropriation and all rights thereunder, and the department shall cancel such appropriation." The director had the authority to set aside the department's prior approvals, pursuant to § 46-238, and that order is not void.

Also, CNCA has, in essence, acquiesced, as further demonstrated in its showing of cause filed with the department on August 31, 1990. In that document, CNCA informed the director that

> [d]ue to the recent information developed concerning augmentation flows, CNCA's Applications are not in need of the amendments sought in June of 1988 and as currently filed such original Applications constitute a project which is economically and environmentally feasible and which has an adequate and reliable water supply.

If this court did not have jurisdiction to consider the merits of the September 22 order when the first appeal was filed, we certainly did not acquire jurisdiction over the matter by the passage of another 18 months. The appellants' assertions to the contrary are without merit, and the only issues properly raised in this appeal pertain to subsequent hearings and the director's final order of March 4, 1991.

ORDER OF MARCH 4, 1991

As discussed above, CNCA filed its response on August 31, 1990, to the director's order to show cause why the four original applications should not be dismissed because they no longer reflected the project originally proposed in 1976. A hearing was held on November 5, 1990, resulting in the director's order of March 4, 1991, dismissing CNCA's original applications. The only issue properly raised in this court is whether the March 4 order conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable.

On this question, the record shows that CNCA's original applications described a direct surface irrigation project for 70,000 acres. The original applications also called for two storage reservoirs, the waters impounded in each to be used for irrigation.

At the November 5 hearing, CNCA's chairman, Ronald Hargens, testified that CNCA wanted to proceed with the original applications because it did not intend to change the purpose of the project. Hargens also referred to investigations conducted for CNCA by the U.S. Fish and Wildlife Service and the U.S. Bureau of Reclamation. According to Hargens, the results of those investigations suggested that other uses of the water would be appropriate, including use for wildlife enhancement, ground water quality enhancement, and ground water recharge. Consequently, Hargens indicated that CNCA would use project water "[p]robably for irrigation, wildlife enhancement, groundwater quality enhancement, and, finally, recharge."

In his order, the director concluded that Hargens' testimony was "general but clearly contradictory." The record supports the director's conclusion that Hargens' testimony did not

demonstrate a firm commitment on the part of CNCA to proceed with its original intentions.

Central Platte's general manager, Ronald Bishop, also testified on behalf of CNCA. Bishop has been CNCA's advisor since 1976. He testified that Central Platte had filed its own set of applications for a proposed Prairie Bend II project, to be pursued in the event CNCA's applications were not allowed. Bishop went on to indicate that there is not a need for both projects in the area.

More uncertainty about the project was revealed in other testimony. Hargens, Bishop, and Duane Woodward, a hydraulic engineer employed by the U.S. Bureau of Reclamation, all noted the need for additional planning. Woodward testified that the project required at least 5 more years of planning and that perhaps then a clear outline of the project's precise configuration and purpose would be known. We conclude, as did the director, that the testimony of these witnesses did not suggest a single focus upon achieving CNCA's original objectives. As a result, their testimony also undermined CNCA's showing of cause.

CNCA's application U-11 sought authority for intentional underground water storage. During the November 5 hearing, Hargens testified that application U-11 was not essential and could be dismissed. In addition to yet another weakening of CNCA's show cause efforts, Hargens' admission (and implicit invitation) establishes justification for dismissing application U-11.

The March 4, 1991, order concludes:

> More than 14 years have passed since CNCA filed its first applications. Over that time period, it was afforded ample opportunity to refine and perfect its plans. That task remains incomplete. It is apparent that CNCA does not know specifically what it wants to construct. From the November 5 record, enough is known, however, to conclude that CNCA no longer intends to pursue a project designed to meet only its initial goals. Its attempt to demonstrate that its current intentions parallel those it originally had, fell short.

We have reviewed the record and determine that the

director's judgment conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable. The appellants' assertions to the contrary are without merit.

The order of the director is affirmed.

AFFIRMED.

JUNIOR HERNANDEZ, APPELLANT, V. HAWKINS CONSTRUCTION COMPANY AND AETNA CASUALTY AND SURETY COMPANY, APPELLEES.

480 N.W.2d 424

Filed February 28, 1992. No. S-91-415.

1. **Workers' Compensation.** Findings of fact made by the Nebraska Workers' Compensation Court have the same force and effect as a jury verdict.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** Factual determinations by the Nebraska Workers' Compensation Court will not be set aside unless such determinations are clearly erroneous.
4. **Workers' Compensation.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
5. **Workers' Compensation: Appeal and Error.** As to procedural and evidentiary rulings of the compensation court, the appellate court may reverse or modify an order of the compensation court based on error in such rulings if the compensation court acted without or in excess of its powers.
6. **Workers' Compensation: Evidence: Appeal and Error.** Where the evidence before the compensation court is in conflict, the appellate court will presume that controverted facts were decided in favor of the successful party.
7. **Workers' Compensation: Appeal and Error.** The appellate court may not substitute its judgment for that of the compensation court but, rather, may simply review the decision for error.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael D. Carper for appellant.

Theodore J. Stouffer and Kurt F. Tjaden, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

HASTINGS, C.J.

Plaintiff, Junior Hernandez, has appealed the dismissal of his workers' compensation claim. The compensation court found that "[c]onsidering the evidence as a whole," Hernandez had "failed to prove preponderantly that he sustained an accident arising out of and in the course of his employment by the defendant, Hawkins Construction Company." The sole issue on appeal is whether the dismissal is supported by the record.

> " 'Findings of fact made by the Nebraska Workers' Compensation Court . . . have the same force and effect as a jury verdict . . . . In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court . . . the evidence must be considered in the light most favorable to the successful party. . . . Factual determinations by the Workers' Compensation Court will not be set aside . . . unless such determinations are clearly erroneous. Regarding facts determined and findings made . . . in the Workers' Compensation Court, § 48-185 precludes the [appellate court's] substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . . As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.' "

(Citations omitted.) *Phipps v. Milton G. Waldbaum & Co.*, 239 Neb. 700, 702-03, 477 N.W.2d 919, 920-21 (1991). As to procedural and evidentiary rulings of the compensation court, the appellate court may reverse or modify an order of the compensation court based on error in such rulings if the compensation court acted "without or in excess of its powers." See, Neb. Rev. Stat. § 48-185 (Reissue 1988); *Koch v. Frieden*

Constr. Co., 228 Neb. 328, 422 N.W.2d 354 (1988).

Hernandez was hired by Hawkins Construction Company (Hawkins) on July 12, 1989. On that day, Hernandez was sent to work with a construction crew near Lexington. The crew was cutting wire from chunks of concrete being salvaged from reconstruction of Interstate 80. Hernandez testified on rehearing that he and another worker were told to ascend a pile of concrete and cut wire from the concrete near the top, using wirecutters.

Hernandez testified that he climbed to the top of the pile and began cutting. Hernandez claimed that at approximately 10 a.m., he felt the concrete under his feet move, and he fell approximately 10 feet, landing on his buttocks and back. He testified that he immediately felt sharp pain in his legs and lower back.

There was further testimony by Hernandez that he descended the pile immediately and informed the foreman of the accident. He then continued working until lunchtime, when he and the rest of the crew took a 1-hour break. Hernandez testified that after the break, he returned to work for approximately one-half hour. By this time, Hernandez claimed, the pain had intensified, so he again notified the foreman and was given a ride in a company truck back to Hawkins' main office. At the main office, a Hawkins secretary made arrangements for Hernandez to be taken to the Lexington hospital.

Hawkins offered the deposition testimony of Roland Anderson, Scott Panagiotis, and Christopher Feeney, three of Hernandez' coworkers on July 12, 1989. Anderson, who was working for Marcus Tree Service at the time of his deposition on January 8, 1991, was Hawkins' crew foreman on the day of the alleged injury, and Anderson testified that he assigned other workers—not Hernandez—to work on top of the pile of concrete. Anderson said Hernandez was assigned to work the small piles, one dumped truckload, which would be about 4 or 5 feet high. Anderson also testified that Hernandez left after telling Anderson "he [Hernandez] hurt his back." Specifically, Anderson's testimony was as follows:

Q If I could back you up a second there, did he say that

he had hurt his back or his back hurt?

A He said his back hurt. He didn't — He didn't tell me he'd gotten injured or he had fallen or anything, he just — he gave me the impression he was quitting, he was, you know, he didn't want to do it.

Q Okay, he never reported an injury to you that day?

A No.

Anderson also testified that Hernandez did not report an injury to him and that he did not send Hernandez to a doctor. Anderson did testify that Hernandez came back to the job a few days later, worked part of a day, and left again. It was at that time Anderson heard that Hernandez had previously hurt himself and that he had gone to a doctor. Anderson was told that day by one of the other workmen that Hernandez had fallen and hurt himself on July 12.

Panagiotis testified by way of deposition taken on December 20, 1990, at which time he was working for ADM Gooch Milling and attending the University of Nebraska at Lincoln, that he worked for Hawkins on July 12, 1989. He said that he and Hernandez had worked together on the "rock pile" which was about 40 or 50 feet high. The two of them ate their lunch together in Panagiotis' truck. They discussed the work, and both agreed that it was "back-breaking" work. Hernandez told Panagiotis that "he had hurt his back he told me at a meat packing plant in Hastings lifting some beef or something." Panagiotis testified that Hernandez did not tell him that Hernandez had fallen on the job.

Feeney also testified by deposition, which was taken on January 8, 1991, at which time he was 20 years old and unemployed. According to his testimony, he worked with Hernandez all the time that Hernandez was on the job on July 12, 1989, and they both worked at the bottom of the concrete piles. Feeney testified that he did not see Hernandez fall and that Hernandez told him "he [Hernandez] worked in a meat deal . . . and he said that's where, you know, he lifted weights till he hurt his back when he was lifting meat." Feeney went on to testify that Hernandez told him "he [Hernandez] used to lift weights but he doesn't any more because of his back."

Hernandez testified that upon arriving at the hospital in

Lexington, he was examined by a Dr. Miller. According to Hernandez, the doctor told him that he had "real bad torn muscles" in his back and that he was supposed to take a week off. According to Hernandez, he notified his employer of this fact.

There was further testimony by Hernandez that he returned to work a week later, worked a couple of hours, developed "bad pains" in his back, and could hardly walk. He said that the foreman, Anderson, gave him a ride back to the main office. He was then sent to the hospital again, where he was seen by a Dr. Kloch, who referred Hernandez to a Dr. Urban, an orthopedic physician in Kearney. Finally, Hernandez was referred to a Dr. Brestin, who first prescribed physical therapy and then operated on Hernandez in October 1989 because of a herniated disk.

The narrative reports and the deposition of Dr. Brestin indicate that he first saw Hernandez on September 6, 1989, as the result of a referral from his associate Dr. Urban. Dr. Brestin stated that he saw "him [Hernandez] for an injury which occurred on July 12, 1989. He was working on a pile of concrete, and he fell off the pile of concrete and landed on his back."

The testimony of Dr. Brestin tends to corroborate the story given by Hernandez, although, of course, it is simply a recitation of the story given him by Hernandez. However, missing from the record is any information from the hospital in Lexington; from Dr. Miller, who Hernandez said examined him on the day of the alleged accident; and from Dr. Kloch, who supposedly saw Hernandez a week after the alleged accident.

Hernandez emphasizes that Dr. Brestin testified that to a reasonable degree of medical certainty, Hernandez' medical condition occurred as a result of an alleged employment-related accident happening on or about July 12, 1989. Hernandez argues that this testimony is "undisputed and uncontroverted" and "is binding on the finder [of] fact" on the issue of causation. Regardless of the dubious legal foundation for this position, it is not otherwise supported by the record.

Dr. Brestin's medical opinion is entirely dependent on the accuracy of the evidence related to him establishing the alleged

accident. The most that can be concluded from Dr. Brestin's testimony is that if the accident occurred as related to him by Hernandez, he could say with a reasonable degree of medical certainty that it was the cause of Hernandez' medical condition.

The compensation court simply did not believe Hernandez' testimony, although the court did not say so in so many words. Where the evidence is in conflict, the appellate court will presume that controverted facts were decided in favor of the successful party. See *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 456 N.W.2d 474 (1990). The appellate court "may not substitute its judgment for that of the compensation court but, rather, 'simply review[s] the decision for error.' " See *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 263, 475 N.W.2d 513, 517 (1991) (quoting *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985)).

The judgment of the compensation court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HARVEY I. NEAL, RESPONDENT.

480 N.W.2d 428

Filed February 28, 1992. No. S-92-102.

Original action. Judgment of disbarment.

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

PER CURIAM.

A disciplinary complaint was filed against Harvey I. Neal by the Counsel for Discipline of the Nebraska State Bar Association. On or about January 10, 1992, the respondent pled guilty to count VI of a superseding indictment in the U.S. District Court for the District of Nebraska, which charged respondent with violating 18 U.S.C. § 1344 (1988 & Supp. I

1989) by defrauding a bank to obtain funds by means of false and fraudulent pretenses and representations.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), respondent filed a voluntary surrender of license with this court. The respondent freely and voluntarily waived all proceedings against him in connection with the pending disciplinary complaint. Respondent knowingly admits that he has violated Canon 1, DR 1-102(A)(1) and (3), of the Code of Professional Responsibility. He also freely and voluntarily consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

DONALD BLOOMQUIST, JR., APPELLANT, V. CONAGRA, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS NORTHERN STATES BEEF, ET AL., APPELLEES.

481 N.W.2d 156

Filed March 6, 1992. No. S-89-195.

1. **Trial: Rules of Evidence.** Admissions by a party-opponent are admissible as substantive evidence.
2. **Trial: Rules of Evidence: Pretrial Procedure: Rules of the Supreme Court: Impeachment.** Admissions of a party-opponent are admissible evidence and therefore discoverable under Neb. Ct. R. of Discovery 26(b)(1) (rev. 1989), even though they may be used for impeachment purposes.
3. **Pretrial Procedure: Rules of the Supreme Court.** Neb. Ct. R. of Discovery 26 (rev. 1989) states that a party has the same duty to supplement discovery requests asking for the identity of persons with knowledge of discoverable matters as it has to supplement the testimony of experts expected to be called.
4. **Trial: Time.** Ordinarily, an objection must be made as soon as the applicability of it is known, or could reasonably have been known, to the opponent.
5. **Trial: Time: Witnesses.** Objection to a witness' disqualification would ordinarily be made as soon as he is called to the stand, providing his disqualification is then known.
6. **Motions for Mistrial: Appeal and Error.** The decision as to whether to grant a

motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion.

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

G. Michael Fenner, and Peter J. Hoagland and Stephen L. Gerdes for appellant.

John F. Thomas and Keith Larsen, of McGrath, North, Mullin & Kratz, P.C., for appellee ConAgra.

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

GRANT, J.

Plaintiff-appellant, Donald Bloomquist, Jr., filed his amended petition against defendant-appellee ConAgra, Inc., doing business as Northern States Beef, seeking damages for injuries incurred as a result of defendant's negligence. Plaintiff alleged that he was an employee of Omaha Processors, Inc., and that in the course of his employment he had to go onto defendant's property, where, when he pulled a rope to close an overhead door, a part of the door fell and struck him.

The case was tried to a jury, which returned a verdict for defendant. Plaintiff appealed to this court, where he assigns as error the actions of the trial court (1) in allowing two "surprise" witnesses to testify for defendant, when the identity of the witnesses was not disclosed to plaintiff in response to interrogatories asking for the identity of persons "who have knowledge of any facts relevant to the incident," (2) in refusing to allow the testimony of plaintiff's psychologist, and (3) in permitting defendant's counsel "to point out" certain factors in connection with referrals made by plaintiff's doctor. We affirm, determining that while defendant's counsel acted improperly in presenting the two surprise witnesses without disclosing them to plaintiff, plaintiff did not timely object to that testimony, and the court did not err in permitting the witnesses to testify.

Plaintiff testified that the accident occurred on April 2, 1986, when he was struck on the head by the falling overhead door. There were no witnesses to the accident. Plaintiff had no mark on his head immediately after the accident. At the time, he was

wearing a soft baseball cap, and the door part, weighing between 60 and 100 pounds, allegedly struck him with enough force to cause serious and permanent brain damage. One of his supervisors saw him after the accident, and the supervisor saw no head injuries. Neither the emergency room personnel nor the doctor who examined plaintiff the day of the accident could find any physical evidence that plaintiff had been struck.

On October 3, 1986, plaintiff served interrogatories on defendant. Those interrogatories included: "3. State the names and addresses of each person known to you or your representatives who have knowledge of any facts relevant to the incident or any issues involved in this lawsuit." On November 20, 1986, defendant submitted its answer to the interrogatory, listing four people, in addition to the parties and their attorneys. Dan and Christine Gardner were not listed. On November 29, 1988, 1 week before the trial, defendant submitted amended answers to interrogatories. Those answers included several additional witnesses, but did not include the Gardners. Dan Gardner, the first of the surprise witnesses, testified that he first met with John Thomas, defendant's counsel, 1 to 2 months before the trial, prior to the filing of the amended answers to plaintiff's interrogatories.

The trial began on December 7, 1988. Plaintiff testified that the overhead door fell and struck him, and he testified as to his injuries. He also testified that he had an artificial leg as the result of an automobile accident that had no relation to his later injuries. Plaintiff also testified about a later accident while he was working for Omaha Processors, in which accident he damaged his prosthesis. Defendant's counsel, on cross-examination, questioned plaintiff about Dan Gardner and whether plaintiff had spoken to Gardner after the accident of April 2, 1986. Defendant's counsel also asked plaintiff if he had ever said he "would never be back there to work that day" and if he ever had any conversations about how he "wanted out of work at Omaha Processors and that [he was] going to try to find a way out of working there." Plaintiff denied ever making those statements.

In defendant's case, Dan and Christine Gardner were called as witnesses. The Gardners' testimony contradicted plaintiff's.

Dan Gardner testified that he had had numerous conversations with plaintiff about how they both wanted to get out of their jobs. Gardner also testified that in 1985, plaintiff had injured his prosthesis before coming to work, but successfully lied that it was an on-the-job injury. Gardner testified that plaintiff often discussed faking an injury at work and that plaintiff became so obsessed with planning the injury that Gardner "refused to be his witness."

When asked about the day of the overhead door accident, Gardner testified:

> I saw him for the first time, he was coming through the cooler, and Donnie says — I'm trying to remember exact — Donnie says, that damn door fell over there, I'm saying it hit my head. He tipped his hat (indicating) . . . said he's going home, he said he got hit. I looked, I said, Donnie, where did you get hit? Donnie tipped his hat to me, bent his head. I says, true as true can be, Donnie, there's not a mark, they're never going to believe you. As Donnie walked out the second door, Donnie told me right out of his mouth, let the doctor decide that. I said, Donnie, be sure. I waited all that day scared to death wondering what was happening. I turned around, called Donnie soon after I got off work right that night. Donnie said he's already been to see a doctor and he already seen a lawyer . . . . I said, okay, then, but, Donnie, be very careful, this is not a good case. He says, a no-witness situation is as good as a witness situation. They have no witness and I have no witness.

Christine Gardner testified that she had often overheard her husband and plaintiff discussing the possibility of faking injuries to get out of work.

It is unclear from the record when plaintiff rested after his case in chief, but apparently defendant presented its first two witnesses after plaintiff's case in chief on the afternoon of December 13, 1988. The next morning, defendant continued its case, calling three witnesses, including plaintiff. After the noon recess, plaintiff presented a witness, out of order. This witness was called briefly at 1:15 p.m. and was excused, subject to recall by plaintiff.

Defendant then resumed its case. Dan Gardner and his wife Christine testified as set out above, and Dan Gardner was cross-examined by plaintiff's counsel. Another witness was called by defendant. A recess was taken from 2:45 p.m. to 3:20 p.m., during which time a meeting was held in the judge's chambers. After the recess, defendant's witness continued, and defendant rested.

Plaintiff then recalled his witness mentioned above and concluded her testimony. Plaintiff then called Thomas Rowen, an Omaha attorney who had represented the estate of Christine Gardner's mother in a lawsuit against Blue Cross and Blue Shield Insurance Company. Defendant's counsel objected when plaintiff began to adduce details of the lawsuit. Plaintiff then requested leave to make an offer of proof out of the presence of the jury, and he did so in chambers.

Almost all of Rowen's examination consisted of the offer of proof. Rowen testified that he was the attorney for the estate in a lawsuit against Blue Cross and that John Thomas, who represented defendant in this case, represented Blue Cross in that case. In the case, Christine Gardner was a witness for Blue Cross, testifying against the interests of her father. Her testimony, in essence, was that her parents planned to conceal her mother's preexisting medical condition from the company. Additionally, Rowen testified that the first he knew that Christine Gardner was going to testify in the Blue Cross case was when he checked what witnesses had been subpoenaed and discovered that Christine Gardner had been subpoenaed. Rowen testified that he attempted to talk by telephone to Christine Gardner, but she refused to talk to him. When asked whether he had served interrogatories on Blue Cross requesting the names of all witnesses with knowledge relevant to the issues, Rowen stated, "I'm sure I did."

After plaintiff's offer of proof testimony in chambers, the trial court did not change its ruling on defendant's objection. Plaintiff's counsel then moved to strike the Gardners' testimony because their names had not been disclosed in response to the interrogatories. He also asked for a mistrial. This was the first objection to the Gardners' testimony. At this point, it appears that approximately 2½ hours had elapsed

after Dan Gardner was called to testify. During that time, three witnesses other than the Gardners had been called (two by the plaintiff), and there had been a 35-minute recess, which included a conference with the trial judge and the attorneys. During this time, there was no objection from plaintiff about the Gardners' testimony. The judge overruled both motions.

Plaintiff's counsel requested an opportunity to depose the Gardners the evening after their testimony and did depose Dan Gardner.

The plaintiff continued his rebuttal the following morning. David Duncan, a claims adjuster for an insurance company involved with the accident of April 2, 1986, testified that Dan Gardner had telephoned him on July 18, 1986, offering to sell information relating to plaintiff's alleged accident. Gardner suggested $250 initially, but stated that if he had to testify at a hearing or trial, it would cost more. Duncan later met with Gardner. Duncan testified as to that meeting as follows: " Q. So [Gardner] told you if you wouldn't give him the money he was going to say [the conversations with plaintiff about staging an accident] didn't happen; if you did give him the money he'd say it had happened? A. Yes, that's right." Duncan testified that Gardner told him that he had prior experience testifying for money. Duncan further testified that Gardner also told him that his wife, Christine, had made a similar deal with Blue Cross in another case. The insurance company for which Duncan worked did not use Gardner's statements.

On rebuttal, plaintiff testified that Dan Gardner bragged about selling testimony to Blue Cross in the earlier case involving Christine Gardner's parents. Plaintiff testified, "[Gardner] told me that in the beginning it was like a million dollar insurance policy on his wife, his father-in-law, and that if he would have information that would help the insurance company not to pay that claim that he would receive 10 percent of that money."

At the close of all the evidence, the trial judge and counsel met in chambers and plaintiff renewed his motion for mistrial. In support of this motion, plaintiff's counsel pointed out several facts about the Gardners that he discovered during the deposition the night before. Those facts allegedly included the

Gardners' prior illegal conduct and Dan Gardner's prior criminal record. The trial court summarized plaintiff's statements by saying to counsel, "In other words, a long litany that would, at least in your opinion, affect this gentleman's credibility." Plaintiff's counsel agreed with the court's statement and concluded by saying, "[W]e've been prejudiced."

Defendant's counsel objected to the statements of plaintiff's counsel and objected to inferences or statements

> about me and sandbagging or doing anything else to Mr. Rowen in that case or sandbagging [plaintiff's counsel] in this case. I think the record is clear that Liberty Mutual, their own people, knew about this guy [Gardner] since 1986. It's no surprise to anybody that this guy's out there. You guys are in bed with Liberty Mutual, and if they didn't tell you about him, I mean, that's your problem, it ain't mine.

The pretrial order, entered December 6, 1988, required that defendant list "all witnesses whom the defendant ConAgra expects to call to testify . . . except those who may be called for impeachment purposes only." This order was in addition to the interrogatory set out above which requested the names of persons known to "have knowledge of any facts relevant to the incident." Counsel for defendant contends the Gardners were impeachment witnesses only, and therefore, he did not have to disclose them.

We hold that the Gardners' testimony was substantive evidence, although it could be used to impeach. The statements of plaintiff to which the Gardners testified were admissions of a party-opponent, and therefore, defendant's counsel breached his duty to disclose the Gardners as persons with knowledge of discoverable facts.

Admissions by a party-opponent are admissible as substantive evidence. *United States v. Cline*, 570 F.2d 731 (8th Cir. 1978). In *Cline*, a criminal defendant testified that he had destroyed the gun used to commit the crime. The prosecution then called a witness who testified that the defendant had told him that the defendant had sold the gun. The defendant complained on appeal that the court should have instructed the jury to consider the witness' testimony only as impeachment

and not as substantive evidence. The U.S. Court of Appeals for the Eighth Circuit disagreed, stating:

> Furthermore, the testimony by [the witness] was admissible as substantive evidence because it qualified as an admission by appellant . . . . This testimony was relevant as direct evidence on the issue of concealment. . . . The testimony was not hearsay because it was appellant's own statement which was being offered against him.

Cline, 570 F.2d at 735-36.

Also distinguishing admissions of a party-opponent from impeachment is McCormack on Evidence § 262 at 776 (Edward W. Cleary 3d ed. 1984), which states:

> [I]t is clear that admissions of a party come in as substantive evidence of the facts admitted, and that no foundation or predicate by first examining the party himself, as distinguished from the usual procedure for impeaching a witness by proof of his prior inconsistent statement, is a prerequisite for proof of admissions.

We took the same position in *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979). *Engel* involved an accident in which the truck of the plaintiff corporation went into the ditch as the defendant's car came into the passing lane in front of the truck. Engel testified at trial that he was in the passing lane before the truck. A patrolman testified that Engel told him that he started to pass a vehicle and did not see the truck already in the passing lane. The plaintiff also offered testimony from the passenger in Engel's car that Engel told him he owed the truckdriver his life. The court refused to admit the passenger's testimony.

In *Engel*, the trial court instructed the jury as follows:

> "You have heard testimony concerning statements allegedly made by a witness prior to this trial which may be inconsistent with his testimony at trial. This testimony has been admitted solely for impeachment purposes to aid you in estimating the credibility of the witness and to determine the weight to be given to his testimony. You may consider it for that limited purpose only and not as evidence of the facts declared in the prior statement."

(Emphasis omitted.) *Engel*, 204 Neb. at 635, 284 N.W.2d at

561.

We held that the testimony of the passenger should have been admitted because it was an admission of a party-opponent. "The admissions by a party to an action upon a material matter are admissible against him as original evidence." *Engel*, 204 Neb. at 636, 284 N.W.2d at 562. See, also, *Hyde v. Cleveland*, 203 Neb. 420, 279 N.W.2d 105 (1979). We also held that the jury instruction limiting consideration of Engel's inconsistent statements to impeachment was plain error.

The Engel situation presented much the same situation as that which is before us. In this case, the Gardners' testimony had an impeaching aspect, but was properly admissible as substantive evidence and would have been admissible even if plaintiff had never taken the stand. In the case before us, the court did admit that testimony as substantive evidence and did not instruct the jury to view the Gardners' testimony only for impeachment purposes.

Admissions of a party-opponent are admissible evidence and therefore discoverable under Neb. Ct. R. of Discovery 26(b)(1) (rev. 1989), even though they may be used for impeachment purposes. See *Ferlise v. Raznick*, 202 Neb. 745, 277 N.W.2d 94 (1979). We stated in *Ferlise*, " 'The applicable rule is that extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment.' " 202 Neb. at 748, 277 N.W.2d at 96 (quoting *Dorn v. Sturges*, 157 Neb. 491, 59 N.W.2d 751 (1953)). Simply because a party may choose to use the admissions as impeachment does not make the admissions any less discoverable.

Rule 26(b)(1) of the Nebraska Discovery Rules states, in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including . . . the identity and location of persons having knowledge of any discoverable matter.

Even if the Gardners' testimony was used only for impeachment purposes, defendant's counsel was required to disclose them as persons with knowledge of relevant facts. Rule 26 requires supplementation of interrogatories asking for persons with knowledge of relevant facts.

We discussed the policies served by a liberal discovery process in *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 536, 407 N.W.2d 146, 153 (1987):

> A purpose of the discovery process is exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. . . . Also, the discovery process provides adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case.

Norquay dealt with disclosing expert witnesses expected to be called at trial. Defendant contends that *Norquay* is distinguishable because it concerns an expert witness. This contention is without merit. Neb. Ct. R. of Discovery 27(e) (rev. 1989) states, in part:

> Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to
>
> (A) the identity and location of persons having knowledge of discoverable matters, and
>
> (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

Rule 26 states that a party has the same duty to supplement

discovery requests asking for the identity of persons with knowledge of discoverable matters as it has to supplement the testimony of experts expected to be called. *Norquay* is applicable to this case.

In *Norquay*, 225 Neb. at 538, 407 N.W.2d at 154, we stated:

> "For a party to sit idly by, knowing that a previous answer he has given in response to discovery is no longer truthful in the light of his present information, is intolerable. It is inconsistent with the purpose of the rules to avoid surprise and it is inconsistent with the standards of conduct that one expects in a learned and honorable profession." . . . "... With the expert witnesses, as with the persons having knowledge of discoverable facts, any change in plan would routinely come to the attention of the lawyers for the party and the burden of supplementation is very small."

We recognize that it is not always possible to know at a pretrial conference which witnesses may be needed for rebuttal. When need for a witness' testimony cannot be anticipated, the witness may be allowed to testify even if not disclosed in a pretrial order. See *Chicago Lumber Co. v. Gibson*, 179 Neb. 461, 138 N.W.2d 832 (1965). Those circumstances are not present in this case.

We hold that defendant's counsel did not comply with the applicable discovery rules when he failed to disclose the Gardners as witnesses who would be called and witnesses who had knowledge of facts of the incident. It is clearly no response to that duty to state, as did defendant's counsel, "You guys are in bed with Liberty Mutual, and if they didn't tell you about him, I mean, that's your problem, it ain't mine." It is not a question about whose problem it is; the concern is that lawyers follow the rules and orders of the court. As *Norquay* stated, " ' "[Such conduct] is inconsistent with the standards of conduct that one expects in a learned and honorable profession." ' " 225 Neb. at 538, 407 N.W.2d at 154.

Although defendant was guilty of misconduct in failing to supplement the responses to interrogatories, plaintiff failed to preserve the error for appeal. This court has held that a party who objects to certain evidence must preserve the error, stating:

> Ordinarily an objection must be made as soon as the applicability of it is known, or could reasonably have been known to the opponent. Objection to a witness' disqualification should ordinarily be made as soon as he is called to the stand, providing his disqualification is then known. See I Wigmore on Evidence (3d Ed.) § 18, p. 323. We see no reason why the same general rules should not apply to the introduction of testimony of a witness whose name has not been properly disclosed in answer to an interrogatory.
>
> While we in no sense attempt to explain the failure of counsel to disclose the names of the witnesses, it is still incumbent upon opposing counsel to make objection promptly. . . . Counsel should not be permitted to withhold objection, proceed with full and extensive cross-examination, and then decide whether or not the testimony was prejudicial.

Cardenas v. Peterson Bean Co., 180 Neb. 605, 612, 144 N.W.2d 154, 159 (1966).

In *Cardenas*, the defendant did not disclose the names of three witnesses in its answers to interrogatories. The witnesses testified to conversations had with the plaintiff. The plaintiff did not object, but cross-examined the witnesses and presented rebuttal evidence. At the conclusion of the case, in answer to a question, defendant's counsel stated he first knew of the witnesses 3 months before responding to the interrogatories. The plaintiff then moved to strike the testimony for the first time because the witnesses were not disclosed in the answers to interrogatories. The motion was denied as untimely, and the denial was affirmed in this court.

In *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984), the prosecutor adduced evidence on cross-examination that the defendant had previously committed a crime similar to that for which she was being tried. Her counsel did not object, and the prosecutor continued with the cross-examination. After commencing redirect examination, defense counsel moved for a mistrial and to strike the testimony. The court overruled both motions. This court held that the objection was not timely, stating:

> A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. . . .
>
> In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made. . . .
>
> When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial.

State v. Archbold, 217 Neb. at 352, 350 N.W.2d at 505.

The Gardners' disqualifications appear to have been known to plaintiff at the time of their testimony. The fifth question plaintiff's counsel asked Dan Gardner on cross-examination was: "Q, Now, your name hadn't been listed in any — well, strike that. You wouldn't know the answer to that. You've talked to Mr. Thomas about your testimony here before, you talked to him before it, haven't you?" It could fairly be deduced from that question that plaintiff's counsel knew, as he began his cross-examination, of Dan Gardner and that Gardner's name had not been listed in any documents submitted to plaintiff's counsel. Nonetheless, plaintiff's counsel continued his cross-examination without making any objection to Gardner as a witness.

The concept of objecting to the testimony of witnesses for the reason the witnesses were not listed by the opposing counsel was clearly not new to plaintiff's counsel. The first witness on the afternoon the Gardners testified was a witness called out of order by plaintiff. The testimony of this witness was objected to by defendant because "she was not disclosed as a witness to appear and testify on the Pre-trial Order and witnesses other than impeachment witnesses are required to be disclosed under the terms of that order . . . ." Plaintiff's counsel replied that the witness in question was "merely a foundational witness" and that plaintiff's counsel had given defendant's counsel "notice weeks before trial that we reserved the right to call foundational witnesses as necessary . . . ." The trial court overruled the

objection. Plaintiff's counsel was well aware of the opportunity to object to testimony of an unlisted witness.

In addition, we note that after the Gardners' testimony but before the objection to their testimony, another witness testified for defendant and two witnesses testified for plaintiff. In connection with the second of these two witnesses, plaintiff attempted to adduce evidence from Thomas Rowen. As stated above, the majority of Rowen's testimony is before this court in the form of an offer of proof. In that offer, plaintiff set out a scenario which, if admissible and if believed by the jury, would have been helpful to plaintiff's case. The scenario indicated that Christine Gardner had previously testified against her father's interest at the request of John Thomas, and she was not listed as a witness in that case either. It was only after the trial court sustained defendant's objections to that testimony, that plaintiff sought a mistrial.

In *State v. Groves*, 239 Neb. 660, 673, 477 N.W.2d 789, 799 (1991), we stated: "The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion." That holding was set out in a criminal case, but we hold it applies in a civil case as well. To hold otherwise in this case would further reduce this trial to a game of chance, as criticized in *State v. Welsh*, 232 Neb. 219, 440 N.W.2d 225 (1989) (White, J., dissenting).

In this case it is not beyond the bounds of the trial court's discretion to determine that plaintiff took a calculated risk in trying to adduce evidence attacking the testimony of the Gardners and, when not totally succeeding in that approach, to then move for a mistrial or to strike. The trial court did not abuse its discretion in denying plaintiff's motions.

In light of our holdings on these issues, we do not reach the plaintiff's other assignments of error. We affirm.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, ON BEHALF OF THE MINOR CHILD J.R., APPELLEE, V. JOSE MENDOZA, APPELLANT.

481 N.W.2d 165

Filed March 6, 1992. No. S-89-494.

1. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
2. **Parties: Appeal and Error.** When the determination of a controversy is impossible without the presence of other parties, the district court must order them brought in and failure to do so is reversible error.
3. **Collateral Estoppel.** The doctrine of collateral estoppel only applies if four conditions are met: (1) The identical issue was decided in a prior action, (2) there was a final judgment on the merits, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
4. **Paternity: Child Support: Parties.** In a filiation proceeding commenced by the State for the purpose of obtaining a support order against the alleged biological father of a child born out of wedlock, the husband of the child's mother is not an indispensable party.
5. **Statutes: Legislature: Intent.** Statutes relating to the same subject matter are in pari materia, and this court will construe them together so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme.
6. **Paternity: Child Support: Evidence.** In a filiation proceeding for support of a child born out of wedlock, evidence of the performance of acts described in the acknowledgment statute is not conclusive on the trier of fact, but constitutes relevant evidence of the child's paternity.
7. **Estoppel.** The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
8. _____. In general, estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deed, acts, or representations.
9. **Paternity: Estoppel: Proof.** Proof that the stepfather of a child born out of wedlock held himself out as the child's natural father and acknowledged such a

relationship in sworn documents does not estop the State from pursuing an action for support against the putative father.

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

Kevin Ruser for appellant.

Gary E. Lacey, Lancaster County Attorney, James P. Rocke, Douglas D. Cyr, and Andrew R. Jacobsen for appellee.

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

WHITE, J.

NATURE OF THE CASE

This is a paternity suit commenced by the Lancaster County Attorney, pursuant to Neb. Rev. Stat. § 43-512.03 (Reissue 1984). In its petition the State alleges that P.C. is receiving public assistance, commonly known as ADC payments, on behalf of her minor child J.R. The petition further alleges that the defendant-appellant, Jose Mendoza, is the natural father of J.R. The State therefore seeks a judgment to that effect and an order requiring the defendant to support the child.

The defendant answered, denying he is the child's father. He later moved for an order joining Jesus S. Castillo, P.C.'s husband at the time of trial, as an indispensable party to the suit. The trial court overruled this motion, as well as the defendant's motion for summary judgment, and the case proceeded to trial on February 9, 1989. On April 24, the trial court entered an order finding that the defendant is the father of J.R. and thus obligated to support him. On May 24, the court held a hearing on the defendant's financial status and entered a decree ordering the defendant to pay $175 per month in child support and to provide health insurance for the child if available to the defendant through his employer or any other organization. From this decision the defendant appeals.

STATEMENT OF THE FACTS

The record reveals that P.C. met the defendant sometime in 1980. They engaged in sexual intercourse regularly between April and September 1981, without availing themselves of any

form of birth control. P.C. testified that during this time period she did not engage in intercourse with anybody except the defendant.

P.C. took a pregnancy test in May 1981, which the defendant paid for. The results were positive. When P.C. told the defendant she was pregnant, he first responded with profanity and then requested that she name the child after him if it was a boy. P.C. gave birth to J.R. on March 3, 1982. The defendant visited P.C. at the hospital that day, held the boy, and said the boy was beautiful. P.C. testified that the defendant admitted on several occasions to fathering the child. She also testified that the defendant bought food and diapers and provided money to buy clothes for the boy. During the summer of 1982, the defendant paid a $100 deposit so that P.C. and the child could move into an apartment in the same building he lived in. P.C. testified that the defendant did so because he wanted to get to know his son and that the defendant took care of the boy when she was gone.

P.C. married Castillo on February 11, 1983. Three children were born of the marriage, and Castillo supported them, as well as J.R., by providing them food, clothes, and shelter. Castillo showed affection for J.R. and bought him Christmas and birthday presents. There is evidence that J.R. regards Castillo as his father and calls him "Daddy."

On August 2, 1984, Castillo signed a sworn "Application for Immigrant Visa and Alien Registration." In response to a question asking for the names, addresses, and dates and places of birth of all "children," the name of J.R. is listed. Castillo testified, however, that somebody else added this information after he signed the form. Further, on September 18, 1985, Castillo signed a notarized document acknowledging himself as J.R.'s biological father, this time for the purpose of acquiring a new birth certificate reflecting the child's name as "Jose de Jesus Castillo" and himself as the father. See Neb. Rev. Stat. § 71-628 (Reissue 1990).

Despite these documents, both P.C. and Castillo testified at trial that Castillo is not J.R.'s natural father. Further, pursuant to the State's motion, blood tests were taken of P.C., Castillo, the defendant, and the boy. A doctor testified that based on

these tests, Castillo is not the boy's natural father. The same doctor also testified that based on a "combined paternity index," there is a probability of 98.23 percent that the defendant fathered the child.

ASSIGNMENTS OF ERROR

On appeal, the defendant argues that the trial court erred in (1) failing to find that Castillo's actions acknowledging J.R. as his son bar this suit and (2) failing to grant his motion to join Castillo as an indispensable party.

CASTILLO AS A NECESSARY PARTY

In Nebraska,

> " ' " 'Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . .' " ' "

Helter v. Williamson, 239 Neb. 741, 743, 478 N.W.2d 6, 7 (1991), quoting *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987). When the determination of a controversy is impossible without the presence of other parties, the district court *must* order them brought in. See Neb. Rev. Stat. § 25-323 (Reissue 1989). Therefore, if Castillo is an indispensable party to this suit, the trial court committed reversible error in denying the defendant's motion to join him.

The defendant argues that our decision in *Helter* requires a holding in this case that Castillo is a necessary party. *Helter* involved a custody suit in which the plaintiff Helter claimed to be the biological father of a child conceived and born during the marriage of Margaret and Tracy Williamson. Though Margaret Williamson did not deny the plaintiff's assertion that he fathered the child, she was awarded custody. This court reversed and remanded with directions to join Tracy Williamson as an indispensable party. The court based its decision on the ancient presumption that children born during a marriage are legitimate, noting that "[t]he presumption prevents nonparents from arriving on the scene, either during

or after the marriage, and staking claims, parental visitation rights, and responsibilities without the knowledge or consent of the true parent." *Helter*, 239 Neb. at 743, 478 N.W.2d at 8.

The defendant's reliance on *Helter* is misplaced. There, the plaintiff sought a determination of paternity for the purpose of establishing his parental right to custody of the child. Because awarding custody to the plaintiff would dramatically affect the presumed father's legal interest in custody, we held that it was necessary to join the presumed father to adequately protect this important interest. In this case, however, the State seeks a determination of paternity for the sole purpose of obtaining support payments from the defendant. The State's interest is primarily financial, in that it is attempting to recoup moneys paid out of public coffers to support the child from the party morally responsible for that support. See Neb. Rev. Stat. § 43-512.07 (Supp. 1991) (acceptance of aid to dependent children payments by a parent constitutes an assignment of the right to support payments to the Department of Social Services up to the amount paid).

An order obligating the defendant to make periodic support payments in no way prejudices Castillo's legal interests. As noted in the plurality opinion by Justice Scalia of the U.S. Supreme Court in *Michael H. v. Gerald D.*, 491 U.S. 110, 126, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989):

> [W]hat is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration. What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*.

(Emphasis in original.) Though asserted in a slightly different context, Justice Scalia's reasoning is directly applicable here. The opportunity to contest the paternity of a child is only meaningful as it relates to the legal consequences which flow from such a determination. In *Helter*, the presumed father had a vital interest in contesting the issue of paternity only because determination of that issue could have substantially affected his parental prerogative of child custody. Here, however, Castillo's

parental prerogatives are not at stake. No rights of visitation or custody are at issue, and an award of the relief sought in no way alters Castillo's obligation to support the child. See Neb. Rev. Stat. § 28-705(1) (Reissue 1989) (making it a crime to abandon or neglect a dependent stepchild, even if the child was born out of wedlock).

Not only is there no effect on Castillo's interests from a finding of paternity in this case, but such a finding does not preclude him from relitigating the issue in a future lawsuit which does affect his interests. In *Comr. of Public Welfare v. Koehler*, 284 N.Y. 260, 30 N.E.2d 587 (1940), the New York Court of Appeals held that neither the child nor the husband of the mother is a necessary party to a paternity proceeding. In so doing, the court reasoned that

> [t]he order made in such a proceeding does not constitute an adjudication binding on them or persons claiming through or under them that the child is or is not the legitimate offspring of married parents. An order adjudging that some person other than the mother's husband is the father of the child and ordering him to provide for its support is, it is plain, not a binding adjudication of illegitimacy. It does not establish the status of the child nor would it be competent evidence to establish illegitimacy in any proceeding to which others are parties.

Id. at 267, 30 N.E.2d at 590-91. This reasoning clearly applies in Nebraska as well.

In Nebraska, the doctrine of collateral estoppel applies only if four conditions are met: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party *against* whom the rule is applied was a party or in privity with a party to the prior action, *and* (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *In re Applications of Nebraska P.P. Dist.*, 215 Neb. 8, 337 N.W.2d 107 (1983). Therefore, a finding in this case that the defendant fathered the child could not be asserted *against* Castillo in a subsequent suit in which his legal interests hinged on a finding of paternity. For example, should J.R. later die intestate, the finding made in this case would not prevent

Castillo from asserting a claim for a share of the estate and relitigating the issue of paternity. The same is true should Castillo wish to assert rights of visitation or custody based on the allegation that he fathered the child.

To be sure, the defendant could have admitted paternity, willingly accepted his support obligation, and sought rights of visitation, custody, or a change of the child's surname. See, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981) (in a paternity suit issues of custody and visitation fall within the general equity jurisdiction of the district court); *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988) (a court exercising jurisdiction in a filiation proceeding has the discretion to change the child's surname from that of the mother to that of the natural father). Such a case would present an altogether different question as to the necessity of joining Castillo.

Though the trial court denied the defendant's motion to join Castillo as an indispensable party, it did order that the State serve him with notice of the pendency of the suit. Though he at all times retained the right to intervene, he did not do so. See Neb. Rev. Stat. § 25-328 (Reissue 1989). His failure to do so is further indication that his legal interests are simply unaffected by this lawsuit. He and P.C. already knew that he did not father the child; they admitted as much at trial. As discussed above, no rights regarding custody, visitation, or the name of the child are at issue here—only the financial obligation of the defendant to contribute to the child's support. Because the imposition of such an obligation could in no way prejudice Castillo, he is not a necessary party to this suit. The defendant's second assignment of error is without merit.

EFFECT OF CASTILLO'S WRITTEN ACKNOWLEDGMENT OF PATERNITY

For his first assignment of error, the defendant argues that the State is estopped from pursuing this action. Subsumed in the defendant's first assignment of error is an argument regarding the effect of Neb. Rev. Stat. § 43-1409 (Reissue 1988). The statute provides in part that

> [a] person may state in writing that he is the father of a child or perform acts, such as furnishing of support,

> which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child.

The defendant insists § 43-1409 must be read in conjunction with Neb. Rev. Stat. § 43-1406 (Supp. 1991), which provides that "[t]he father of a child whose paternity is established either by acknowledgment or by a judicial proceeding as hereinafter specified . . . may be made the defendant in an equitable proceeding for the support of the child."

From these statutory provisions, the defendant constructs the following argument: (1) The father of a child born out of wedlock is liable for the child's support; (2) a man may become the "legal father" of a child born out of wedlock either through a formal court proceeding or by acknowledgment; (3) Castillo, by signing the birth certificate and immigration forms and providing support for the child, became J.R.'s legal father by acknowledgment; (4) a child may not have more than one father; and therefore (5) Castillo is obligated to support the child and the defendant is not.

In support of this argument the defendant cites *Sanders v. Sanders*, 384 Pa. Super. 311, 558 A.2d 556 (1989). In that case Ernestine Sanders divorced James Walker and, in 1972, obtained a consensual support order regarding a child born during the marriage. In 1985, Ernestine Sanders filed a complaint seeking support of the same child against Mike Sanders, alleging that he in fact fathered the child. The trial court ordered blood tests, and Mike Sanders objected. Mike Sanders ultimately appealed from an order holding him in contempt for refusing to submit to the blood tests.

The Pennsylvania Superior Court reversed the trial court's contempt order. In so doing, the court held that the doctrine of collateral estoppel barred relitigation of the paternity issue. The court stated:

> Although it is certainly possible that Sanders is the child's biological father, once paternity in Walker had been determined as a matter of law, paternity was no longer a relevant fact. A mother simply cannot attempt to establish paternity in someone after paternity has already been

> established under the law; she cannot seek and receive child support from two men for the same child. This is a legal impossibility.

Sanders, 558 A.2d at 560.

Here, the defendant argues that because § 43-1409 provides for the establishment of paternity by either judicial proceeding *or* acknowledgment, Castillo's acknowledgment of parenthood should have the same preclusive effect in this case as the prior judicial proceeding had in *Sanders*. The defendant's argument raises the issue of whether a sworn acknowledgment of paternity filed with the department of vital statistics for purposes of obtaining a new birth certificate conclusively establishes the party executing it as the child's "legal father." For the following reasons we decline to give such an acknowledgment conclusive effect.

The defendant relies heavily on Nebraska's "long-standing public policy" of preventing the bastardization of children in asserting his interpretation of § 43-1409. Brief for appellant at 18. Though certainly an important consideration, the defendant's argument overstates the significance of this policy in construing the statute.

The Louisiana Supreme Court addressed a similar issue in *Smith v. Cole*, 553 So. 2d 847 (La. 1989). There, Ledora Smith married Henry Smith in 1970. In 1974 they separated, and Ledora Smith began living with Playville Cole. The following year Ledora Smith gave birth to a child. The child's birth certificate named Henry Smith as the child's father. The Smiths divorced in 1978, and Ledora Smith subsequently brought suit against Cole seeking a determination of paternity and a support order for the child. The trial court dismissed the suit on grounds that a mother cannot rebut the presumption that the husband of the mother at the time of conception is the child's father, and thus bastardize the child, for purposes of obtaining a support order. An intermediate court of appeals reversed the trial court's decision, and Cole appealed.

On appeal, the state's highest court affirmed the decision of the court of appeals and reinstated the mother's cause of action. The court recognized the historic vitality of the presumption of legitimacy as a buffer against the harsh social and legal

consequences of illegitimacy. However, the court recognized that decisions of the U.S. Supreme Court prohibiting discrimination against illegitimate children have "weathered away" the legal disadvantages of illegitimacy. *Id.* at 850 n.4 (citing *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); and *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973)). The court also noted decisions affording greater protection to the rights of biological fathers who establish actual relationships with children born out of wedlock. *Smith*, 553 So. 2d at 851 (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979); and *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983)). But, cf., *Michael H. v. Gerald D.*, 491 U.S. 110, 123, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989) (rights of putative fathers of children born out of wedlock rest upon historic respect traditionally accorded relationships that develop within the unitary family and not upon a simple "biological fatherhood plus" test).

Given these trends in the law, the Louisiana court concluded that public policy favors a "dual paternity" scheme in which the mother of a child born out of wedlock may bring a filiation proceeding for support against a putative father despite the existence of another "legal father." The lack of significant legal consequences of such a determination, combined with the inequity of granting biological fathers certain rights without also imposing on them certain responsibilities, convinced the court to embrace such a scheme. The court stated:

> The presumption was intended to protect innocent children from the stigma attached to illegitimacy and to prevent case-by-case determinations of paternity. It was not intended to shield biological fathers from their support obligations. . . . The presumed father's acceptance of paternal responsibilities, either by intent or default, does not enure to the benefit of the biological father. It is the fact of biological paternity or maternity which obliges parents to nourish their children.

Smith, 553 So. 2d at 854. See, also, *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (abrogating proof beyond a reasonable doubt standard for rebutting the presumption of legitimacy in light of improving legal position of children born out of wedlock and greater recognition of rights of unwed putative fathers).

As the Louisiana and Massachusetts Supreme Courts have recognized, the legal status of children born out of wedlock is much more favorable today than in the past. Thus, the necessity of indulging in legal fictions in order to steadfastly protect their legal status is somewhat lessened. See, e.g. Neb. Rev. Stat. § 30-2309 (Reissue 1989) (establishing standard by which children born out of wedlock may prove paternity for purposes of intestate succession). This trend in the law, combined with the inequity of granting biological fathers of children born out of wedlock extensive rights without imposing on them corresponding responsibilities, indicates that concerns regarding the stigma of illegitimacy should not outweigh the primary purposes of the filiation statutes: identifying the biological fathers of children born out of wedlock and imposing on them an obligation of support. See, *Race v. Mrsny*, 155 Neb. 679, 53 N.W.2d 88 (1952) (the primary objective in a paternity proceeding is to secure the support of the child); *Gomez v. State ex rel. Larez*, 157 Neb. 738, 61 N.W.2d 345 (1953) (presumption that husband of mother of child at time of conception is the biological father does not deprive district courts of jurisdiction in a paternity proceeding against another man).

Not only does the defendant overstate the modern importance of preventing the "bastardization" of children, but he ignores the countervailing policy implications of his proposed interpretation.

In *Remkiewicz v. Remkiewicz*, 180 Conn. 114, 429 A.2d 833 (1980), Linda Remkiewicz gave birth to a child while married to Eldridge Harris. Subsequently, Linda Remkiewicz divorced Harris and married Edwin Remkiewicz. Edwin Remkiewicz filed an affidavit of parentage with the bureau of vital statistics to obtain a new birth certificate listing the child's surname as Remkiewicz. Until his divorce from Linda in 1975, Edwin

Remkiewicz treated the child as his own and the child regarded him as her father. When the Remkiewicz' filed for divorce, the state intervened, seeking an order of support for the child because Linda Remkiewicz was receiving welfare payments. The trial court dismissed the state's petition because Edwin Remkiewicz was neither the natural nor the adoptive parent of the child and thus not liable for her support after his divorce from the mother. The state appealed.

The Connecticut Supreme Court affirmed the trial court's decision, rejecting the state's argument that the affidavit of parentage conclusively established Edwin Remkiewicz as the child's father. The court held that the affidavit, though relevant evidence of paternity, was not conclusive and therefore subject to explanation by the party making it. In so doing, the court responded to the state's argument that the public policy against bastardizing children should prevent a court from going behind a written acknowledgment of paternity:

> In this case, however, public policy cuts two ways. The adoption statutes contained in chapter 778 of the General Statutes express a legislative intent that no person shall acquire parental status unless certain formalities are observed. A parent has rights as well as duties. If a stepfather could acquire parental rights through the simple expedient of changing his stepchild's birth certificate, all sorts of mischief could result. If the state commissioner of income maintenance wishes to impose obligations of support on persons who acknowledge paternity in writing . . . the legislature is the appropriate forum to consider his concerns.

Remkiewicz, 180 Conn. at 120, 429 A.2d at 836-37. See, also, *Byers v. Byers*, 618 P.2d 930 (Okla. 1980) (the fact that a stepfather takes the child into his home does not relieve the biological father of his overriding obligation of support; "adoption by acknowledgment" statute applies only to biological fathers); *Mace v. Webb*, 614 P.2d 647 (Utah 1980) (defendant not liable for support of child based on acknowledgment statute where blood tests conclusively exclude him as the natural father because the adoption statutes are the only means of establishing a father-child relationship between

blood strangers); *Chambers v. Chambers*, 43 N.C. App. 361, 258 S.E.2d 822 (1979) (legitimation statute is not intended to provide a means of circumventing the adoption statutes).

We agree with those courts which refuse to give conclusive effect to written acknowledgments of paternity based on the inconsistency of such an interpretation with the legislative policy of prescribing rigorous procedures for adoption. See Neb. Rev. Stat. § 43-101 et seq. (Reissue 1988 & Cum. Supp. 1990). Statutes relating to the same subject matter are in pari materia, and this court will construe them together so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme. *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *Georgetown Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). Under the defendant's interpretation of § 43-1409, a person could establish a paternal relationship with a child, with all its attendant rights and responsibilities, by simply signing an acknowledgment of paternity form before a notary public. Such an interpretation not only makes it too easy to establish a permanent parent-child relationship for those wishing to do so, but also could have the effect of discouraging voluntary support of illegitimate children or stepchildren by men wishing to avoid becoming permanently obligated. See *Mace, supra*.

The plain language of § 43-1409 also fails to support the defendant's interpretation. The statute encompasses both a formal written acknowledgment of paternity and an informal acknowledgment through the performance of certain acts. Each is given the same legal effect under the statute. Thus, even without acknowledging his paternity in writing, Castillo's performance of such acts as taking J.R. into his home, treating the child as his own, and providing the boy food and clothing conclusively established him as the child's legal father under the defendant's interpretation of § 43-1409. Again, such an interpretation is flatly inconsistent with legislation imposing civil and criminal liability on stepparents who fail to support their stepchildren. See Neb. Rev. Stat. § 43-512.01 (Reissue 1988) (authorizing action against nonsupporting parent *or* stepparent of dependent child); § 28-705(1) (making it a crime

to abandon or neglect a dependent stepchild, even if the child was born out of wedlock). By requiring a stepfather to support his stepchild, the Legislature surely does not intend to confer on him permanent status as the child's legal father. See *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991) (a stepfather has no duty to support a child after he divorces the child's mother unless he maintains an "in loco parentis" relationship).

Significantly, some state legislatures do distinguish between a formal written acknowledgment of paternity and informal acknowledgment through the performance of certain acts, according only the former the conclusive effect of a judgment. See, e.g., Conn. Gen. Stat. § 46b-172a (Supp. 1991) (written acknowledgment of paternity executed by putative father and filed with the superior court has the same force and effect as a judgment of that court); La. Civ. Code Ann. art. 209 (West. Supp. 1992) (acknowledgment of illegitimate child before a notary public eliminates necessity of child's proving paternity in a filiation proceeding). Similarly, Minnesota and Ohio provide that an acknowledgment of paternity made in writing and filed with the registrar of vital statistics by a man who marries the mother of the child after the child's birth creates a presumption of biological paternity. See Minn. Stat. § 257.55(1)(c)(1) (Supp. 1992); Ohio Rev. Code Ann. § 3111.03(A)(3)(a) (Anderson Supp. 1991). In the absence of such a distinction between formal and informal acknowledgments in the Nebraska statutes, we do not think the Legislature intended to give either form of acknowledgment conclusive effect.

Finally, the conclusion that a written acknowledgment of paternity is not binding in a filiation proceeding is supported by this court's decision in *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985). There, the putative father of a child born out of wedlock petitioned for visitation with the child. Four years earlier he had specifically denied paternity in a suit by the mother for support. The parties eventually settled the first case " 'without admission of paternity.' " *Id.* at 159, 376 N.W.2d at 4. Based upon that disposition, the trial court granted the mother's motion for summary judgment in the second case and dismissed the putative father's application for visitation.

On appeal, the putative father argued that his actions since the earlier settlement established him as the child's "father" under the acknowledgment statute. This court rejected that argument, noting the absence of any judicial determination of paternity. The court specifically noted, "If it need be said, we now say that in a paternity action the court may award visitation to the alleged father *only if the court determines that the alleged father is indeed the father.*" (Emphasis supplied.) *Id.* at 163, 376 N.W.2d at 7. The court concluded that because the putative father was estopped from asserting his paternity after specifically denying it in a previous case, no such judicial determination existed or could exist and thus affirmed the trial court's decision. See, also, *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957) (the provisions of the acknowledgment statute define what may be regarded as satisfactory proof in a proceeding to establish paternity).

Enacted in an era characterized by legal hostility toward illegitimate children, during which scientific methods for determining paternity were lacking, statutes like § 43-1409 were designed to facilitate the legitimation of children born out of wedlock. See, *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990); *Chambers v. Chambers*, 43 N.C. App. 361, 258 S.E.2d 822 (1979). They did so by creating a legal fiction that the child of parents who marry subsequent to the child's birth is legitimate. Recognizing that those with an interest in establishing the child's illegitimacy would question the father's paternity in such cases, these statutes armed the child and the father with evidence of a biological relationship based on the performance of certain acts. In so doing, they protected the rights associated with biological parenthood for those willing to accept its responsibilities. See *Chambers, supra.*

From all of the above, it is evident that § 43-1409 is designed to aid courts in identifying the biological fathers of children born out of wedlock. We reject the defendant's disingenuous attempt to turn the statute on its head and use it to impose upon J.R.'s stepfather obligations the defendant properly bears as the child's biological father. We therefore hold that in a filiation proceeding for support of a child born out of wedlock, evidence of the performance of acts described in § 43-1409 is not

conclusive on the trier of fact, but constitutes relevant evidence of a biological relationship. Therefore, the district court did not err as a matter of law in finding that the defendant is J.R.'s natural father.

APPLICABILITY OF THE "PATERNITY BY ESTOPPEL" DOCTRINE

With regard to the remainder of the defendant's first assignment of error regarding the doctrine of "paternity by estoppel," it is argued that the doctrine requires proof of three elements: "(1) misrepresentation; (2) justifiable reliance by another; and (3) detriment." Brief for appellant at 14. The defendant goes on to argue that he satisfied these elements by showing that Castillo made numerous misrepresentations regarding his relationship to J.R., that the child relied on these misrepresentations, and that detriment to the child would occur if the State is allowed to prove the defendant is actually the child's natural father.

The doctrine of paternity by estoppel involves the application of established principles of equitable estoppel in the context of paternity determinations. See *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961). Recently, this court noted:

> The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

State v. Nebraska Assn. of Pub. Employees, 239 Neb. 653, 659-60, 477 N.W.2d 577, 582 (1991). In general, estoppel is a bar which precludes a *party* from denying or asserting anything to the contrary of those matters established as the truth by his own deed, acts, or representations. *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989).

Based on the above, the obvious weakness in the defendant's theory is that the person he alleges engaged in misrepresentations, Castillo, is not a party to this suit. See *Baker by Williams v. Williams*, 503 So. 2d 249 (Miss. 1987) (refusing to apply doctrine of res judicata to bar child's paternity suit against her mother's current husband based on the mother's position in prior divorce suit that her first husband was the father). In this important sense this case is distinguishable from many of those cited in the defendant's briefs. As the doctrine of estoppel acts to preclude a *party* to the suit from taking a position contrary to that taken previously, it is inapplicable in this case.

Not only is the doctrine of equitable estoppel technically inapplicable to this suit, but it is questionable whether the doctrine would apply even if the correct parties were present. In *Knill v. Knill*, 306 Md. 527, 510 A.2d 546 (1986), the Maryland Court of Appeals discussed the trend toward applying the doctrine in divorce suits to estop the man from denying paternity and avoiding a support obligation after holding himself out as the child's father for many years. Though recognizing cases applying the doctrine based on the emotional harm the child could suffer if paternity is denied, the court stated that the majority of courts do not apply the doctrine. Following this "majority," the court held that the doctrine applies only if the acts of the reputed father interfere with the child's ability to seek financial support from his or her natural parent, upon whom is placed the primary obligation of support. Because the parties in *Knill* always knew who the true father was and he was at all times available for process and financially able to support the child, the court refused to apply the doctrine in that case.

Here, the parties were at all times aware of the identity of J.R.'s natural father. Moreover, there is no evidence of the

defendant's unavailability or inability to fulfill his support obligations, or of Castillo in any way interfering with the child's, P.C.'s, or the State's ability to file suit against the defendant for support. The *Knill* court held that the doctrine of equitable estoppel applies only if the child suffers *financial* detriment as a result of his reliance on the reputed father's representations of paternity.

Without deciding whether this court would ever apply the doctrine of paternity by estoppel when the child has suffered no financial detriment, we hold that the doctrine is inapplicable in this case, and therefore the defendant's first assignment of error also lacks merit. Accordingly, the decision of the district court is affirmed.

AFFIRMED.

KAYE METREJEAN, APPELLANT, V. FRANK O. GUNTER, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

481 N.W.2d 176

Filed March 6, 1992. No. S-89-732.

1. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
2. _____: _____. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
3. **Motions for New Trial: Time: Appeal and Error.** An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
4. **Jurisdiction: Motions for New Trial: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1989), an appellate court acquires jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of Neb. Rev. Stat. § 25-1912 (Reissue 1989) have been satisfied for appellate review of a final order, decision, or verdict in the trial court.

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

J. Murry Shaeffer for appellant.

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

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

SHANAHAN, J.

Kaye Metrejean commenced an action in the district court for Lancaster County regarding disciplinary action taken by Frank O. Gunter, director of the Nebraska Department of Correctional Services, and Gary Burger, personnel officer of the Nebraska Department of Correctional Services, against Metrejean, a correctional officer at the Nebraska Center for Women.

On June 16, 1989, the district court sustained the Gunter-Burger demurrer to Metrejean's third amended petition and dismissed the action when Metrejean elected to stand on her pleading. See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991) (dismissal of an action after a demurrer has been sustained to a petition without repleading is a final order). See, also, *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991). Metrejean, on June 27, filed a motion for new trial, which the district court overruled on July 12. Thereafter, on July 26, Metrejean filed her notice of appeal to this court and claims that the district court erred by sustaining the demurrer.

Jurisdiction is a prerequisite for this court's consideration of Metrejean's appeal. See *In re Interest of B.M.H.*, 233 Neb. 524, 527, 446 N.W.2d 222, 224 (1989) ("[a]n appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction"). See, also, *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991) (absence of appellate jurisdiction requires dismissal of an appeal).

On this court's own motion, we examine whether jurisdiction exists to review the judgment which is the subject of Metrejean's appeal. See Neb. Ct. R. of Prac. 7A(2) (rev. 1989) (summary disposition on Supreme Court's own motion—absence of appellate jurisdiction). An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction. See, *Wicker v. Waldemath, supra*;

Larsen v. Ralston Bank, 236 Neb. 880, 464 N.W.2d 329 (1991).

Neb. Rev. Stat. § 25-1912(1) (Reissue 1989) prescribes the time within which a notice of appeal must be filed to vest jurisdiction in this court, namely:

> [P]roceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

Section 25-1912(2) provides: "The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143, if such motion is filed by any party within ten days after the verdict, report, or decision was rendered . . . ." See, also, Neb. Rev. Stat. § 25-1143 (Reissue 1989) (an application for a new trial must be made within 10 days after the verdict or decision is rendered).

> If a motion for new trial, authorized by law, has been filed within 10 days of a decision (see Neb. Rev. Stat. § 25-1143 . . . and § 25-1912(2)), the motion for new trial suspends the time limit for filing a notice of appeal. When the motion for new trial has been disposed of by the court rendering the decision, appellate jurisdiction is vested in the Supreme Court by compliance with the provisions prescribed by § 25-1912, i.e., timely notice of appeal and deposit of docket fee.

In re Interest of B.M.H., 233 Neb. at 526-27, 446 N.W.2d at 224.

Metrejean's motion for new trial was filed 11 days after the district court entered its order sustaining the demurrer and, hence, was filed after the 10-day period statutorily allowed for filing a motion for new trial. See §§ 25-1143 and 25-1912(2). An untimely motion for new trial is ineffectual, does not toll the

time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. See *In re Interest of B.M.H., supra*. See, also, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990) (motion for new trial not filed within 10 days is a nullity and does not extend time for filing a notice of appeal). Therefore, Metrejean's motion for new trial is a procedural nullity.

Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1989) provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." Pursuant to § 25-1912.01(1), an appellate court acquires jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of § 25-1912 have been satisfied for appellate review of a final order, decision, or verdict in the trial court. See *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989). See, also, *State v. Turner*, 221 Neb. 132, 375 N.W.2d 154 (1985).

In the present appeal, without a timely motion for new trial, Metrejean had 30 days from June 16, 1989, to perfect her appeal. See § 25-1912(1). Metrejean's notice of appeal, filed on July 26, 1989, was undeniably filed beyond the 30-day limit for filing a notice of appeal.

> It is mandatory and jurisdictional that the notice of appeal be filed within the time required by statute; where a notice of appeal is not filed within 30 days from the entry of the final order appealed from, as required by § 25-1912(1), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

State v. Flying Hawk, 227 Neb. 878, 880, 420 N.W.2d 323, 324 (1988). See, also, *In re Interest of B.M.H., supra*.

Because Metrejean failed to comply with the requirements of § 25-1912(1) for appellate jurisdiction, this court is without jurisdiction to review the district court's judgment; therefore, Metrejean's appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. TERRY G. STUEBEN, APPELLANT.

481 N.W.2d 178

Filed March 6, 1992. No. S-90-922.

1. **Evidence: Other Acts.** Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
2. **Rules of Evidence: Appeal and Error.** To determine whether unfair prejudice existed in the admission of evidence, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.
3. **Self-Defense.** The principle which underlies the rule of justification of bodily force is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any man that he is in danger of death or bodily harm.
4. **Sentences: Probation and Parole.** A sentencing court may impose any conditions of probation that are authorized by statute.
5. **Restitution: Sentences.** Regarding restitution as a criminal penalty, the statutory limitation on the potential criminal fine is not to be equated with the maximum restitution that may be ordered to be paid.

Appeal from the District Court for Dawes County, PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Dawes County, JAMES T. HANSEN, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and, on brief, Susan M. Ugai for appellee.

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

WHITE, J.

Appellant, Terry G. Stueben, was found guilty by a county court jury of the criminal offense of assault in the third degree, a Class I misdemeanor, in violation of Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1989). He was sentenced to a term of 2 years on probation, including a requirement that he participate in alcohol counseling, and ordered to pay $15,000 in restitution,

payable in monthly $250 installments over a 5-year period. Third degree assault is punishable by no more than 1 year's imprisonment, a $1,000 fine, or both. Stueben appealed to the district court for Dawes County, which affirmed the judgment and sentence of the county court in its entirety. He appeals to this court.

Appellant had been consuming beer with some acquaintances at a bar when one of the women, Susan Reynolds, suggested that they gather at her home for more drinks and snacks. Appellant accepted the invitation and stayed at the residence for roughly 45 minutes. He left the party, returned a short while later, and reentered the residence unannounced. Inside, he found Reynolds seated on the couch, and the victim, Donald Sheneman, another male guest, seated on the floor, facing away from Stueben.

Both Reynolds and Sheneman testified that, without apparent provocation, appellant punched Sheneman in the jaw, breaking Sheneman's jaw in two places, and left.

At trial, the county court judge refused to allow two of appellant's proposed jury instructions: one regarding the presumption of innocence in the event that two constructions may be derived from the same evidence and the other regarding self-defense as a justification for appellant's use of force.

ASSIGNMENTS OF ERROR

Stueben's assigned errors may be summarized as follows: The trial court erred in (1) receiving rebuttal evidence offered by appellee which was unfairly prejudicial, (2) denying two of appellant's proposed jury instructions, and (3) assessing restitution.

REBUTTAL EVIDENCE

"Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court." *State v. Jacobs*, 226 Neb. 184, 192, 410 N.W.2d 468, 474 (1987).

To determine whether unfair prejudice existed in the admission of evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1989), an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper

purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). See, also, *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

Appellant contends that the court unfairly admitted testimony that implied a romantic relationship between the appellant and Reynolds. The purpose of the testimony is clear on the record as a relevant rebuttal of a material defense assertion regarding motive. The testimony was intended to rebut appellant's position that he had struck Sheneman in self-defense. The evidence was relevant in that it tended to show the victim was struck in a fit of jealousy and not in self-defense. The assignment is without merit.

JURY INSTRUCTIONS

As we stated in *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983), when an applicable jury instruction may be derived from the Nebraska Jury Instructions, that is the instruction which should be given to the jury.

Appellant's proposed jury instruction No. 13 provided:

> If the evidence or any material part of it is susceptible of two constructions, one in favor of the State, and the other in favor of the Defendant, Terry Stueben, the doubt must be resolved in behalf of the innocence of the Defendant, as every intendment or inference under the evidence, considered in its entirety, must be construed in his behalf.

This instruction, according to appellant, directly correlates with NJI 14.07. NJI 14.07 was incorporated in instruction No. 1, which stated, in part, "The Defendant has pleaded not guilty. He is presumed to be innocent. That means you must find him not guilty unless you decide that the State has proved him guilty beyond a reasonable doubt."

Not only was NJI 14.07 the more appropriate instruction, but it was also the *correct* instruction. Under the appellant's version, if a defendant denies the facts tending to show guilt, he

would automatically be entitled to an acquittal. The instruction was properly refused.

Appellant's self-defense instruction was refused on the basis that the judge had already included an instruction that was virtually identical to the proposed instruction, setting forth, additionally, the "reasonable belief" requirement to a successful justification of use of bodily force in self-defense.

The instruction as proposed by appellant read, in part, as follows:

> The use of force by Terry Stueben on or toward Don Sheneman was justifiable if Terry Stueben at that time and place then believed that such force was immediately necessary for the purpose of protecting himself against the use of unlawful force by Don Sheneman. Terry Stueben was entitled, without retreating, to estimate the necessity of force under the circumstances as he believed them to be when the force was used.

The instruction as given to the jury read:

> The use of force by Terry G. Stueben on or toward Donald R. Sheneman was justifiable if Terry G. Stueben at that time and place then *reasonably* believed that such force was immediately necessary for the purpose of protecting himself against the use of unlawful force by Donald R. Sheneman. Terry G. Stueben was entitled, without retreating to estimate the necessity of force under the circumstances as he believed them to be when the force was used.

(Emphasis supplied.) It is the decision of the trial court to include the requirement that appellant *reasonably* believed that force was necessary, to which the appellant objects.

At the outset, we note that the Legislature codified the defense of justification in use of force for self-protection in 1972. See Neb. Rev. Stat. § 28-1409 (Reissue 1989). The words "reasonably believed" or any equivalent do not appear in the statute.

NJI 14.33 contains the following opening paragraph:

> Defendant contends that he acted in self-defense. "Self-defense" is defined as the use of such force to repel an attack as at the time appeared to defendant to be

> reasonably necessary, although he may have been mistaken as to the extent of the actual danger, if a reasonable person would also have been so mistaken. The defendant was justified in acting upon the facts as they appeared to him and is not to be judged by the facts as they actually were.

The reasonable belief requirement appears to have originated in *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895), where the court said,

> The bare belief of one assaulted that he is about to suffer death or great bodily harm will not of itself justify him in taking the life of his adversary. There must exist reasonable ground for such belief at the time of the killing, and the existence of such grounds is a question of fact for the jury.

(Syllabus of the court.) The following excerpt from *Housh* is a particularly pertinent observation on the appellant's contention: "The principle which underlies the rule there stated is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any man that he is in danger of death or bodily harm . . . ." *Id.* at 169, 61 N.W. at 573. Accord *State v. Archbold*, 178 Neb. 433, 133 N.W.2d 601 (1965).

Though there is justification for the position that a simple, honest belief is all that is required by § 28-1409, which has its origin in the Model Penal Code, this court, since it was not specifically required to abandon the reasonable belief standard, declined to do so in a series of cases following the adoption of the statute. See, *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990); *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979); *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The Legislature has adhered to our construction for 20 years, and we are not constrained to abandon it now. We note that the appellant and others similarly situated should not have been misled, since the 1975 supplement to the Nebraska Jury Instructions concluded that the reasonable belief requirement remained part of the Nebraska law on self-defense. The assignment is without merit.

RESTITUTION

Appellant's contention that the court's order of $15,000 in restitution was excessive, improper, and constituted cruel and unusual punishment is without merit.

Neb. Rev. Stat. § 29-2280 (Reissue 1989) specifically authorizes a sentencing court to

> order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

In *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991), we held that a sentencing court may impose any conditions of probation that are authorized by statute. See *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

While appellant is correct in asserting that the penalty of restitution ordered by the trial court is a criminal penalty, rather than its civil counterpart codified at Neb. Rev. Stat. § 28-427 (Reissue 1989), see *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987), appellant is incorrect in his assumption that the statutory limitation on the potential criminal fine is equated with the maximum restitution he may be ordered to pay. Pursuant to Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1986), "When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary."

The court's order itemized, based upon the submitted evidence, how the $15,000 restitution was to be allotted: $1,050 to the victim for medical treatment of his injuries, $2,750 to the victim as reimbursement for lost wages, and $11,200 to the insurance company which covered most of Sheneman's medical expenses, the Aid Association of Lutherans. (Neb. Rev. Stat. § 29-2283 (Reissue 1989) authorizes a court to order the defendant to make reparation payments directly to any person who has compensated the victim, to the extent that such compensation has been provided.)

The court's consideration of an anticipated tax refund to the Stuebens and of Mrs. Stueben's financial contributions to the family's needs was not improper. The tax refund is a financial resource, and Mrs. Stueben's financial contributions alleviate appellant's financial and legal obligations. Thus, both are relevant to appellant's ability to pay restitution. We affirm the court's order of restitution.

The matter is affirmed in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWIN KIMMINAU, APPELLANT.

481 N.W.2d 183

Filed March 6, 1992. No. S-90-923.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Weapons.** Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a police officer and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.
4. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
5. _____: _____: _____. Probable cause for a warrantless arrest exists if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.

6. **Arrests: Search and Seizure.** The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself.
7. **Search and Seizure: Arrests: Search Warrants: Warrants: Probable Cause.** A search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search.
8. **Criminal Law: Verdicts: Appeal and Error.** The Supreme Court will not set aside a verdict in a criminal case when the verdict is supported by relevant evidence. Only when the 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.

Appeal from the District Court for Harlan County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Arthur R. Langvardt for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

BOSLAUGH, J.

After a trial to the court the defendant, Edwin Kimminau, was found guilty of possession of cocaine and sentenced to 24 months' probation. He has appealed, and his assignments of error, when summarized, allege that (1) the trial court erred in failing to suppress evidence which became the basis for the defendant's conviction and that (2) to the extent the trial court's verdict rested on certain evidence, i.e., evidence contained within a cooler, the judgment is not supported by the evidence.

The record shows that about 3:30 a.m. on May 28, 1989, Harlan County Deputy Sheriff Donald Tompkins spotted a pickup truck in a field near the Harlan County Dam and Lake. The lights of the pickup then came on, and the pickup left the field, turned onto an unpaved road, and drove past Deputy Tompkins' patrol vehicle. Officer Tompkins followed the pickup for a "quarter to half mile" and observed the pickup weaving, with the pickup's right tires occasionally driving onto the gravel road's grass shoulder.

Suspecting that the pickup's driver was intoxicated, Deputy Tompkins stopped the vehicle and requested identification

from the driver, Brent Jullian. When Jullian could produce no identification, Tompkins asked him to step out of the vehicle. When Jullian complied with this request, Tompkins noticed a number of "stray bullets" lying on the seat of the pickup next to two passengers, who had been riding with Jullian. Being concerned for his own safety, Tompkins requested the two male passengers to get out of the pickup and directed all three men to place their hands on the hood of the pickup. Tompkins commenced pat-down searches of the men to determine whether any of them were armed. Tompkins began with Daniel Calderon, one of the passengers in the pickup.

Although it was late May, Calderon was wearing a "very thick heavy winter type coat," which made it difficult for Tompkins to determine whether Calderon was carrying a weapon. While conducting his pat-down search, Tompkins felt a bulky object which he thought might be a gun in Calderon's coat. Tompkins removed the object, which turned out to be a clear plastic bag filled with a substance which Tompkins suspected to be cocaine. Tompkins then informed the three men that they were under arrest and directed them back to his patrol vehicle. Before he could handcuff each of the men, one of the three fled into a field. Tompkins radioed for assistance, and law enforcement officers later searched the area, but they were unable to locate the escapee.

Tompkins described the escapee as being 5 feet 10 inches to 6 feet tall, weighing 175 pounds or more, and wearing red sweat pants. While the defendant had a beard at the time of his arrest, Tompkins testified that the escapee had no beard.

After arresting the two men, Tompkins recovered a firearm from the pickup and found that the pickup also contained ammunition which did not match the weapon which was recovered. Thus, the officers believed it likely that the escapee could be armed.

Harlan County Sheriff Ron Early briefly questioned Calderon and Jullian after their arrest. Early also observed "track marks" on the arms of both Jullian and Calderon; this observation led Early to be concerned that the two were intravenous drug users and to question them about potential withdrawal problems which could occur while they were

incarcerated. While the officers did not find hypodermic needles on the person of either Calderon or Jullian, the officers did find that Calderon was carrying a title to a Chevrolet van which was titled in his name. Noting that Calderon had indicated that he had come to the lake with Jullian, while Jullian had contrarily indicated that the two had not come to the lake together, Early used the vehicle identification number from the title to Calderon's van to determine the van's license plate number. Early then decided to search the area for the van.

At the January 19, 1990, hearing on the defendant's motion to suppress, Early provided the following testimony concerning his reason for searching the area for Calderon's van:

> Well, there was several reasons. Number one, we had a person that had fled after being placed under arrest. Number two, we hadn't found any needles on either one of them but obviously there was some intravenous usage by both.
>
> The inconsistency in how they arrived at the lake, I thought there was a very good possibility that the van was in that area somewhere and that possibly this person that had fled the arrest was in that van or close to it.
>
> . . . .
>
> . . . There was shells that did not fit the weapon that we recovered that told me additional weapons were somewhere around.

That same morning, at approximately 5:45 a.m., Nebraska State Trooper Robert Zeiler tested the substance which Tompkins had recovered from Calderon. Zeiler's test revealed that the substance was cocaine, having a street value possibly exceeding $6,000.

In searching a camping area near Harlan County Lake, Sheriff Early and one of his deputies located Calderon's van approximately one-half mile from where Tompkins had earlier arrested Calderon and Jullian. Because the camping area was congested with vehicles and to avoid potential danger to bystanders in connection with a possibly armed escapee, Sheriff Early decided to wait until the van left the camping area before stopping the vehicle or its occupants.

Later that morning, between 7:15 and 7:40 a.m., Calderon's

van was driven to Little Mexico, a restaurant located in Republican City, Nebraska, near Harlan County Lake. Sheriff Early, Trooper Zeiler, and several other officers observed the van in the restaurant's parking lot and determined that they would stop the van after it had left the restaurant. While the officers watched the van they could see some movement inside the van. Between 7:45 and 8:30 a.m., the defendant and a companion, Granville Cross, left the restaurant and entered the van. With the defendant riding as a passenger in the van, Cross drove the van onto the highway. The officers then stopped the van and, using the public address system in a patrol vehicle, instructed the defendant and Cross to get out of the vehicle.

After the defendant and Cross had stepped out of Calderon's van, the officers ordered them to lie on the ground and then conducted pat-down searches. The record is not entirely clear whether the defendant was handcuffed at the time he was searched. While the officer who conducted the search, State Trooper Tom Nutt, testified that the defendant was handcuffed during the search, the defendant testified that his hands were on his head when he was searched, and Deputy Tompkins testified that the defendant's hands were stretched out away from his sides during the search.

While searching the defendant, the officers retrieved from one of his pockets a small plastic gram scale and a small metal tube that contained a residue which Trooper Zeiler suspected to be cocaine. Zeiler testified that such a gram scale is typically used in the street distribution of controlled substances and that such a metal tube is typically used to ingest cocaine or methamphetamine. The defendant was then arrested for possession of drug paraphernalia and a controlled substance. Laboratory analysis of the residue on the tube did in fact show that the residue was cocaine.

In his motion to suppress and again at trial, the defendant objected to the introduction of the gram scale, the metal tube, and the residue on the tube, claiming that they were products of an illegal search in violation of the 4th and 14th Amendments to the U.S. Constitution and in violation of the Nebraska Constitution. The defendant contends that the trial court erred in overruling his objection.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Masat*, 239 Neb. 849, 479 N.W.2d 131 (1992).

In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *State v. Masat, supra.*

The defendant concedes that under the circumstances in this case, the officers were justified in conducting an investigatory "*Terry* stop" with respect to Calderon's van and its occupants. See, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

As stated in *Terry v. Ohio*, 392 U.S. at 30:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

However, while conceding that a "*Terry* stop" was justified, the defendant contends that the scope of the officers' search went beyond that permitted by *Terry v. Ohio* and that, therefore, it was constitutionally impermissible.

It appears from the record that the search of the defendant did go beyond the "carefully limited" weapons search envisioned by *Terry*. Trooper Nutt testified that the purpose of the "pat down" he conducted was to look for both firearms and controlled substances. However, if the officers had probable cause to arrest the defendant prior to the search, and if the search was within the scope of a search which may be conducted

incident to a lawful arrest, then the evidence obtained from the search was properly admitted. See, *State v. Twohig, supra*; *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990).

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

Probable cause for a warrantless arrest exists if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime. *State v. Roach, supra*.

We believe the facts in this case gave the law enforcement officers probable cause to arrest the occupants of Calderon's van, one of whom was the defendant. Only hours before the defendant was arrested, Calderon had been arrested and found to be in possession of cocaine having a street value possibly exceeding $6,000. Later, after it was found that Calderon was carrying the title to a Chevrolet van, Calderon apparently attempted to conceal the fact that the van was in the area by telling the officers that he had ridden to the area with Jullian. In addition, one of two companions arrested with Calderon escaped and fled to avoid arrest.

Further compounding suspicions concerning the occupants of Calderon's van was the likelihood of additional weapons existing within the van, for along with one firearm, the officers also recovered ammunition for other unrecovered weapons when they arrested Calderon. Courts, along with law enforcement personnel, have recognized that weapons and drug dealers go hand in hand. See *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

Given the cocaine which Calderon was found to possess, the arrest and subsequent escape of Calderon's companion, Calderon's apparent attempt to conceal the nearby presence of his van, and the insertion of weapons into the subject equation, officers could prudently believe that the occupants of the van illegally possessed a controlled substance and that one of the

occupants of the van was their escapee.

Despite circumstances which provided officers with probable cause to arrest him, the defendant contends that because officers stated that they arrested defendant for possession of items found during the arrest, the State is attempting to justify the arrest and search with evidence found during the search. It is true that "a search before an arrest, and claimed to be an incident of the arrest, cannot serve as a basis for the validity of the arrest." *State v. Twohig*, 238 Neb. 92, 107, 469 N.W.2d 344, 354 (1991). " ' "[J]ustify[ing] the arrest by the search and at the same time . . . the search by the arrest," just "will not do." ' " *Id.*, quoting *Smith v. Ohio*, 494 U.S. 541, 110 S. Ct 1288, 108 L. Ed. 2d 464 (1990).

However, as explained in *State v. Roach*, 234 Neb. at 625, 452 N.W.2d at 266:

> The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself. It is not necessary that an actual formal arrest occur before a search is undertaken, as long as probable cause for arrest does exist prior to the search. The constitutional issue regarding a reasonable search as an incident to arrest depends upon the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a crime.

Furthermore, where a formal arrest follows quickly on the heels of a challenged search, it is not particularly important that the search preceded the arrest, so long as the fruits of the search are not necessary to support probable cause for the arrest. See, *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct 2556, 65 L. Ed. 2d 633 (1980); *State v. Twohig, supra*; *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). Thus, "a search without a warrant before an arrest, also without a warrant, is valid as an incident to the subsequent arrest if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search." *State v. Twohig*, 238 Neb. at 107, 469 N.W.2d at 354.

In the present case, the officers had probable cause to arrest the defendant before searching him, and their search was

reasonably contemporaneous with the arrest. In addition, there is no question that the scope of the officers' search remained within constitutionally permissible limits. See *State v. Twohig, supra*. Consequently, the trial court properly admitted the evidence which the officers seized when they searched the defendant.

The defendant's second summarized assignment of error alleges that to the extent that the trial court's finding of guilt rested on evidence derived from a cooler found within Calderon's van, the finding is not supported by the evidence. This assignment of error stems from the fact that after arresting the defendant, the officers searched the van and discovered a cooler which was found to contain cocaine. The record, however, shows that the trial court did not rely on this evidence and explicitly stated that it had reasonable doubt that the evidence contained within the cooler could be associated with the defendant.

The Supreme Court will not set aside a verdict in a criminal case when the verdict is supported by relevant evidence. *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991); *State v. West*, 238 Neb. 939, 473 N.W.2d 81 (1991). Only when the 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. Melton, supra*.

The evidence in this case is sufficient to support the finding of guilty beyond a reasonable doubt. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK A. SCHUMACHER, APPELLANT.

480 N.W.2d 716

Filed March 6, 1992. No. S-90-1150.

1. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential

element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
3. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, an appellate 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 an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

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

Steven Lefler, of Lefler & Flick, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

SHANAHAN, J.

A jury in the district court for Douglas County convicted Mark A. Schumacher on five separate felony charges: first degree forcible sexual assault, a violation of Neb. Rev. Stat. § 28-319 (Reissue 1989) and a Class II felony; two counts of using a firearm to commit a felony, violations of Neb. Rev. Stat. § 28-1205 (Reissue 1989), which is a Class III felony; and two counts of first degree false imprisonment, in violation of Neb. Rev. Stat. § 28-314 (Reissue 1989), a Class IV felony. Pursuant to Neb. Rev. Stat. § 28-105(1) (Reissue 1989), Class II felonies are punishable by imprisonment for 1 to 50 years; Class III felonies are punishable by imprisonment for 1 to 20 years, a $25,000 fine, or both imprisonment and a fine; and Class IV felonies are punishable by imprisonment not exceeding 5 years, a $10,000 fine, or both imprisonment and a fine. The district court sentenced Schumacher to a term of 5 to 10 years' imprisonment on the sexual assault conviction, 1 to 2 years for each conviction of false imprisonment, and 1 year for each

conviction of use of a firearm to commit a felony. Schumacher's false imprisonment sentences run consecutively to the sexual assault sentence, and the sentences on the firearm convictions run consecutively to the sentences for the false imprisonment convictions.

Schumacher assigns two errors in his appeal: First, the evidence is insufficient to sustain a conviction on the charges against him; therefore, his motion for directed verdicts should have been granted, and, second, the sentences imposed are excessive. We affirm.

STANDARD OF REVIEW

> In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

State v. Pierce, 231 Neb. 966, 970, 439 N.W.2d 435, 440 (1989). Accord, *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Fleck, 238 Neb. 446, 447, 471 N.W.2d 132, 134 (1991). Accord, *State v. Zitterkopf, supra*; *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

> On a claim of insufficiency of evidence, an appellate 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 an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Fleck, 238 Neb. at 447, 471 N.W.2d at 134. Accord, *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

APPLICABLE STATUTES

Section 28-314 provides in pertinent part: "(1) A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury . . . ."

Section 28-319(1) states: "Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree."

Under § 28-1205, any person who uses a firearm to commit a felony which may be prosecuted in a Nebraska court commits the separate offense of using a firearm to commit the felony.

SUFFICIENCY OF EVIDENCE

Examining the evidence, which is construed most favorably to the State in light of Schumacher's convictions, we conclude that the convictions are based on sufficient evidence.

About midnight on April 2, 1990, Schumacher and James Vance appeared at the door of an Omaha home shared by a 21-year-old woman and her fiance. After the woman allowed the pair to enter the house, Schumacher and Vance brandished a firearm and demanded money or drugs. When the couple said they had nothing to hand over, Vance and Schumacher led the woman, at gunpoint, out of the house and into a car, and then drove to a nearby house. Vance took the woman to the house while Schumacher remained with the car.

When the door to the house opened, Vance entered, pointed his firearm at the people inside, and demanded drugs from them. A man in the house said he did not have any drugs, but knew where he could get some. Vance then forced the man and the previously seized female victim out of the house at gunpoint, and all three went back to Schumacher and the car. Vance and Schumacher then took their captives to yet another house and, en route, discussed whether they would kill their female victim. When the four arrived, Vance forced the male

captive to go up to the front door of the house while Schumacher remained with the woman in the car.

In the car, when Schumacher was alone with the woman, he forced her to remove some of her clothes, demanded that she perform oral sex on him, and then forced her to have sexual intercourse. At this point, the police, who were responding to a call regarding the earlier episode involving Schumacher, arrived on the scene. Vance, who had returned to the car, ran away, but the officers caught Schumacher in the act of assaulting the woman in the car.

After the close of the State's case in chief, Schumacher moved for a directed verdict on all five charges against him; the district court denied these motions; Schumacher then rested without presenting any evidence; and the jury found him guilty on all five counts.

The evidence against Schumacher and the evidentiary inferences for the State warranted submission of the case to the jury. Therefore, the district court correctly overruled Schumacher's request for directed verdicts of acquittal. We conclude that the State presented evidence sufficient to sustain each of Schumacher's five convictions. For that reason, we affirm each of Schumacher's convictions.

EXCESSIVE SENTENCES

We have consistently held that " ' "[a] sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." ' " *State v. Witt*, 239 Neb. 400, 402-03, 476 N.W.2d 556, 558-59 (1991). Accord, *State v. Jameson*, 239 Neb. 109, 474 N.W.2d 475 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). We have also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord *State v. Witt, supra*.

After a presentence investigation, the district court determined that Schumacher was a nontreatable mentally disordered sex offender. Schumacher has prior convictions for criminal mischief, theft, destruction of property, and numerous traffic offenses. When we consider the nature of the crimes committed by Schumacher and his conduct in the course of those offenses, we are unable to conclude that any of the sentences imposed on Schumacher is excessive. Hence, we affirm the sentences imposed on Schumacher.

CONCLUSION

Schumacher's assignments of error are without merit. Accordingly, Schumacher's convictions and sentences are affirmed.

AFFIRMED.

LUANN M. LIBERTY, APPELLANT, V. COLONIAL ACRES NURSING HOME AND FIDELITY & CASUALTY COMPANY OF NEW YORK, APPELLEES.

481 N.W.2d 189

Filed March 6, 1992. No. S-91-622.

1. **Workers' Compensation: Proof.** A claimant has the burden to prove by a preponderance of the evidence that the claimant's employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
2. **Workers' Compensation: Appeal and Error.** The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.
3. **Workers' Compensation: Proof.** In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of the evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.
4. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the

light most favorable to the successful party. Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

5. **Expert Witnesses.** The value of an opinion of an expert is no stronger than the facts upon which it is based.
6. **Workers' Compensation.** The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony.
7. **Trial: Expert Witnesses.** Triers of fact are not required to take an expert's opinion as binding upon them.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Rod Rehm, P.C., for appellant.

Dallas D. Jones, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

FAHRNBRUCH, J.

Citing insufficient evidence as its reason, the Nebraska Workers' Compensation Court, upon rehearing, dismissed Luann M. Liberty's claim for workers' compensation benefits, and she appeals. We affirm the majority ruling of the three-judge panel.

In deciding this case, we need discuss only the first of appellant's five assignments of error: that the compensation court "erred in finding the plaintiff failed to sustain her burden of proof in connection with the causal relationship between her accident on January 1, 1989 and her current disability."

This court has long held that a claimant has the burden to prove by a preponderance of the evidence that the claimant's employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. See *Phipps v. Milton G. Waldbaum & Co.*, 239 Neb. 700, 477 N.W.2d 919 (1991). The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong. *Castro v. Gillette Group, Inc.*, 239 Neb. 895, 479 N.W.2d 460 (1992).

We have also held that in a workers' compensation case

involving a preexisting condition, the claimant must prove by a preponderance of the evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

On January 1, 1988, Liberty, then 30 years of age, began working as a nursing attendant at the Colonial Acres Nursing Home in Humboldt, Nebraska. In a review of the evidence in the light most favorable to the appellees, the record reveals the following: About January 1, 1989, Liberty injured her back. She claims her injury occurred when the bed to which she was transferring a patient from his wheelchair rolled. She testified that the rolling bed caused her to support all of the patient's weight until she could get the patient back into his wheelchair. Liberty claims she suffered a sharp pain in her lower back. She sought medical attention on January 2, 1989, from Dr. Stephen Stripe of Humboldt. Liberty was off work for 10 days and received workers' compensation for temporary partial disability.

There is conflicting evidence as to whether Liberty suffered back and leg pain between the time she returned to work in January and mid-October 1989. The appellant and two of her coworkers testified that Liberty continually complained of back and leg pain after returning to work in January 1989. However, Liberty made no complaint to her doctors of any such pain during the January to mid-October period. Appellant's

supervisor testified that during that period Liberty did not complain of back or hip pain, nor did she lose worktime on account of any such pain. There is a conflict in the evidence regarding whether Liberty recalled telling her employer about any back pain between the time she returned to work in January and mid-October 1989.

On November 2, 1989, Liberty visited Dr. Stripe and complained she had had pain in her hip, back, and left buttock for about 2 weeks. Liberty denied she was involved in any accident or trauma, and she gave no indication that the pain of which she was complaining was related to the injury that occurred the previous January. Dr. Stripe prescribed crutches for Liberty and referred her to Dr. Dennis Bozarth, a Lincoln orthopedic surgeon. Dr. Bozarth noted that in addition to complaining of pain in her hip, back, and left buttock, Liberty also complained of occasional numbness and tingling on the top of her left foot. Appellant told Bozarth that she had not hurt herself or done anything unusual which would have caused the pain. On her way to see Dr. Bozarth on November 2, 1989, Liberty stopped at the nursing home and told her supervisor that she would be off work for a time.

Conservative treatment ordered by Dr. Bozarth failed to provide relief to Liberty. On November 27, 1989, a CAT scan revealed that Liberty suffered from a spinal defect, a grade II spondylolisthesis with a compression of the thecal sac at level L4-5. Spondylolisthesis is a naturally progressing problem which can lead to nerve root compression and may be a congenital condition. It can also result in radiculopathy, a disease of the nerve roots. Dorland's Illustrated Medical Dictionary 1109 (26th ed. 1981).

At the end of November 1989, Dr. Bozarth prescribed a back brace for Liberty in an attempt to relieve nerve irritation in the affected areas. Liberty eventually required two surgeries, which were performed in June 1990 by Dr. Daniel Ripa of Lincoln, a specialist in spine surgery. The first surgery consisted of a bilateral complete laminectomy at L4 and a posterolateral spinal fusion from L4-5. The second surgery consisted of an anterior fusion of L4-5. When he released Liberty to return to work on January 21, 1991, Dr. Ripa recommended that Liberty

not lift more than 35 pounds on a repetitive basis and that she not engage in prolonged repetitive bending, twisting, or stooping. These recommendations were to be permanent restrictions.

It is undisputed that in the winter of 1989-90 Liberty slipped on ice and fell on the driveway at her home. The evidence is in conflict as to the point in time the fall occurred. Liberty claims the fall occurred sometime after she started wearing a back brace in December 1989. Two of Liberty's coworkers corroborated this claim. However, two of Liberty's supervisors and two of her other coworkers contradicted Liberty's claim that she fell on the ice after the end of November 1989. All of appellees' witnesses testified that Liberty told them on November 2, 1989, that she had hurt herself when she slipped and fell on ice. They further testified that these conversations occurred on November 2, 1989, when Liberty, while using crutches, stopped by the nursing home on her way to see Dr. Bozarth for the first time.

Dr. Bozarth, when asked whether he could state with reasonable medical probability that the injury Liberty suffered in January 1989 either caused or aggravated her spondylolisthesis, answered that the type of work nurse's aides perform, lifting and bending, *probably* exacerbated her spondylolisthesis condition. He never answered whether Liberty's accident in early January 1989 caused or exacerbated her condition. Thus, a fact finder could conclude that Dr. Bozarth's testimony does not support a finding that the condition for which Liberty seeks compensation was causally related to her accident on or about January 1, 1989, as Liberty contends.

In response to a boilerplate-type written questionnaire entitled "Medical Report — Luann Liberty," Dr. Ripa diagnosed Liberty's condition to be "spondylolysis L-4 with grade 3 spondylolisthesis of L-4 on L-5 causing lumbar nerve root irritation." Dr. Ripa placed an X in the "yes" column opposite paragraph No. 2, which stated: "The condition diagnosed above was caused or aggravated by a work injury at Colonial Acres Nursing Home on *February 12, 1989*." (Emphasis supplied.) One of Dr. Ripa's surgical reports

indicates that Liberty was injured in February 1989. No specific date in February is listed. In her testimony before the three-judge panel, Liberty claimed she had been uncertain as to the date the bed rolled at the nursing home. A written accident report completed January 6, 1989, by the nursing home, which was filed with the Workers' Compensation Court, states that the accident occurred on January 1, 1989. Dr. Stripe's records reflect that he attended Liberty on January 2, 1989, for the injury she received in that incident. It is understandable that a fact finder might give little or no weight to the one-word opinion of Dr. Ripa as to the causation of Liberty's injuries. An expert opinion that consists of an X on a questionnaire that details no factual basis for the opinion or the expert's reasoning behind the opinion may explain the lack of credibility or weight the compensation court apparently attributed to Dr. Ripa's opinion as to the cause of Liberty's injuries. The value of an opinion of an expert is no stronger than the facts upon which it is based. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony. *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991). In any event, triers of fact are not required to take an expert's opinion as binding upon them. See *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991).

Dr. Alan H. Fruin, a member of the Creighton University School of Medicine, examined Liberty at the request of the employer's counsel. After reviewing the facts of the rolling bed incident in January 1989 and Liberty's medical records, Dr. Fruin reported that in his opinion Liberty suffered an acute lumbar strain as a result of the rolling bed incident, "which she completely recovered from and [she] was able to return to work without pain." He stated that Liberty's symptoms and difficulties that developed in October 1989 were the result of the natural progression of her spondylolisthesis and not the result of the back strain that she suffered in January 1989.

Thus, there was conflicting medical testimony as to the cause of the injury upon which Liberty attempts to collect workers' compensation. As our cases require, the conflicting expert

testimony was weighed and resolved by the trier of fact. See *Schmidt v. City of Crofton*, 238 Neb. 49, 468 N.W.2d 625 (1991).

The Workers' Compensation Court, the trier of fact herein, concluded that there was insufficient evidence to prove a compensable causal relation between Liberty's work and the condition for which she was treated. After reviewing the record, we cannot say that the compensation court was clearly wrong.

AFFIRMED.

MATTHEW MOORE, DOING BUSINESS AS MILLARD MUSIC CENTER, APPELLANT, V. THE HARTFORD FIRE INSURANCE COMPANY, APPELLEE.

481 N.W.2d 196

Filed March 13, 1992. No. S-89-746.

1. **Summary Judgment.** Summary judgment is proper when, based upon the pleadings, the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** On appeal from the grant of a motion for summary judgment, this court views the evidence in the light most favorable to the party against whom the judgment is granted.
3. **Insurance: Brokers: Principal and Agent.** The question of whether an insurance intermediary is an agent of the insured or the insurer is generally one of fact.
4. _____: _____: _____. The general rule is that an insurance intermediary acts as an agent for the insured in submitting an application and procuring a policy.
5. _____: _____: _____. Payment by and acceptance of a commission from the insurer does not, in and of itself, constitute control sufficient to establish a relationship of principal and agent between a broker and an insurance company.
6. _____: _____: _____. An insurance salesman who solicits business for more than one company, with no power to bind a specific insurer without its permission, and who is asked by the client to procure coverage from whomever possible at the lowest price, is not the agent of the insurer selected, even if he uses application forms or advertising decals with that insurer's name.

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

Jeffrey A. Silver for appellant.

David A. Castello, of Katskee & Henatsch, for appellee.

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

WHITE, J.

This is a breach of contract action in which the plaintiff-appellant, Matthew Moore, brought suit alleging that the defendant-appellee, The Hartford Fire Insurance Company, breached its contract to provide burglary coverage for the plaintiff's business, the Millard Music Center. The plaintiff alleges that he requested burglary coverage and that the defendant's agent, Jack Anderson, sold him a policy of insurance which Anderson represented as including burglary insurance. The plaintiff further alleges that the defendant's breach caused him to suffer a loss of inventory and business profits. The defendant answered and moved for a summary judgment, which motion the trial court sustained. The trial court found that the plaintiff did not request burglary coverage and that Anderson was not acting as Hartford's agent in providing the insurance. This appeal followed.

FACTUAL BACKGROUND

The record reveals that in January 1986 Moore operated a music store out of his home in Omaha, Nebraska. Due to the business' growth, he planned to move out and devote the building exclusively to the business. His accountant recommended that he consult an "insurance specialist" regarding the insurance implications of such a move. As a result, Moore came into contact with Anderson.

At the time, Anderson owned and operated the Skyline Insurance agency. He was an independent insurance agent licensed to sell policies for six different companies, including Hartford. He sold various types of insurance, including property, casualty, life, and health. Regarding his relationship with Hartford, Anderson testified that he worked strictly on a commission basis. He further stated that Hartford did not dictate his business hours, control the customers he solicited, or otherwise direct the manner in which he operated.

Shortly after their initial phone conversation, Anderson

visited Moore at Moore's place of business. At that meeting Moore told Anderson of his desire for burglary insurance to protect his business inventory and for increased liability coverage "in case somebody fell or something" while he was giving music lessons. Anderson then presented Moore with a brochure describing two business insurance plans offered by Hartford. These plans were designated the "standard" plan and the "special" plan, respectively.

According to the brochure, the standard plan protected the owner's business property from losses caused by "fire, lightning, windstorm or hail, explosion, smoke, riot, riot attending a strike or civil commotion, vandalism or malicious mischief, and sprinkler leakage." The special plan, on the other hand, simply provided protection from "all risk." Though Anderson testified that he probably explained to Moore that the "all risk" insurance included burglary coverage, he did not specifically recall discussing that type of coverage. The brochure also listed a series of optional coverages, including "Burglary and Robbery," which were described as applying to the standard plan only. Again, Anderson could not recall whether he discussed these optional coverages with Moore.

Anderson testified that he recommended the special plan because of its "better" coverages, but that Moore chose the standard plan because it was cheaper. Apparently during this same meeting, Anderson completed an application for coverage under the standard plan, with none of the optional coverages included. Either at this meeting or sometime thereafter it was decided that the Hartford policy would cover only the business inventory and not the building because Moore already owned a homeowner's policy covering the building. Moore testified that though he thought it a bit odd to use two insurance companies, Anderson "came across strong and qualified" and he believed Anderson had the expertise to provide the necessary coverages. Anderson submitted the completed application and Hartford issued a policy, which Anderson in turn mailed to Moore.

Moore's business was burglarized on March 23, 1987. After Moore informed him of his losses, Anderson submitted a claim to Hartford on Moore's behalf. Hartford denied the claim

because the policy did not include burglary coverage. This suit followed.

ASSIGNMENTS OF ERROR

On appeal, Moore argues that the trial court erred in finding that he did not request burglary insurance and in finding that Anderson was not acting as Hartford's agent. Because we agree with the trial court regarding Anderson's relationship with Hartford, it is unnecessary to address the issue of Moore's responsibility for the policy's lack of burglary coverage.

STANDARD OF REVIEW

Summary judgment is proper when, based upon the pleadings, the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). On appeal from the grant of a motion for summary judgment, this court views the evidence in the light most favorable to the party against whom the judgment is granted. *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991). Here, then, we view the evidence in the light most favorable to Moore.

INSURANCE "BROKERS" VERSUS INSURANCE "AGENTS"

The question of whether an insurance intermediary is an agent of the insured or the insurer is generally one of fact. 3 George J. Couch, Cyclopedia of Insurance Law § 25:94 (rev. 2d ed. 1984); *American Ins. Corp. v. Sederes*, 807 F.2d 1402 (7th Cir. 1986) (applying Illinois law). See *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989) (whether an insurance broker is the insured's agent for receipt of the premium refund upon cancellation is a question of fact). A review of the principles governing classification of an insurance salesman as a "broker" or an "agent" reveals that in applying for and procuring an insurance policy for Moore from Hartford, Anderson was acting as an independent broker and not as an agent of the company.

Nebraska law provides that

> [e]very agent who solicits an application for insurance

> of any kind shall in any controversy between the insured or the insured's beneficiary and the company issuing any policy upon such application be presumed to be representing the company and not the insured . . . . Such presumption shall not apply to a broker who is not an appointed agent of the company.

Neb. Rev. Stat. § 44-4004 (Reissue 1988). The Legislature has defined a "broker" as

> any individual who acts or aids in any manner in negotiating contracts of insurance, in placing risks, or in soliciting or effecting contracts of insurance as an agent for an insured other than himself or herself and not as an agent of an insurance company or any other type of insurance carrier.

Neb. Rev. Stat. § 44-4002(2) (Reissue 1988). This scheme is somewhat circular, in that it creates a presumption of an agency relationship with the insurer except when the individual is acting as an agent of the insured. Nevertheless, its purpose is clearly to shield insurance companies from liability for the acts of certain insurance intermediaries over whom they do not exercise control sufficient to establish a principal-agent relationship. See Neb. Rev. Stat. § 44-329 (Reissue 1978) (conclusive presumption exists that every agent *or* broker who solicits an application for insurance is an agent of the company issuing the policy in any controversy between the insured and the insurer) (repealed by 1984 Neb. Laws, L.B. 801, and replaced with § 44-4004).

The definition of "broker" in § 44-4002(2) is consistent with the general rule that an insurance intermediary acts as an agent for the insured in submitting an application and procuring a policy. See, 3 Couch, *supra*; *Vina v. Jefferson Ins. Co. of New York*, 761 P.2d 581 (Utah App. 1988). As stated by Professor Couch,

> [a]n "insurance broker" is one who acts as middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, and who, upon securing an order, places it with a company selected by the insured, or, in the absence of such a selection, with a company selected by

> himself; whereas an "insurance agent" is one who represents an insurer under an employment by it.

3 Couch, *supra*, § 25:93 at 442-43. The mere payment by and acceptance of a commission from the insurer does not constitute control sufficient to establish a relationship of principal and agent between the broker and the company. *Thibodeaux v. Lumbermen's Mut. Cas.*, 448 So. 2d 888 (La. App. 1984). Rather, an insurance salesman who solicits business for more than one company, with no power to bind a specific insurer without its permission, and who is asked by the client to procure coverage from whomever possible at the lowest price, is not the agent of the insurer selected, even if he uses application forms or advertising decals with that insurer's name. *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199 (5th Cir. 1990) (applying Louisiana law).

When we apply the foregoing principles to the case at hand, it is clear that the trial court correctly found no triable issue as to Anderson's relationship with Hartford. Anderson sold insurance for six different companies, operating out of a business known as the Skyline Insurance agency. Anderson did not work only for Hartford, and that company did not control or direct the manner in which he operated. It is clear that Anderson lacked power to bind Hartford to a policy covering Moore's business property without Hartford's approval. Though he received commissions from Hartford, receipt of commissions alone is not sufficient to establish a principal-agent relationship.

Further, Moore regarded Anderson as an "insurance specialist" capable of choosing from the various companies Anderson represented a policy of insurance suitable for his business needs. That Moore's only preference was for the most cost-effective coverage available, regardless of the provider, is evident from his assent to Anderson's suggestion that he cover the building under his existing homeowner's policy. Though he thought the use of two insurance companies was odd, Moore stated that he agreed to it because he believed Anderson had the expertise to provide the necessary coverages.

The trial court correctly found no genuine issue as to the fact that Anderson, in applying for and procuring an insurance

policy for Moore, acted as an independent broker and not as an agent of Hartford. Because, as a matter of law, the failure of an independent insurance broker to provide coverage requested by a client is not imputable to the insurer issuing the policy, the trial court did not err in granting the defendant's motion for summary judgment. The decision of the trial court is therefore affirmed.

AFFIRMED.

HAROLD BOWMAN AND DONNA BOWMAN, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLEES, V. CITY OF YORK ET AL., APPELLEES AND CROSS-APPELLANTS, AND YORK COLD STORAGE COMPANY, INC., INTERVENOR-APPELLANT.

482 N.W.2d 537

Filed March 13, 1992. No. S-89-826.

1. **Administrative Law: Governmental Subdivisions.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
2. **Zoning: Administrative Law.** Boards of adjustment function primarily as administrative agencies.
3. **Zoning: Evidence: Appeal and Error.** A district court may disturb a decision of a board of adjustment only if the board's decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
4. _____: _____: _____. In deciding whether a board of adjustment's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
5. **Zoning: Courts: Appeal and Error.** In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing the decision of a board of adjustment, the district court abused its discretion or made an error of law; where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.
6. **Zoning: Ordinances.** Neb. Rev. Stat. § 19-910 (Reissue 1987) empowers a board of adjustment to grant a variance from a zoning regulation only if strict application of the regulation, because of the unusual physical characteristics of the property existing at the time of the enactment, would result in peculiar and

exceptional practical difficulties to or exceptional and undue hardships upon the owner.

7. **Zoning: Words and Phrases.** An undue hardship is a demonstrable and exceptional hardship, as distinguished from variations for purposes of convenience, profit, or caprice.
8. **Zoning: Ordinances.** The financial situation or pecuniary hardship of a single owner affords no adequate grounds for granting a variance from a zoning regulation.
9. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment of a known, existing legal right or conduct from which such relinquishment can be inferred.
10. **Waiver: Estoppel.** To establish the waiver of a legal right, there must be clear, unequivocal, and decisive action of the party showing such purpose, or acts which amount to an estoppel.
11. **Judgments: Restitution: Zoning: Appeal and Error.** Just as a plaintiff who collects a judgment which is appealed but is not superseded takes the risk of having to make restitution, so, too, does one who builds in accordance with a zoning variance which is appealed take the risk that it will have to tear down what it has built.
12. **Zoning: Notice: Appeal and Error.** Expenditures made in accordance with a zoning variance after notice that the grant of the variance has been appealed are not made in good faith reliance on the variance.
13. **Pretrial Procedure: Pleadings: Interventions.** The direct and immediate interest which requires the granting of a motion for leave to intervene is such an interest that the one seeking to intervene will either lose or gain by the direct application of the judgment.
14. **Injunction.** Under the provisions of Neb. Rev. Stat. § 19-912 (Reissue 1987), a district court may grant permanent mandatory injunctive relief.
15. **Actions: Pleadings: Evidence.** The prayer of a petition is not a part of the allegations of fact constituting the cause of action; thus, where the facts alleged state a cause of action and are supported by the evidence, the court will grant proper relief, although it may not conform to the relief requested.

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

Robert T. Grimit and Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, for intervenor-appellant.

Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., for appellees Bowman.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellees City of York et al.

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

CAPORALE, J.

I. INTRODUCTION

The City of York, an appellee in this court, through its board of adjustment, granted a zoning variance to York Cold Storage Company, Inc. The abutting property owners, Harold Bowman and his wife, Donna Bowman, also appellees in this court, challenged the board's decision in the district court. That court reversed the grant of the variance and ordered York Cold Storage to tear down the portion of the structure erected in accordance with the variance. York Cold Storage, which had intervened in the district court, then appealed to this court, assigning as errors the district court's (1) finding that the variance was granted illegally, (2) failure to find that the Bowmans had waived their right to challenge the variance, (3) failure to find that York Cold Storage had detrimentally relied in good faith on the variance and thus had a vested right to use its property in accordance therewith, and (4) order to remove the offending portion of the structure. The City of York cross-appealed, joining in appellant York Cold Storage's claim that the district court erred in finding that the variance was granted illegally and adding the assertion that the district court erred in permitting an expert witness to testify. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Bowmans purchased realty abutting to the east of the realty owned by York Cold Storage. At the time of the Bowman purchase, both pieces of abutting property were zoned residential.

In April 1987, York Cold Storage applied to have its property zoned to permit heavy industrial use. Following a public hearing, the planning commission of the City of York recommended approval of the zoning change notwithstanding the Bowmans' objection. The City of York then amended its zoning ordinance in accordance with the commission's recommendation.

York Cold Storage next applied for a permit authorizing it to build a warehouse on its property such that its 30-foot high rear wall would be within 1 foot of the line dividing its property from that of the Bowmans. However, the heavy-industrial-use

zoning designation requires a 15-foot rear yard building setback when the property abuts a residential zone. Accordingly, York Cold Storage requested a 14-foot variance from the required rear setback.

Neb. Rev. Stat. § 19-910 (Reissue 1987) provides that a board of adjustment shall have the power,

> where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution.

Section 19-910 further provides:

> No such variance shall be authorized by the board unless it finds that: (a) The strict application of the zoning regulation would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.

The foregoing criteria are also found in the York Code of Ordinances, app. A, art. XXVII, § 10 (1986).

At the hearing before the board, a vice president and director of York Cold Storage, Roger Sack, testified:

> Our hardship is potentially financial. But I don't want to

> really dwell on that because I think in the broader sense the only representation we can make and we have a past history to back it up, is that the intent of this project is to lead to a substantial increase in local employment. It is not guaranteed but this sure won't happen without it. We have a substantial prospect for a materially large facility coming in to utilize this building which we cannot get unless we build it up first to prove it. So if we want to talk about adversity it is more along the lines of broader community risk. But going to negotiation is one thing or another - it isn't really the sort of thing that we can come right out and sit down and tell stories the way we would like to about exactly who we are talking to and what they are saying. But we do want to make the representation that we think the project will not only be a substantial benefit to the community not the least of which is $5,000 of [sic] $6,000 a year in taxes instead of $35 . . . . So the adversity I could recite that in dollars but I think it might be inappropriate and it may be technically irrelevant in terms of our own direct situation but I can guarantee you that it would be adverse to the community.

Sack conceded, however, that "it would be mechanically as easy to build the building farther west thereby utilizing the 15 foot setback, however, the building would have to be smaller and that is against the interests of the people who are banging us on the head to provide this facility." He also said:

> With regard to moving it to another location, one of the economies that have these people interested in coming to town has to do with its association mechanically with the Cold Storage Co. The existing engine room facility can be connected by overhead piping to the facility. If this were built as a free standing affair, as we have seen in the past, not only the construction itself may not be more expensive but the site costs, the approach costs, streets, the stuff that don't exist, independent engine room and operationally a separate staff with separate supervisory force a couple of miles away for example where we own property up north would be economically in that regard a substantial hardship and may damage the economics of it to the point

> to where the pricing we would have to do to recoop [sic] that extra cost would sort of make our people take a walk.

The Bowmans countered that permitting York Cold Storage to construct the facility within a foot of their lot line would injure them by damaging their garden and fruit trees, interfering with the draft necessary for their woodburning stove, reducing the amount of air circulation and sunlight their property would receive, and creating noise from the "running units on top of the building."

On June 2, 1987, the board unanimously voted to grant York Cold Storage the requested variance. On June 16, 1987, the Bowmans filed their appeal to the district court and gave notice thereof to York Cold Storage the following day. York Cold Storage commenced construction of its warehouse on June 23, 1987.

At the hearing which followed, the district court received additional evidence in accordance with Neb. Rev. Stat. § 19-912 (Reissue 1987), which provides that if, upon the district court hearing,

> it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

Upon questioning by the Bowmans, the district court heard Sack explain York Cold Storage's decision to proceed with construction notwithstanding the appeal, as follows:

> Q. . . . The question was, you then assumed the risk of going ahead with construction, based on your business decision in the face of the appeal?
>
> [Sack]. That's correct.
>
> Q. And the risk you assumed was, was that the variance would be overturned, isn't that right?
>
> [Sack]. That's right.
>
> Q. And you made that decision because there were profits to be made from this new client — or old client that was expanding its business with you, isn't that correct?

[Sack]. It was to avoid the loss of losing them.

Q. So basically, it was a money decision, is that right?—To avoid money losses, is that correct?

[Sack]. To proceed with the construction?

Q. Right.

[Sack]. That's correct.

Q. And it was also — I think you also indicated that by proceeding with construction, you would increase your profits, is that also correct?

[Sack]. We had hoped so, yes.

The record further reveals that after the warehouse was built, York Cold Storage added a total of two employees, whose duties are not disclosed, and that the warehouse produces gross revenues of $25,000 per month. Since the building was completed in October 1987, it has thus far produced approximately $1.3 million in such revenues. The cost to physically tear down the offending 14 feet is calculated to be approximately $15,000 and would cause the elimination of the two employees added to York Cold Storage's prior work force.

The district court also received the opinion of a real estate appraiser that the variance diminishes the value of the Bowmans' property by approximately $1,500.

III. SCOPES OF REVIEW

Before proceeding further, we must settle upon the scope of the district court's and our review. *Frank v. Russell*, 160 Neb. 354, 363, 70 N.W.2d 306, 312 (1955), holds that the decision of a board of adjustment granting a variance from the provisions of a zoning ordinance will not be disturbed on appeal unless the decision "is found to be illegal or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong."

This same standard was reiterated in *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958). But *Weber* also states:

> "In appeals from the district court to the supreme court in suits in equity, on trial de novo this court will retry the issue or issues of fact involved and reach an independent conclusion as to what findings are required under the

> pleadings and the evidence, without reference to the conclusion reached in the district court." Also, as said in that opinion: "The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts in each particular case presented. On this proposition the law is well settled."

Id. at 830-31, 87 N.W.2d at 578.

Weber, however, was concerned not with a variance but with a situation in which the city council had met as a board of adjustment and heard evidence relating to a request for rezoning. According to the *Weber* opinion, this action was authorized by then § 19-910 (Reissue 1954). Nonetheless, we find nothing in § 19-910 as it then existed which authorized a board of adjustment to participate in any rezoning activity. That statute empowered boards of adjustment to (1) hear appeals from decisions of an administrative official, (2) hear and decide special exemptions to the terms of ordinances, and (3) authorize variances from the terms of an ordinance. In any event, the *Weber* court examined the board's actions in light of the evidence it received and concluded that the board's action in permitting the rezoning and the city's enactment of an ordinance to enforce it were both invalid.

It is also worth noting that the *Weber* opinion cites no source for the scope of review language it appears to quote. While the *Weber* opinion contains two quotations from *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944), the scope of review language does not appear therein. The Supreme Court treated *Dundee*, in which the plaintiff unsuccessfully claimed a zoning ordinance adopted by the city council was unconstitutional, as one in equity to be reviewed de novo.

More recently, *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989), relying on *McClelland v. Zoning Bd. of Appeals*, 232 Neb. 711, 441 N.W.2d 893 (1989), declared that the actions of zoning boards of adjustment are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary. However, *McClelland* dealt with the order of a zoning board of appeals, an entity created by a different statute than the one which brings boards of adjustment into being. See Neb. Rev. Stat. §§ 14-409

and 19-910 (Reissue 1987).

Given that history, further study is necessary. Section 19-912 provides that a person aggrieved by a decision of a board of adjustment may appeal to the district court on the ground that the decision "is illegal, in whole or in part" and that the appellant must "[specify] the grounds of such illegality."

As noted in part II, § 19-912 also authorizes, but does not require, the district court to take additional evidence. Provisions which allow the taking of additional evidence have been construed by some courts as authorizing a de novo proceeding in the trial court. See, *Whitcomb v. City of Woodward*, 616 P.2d 455 (Okla. App. 1980); *Thayer et ux. v. Lower Milford Twp. et al.*, 16 Pa. Commw. 124, 343 A.2d 92 (1974).

Other courts, however, have determined that the power to hear additional evidence does not authorize a de novo review but, rather, that the additional evidence is to be used in deciding whether the board abused its discretion. See, *Shaw v. City of Manchester*, 120 N.H. 529, 419 A.2d 394 (1980); *Rickard v. Fundenberger*, 1 Kan. App. 2d 222, 563 P.2d 1069 (1977); *Blum v. McGraw*, 92 Misc. 2d 781, 401 N.Y.S.2d 127 (1977).

An administrative agency has been said to be "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." 1 Kenneth C. Davis, Administrative Law Treatise § 1:2 at 9 (2d ed. 1978). Under that definition, boards of adjustment function primarily as administrative agencies. See *Florentine v. Darien*, 142 Conn. 415, 115 A.2d 328 (1955) (zoning board which has power to apply zoning regulations is primarily an administrative agency). See, also, *Rogoff v. Tufariello*, 106 N.J. Super. 303, 255 A.2d 781 (1969); *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946); *McCord v. Ed Bond & Condon Co.*, 175 Ga. 667, 165 S.E. 590 (1932).

The powers of administrative agencies were well described in *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 222, 334 A.2d 514, 522 (1975):

> The primary function of administrative agencies is to advance the will and weal of the people as ordained by

> their representatives — the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State. While these agencies at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, they in addition take on a judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity. This dual role which administrative agencies play has long been accepted in this State as being constitutionally permissible. [Citations omitted.] However, this authority is not the same and, therefore, is distinguishable from the exercising of the "judicial powers" of this State . . . .

And as recently stated in *Bentley v. Chastain*, 242 Ga. 348, 350-51, 249 S.E.2d 38, 40 (1978):

> Whether operating in the federal, state, or local sphere, agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary. Review overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the agency, thereby nullifying the benefits of legislative delegation to a specialized body.

The considerations discussed in the foregoing two cases, coupled with the fact that § 19-912 permits an appeal to the district court only on the ground that a board of adjustment's decision is illegal, lead us to conclude that a district court may disturb a decision of such a board only if, as suggested in *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), and *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989), the decision was illegal or is not supported by the evidence and is

thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives. See, e.g., *Demarest v. Mayor & Council of Bor. of Hillsdale*, 158 N.J. Super. 507, 386 A.2d 875 (1978); *Richman v. Zoning Bd. of Adj.*, 391 Pa. 254, 137 A.2d 280 (1958).

That brings us to the question of what it is this court is to review and by what standard it is to be judged. In *Frank v. Russell*, this court, relying on cases appealed from the Nebraska State Railway Commission, reviewed the decision of a board of adjustment. The distinction between railway commission reviews and board of adjustment reviews is that appeals from the railway commission were directly to this court, e.g., *Rawlings v. Chicago, B. & Q. R. Co.*, 109 Neb. 167, 190 N.W. 569 (1922), whereas appeals from boards of adjustment are first reviewed by the district court, § 19-912.

We therefore now hold that an appellate court reviews the decision of the district court and that irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. See, *Lambros v. Missoula*, 153 Mont. 20, 452 P.2d 398 (1969); *Estate of Barbagallo v. Zoning Hear. Bd.*, 133 Pa. Commw. 38, 574 A.2d 1171 (1990).

IV. ANALYSIS OF APPEAL

Having settled upon the scope of our review, we now proceed to a consideration of the errors York Cold Storage has assigned.

1. Illegality of Variance

Frank v. Russell is instructive on the question of the circumstances under which a board of adjustment may grant a zoning variance. In *Frank*, the defendants had applied for and obtained a variance from a zoning ordinance which required a front yard setback of 40 feet from the lot line. The variance permitted construction within 27 feet of the line. The plaintiffs, who lived in the same block as the defendants, argued that as all

other homes on the block had a front yard setback of 40 feet, a house constructed 13 feet closer to the lot line would obstruct their view, interfere with the enjoyment of their home, and depreciate the value of their property. The district court affirmed the grant of the variance. This court reversed for the reasons that no substantial hardship to the applicant had been shown but that injury to other property owners had, in that the variance destroyed the symmetry of the block and interfered with the views of other property owners.

In so ruling, the *Frank* court stated:

> It appears that the rule respecting the right of a board of adjustment, such as the one here, to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that it may not be granted: Unless the denial would constitute an unnecessary and unjust invasion of the right of property; if the grant relates to a condition or situation special and peculiar to the applicant; if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily if the applicant purchased his premises after enactment of the ordinance.

160 Neb. at 362-63, 70 N.W.2d at 312.

It is worth observing that at the time *Frank* was decided, § 19-910 did not enumerate the criteria one applying for a variance had to meet, other than to show that a literal enforcement of the ordinance would result in unnecessary hardship and that the requested variance was not contrary to public policy. It is apparent that much of what is now in § 19-910 comes from *Frank*.

In any event, so far as is relevant to this case, § 19-910 and the code of the City of York now empower a board of adjustment to grant a variance from a zoning regulation only if strict application of the regulation, because of the unusual physical characteristics of the property existing at the time of

the enactment, "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner . . . ." § 19-910. Both the statute and the code define undue hardship as a "demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice."

The evidence establishes that the setback requirement at issue was part of the rezoning designation York Cold Storage wanted and obtained. There is no evidence that the physical characteristics of York Cold Storage's property were, at that or at any other time, such that strict application of the setback requirement would produce undue hardship for it.

Indeed, Sack's testimony establishes that York Cold Storage wanted relief from the requirement solely in order that it might maximize its profits. Although that is certainly an understandable, and even laudable, goal, it does not provide a basis for riding roughshod over the rights of others by obtaining a variance from zoning regulations with which the rest of the community must live. As said in *Frank v. Russell*, 160 Neb. at 361, 70 N.W.2d at 311, quoting Annot., 168 A.L.R. 30 (1947): " '[T]he financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public.' "

Nor is the situation changed, as York Cold Storage argues, by the fact that its ability to build a larger facility enables it to augment its work force and thus benefit the community at large. A business which expands its facilities will generally require additional employees; if the need or desire for expansion alone were to justify a variance, zoning regulations would be meaningless.

Having determined that York Cold Storage failed to establish that strict application of the setback requirement would have produced undue hardship for it, we do not need to consider whether it met the other criteria for a variance.

Accordingly, the district court neither made an error of law nor abused its discretion in concluding that the variance was granted illegally.

2. CLAIMED WAIVER OF CHALLENGE

York Cold Storage next contends that the district court erred in failing to find that the Bowmans waived "their right to challenge the decision of the Board of Adjustment by their failure to seek injunctive relief to stop construction." Section 19-912 provides that on appeal, "the district court shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order."

York Cold Storage in effect argues that the foregoing statute places upon one who wishes to challenge the grant of a variance an affirmative duty not only to appeal but to also seek and obtain a restraining order pending the outcome of the appeal.

"Waiver" is a voluntary and intentional relinquishment of a known, existing legal right or conduct from which such relinquishment can be inferred. *Stuhr v. Stuhr, post* p. 239, 481 N.W.2d 212 (1992); *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990). To establish the waiver of a legal right, there must be clear, unequivocal, and decisive action of the party showing such purpose, or acts which amount to an estoppel. See *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). The Bowmans took no action which can be said to have clearly and unequivocally demonstrated a knowing relinquishment of the right to challenge the variance nor such as to estop them from so doing.

The very opposite is true; they filed their appeal and promptly gave York Cold Storage notice that they had done so. York Cold Storage simply made a business decision to take the risk of construction, knowing that the grant of the variance was being challenged and might be reversed.

There is nothing in § 19-912 which requires one to either seek and obtain a restraining order or forgo any challenge to a variance. On the contrary, the statute merely provides that a challenger who wishes to incur the cost of obtaining a restraining order may do so in order to temporarily protect himself from the consequences of the variance during the pendency of the appeal.

In so holding, we are not unmindful of *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353 (Colo. 1986), which

holds that the failure of one challenging a zoning variance to obtain a temporary injunction pending the outcome of an appeal renders the cause moot. The problem with this approach, however, is that it encourages the disregard of legal challenges and promotes construction which may subsequently be found to be in violation of an erroneously waived zoning regulation. In this regard, we consider the reasoning in *Bat'tles v. Board of Adjustment and Appeals*, 711 S.W.2d 297 (Tex. App. 1986), to be sounder. The *Bat'tles* court rejected the notion that the failure to obtain a restraining order or to file a supersedeas bond renders the cause moot. That court concluded that as the statute concerning the grant or denial of a variance was silent on whether a bond or restraining order was required, the general law of civil suits applied, and that law does not require a losing plaintiff to seek a bond or a restraining order.

We therefore reject the *DeVilbiss* approach and hold that just as a plaintiff who collects a judgment which is appealed but is not superseded takes the risk of having to make restitution, *Ohio Cas. Ins. Co. v. Gantt*, 256 Ala. 262, 54 So. 2d 595 (1951), so, too, does one who builds in accordance with a zoning variance which is appealed take the risk that it will have to tear down what it has built.

3. Effect of Reliance

In an extension of the position it took in the preceding part IV(2), York Cold Storage also urges that the district court erred in reversing the variance because York Cold Storage had, in good faith, detrimentally relied on the grant.

In attempting to distinguish its situation from that presented in *Omaha Fish & Wildlife v. Community Refuse*, 213 Neb. 234, 329 N.W.2d 335 (1983), York Cold Storage argues that as it had made expenditures in constructing the building in good faith reliance on the variance, the variance cannot now be revoked.

Relying on *A. C. Nelsen Enterprises, Inc. v. Cook*, 188 Neb. 184, 195 N.W.2d 759 (1972), *Omaha Fish & Wildlife* suggests that under certain circumstances the expenditure of funds in good faith reliance on an improper zoning may give rise to a vested right for a certain use of the improperly zoned property.

Nonetheless, the *Omaha Fish & Wildlife* court found that the expenditures at issue had not been made in good faith because at the time they were made, the defendants were aware that the correctness of the zoning was in question.

The *Nelsen* court allowed the grantee of a certificate of occupancy the use of the property in accordance with a permit issued but later withdrawn by the city on the ground it had made an error. In that circumstance, the *Nelsen* court held that the grantee's expenditures in good faith reliance upon the certificate prevented the city from later withdrawing it.

Here, York Cold Storage knew for almost a week before it began construction that the variance under which it was proceeding faced a court challenge. Any expenditures it made under that circumstance cannot be said to have been made in good faith reliance on the variance. In the words of the district court, "Economic might under a guise of claimed good faith detrimental reliance cannot replace or change due process of law." See, also, *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985) (purchaser who knew of construction on adjacent property waived any right he may have had to enforce restriction prohibiting such construction).

4. Removal Order

In a further extension of the positions taken in parts IV(2) and IV(3), York Cold Storage contends that in any event, the district court's order of removal "exceeds the scope of the action and pleadings as well as the statutory authority and jurisdiction of the court." Brief for appellant at 34. Its argument in this regard is threefold: (a) York Cold Storage was an intervenor and, as such, was "not a proper party against whom relief can be granted," *id.*; (b) Neb. Rev. Stat. § 19-909 (Reissue 1987), upon which the Bowmans rely, does not authorize such relief; and (c) the Bowmans did not ask for mandatory injunctive relief.

(a) Role of Intervenor

York Cold Storage first argues that as an intervenor it was not a proper party against whom relief could be granted. On the contrary, the direct and immediate interest which requires the granting of a motion for leave to intervene is such an interest

that the one seeking to intervene will either lose or gain by the direct application of the judgment. *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985). Under York Cold Storage's reasoning, a party would be allowed to enter the litigation, but would have to accept the judgment only if it were to its liking. That is patent nonsense.

(b) Statutory Authority

York Cold Storage next urges that in praying for " 'all relief that they are entitled to under the provision of . . . §19-909,' " brief for appellant at 34, the Bowmans invoked no statute authorizing a mandatory injunction. It is true that § 19-909 provides for appeals of certain municipal decisions to a board of adjustment and has no relevance to the matters now before us. However, we have said the prayer of a petition is not a part of the allegations of fact constituting the cause of action; thus, where the facts alleged state a cause of action and are supported by the evidence, the court will grant proper relief, although it may not conform to the relief requested. See, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984); *Standard Reliance Ins. Co. v. Schoenthal*, 171 Neb. 490, 106 N.W.2d 704 (1960).

One of the issues in *State Bldgs. Div. v. Town of Castleton Bd. Adj.*, 138 Vt. 250, 415 A.2d 188 (1980), was whether the trial court could grant declaratory and injunctive relief in an appeal from the board of adjustments. The *Castleton* court stated:

> Although jurisdiction will not attach unless a proper appeal is commenced, this Court has affirmed a judgment order granting injunctive relief in which an action denominated as an appeal and a petition for injunctive relief, filed with the board of adjustment and the superior court respectively, were consolidated for disposition below. [Citation omitted.] Thus, it is apparent that if an appeal is properly commenced, the superior court can grant declaratory and injunctive relief in conjunction with its de novo hearing.

Id. at 255-56, 415 A.2d at 192.

The *Castleton* court then held that the trial court could

"grant such relief as is otherwise within its jurisdiction and consistent with law and equity." *Id.* at 256, 415 A.2d at 192. This reasoning is sound, for to limit the district court's authority to merely reversing the board's grant of the variance would be to award one successfully challenging the action of a board of adjustment a hollow victory, compelling the successful challenger to file a separate action in order to obtain effective relief from the illegally granted variance. Not only would the rule urged by York Cold Storage unnecessarily delay resolution of the matter and further encumber the courts, it would defy common sense and logic.

(c) Relief Requested

York Cold Storage finally claims that even if there is statutory authority for mandatory injunctive relief, the Bowmans did not specifically request such relief; thus, the district court was without the power to grant it. The initial petition was filed before the building was constructed; consequently, there was no reason to pray for an order to remove a building which did not exist. At the time the amended petitions were filed, York Cold Storage had not yet intervened; therefore, there was then no one who might be directed to remove a portion of the building. Once York Cold Storage intervened, removal of the offending portion of the structure was an obvious object of the litigation, and, as we have seen, the facts alleged and proved entitle the Bowmans to the mandatory injunctive relief ordered.

V. ANALYSIS OF CROSS-APPEAL

The City of York's first claim in its cross-appeal, that the district court erred in finding the variance was illegally granted, was adjudicated adversely to it in part IV(1). Accordingly, the City of York's assertion that the district court also erred in receiving the opinion of the Bowmans' appraiser because it was not adequately revealed in the Bowmans' answer to interrogatories is immaterial, as the question of any detriment to the Bowmans' property never arises.

VI. RULING

Because the record fails to sustain any of the errors assigned

by York Cold Storage or the City of York, the judgment of the district court, as first said in part I, is affirmed.

AFFIRMED.

FIRST WESTSIDE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. FOR-MED, INC., A NEBRASKA CORPORATION, AND DAVID R. ANDERSON, APPELLANTS.

481 N.W.2d 193

Filed March 13, 1992. No. S-89-839.

1. **Uniform Commercial Code: Notice: Security Interests.** For private sale of collateral, 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.
2. **Uniform Commercial Code: Notice.** Notification under the Uniform Commercial Code as to disposition of collateral does not depend upon whether the notification actually reached the person to whom it was sent; the statute is satisfied if the steps taken were such as would reasonably be required to inform the person to be notified in the ordinary course.
3. **Uniform Commercial Code: Security Interests: Proof: Sales.** Under Neb. U.C.C. § 9-504(3) (Reissue 1980), the secured party has a duty to resell possessed collateral in a commercially reasonable manner. The burden of proof as to the commercial reasonableness of a sale is placed upon the secured party conducting the sale where the secured party is seeking a deficiency judgment.
4. **Summary Judgment.** The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are other than alleged and that the moving party is entitled to judgment as a matter of law.
5. _____. Summary judgment is appropriate where the moving party establishes that there exists no genuine issue of material fact or differing inferences to be drawn therefrom in the case and that under the facts he is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

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

James M. Kelley for appellee.

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

WHITE, J.

Appellee, First Westside Bank, sued appellants, For-Med, Inc., and David R. Anderson, in an action for a deficiency judgment ($22,808.35) after the sale of collateral, a motor home, for a loan and security agreement.

For-Med and Anderson appeal from the district court's entry of summary judgment for appellee. The court awarded judgment in the amount of $22,808.35, plus interest at the rate of $6.70 per day from July 26, 1984, to the date of judgment, July 7, 1989, plus interest at the statutory judgment rate thereafter.

FACTS

On June 24, 1983, the parties executed a loan and security agreement in the amount of $79,924.89, plus interest, using the motor home as collateral. Allegedly, each appellant breached the terms and conditions of the note, and appellee opted to declare the entire note due and payable in full.

Upon notice to each appellant and solicitation of bids from various individuals and entities, appellee sold the motor home to the highest bidder for $60,000. On June 27, 1984, a notice of sale was mailed to appellant Anderson, which was refused over the initials of Anderson. After the sale price was credited, a balance of $18,735.04 remained on the debt, plus the reasonable and necessary expenses of the sale. The appellants did not raise the issue of commercial reasonableness of the sale in their answer or introduce evidence in the summary judgment process.

ASSIGNMENTS OF ERROR

For-Med and Anderson allege that the district court erred in (1) finding that Anderson had received proper notice of the sale of collateral by the appellee, (2) failing to make a finding as to whether the collateral had been sold in a commercially reasonable manner, and (3) determining that there were no material issues of fact in dispute.

NOTICE

The district court found that Anderson had received constructive notice of the sale of the collateral. We agree.

Although stockholders in corporations are not normally individually liable for corporate debts, the reality is that many loan institutions require one representing a small, low equity corporation to personally cosign for a corporate loan, thereby acting as guarantor. Anderson had personally signed the note for this loan as a debtor. No question exists as to his joint and several liability for the obligation.

Neb. U.C.C. § 9-504(3) (Reissue 1980) requires that for private sale of collateral "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 . . . ." We have interpreted this to require that a written notice be sent in such time that the debtors will have a minimum of 3 business days to arrange to protect their interest in the property. See, *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).

This court has also held that notification under the Uniform Commercial Code as to disposition of collateral does not depend upon whether the notification actually reached the person to whom it was sent; the statute is satisfied if the steps taken were such as would reasonably be required to inform the person to be notified in the ordinary course. *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 286 N.W.2d 750 (1980).

This view is supported by James J. White & Robert S. Summers, Uniform Commercial Code § 25-12 at 1225 (Student 3d ed. 1988):

> After the secured creditor prepares a notice with all the necessary information and rechecks it to assure accuracy, the creditor must send the notice to the debtor. . . . However, the Code does not require that the debtor actually receive the notice. . . . Indeed, if a creditor had to assure debtor's receipt of the notice, a debtor could hide to prevent disposition of collateral!

As to appellants' claim that the district court erred in its failure to make a finding as to the commercial reasonableness of appellee's sale of the collateral, we agree. We therefore vacate the order of summary judgment in favor of the appellee and remand the matter for further proceedings.

Under § 9-504(3), the secured party has a duty to resell possessed collateral in a commercially reasonable manner. The burden of proof as to the commercial reasonableness of a sale is placed upon the secured party conducting the sale where the secured party is seeking a deficiency judgment. *Adams State Bank v. Navistar Financial Corp.*, 229 Neb. 334, 426 N.W.2d 525 (1988). See, *Associates Finance Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973); *First Nat. Bank of Bellevue v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972).

The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are other than alleged and that the moving party is entitled to judgment as a matter of law. *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984). Summary judgment is appropriate where the moving party establishes that there exists no genuine issue of material fact or differing inferences to be drawn therefrom in the case and that under the facts he is entitled to judgment as a matter of law. *Gilbreath v. Ridgeway*, 218 Neb. 822, 360 N.W.2d 474 (1984); Neb. Rev. Stat. § 25-1332 (Reissue 1989).

We cannot say that there exists no genuine issue of material fact or that no differing inferences may be drawn from the evidence. Appellee did not assert the commercial reasonableness of its private sale, aside from its evidence of costs and expenses contributing to the deficiency on the debt. The court, subsequently, could make no finding, having no evidence before it regarding the reasonableness of the sale. A genuine issue of material fact remained unresolved and, as such, the granting of appellee's motion for summary judgment was improper under § 25-1332.

We reverse the district court's order of summary judgment for the appellee, and we remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. GERALD RICHTER, APPELLANT.

481 N.W.2d 200

Filed March 13, 1992. No. S-90-568.

1. **Records: Appeal and Error.** Generally, an appellate court is to accord weight to findings of fact by the trial court where such findings are supported by the record.
2. **Evidence: Appeal and Error.** An appellate court can accord no weight to findings which find no support in the evidence.
3. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
4. **Speedy Trial: Complaints: Appeal and Error.** As a general rule, a determination made by the trial court as to whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by the appellate court unless such was clearly erroneous.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
6. **Speedy Trial: Notice: Time.** Nebraska law requires that a criminal defendant must be properly notified of the need to appear in court on a given date and time before failure to so appear can initiate a period of excludable time.
7. **Speedy Trial: Time: Proof.** The primary burden is upon the State to bring the accused person to trial within the time provided by law, and failure to do so entitles the defendant to an absolute discharge. The burden is on the State to prove an excludable time period.
8. **Speedy Trial: Time: Notice.** An excludable period under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1989) does not begin if the defendant fails to appear at a hearing of which he or she has no notice.
9. **Speedy Trial: Warrants: Time: Notice.** The period of time during which an arrest warrant is outstanding is not excludable where the warrant is issued as a result of a defendant's failure to appear, when that failure is a result of lack of notice.
10. **Speedy Trial: Warrants: Time: Notice: Service of Process.** Under certain circumstances, warrant pendency time may be excludable as to an unnotified defendant who has failed to appear if diligent efforts to secure his or her presence by the service of an arrest warrant have been tried and failed. Whether all reasonable means to qualify a search as a reasonably diligent one have been exhausted must be determined by the circumstances of each particular case.

Appeal from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES L. MACKEN, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Randall L. Lippstreu and Robert M. Harris, of Harris & Lippstreu, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

HASTINGS, C.J.

Gerald Richter appeals his conviction for third-offense drunk driving and refusal to provide a breath sample. The sole issue on appeal is whether the district court erred in affirming the ruling of the county court, which refused to dismiss the case based upon the speedy trial provisions of Neb. Rev. Stat. § 29-1207 (Reissue 1989).

The standard of review of factual determinations by the trial court in support of its decision on a speedy trial question is not explicitly addressed in any Nebraska case. However, generally, an appellate court is to "accord weight" to findings of fact by the trial court where such findings are supported by the record. *State v. Bennett*, 219 Neb. 601, 603, 365 N.W.2d 423, 425 (1985) (where "the finding of the trial court is supported by the record," we "can and do accord weight to that finding"). Cf., *State v. Beck*, 212 Neb. 701, 704, 325 N.W.2d 148, 151 (1982) ("[w]e can accord no weight to findings which find no support in the evidence"); *State v. Melton*, 239 Neb. 790, 794, 478 N.W.2d 341, 346 (1992) ("[i]n determining the correctness of a trial court's ruling on a *motion to suppress*, the Supreme Court will uphold the trial court's findings of fact unless those findings are *clearly erroneous*" (emphasis supplied)). As a general rule, a determination made by the trial court as to whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by the appellate court unless such was clearly erroneous.

A complaint charging Richter with third-offense drunk driving and refusal to submit to a blood, breath, or urine test was filed in county court on October 7, 1987. This case was captioned case No. T-62605-M. Richter appeared in court as

required on October 23, 1987.

Case No. T-62605-M was dismissed upon the State's motion on November 18, 1987. The defendant testified that he was in the office of the clerk of the county court to report a change of address and noticed across the counter a dismissal sheet on his pending case. Richter did not say what date that was. He also did not say what address change he made. He did say he asked for a copy of the dismissal and also asked about his bond, and was told that the bond was "being ready to be sent in the mail."

The State filed a new complaint against Richter on November 30, 1987, captioned case No. T-63416-M. The court transferred Richter's bond from the earlier case to case No. T-63416-M without securing the agreement of and absent any notice to the defendant. Service of the new complaint was attempted by the State by citation, pursuant to Neb. Rev. Stat. § 29-425 (Reissue 1989). The face of the citation found in the record certifies that it was served "United States Mail, postage prepaid." No return of service appears in the record.

The citation required Richter to appear in the county court on December 23, 1987. Richter failed to appear on that day. On January 5, 1988, the county court issued a warrant for Richter's arrest. Richter was not asked during the course of the later proceedings seeking dismissal because of the lack of a speedy trial whether he actually received the citation ordering his appearance on December 23, 1987.

Deputy Sheriff Dick Blaha was assigned the duty of serving the warrant on Richter. Blaha went to 1218 Avenue F in Scottsbluff—listed on the warrant as Richter's address—at least six times during the 30 days after the warrant issued, but never located Richter there. Richter testified that 1218 Avenue F was a legitimate address and that he lived there "around December, first part of December [of 1987]." No evidence was adduced by the State as to Richter's address during the month of January 1988.

Sometime after issuance of the warrant, according to the county court clerk's testimony, a man who identified himself as Gerald Richter called the county court clerk's office to inquire about the return of bond money. The clerk informed him that the charges against him, Richter, had been refiled and that there

was a warrant for his arrest. The clerk was unable to recall when the phone conversation took place. While the clerk was unable to positively identify the caller, she testified she was "pretty sure it was Gerald Richter."

Richter was ultimately arrested on the warrant on August 30, 1989. Richter told the arresting officer that he thought the charges against him had been dismissed.

Richter apparently gave several addresses to various law enforcement and court personnel prior to his ultimate arrest. At his initial arrest, Richter gave his address as Box 111, Mitchell, Nebraska. The warrant for Richter's arrest indicates that he lived at that address or at 1218 Avenue F, Scottsbluff, Nebraska. The docket sheet for Richter's October 7, 1987, court appearance lists his address as 1455 6th Street, Gering, Nebraska. The October 23, 1987, docket sheet states, "New address as of 11-12-87 1819 Ave I Scottsbluff."

Richter's pretrial motion for dismissal based on the absence of a speedy trial was denied, and the county court stated, "[T]he only reason Mr. Richter has not been tried is that he's not available for trial." The district court affirmed the action of the county court.

Richter assigns as error the deprivation of his rights to a speedy trial under § 29-1207 and Neb. Rev. Stat. § 29-1208 (Reissue 1989) and under both the U.S. and Nebraska Constitutions.

We dispose of the second assignment of error first. Richter's motion to dismiss in the trial court was not grounded on the speedy trial guarantees of either the U.S. or Nebraska Constitution. Therefore, he may not be heard on those arguments on appeal. Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

Regarding his statutory claim, § 29-1207 provides in 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." There then follows a recitation of the time excludable from the 6-month limitation

because of the action of the defendant, such as the filing of motions which require a delay in proceedings or the absence or unavailability of the defendant.

Section 29-1208 provides 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."

The first complaint in this case was filed on October 7, 1987, and dismissed on November 18, and a new complaint was filed on November 30, 1987. There were several events totaling 29 days which caused delays in the commencement of trial which were either properly chargeable to the defendant or not chargeable to the State. The events not chargeable to the State included the period of 12 days between the dismissal of the initial complaint and the filing of the new complaint when no charge was pending. See *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). This would move the last day for trial to May 6, 1988, as compared with the actual trial date of December 5, 1989.

However, the period of time between the apparent issuance of an arrest warrant on January 5, 1988, on the one hand, and the actual arrest of the defendant on the warrant on August 30, 1989, on the other hand, amounting to 603 days, if added to the preliminarily determined last day of trial of May 6, 1988, would move that date to December 30, 1989, and trial was held within that period. The question becomes, Was defendant absent or unavailable during that latter period of time within the meaning of § 29-1207?

Defendant appeared for arraignment on the original charge on October 23, 1987, as required. He entered a plea of not guilty, and trial was set for January 5, 1987. In the meantime, Richter learned that those charges had been dismissed. They were in fact dismissed on November 18, 1987. A new complaint was filed on November 30, 1987. There was evidence presented by the State that defendant learned of this new filing by way of a telephone conversation with the clerk of the county court. However, notice of charges and filing of complaints are not accomplished by telephone calls.

Nebraska law requires that a criminal defendant must be properly notified of the need to appear in court on a given date and time before failure to so appear can initiate a period of excludable time. *State v. Groves*, 238 Neb. 137, 469 N.W.2d 364 (1991); *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982).

In *State v. Beck, supra*, this court held that the primary burden is upon the State to bring the accused person to trial within the time provided by law, and failure to do so entitles the defendant to an absolute discharge. The burden is on the State to prove an excludable time period. In reversing the judgment of the district court, which had found that the defendant was unavailable for trial during a period of time, this court reversed and observed that "[n]o evidence appears in the record showing the appellant and/or counsel were ever notified to appear." *Id.* at 704, 325 N.W.2d at 150.

An excludable period under § 29-1207(4)(d) does not begin if the defendant fails to appear at a hearing of which he or she has no notice. When this rule is applied in light of the burden upon the State to prove that any given period was excludable, see *State v. Sumstine, supra*, the State in this case was required to prove, by a preponderance of the evidence, that Richter had notice of the December 23, 1987, hearing for which he failed to appear.

A citation was issued in the new case on December 11, 1987. It commanded the defendant to appear in court on December 23, 1987. Richter did not appear on that date. However, the certificate of service indicates that the "CITATION, along with a copy of the charge attached was served upon the Defendant by United States Mail, postage prepaid, this 11th day of December, 1987 at the following address: 1218 Avenue F, Scottsbluff Nebraska."

A citation "may be served in the same manner as an arrest warrant, in the same manner as a summons in a civil action, or may be served by certified mail." § 29-425. It is clear from the record that no attempt was made to serve the citation on Richter in the manner required for an arrest; he was not taken into custody and brought before a magistrate or court. See, Neb. Rev. Stat. § 29-406 (Reissue 1989) (a warrant "shall command the officer to take the accused and bring him or her before the

magistrate or court issuing the warrant or some other magistrate having cognizance of the case"); Neb. Rev. Stat. § 29-412 (Reissue 1989) (person arrested under warrant shall be presented before "the proper magistrate"). The citation was also, on the face of the certificate of service, not served by certified mail. Therefore, sufficiency of the service of the citation must be evaluated under the standards for service of a civil summons.

A civil summons may be served by personal service, residence service, or certified mail. Neb. Rev. Stat. § 25-505.01 (Reissue 1989). There is nothing in the record to indicate that the citation was served by any of these means. The citation was served by "United States Mail, postage prepaid." Even if one were to assume that this language refers to certified U.S. mail, service by certified mail has not been perfected. Certified mail service, as provided in § 25-505.01(1)(c), requires "(i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached." If we leave aside the question whether the "Certificate of Service" appearing on the face of the citation is itself an adequate proof of service, there was no filing of any return receipt indicating to whom, where, and when the citation was served.

The record discloses that the State failed to prove, by a preponderance of the evidence, that Richter was ever served with the citation requiring his appearance in court on December 23, 1987, or that Richter otherwise had notice of the required court appearance. The period between the filing of the new complaint and the issuance of an arrest warrant was not an excludable period.

The State next argues that the period during which the arrest warrant was outstanding was excludable time. This position, however, ignores the ruling in *State v. Groves, supra*, that the period of time during which a warrant is outstanding is not excludable where the warrant is issued as a result of a defendant's failure to appear, when that failure is a result of lack of notice.

There can be no serious dispute that a defendant is

> required to appear at those dates and at those times when ordered *and of which he is notified*. No evidence appears in the record showing the appellant and/or counsel were ever notified to appear. If there was proof available to support the trial court's findings, it was simply not introduced. We can accord no weight to findings which find no support in the evidence.

(Emphasis supplied.) *State v. Beck*, 212 Neb. at 704, 325 N.W.2d at 150-51.

In this case, to allow the statute to be tolled with the mere issuance of a warrant without service would allow the State to schedule hearings without notifying the defendant and then to switch off the speedy trial clock by applying for a warrant.

Some courts have tolled the speedy trial clock where the state shows due diligence in obtaining the defendant's attendance by warrant. See, *Com. v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (1991) (pendency of warrant excluded where state had made diligent efforts—checking defendant's last known address, consulting defendant's family, broadcasting "wanted" message on police information network, and patrolling neighborhood defendant known to frequent—to serve warrant on defendant); *Williamson v. State*, 716 S.W.2d 591 (Tex. App. 1986) (time during pendency of warrant excluded where state had made diligent efforts—checking defendant's last known address, checking defendant's place of employment, and consulting defendant's family); *People v. Mouliere*, 118 Misc. 2d 999, 462 N.Y.S.2d 749 (1983) (time during pendency of warrant excluded where state had made diligent efforts—notifying police in Puerto Rico, where defendant reportedly fled; staking out repeatedly defendant's last known address; interviewing defendant's relatives and neighbors; and checking local utilities, the post office, state agencies, and employers).

This is not to say that under certain circumstances warrant pendency time may not be excludable as to an unnotified defendant who has failed to appear if diligent efforts to secure his or her presence by the service of an arrest warrant have been tried and failed. Whether all reasonable means to qualify a search as a reasonably diligent one have been exhausted must be determined by the circumstances of each particular case. *In re*

Interest of A. W., 224 Neb. 764, 401 N.W.2d 477 (1987).

However, in this case, in spite of the fact that the Richter family was well known to local authorities, no inquiries as to defendant's whereabouts were made of either of two brothers who lived in the vicinity. There is no showing in the record where the authorities obtained the 1218 Avenue F address at which service was attempted by *regular* mail on December 11, 1987, and by service of warrant in early 1988. The record does not disclose from what source this address was obtained. The defendant, in his testimony, admitted that this address was his "legitimate" address the first part of December 1987. However, he was never asked during the proceedings relating to the speedy trial issue what his residence address was in January 1988.

The deputy sheriff merely stated that he stopped at this Avenue F address on six different occasions and was unable to find anyone at home. Efforts similar to these evoked the observation of this court in *Emery v. State*, 138 Neb. 776, 777-78, 295 N.W. 417, 418 (1940), "The record shows that the police called at his home and, not finding him in, decided to wait until they should happen to run across him." See *In re Interest of A. W., supra*. No attempt was made to contact the post office regarding Richter's address nor to contact the local utilities or governmental agencies with which Richter would necessarily have contact in day-to-day living.

The State has not shown diligent efforts to secure Richter's appearance by means required by law, and therefore, under the circumstances of this case, there is no evidence to support the finding of the county court that Richter was unavailable for trial, within a reasonable construction of § 29-1207(4)(d), while the warrant remained outstanding.

As the State has failed to bring Richter to trial within 6 months of the filing of the complaint, after excluding time chargeable to Richter, his discharge is mandated by statute. The judgment of the district court is reversed, and the cause is remanded with directions to remand the case to the county court with directions to dismiss it.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. BRANDON, ALSO KNOWN AS JAMES DODDS, APPELLANT.

481 N.W.2d 207

Filed March 13, 1992. No. S-90-783.

1. **Trial: Witnesses: Indictments and Informations.** A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon the information after the information has been filed when doing so does not prejudice the defendant in the preparation of his defense.
2. **Trial: Witnesses: Indictments and Informations: Motions for Continuance: Appeal and Error.** To obtain a reversal on the grounds of an additional endorsement of witnesses, the defendant must have requested a continuance at trial and must demonstrate prejudice.
3. **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.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court.

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

Frederick D. Franklin for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

BOSLAUGH, J.

The defendant, James L. Brandon, also known as James Dodds, was found guilty by a jury of unlawful possession of crack cocaine with intent to deliver and was sentenced to 8 to 12 years' imprisonment, with credit given for time previously served. He has appealed and assigns as error the trial court's order permitting the State to endorse the name of an additional witness on the information on the day of trial, failure to grant his request for a continuance, refusal to give a jury instruction requested by him, and imposition of an excessive sentence.

The record shows that on February 24, 1990, Inspector Gerald Vajgert of the U.S. Postal Service was notified by the Express Mail office in Omaha, Nebraska, that there was a suspicious-looking package in its custody and that he was

requested to examine the parcel. Inspector Vajgert is the prohibited mailing specialist for the states of Nebraska and Iowa. His duties include investigating the use of mail service for anything that is illegal, including narcotics.

There are specific states from which a high volume of narcotic contraband originates for dispersion throughout the rest of the country. Those source states are Texas, Florida, Arizona, New Mexico, and California.

Inspector Vajgert went to the Express Mail office and examined the package and observed that it met the post office's criteria to warrant further investigation, in that the parcel originated from a source state, the label was handwritten, the label was addressed from one individual to another individual, the ZIP Code was incomplete, and the ZIP Code was different from that of the post office where the parcel was mailed.

The package was from a Brenda Dodds, 2734 Rainy River, Houston, Texas, with an incomplete ZIP Code of 7708. It was addressed to James Dodds, Jr., 3906 North 17th Street, Omaha, Nebraska, 68111.

Inspector Vajgert then contacted the Omaha Police Division's narcotics unit and arranged for a drug-detection dog to sniff the package. The dog "alerted" to the package, and subsequently a federal search warrant was prepared and executed on the parcel. Pursuant to the warrant, the parcel was opened in a systematic fashion, with step-by-step photographs being taken as the process ensued.

The outside cardboard envelope was opened, revealing a small box-shaped parcel wrapped in brown paper, with the same return address and delivery address that appeared on the Express Mail label. When the brown paper wrapping was removed from the inside box, a box of chocolate-covered peanut clusters was revealed. The cellophane on the outside of the box had already been torn, so Inspector Vajgert reopened the end of the box and emptied the contents onto the table. Contained within the box were a number of the peanut clusters and a small resealable plastic bag containing a tan rock-like substance which field tested positive for, and was subsequently confirmed to be, cocaine.

It was decided at that point to attempt a controlled delivery

of the package to its indicated destination. On the following day, February 25, 1990, the officers met again at Omaha police headquarters and proceeded to remove most of the suspected cocaine from the package and replace it with a look-alike substance. The officers wrapped the box again in the brown paper they had unsealed the previous day and then resealed it in the Express Mail envelope.

At approximately 1 p.m. on February 25, Inspector Vajgert approached the residence at 3906 North 17th Street. There was no response to his knock at the door, so he filled out a notification slip to let the parties at the residence know that there had been an attempt to deliver a parcel at that residence.

At approximately 8 p.m. that night, Inspector Vajgert was notified by Post Office personnel that a man had called inquiring about the parcel that the inspector had tried to deliver earlier that day. Pursuant to the inspector's instructions, the Post Office personnel had told the calling party that the package could not be delivered that day, but that the caller could either have it delivered or could pick it up the following day.

On the morning of February 26, 1990, Inspector Vajgert, dressed as a postal delivery person, returned to 3906 North 17th Street to deliver the parcel. He was being observed by members of the Omaha Police Division's undercover narcotics unit.

As the inspector got out of his car to deliver the parcel, a woman standing on the top step of the porch at 3906 North 17th Street asked if he had a parcel for her, and after ensuring that he was at the correct address, he had the female sign for the package. The signature was that of Victoria Robinson.

Robinson was seen leaving the front porch of the residence on 3906 North 17th Street and walking from that residence toward a vacant lot and then across the street to 3909 North 17th Street. Prior to her arriving at 3909 North 17th Street, the police officer tracking Robinson lost sight of her as she went behind a blue pickup truck. When Robinson reentered his view, the Express Mail envelope she had been carrying in her right hand was no longer visible.

After Robinson entered the residence at 3909 North 17th Street, the police officers went to the residence and spoke with a

woman at that house, who, after being advised as to why the officers were there, allowed them to search the residence. Robinson was ultimately found in an upstairs bedroom. The officers also found a "black zipper-like pouch bag" containing the brown paper wrapped package that had been inside the Express Mail envelope, and the Express Mail envelope was found, torn up, in a trash can in another bedroom of the residence.

Sometime prior to the controlled delivery at 3906 North 17th Street, Inspector Vajgert attempted another controlled delivery of a package to a Danny Livingston at 1608 Corby Street, Omaha, Nebraska. In the process of attempting this delivery, the inspector saw the name "J. Dodds" on the mailbox at the residence.

Subsequent to the search of the residence at 3909 North 17th Street, the defendant, Robinson, and Livingston were arrested and taken to police headquarters. A short time later, a consensual search of the residence of Livingston at 1608 Corby Street, Apartment 2, was performed. At the Corby Street residence, two torn up Express Mail envelopes were retrieved from the trash, one of which had the name "Dodds" on it.

On May 29, 1990, just before the trial commenced, the State, pursuant to Neb. Rev. Stat. § 29-1602 (Reissue 1989), asked leave of the court to endorse the name of Robinson on the information as a witness. The trial court allowed the endorsement over the objection of the defendant and overruled the defendant's motion for a continuance.

At the trial, Robinson testified that the defendant had asked her to sign for the Express Mail package for him and that he said he would "take care of" her after she received the package. The defendant told Robinson that he was afraid to sign for the package because he was concerned that the police were watching him. He thought it would look better for someone else to sign for the package. Robinson also stated that the defendant told her that he was going to sell the crack cocaine that was to be delivered in the Express Mail package.

Robinson was aware that the defendant had previously received Express Mail packages at his brother's residence at 1608 Corby Street, Apartment 2.

Robinson further testified that she signed for an Express Mail package on February 26, 1990, that was addressed to James Dodds at 3906 North 17th Street, which is where the defendant resided with his grandmother. After she signed for the package, Robinson went to a black van where the defendant was sitting with his girl friend and handed the package to him. The defendant looked at it and then gave it back to Robinson and told her to take it to her house and put it away where it could not be found.

When Robinson went from the van to her residence, she concealed the package in her jacket as instructed by the defendant. When she got inside the house, Robinson saw the defendant being arrested, and she became frightened, tore up the Express Mail envelope and threw it in the trash in her brother's room, and hid the brown paper-covered package in a black bag that she placed in the attic of her sister's closet.

Robinson admitted that a statement she had previously given to Sgt. William Agnew at Omaha police headquarters was incorrect in that she had denied knowing there was crack cocaine in the package because she was trying to protect herself and the defendant. She further testified that she had a felony conviction for second degree forgery and had been convicted on two counts of giving false information.

The defendant called Gregory Boswell to testify on his behalf. Boswell testified that he was in the black van with the defendant on the morning that the package was delivered and that Robinson mentioned to them that there was something that was supposed to be delivered to the defendant or that a slip had been left regarding this item the previous day. According to Boswell, Robinson said something about going to get the package and the defendant never asked Robinson to get it for him. When Robinson returned to the van, Boswell did not observe any package with her, nor did he hear the defendant ask Robinson to take anything back to her residence.

The defendant argues that his right to a fair trial was prejudiced by the trial court's allowing the endorsement of Robinson as a witness because without her testimony, there was no evidence to support a conviction on the charge against him. The defendant also argues that after the trial court granted the

State's request to endorse Robinson as a witness, the trial court should have granted his request for a continuance so that he could get a statement from Robinson, exploit contradictions in her testimony, and seek out character witnesses.

In *State v. Boppre*, 234 Neb. 922, 940-41, 453 N.W.2d 406, 422 (1990), this court stated:

> Pursuant to Neb. Rev. Stat. § 29-1602 (Reissue 1989), a trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon the information after the information has been filed when doing so does not prejudice the defendant in the preparation of his defense. . . . The purpose of § 29-1602 is to notify the defendant as to witnesses who may testify against him and give him an opportunity to investigate them. . . . We have held that to obtain a reversal on the grounds of an additional endorsement of witnesses, the defendant must have requested a continuance at trial and must demonstrate prejudice.

On May 24, 1990, the State had moved to consolidate the trials of Robinson and the defendant. In the course of the discussion regarding this motion, the State informed the court that Robinson had made a statement to the police indicating that she signed for the package for the defendant at his request and that when she brought the package to him in the van, the defendant asked her to take it to her house. Robinson's attorney, who was also present at the hearing, informed the court that Robinson would testify, making a similar statement as to what happened and how she was involved with the defendant.

While the defendant was not formally notified that Robinson intended to testify against him until the day of his trial, he makes no claim of surprise as to the content of her testimony. Furthermore, because of Robinson's name being mentioned in the police reports and the statements made at the consolidation hearing 5 days prior to trial, the defendant is unable to show actual prejudice because of the late endorsement in this case. See *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979).

As to the trial court's refusal to grant the defendant's request

for a continuance, that was a matter within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Otey, supra*. Under the circumstances in this case, it was not an abuse of discretion to deny the defendant's request for a continuance.

The defendant argues that the trial court abused its discretion by not allowing him to depose Robinson; however, the record does not reflect any request or motion to allow him to take the deposition of Robinson. "An issue not properly presented and passed upon by the trial court may not be raised on appeal." *State v. Chapman*, 234 Neb. 369, 375, 451 N.W.2d 263, 268 (1990). See, also, *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983). Moreover, the defendant makes no assignment of error regarding this matter, and this court does not consider errors which are argued but not assigned. See *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990).

The defendant claims the trial court erred in failing to give a requested jury instruction, to wit: " 'The terms "Innocent" and "Not Guilty" are not synonymous, [and] you do not have to believe that James Brandon is innocent to return a verdict of Not Guilty.' " Although the trial court refused to give the defendant's requested instruction because it would be confusing to the jury, it permitted counsel for the defendant to argue that distinction to the jury.

The defendant did not object to the instructions given to the jury, and he does not argue that the instructions given do not correctly state the law. "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. at 654, 456 N.W.2d at 763.

The instructions given to the jury are not included in the record in this case, apparently because they were not requested by the defendant. Because the defendant has not presented us with a record which shows that the jury instructions given were misleading or otherwise inadequate statements of the law or the issues involved, we do not further consider his assignment of error pertaining to the trial court's failure to give his requested instruction. See *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990).

Finally, the defendant contends that the trial court erred in imposing an excessive sentence. He was sentenced to not less than 8 nor more than 12 years' imprisonment, with credit for time previously served.

The defendant was convicted of unlawful possession with intent to deliver crack cocaine, a Class ID felony, which is punishable by a maximum term of imprisonment of 50 years, with a mandatory minimum of 3 years. See Neb. Rev. Stat. § 28-105(1) (Reissue 1989).

A sentence imposed within the statutory limits will not be set aside as excessive absent an abuse of discretion by the trial court. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

At the time of the crime, the defendant was 28 years old and single. He has never held any meaningful employment.

The defendant's criminal record includes convictions for arson and aggravated robbery. The aggravated robbery conviction was in Houston, Texas. The trial court noted that the drugs involved in this case were being delivered to Omaha from that city.

Given the defendant's prior record, and the seriousness of the case at bar, the sentence imposed by the district court was not an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

GALEN C. STUHR, APPELLEE, V. CATHERINE L. STUHR, NOW KNOWN AS CATHERINE L. MYERS, APPELLANT.

481 N.W.2d 212

Filed March 13, 1992. No. S-91-159.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, an appellate 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 appellate court considers, and may give weight to, the fact that the trial judge heard and

observed the witnesses and accepted one version of the facts rather than another.

2. **Waiver: Words and Phrases.** Waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
3. **Divorce: Child Custody: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement.
4. **Child Custody: Evidence: Stipulations.** A determination of the best interests of a child or children includes a judicial decision based on evidence, not exclusively on a parental stipulation for disposition of a question concerning the parties' child or children.
5. **Child Custody: Parental Rights.** In the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
6. _____: _____. A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded with direction.

Terrance A. Poppe and Gregory C. Damman, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellant.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellee.

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

SHANAHAN, J.

Catherine L. Myers, formerly Catherine L. Stuhr, the biological and noncustodial mother of Ashton Martin, appeals from the decision of the district court for Seward County, which denied Catherine Myers' application to change Ashton Martin's custody, previously granted to Galen C. Stuhr under a decree dissolving the Stuhr marriage. Galen Stuhr is neither the biological nor the adoptive father of Ashton Martin, who was born in 1985, but was the child's stepfather as a result of Catherine and Galen Stuhr's marriage in 1986.

In 1988, when the Stuhr marriage was dissolved, custody of Ashton Martin was disposed of by the district court's decree,

which incorporated Stuhrs' "Property Settlement and Custody Agreement," namely, the provision that Ashton Martin's custody was placed with Galen Stuhr, subject to reasonable visitation by Catherine Stuhr. The custody agreement also stated that Catherine and Galen Stuhr

> specifically agreed that the terms and provisions of this Property Settlement Agreement and Custody Agreement of the parties, specifically relating to the custody of Ashton L. Martin, shall be subject to modification by the Court, upon the petition of either party, upon the showing of a material change of circumstances indicating that such modification is in the best interest of said minor child [and that] in the event of the death of either party during the minority of such child, that the surviving party shall be entitled to custody.

Ashton Martin has lived with Galen Stuhr since 1986.

In May 1990, Catherine Myers filed an application to obtain custody of Ashton Martin and, for such modification of the custody provision in the dissolution decree, alleged that "there has occurred a material . . . change of circumstances," such as Catherine Myers' completion of treatment for alcohol and chemical dependency; hence, a change of custody was in the best interests of Ashton Martin.

At the November 27, 1990, hearing for change of child custody, the evidence centered on events after the dissolution decree in 1988.

At the time of the dissolution decree, Catherine Myers was receiving treatment for alcohol and chemical dependency, and she continued treatment until April 1989, when she eliminated her alcohol and chemical dependency and no longer required any form of treatment or counseling for substance abuse. To visit Ashton Martin, Catherine Myers drove from her home in Kansas to Galen Stuhr's home at Seward and frequently returned to Kansas with Ashton for periods ranging from a few days to a couple of weeks.

In December 1989, Catherine married Jeff Myers, a police officer in El Dorado, Kansas, and moved into a three-bedroom house with Jeff Myers and his son, Justin, a child by Jeff Myers' former marriage. At the time of the custody hearing,

Catherine Myers was pregnant and had an expected due date in May 1991. According to Jeff, Ashton and Justin consider each other brothers and have a good relationship. Jeff Myers approves of Catherine's decision to seek Ashton Martin's custody. Over the past several years, Catherine Myers has held various jobs from time to time, but at the time of the hearing was occupied with her activities in the Myers home and has indicated her intention to remain at home with Ashton, Justin Myers, and the new Myers baby.

Galen Stuhr is married to Teri J. Stuhr. Ashton Martin lives with Galen, Teri, and Teri's three children. Galen Stuhr expressed his love for Ashton, who is "like a son." Additionally, Catherine Myers acknowledged that Galen has been a good "father" and has done a good job raising Ashton.

As Galen and Teri Stuhr are both employed by Walker Manufacturing in Seward, a licensed day-care provider attends to Ashton while Galen and Teri are at work; otherwise, Galen and Teri Stuhr provide all child care for Ashton, who is a well-adjusted child, does well in school, and gets along well with Teri Stuhr's three children.

In its order on the custody question, the court stated:

> The circumstances of both of the parties to this action have changed significantly since the entry of the decree herein on February 24, 1988. Each maintains and can provide an appropriate home environment for Ashton L. Martin and both have appropriate parenting perspectives. Each has improved his or her lifestyle.
>
> However, significant changes in the circumstances of the parties do not result in an automatic change of custody of a minor child. The change must be in the best interest of the child - not the party.
>
> [Galen Stuhr] has provided the only home to Ashton L. Martin that he has ever known and stability in the life of a minor child is very important and a factor that cannot be overlooked. Petitioner has been and remains a suitable parent.
>
> Considering all the facts and circumstances of the relative positions of these parties and of the minor child this Court cannot conclude that it is in the best interest of

Ashton L. Martin to change custody.

ASSIGNMENTS OF ERROR

Catherine Myers' assignments of error may be distilled as follows: (1) The district court abused its discretion by failing to properly consider Catherine Myers' superior right as Ashton Martin's biological mother, who is fit to have child custody, and (2) the district court abused its discretion in failing to grant Catherine Myers the custody of Ashton Martin.

STANDARD OF REVIEW

In an appeal involving an action for dissolution of marriage, an appellate 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 appellate 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. See, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

DISCUSSION

Waiver of Parental Right.

Galen Stuhr contends that Catherine Myers "waived" her parental rights when she executed the custody agreement incorporated into the dissolution decree and thereby lost not only her parental superior right to the custody of Ashton Martin, but also lost her right to even seek a change in child custody.

"[W]aiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986). See, also, *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977); *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973).

As we have stated repeatedly: "[P]arties in a proceeding to dissolve a marriage cannot control the disposition of minor

children by agreement." *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 582, 477 N.W.2d 8, 11 (1991). Accord, *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Koser v. Koser*, 148 Neb. 277, 27 N.W.2d 162 (1947). "A determination of the best interests of a child or children includes a judicial decision based on evidence, not exclusively on a parental stipulation for disposition of a question concerning the parties' child or children." *Schulze v. Schulze*, 238 Neb. at 86-87, 469 N.W.2d at 143.

Judicial authority and responsibility to determine custody of minor children legally affected by a marital dissolution action is expressed in Neb. Rev. Stat. § 42-364 (Reissue 1988), namely:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of . . . third parties . . . . Custody and visitation of minor children shall be determined on the basis of their best interests.

The preceding statutory expression imposes on courts the responsibility to determine matters involving child custody, visitation, and support, a responsibility that cannot be forestalled by an agreement or stipulation of parties in a marital dissolution action. See *Hickenbottom v. Hickenbottom, supra.*

Moreover, Catherine Myers' execution of a custody agreement, standing alone, does not affirmatively demonstrate that she irrevocably waived or relinquished her maternal right in Ashton Martin, even if that were a legal possibility under the circumstances. The custody agreement expressly allows either party to obtain modification of the custody provision when the best interests of Ashton Martin dictate such alteration.

Although the record in this appeal reflects only the parties' stipulation for custody of Ashton Martin in conjunction with the Stuhrs' dissolution proceedings in 1988, and since no additional evidence was presented in the dissolution action concerning the child's best interests, for purposes of this appeal we accept the district court's conclusion in the dissolution decree, namely, the best interests of Ashton Martin in 1988

warranted that custody be granted to Galen Stuhr, and, on that basis, we proceed to dispose of the present appeal concerning the modification issue.

Parental Superior Right.

In the absence of a statutory provision otherwise, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. See *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980):

> Where the custody of a minor child is involved . . . the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
>
> The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
>
> The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). Cf. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991) (pursuant to § 42-364(1), a former stepparent may have visitation rights to a child in a marital dissolution proceeding, when visitation is consistent with the child's best interests). The vast majority of state jurisdictions, 38 to be exact, have adopted the "parental preference" principle in child custody disputes, including these illustrative decisions: *Ex Parte Terry*, 494 So. 2d 628 (Ala. 1986) (biological parent's prima facie right to child custody may be overcome only by forfeiture of parental rights or unfitness); *In re B. G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (parental custody must be detrimental to a child before custody is granted to one who is not the biological parent of the child); *In re Guardianship of D.A.McW.*, 460 So. 2d 368 (Fla. 1984) (custody denied to biological parent only when detrimental to

child's welfare); *Sheppard v. Sheppard*, 230 Kan. 146, 630 P.2d 1121 (1981) (biological parent has fundamental right to custody of child in the absence of parental unfitness); *Chandler v. Chandler*, 535 S.W.2d 71 (Ky. App. 1975) (denial of a biological parent's custody of a child in favor of one who is not the child's biological parent requires a determination that the biological parent is not a suitable custodian); *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627 (1971) (biological parent entitled to custody of child as a matter of law in the absence of neglect, abandonment, incapacity, or inability to care for child, or when custody by such parent is detrimental to child's best interest); *Keely v. Keely*, 495 So. 2d 452 (Miss. 1986) (best interests of a child are served by biological parent's custody of the child in the absence of abandonment, conduct of parent detrimental to child, or parental unfitness); *Henderson and Riphenburg v. Henderson*, 174 Mont. 1, 568 P.2d 177 (1977) (child custody granted to a biological parent unless that parent has neglected or abused the child); *Matter of Dickson v. Lascaris*, 53 N.Y.2d 204, 423 N.E.2d 361, 440 N.Y.S.2d 884 (1981) (child custody by a biological parent may not be displaced in the absence of grievous cause or necessity); *Worden v. Worden*, 434 N.W.2d 341 (N.D. 1989) (in the absence of exceptional circumstances, the biological parent is entitled to custody of a child notwithstanding that a third party can provide more amenities); *Langerman v. Langerman*, 321 N.W.2d 532 (S.D. 1982) (granting child custody to one other than a biological parent requires a showing of gross parental misconduct, unfitness, or extraordinary circumstances affecting child's welfare).

The parental preference principle, reflected in *Nielsen* and *Peterson*, is recognition that "the relationship between parent and child is constitutionally protected." See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). Accordingly, a court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.

District Court's Decision.

Evidence presented at the modification hearing convinced

the district court, and convinces us, that both Catherine Myers and Galen Stuhr are fit and proper persons to have custody of Ashton Martin. Galen Stuhr has commendably cared for Ashton Martin, notwithstanding that Galen is neither a biological nor an adoptive parent of Ashton. The evidence demonstrates that Catherine Myers has exercised her visitation rights and nurtured a relationship beneficial to Ashton. However, the district court abused its discretion in failing to recognize and adequately consider Catherine Myers' superior right as a fit biological parent of Ashton Martin. Disregarding the superior right of Catherine Myers as the biological mother of Ashton Martin, the district court proceeded immediately and directly to the question whether there had been a material change of circumstances since the Stuhr dissolution decree. Applying the parental preference rule to the present case, however, we conclude that the district court abused its discretion by not recognizing and adequately considering Catherine Myers' superior right as a fit biological mother of Ashton Martin. Also, considering Ashton Martin's best interests under the circumstances, see *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990), and *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990), we conclude that custody of Ashton Martin should have been granted to Catherine Myers; therefore, we reverse the district court's judgment and grant custody of Ashton Martin to Catherine Myers, subject to Galen Stuhr's right to reasonably visit Ashton Martin. On issuance of this court's mandate in these proceedings, the district court shall enter its order, reflecting Ashton Martin's custody in Catherine Myers in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

HASTINGS, C.J., concurring.

I agree with the result reached by the majority opinion. However, I object to our returning to, or reinforcing, the "chattel theory" of child custody rather than looking to the best interests of the child, " 'with due regard for the superior rights of a fit, proper, and suitable parent.' " See *Nielsen v. Nielsen*, 207 Neb. 141, 152, 296 N.W.2d 483, 489 (1980) (Hastings, J., concurring).

BOSLAUGH, J., joins in this concurrence.

JUNE THILKING, APPELLANT, V. THE TRAVELERS INSURANCE COMPANY, APPELLEE.

482 N.W.2d 548

Filed March 13, 1992. No. S-91-410.

1. **Workers' Compensation: Evidence: Appeal and Error.** In considering whether evidence sustains a finding for an award or dismissal by the Nebraska Workers' Compensation Court on rehearing, an appellate court does not reweigh evidence, but considers the compensation court's award or dismissal in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Workers' Compensation: Proof.** For an award based on an employee's death, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in death compensable under the Nebraska Workers' Compensation Act.
3. **Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
4. **Trial: Expert Witnesses.** A fact finder or trier of fact may accept or reject an opinion from an expert witness.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ronald H. Stave, of Stave & Coffey, P.C., for appellant.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

SHANAHAN, J.

June Thilking appeals from the order on rehearing in the Nebraska Workers' Compensation Court dismissing Thilking's action as the widow of William Thilking, a former employee of The Travelers Insurance Company. We affirm.

STANDARD OF REVIEW

Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence

must be considered in the light most favorable to the successful party. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Supp. 1991) precludes an appellate court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. See, *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991); *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); § 48-185.

> In considering whether evidence sustains a finding for an award or dismissal by the Nebraska Workers' Compensation Court on rehearing, an appellate court does not reweigh evidence, but considers the compensation court's award or dismissal in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Roan Eagle v. State, 237 Neb. at 962-63, 468 N.W.2d at 384-85. Accord *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 476 N.W.2d 243 (1991).

BACKGROUND FOR THILKING CLAIM

June Thilking is the widow of William Thilking, a former employee of The Travelers Insurance Company since 1983, who worked in Omaha, Nebraska, as the life, health, and financial services manager in Travelers' Omaha territory. William Thilking organized and coordinated Travelers' marketing strategy for the Omaha territory, which included Nebraska, Iowa, and South Dakota. On May 20, 1989, William Thilking, after a full day's preparatory study, took an examination at completion of the last in a series of insurance courses designed to maintain his proficiency in the insurance industry.

On May 24, 1989, William Thilking drove from Omaha to Rapid City, South Dakota, for meetings on May 25 and 26 with employees and customers of Kluthe & Lane Insurance agency concerning insurance and estate planning matters, and to recognize Kluthe & Lane for its service to Travelers.

William Thilking's schedule for May 26 indicates that he had arranged Travelers-related activities which commenced at 8:30 a.m. with Thilking's attendance at a breakfast meeting. Later in the day, Thilking toured Mount Rushmore, where he met a potential customer and discussed insurance business, and ended the day with an evening dinner party at which he participated in entertainment by playing the guitar and singing.

Shortly after 9 a.m. on May 27, William Thilking left Rapid City and started to drive back to Omaha. At approximately 3 p.m. on May 27, William Thilking was discovered in his automobile near Ainsworth, Nebraska. Thilking's vehicle was undamaged in a ditch and had its engine running with the transmission in "drive" when a Brown County deputy sheriff arrived at the scene in response to an emergency call. An ambulance transported William Thilking to the Brown County Hospital, where he was examined by Dr. Melvin Campbell, who concluded that Thilking died before arrival at the hospital. According to the death certificate signed by Dr. Campbell, the cause of William Thilking's death was "cardiac arrest." Also, on the death certificate Dr. Campbell noted that the "[i]nterval between onset and death" was "immediate." Under the death certificate heading "OTHER SIGNIFICANT CONDITIONS - Conditions contributing to death but not related," Dr. Campbell wrote "hypertension." There was no autopsy on William Thilking.

REHEARING IN NEBRASKA WORKERS' COMPENSATION COURT

June Thilking, as the widow of William Thilking, sued Travelers in the Workers' Compensation Court and claimed that William Thilking, on May 27, 1989, sustained personal injury in an accident arising out of and in the course of his employment by Travelers, namely, William Thilking "suffered a cardiac arrest" on his trip from Rapid City for return to

Omaha. June Thilking contends that the work-related activities of William Thilking produced stress sufficient to result in myocardial infarction. Myocardial infarction is gross necrosis of the myocardium, the middle and thickest layer of the heart wall composed of cardiac muscle, which necrosis results from interruption of the blood supply, such as in coronary thrombosis or occlusion of a coronary artery. Dorland's Illustrated Medical Dictionary 834, 1089 (27th ed. 1988); Stedman's Medical Dictionary 780 (25th ed. 1990).

Nothing in William Thilking's medical history indicated any particular cardiac problem, although he was overweight and had an elevated serum cholesterol with blood pressure readings which fluctuated between normal and high. Since William Thilking had a history of high blood pressure dating back to 1983, he was taking medication to control his elevated blood pressure. In the 2 years before his death, William Thilking had two electrocardiograms that revealed normal heart activity and presented no evidence of heart damage or cardiac problems.

To support her claim, June Thilking offered testimony from Dr. Stephen Carveth, a cardiovascular and thoracic surgeon. Dr. Carveth testified that "cardiac arrest" and "myocardial infarction" are not synonymous and are not interchangeable descriptions of the same cardiac condition. As Dr. Carveth explained, a myocardial infarction "is the term which basically means death of a segment of [heart muscle] or the entire heart," whereas "[c]ardiac arrest is the term used by Heart Association standards as the sudden and unexpected cessation of breathing and heartbeat." Dr. Carveth expressed his opinion that William Thilking's "stress related job was a major factor and the most likely cause of his death being a myocardial infarction." Dr. Carveth supported his opinion by reference to several factors: William Thilking, 55 years of age, had been under stress in his employment with Travelers. On the Rapid City trip, Thilking participated in 2 days of business meetings and entertainment activities. William Thilking was found dead in his car, which was in a ditch by the side of the road, with the automobile's transmission locked in the drive position without any evidence that the automobile had been in any type of collision. As Dr. Carveth expressed: "Based, again, on Heart Association

statistics and my own practice of medicine and surgery, a 55-year-old man who was dedicated to his job, who was under a great deal of stress, I believe, the most likely cause of death in this individual is myocardial infarction." Dr. Carveth was aware that William Thilking had been classified as obese and suffered from high blood pressure dating back to 1983, and concluded that "[n]othing in the records . . . clearly indicate[s]" that William Thilking had a previously weakened or diseased heart. Referring to possible causes for cardiac arrest, that is, other than myocardial infarction, Dr. Carveth acknowledged that other causes might be a "stroke" or "a litany of other causes . . . a whole raft of causes that is clumped under the title of cardiac dysrhythmia."

Dr. Michael Hugh Sketch testified for Travelers concerning causation for William Thilking's death. Dr. Sketch is a cardiologist who is a professor of medicine and chief of the cardiology department at Creighton University. Dr. Sketch reviewed several of the "cardiac risk factors" for Thilking's suffering a cardiovascular disease, factors such as Thilking's high cholesterol, obesity, and high blood pressure. Although Dr. Sketch agreed with Dr. Carveth that William Thilking's "death was one of cardiac arrest," Dr. Sketch stated that "the question is as to what caused that cardiac arrest, whether it was a myocardial infarction or whether it was not is a whole other matter." Dr. Sketch concluded that there was no medical evidence to substantiate that

> Mr. Thilking suffered a myocardial infarction. In fact, he had a cardiac arrest is a foregone conclusion because he did suffer unequivocally with sudden cardiac death. And this was due to an arrythmia. . . . Now, whether that was due to a myocardial infarction is a matter of pure conjecture anyway. But statistically it's not a high probability that it was.

Cardiac arrythmia is any variation from the normal rhythm of the heartbeat, that is, a loss of rhythm, denoting especially an irregularity of the heartbeat. Dorland's Illustrated Medical Dictionary 127 (27th ed. 1988); Stedman's Medical Dictionary 120 (25th ed. 1990). Dr. Sketch disagreed with Dr. Carveth's opinion that myocardial infarction caused William Thilking's

death and based his disagreement on the medical fact that myocardial infarction is "caused by a blood clot forming within a coronary artery, one of the arteries that supplies the heart with blood. . . . [T]here is at this time no evidence that this clot formation can be caused by or is caused by emotional or physical stress." Dr. Sketch acknowledged that his view of emotional or physical stress in relation to myocardial infarction may not be universally accepted by cardiologists. Additionally, in reference to myocardial infarction and William Thilking's death, Dr. Sketch testified that "the prevalence of a myocardial infarction in people who suffer this kind of death is very low. So you can say that is one thing which would point against a myocardial infarction."

In its order of dismissal, the compensation court concluded that

> no autopsy was performed on the decedent and the actual cause of death can only be deduced by conjecture by both Dr. Carveth and Dr. Sketch. Although both Dr. Sketch and Dr. Carveth believed the decedent had died of a heart attack, there is no indication as to the specific type or cause of the heart attack such as myocardial infarction, severe coronary artery disease, or arrythmia. Both expert witnesses stated that there were other things that could cause a heart attack such as a stroke.

ASSIGNMENTS OF ERROR

June Thilking's assignments of error may be distilled into the following: The Workers' Compensation Court erred in finding that William Thilking's death from a "heart attack" was noncompensable under the Nebraska Workers' Compensation Act.

CLAIMANT'S BURDEN OF PROOF

Neb. Rev. Stat. § 48-151(2) (Reissue 1988) in part provides that in all workers' compensation cases, an "accident" shall mean "an unexpected or unforeseen injury happening suddenly and violently . . . and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or

unforeseen injury was in fact caused by the employment." *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 854, 472 N.W.2d 727, 730 (1991).

"For an award based on an employee's death, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in death compensable under the Nebraska Workers' Compensation Act." *Rosemann v. County of Sarpy*, 237 Neb. 252, 257, 466 N.W.2d 59, 62 (1991). Cf. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 467, 461 N.W.2d 565, 571-72 (1990):

> [A] claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment . . . .

Accord *Tarvin v. Mutual of Omaha Ins. Co., supra.*

> "In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case."

Mann v. City of Omaha, 211 Neb. 583, 591-92, 319 N.W.2d 454, 458 (1982) (quoting from *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980)). Accord *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

> Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 785, 408 N.W.2d 280, 289 (1987). Accord, *Tarvin v. Mutual of Omaha Ins. Co., supra*; *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

"Determination of causation is, ordinarily, a matter for the

trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. at 778, 408 N.W.2d at 285. Accord *Tarvin v. Mutual of Omaha Ins. Co., supra.*

DISCUSSION

Although the physicians testifying in the Thilking case concurred that William Thilking suffered "cardiac arrest," or, more simply, Thilking's heart stopped beating, the question in its most fundamental form is: What caused William Thilking's heart to stop beating, resulting in his death?

Medical evidence in the Thilking case establishes that although William Thilking had some risk factors which may have affected his cardiac arrest, he did not suffer from a previously diseased or weakened heart. As noted by Professor Arthur Larson:

> If there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the employment and causally connected with the collapse as a matter of medical fact is adequate to satisfy the legal test of causation. This is the heart-case application of the actual risk test: This exertion in fact causally contributed to this collapse.

(Emphasis omitted.) 1B Arthur Larson, The Law of Workmen's Compensation § 38.83(b) (1991).

To paraphrase the conclusion of the Nebraska Workers' Compensation Court, all medical evidence in Thilking's case establishes the fact that William Thilking died of cardiac arrest on May 27, 1989. Testimony of Drs. Carveth and Sketch indicates that there are a "litany" of possibilities and a "whole raft" of causes for William Thilking's cardiac arrest. The only connection between William Thilking's death and his employment is that he was returning to Omaha from a business trip. "The combination of employment and a heart attack is insufficient in itself to entitle one to workmen's compensation benefits." *Reis v. Douglas County Hospital*, 193 Neb. 542, 549, 227 N.W.2d 879, 884 (1975).

Although Dr. Carveth expressed his opinion that William Thilking died from a stress-caused myocardial infarction, Dr. Sketch specifically disagreed with Dr. Carveth's conclusion and

stated that medical data was insufficient to "substantiate . . . that Mr. Thilking suffered a myocardial infarction." While Dr. Sketch expressed the view that clot formation, present in myocardial infarction, is not caused by emotional or physical stress, a view that may not be shared throughout the complete community of cardiologists, Dr. Sketch's opinion regarding causation, nonetheless, was placed before the compensation court. Thus, although the testifying physicians agreed that there are numerous factors which may precipitate or affect a cardiac problem, such as myocardial infarction, severe coronary artery disease, or arrythmia, the Workers' Compensation Court concluded that the evidence failed to supply a sufficient basis to determine that William Thilking died from a stress-caused myocardial infarction attributable to Thilking's employment with Travelers. "A fact finder or trier of fact may accept or reject an opinion from an expert witness." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 474, 461 N.W.2d 565, 575 (1990). "We have repeatedly held that where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court." *Zaleski v. Farmland Foods*, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985). Accord *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991).

We note the absence of an autopsy as a source of information concerning William Thilking's death and the compensation court's language in its finding "the actual cause of [William Thilking's] death can only be deduced by conjecture . . . ." In view of the preceding expression by the compensation court, June Thilking suggests that the compensation court requires an autopsy to sustain a workers' compensation claim based on an employee's death when the cause of death is not immediately discernible or, perhaps, even in situations where the cause of death seems readily apparent. The compensation court unfortunately employed imprecise terminology which may be construed as saying that an expert witness' opinion on cause of death is rendered absolute surmise without an autopsy and, in the absence of an autopsy, any opinion on causation of death is "deduced by conjecture."

In *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 910, 464 N.W.2d 343, 349 (1991), we again called attention to Neb. Evid. R. 1101(4)(d), Neb. Rev. Stat. § 27-1101(4)(d) (Reissue 1989), which exempts proceedings in the Nebraska Workers' Compensation Court from applicability of the Nebraska Evidence Rules, that is, "[T]he Nebraska Evidence Rules do not apply to 'proceedings before the Nebraska Workers' Compensation Court . . . .' " See, also, *Schillereff v. Independent Plumbing & Heating*, 237 Neb. 424, 466 N.W.2d 99 (1991). Further, we bear in mind and reemphasize that the Nebraska Workers' Compensation Court cannot utilize evidential standards more restrictive than the Nebraska Evidence Rules. See *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977). Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989) states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

An expert's opinion is the witness' view or expression of thought on a particular matter. As evidenced in many instances, experts on the question of causation for death frequently express opinions without reference to a postmortem examination. Presence or absence of a postmortem examination, or autopsy, may have a bearing on a witness' credibility or affect weight to be given to testimony or other evidence on the question of causation for a death. Therefore, while a postmortem examination may supply information for a medical expert's opinion concerning a cause of death, a postmortem examination, or autopsy, is not an indispensable prerequisite to an expert's opinion within the province of the witness' expertise. Drs. Carveth and Sketch had medical data for their opinions on the cause of William Thilking's death and, therefore, did not indulge in conjecture, that is, express a conclusion reached without sufficient data, evidence, or information.

Consequently, as we construe the expression of the compensation court in reference to the absence of an autopsy,

perhaps a postmortem examination might have provided additional information as an objective basis for a medical opinion on causation for William Thilking's death. However, in view of the record, that is, the presence and absence of evidence, the compensation court gave greater weight to the opinion expressed by Dr. Sketch that myocardial infarction was not the cause of death, as contended by June Thilking, especially since both Drs. Carveth and Sketch agreed that, besides myocardial infarction, "there were other things that could cause a heart attack such as a stroke." Therefore, the compensation court decided that June Thilking had failed to establish, by a preponderance of evidence, that William Thilking's employment with Travelers proximately caused injury which resulted in death compensable under the Nebraska Workers' Compensation Act. See *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991).

CONCLUSION

Accordingly, the Nebraska Workers' Compensation Court was not clearly erroneous in its finding that William Thilking's employment did not cause the cardiac arrest resulting in his death.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL LAFRENIERE, APPELLANT.

481 N.W.2d 412

Filed March 13, 1992. No. S-91-690.

1. **Convictions: Theft: Proof.** In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen.
2. **Criminal Law: Words and Phrases.** The meaning of "knowing" in a criminal statute commonly imports a perception of facts required to make up the crime.
3. **Intent: Circumstantial Evidence.** Knowledge, like intent, may be inferred from the circumstances surrounding the act.
4. **Criminal Law: Intent.** An act is done knowingly if it is done voluntarily and

intentionally, and not because of mistake, accident, or innocent reason.

5. **Criminal Law: Statutes.** In construing a penal statute, nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
6. **Criminal Law: Proof.** When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless the person actually believes it does not exist.
7. **Criminal Law: Words and Phrases.** Willful blindness exists where the actor is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.
8. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if the evidence and the reasonable inferences which may be drawn from the evidence establish guilt beyond a reasonable doubt.
9. **Convictions: Circumstantial Evidence: Presumptions: Proof.** While the State need not disprove every hypothesis except that of guilt, an accused is presumed to be not guilty and cannot be convicted unless the State has proved the accused guilty beyond a reasonable doubt; thus, in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with direction to dismiss.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

Pursuant to verdict, the defendant-appellant, Michael LaFreniere, was adjudged guilty of theft by receiving stolen property, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1989). He assigns but one error, the district court's determination that the evidence is sufficient to support the conviction. The record sustains the assignment, and we thus reverse and remand with direction that the information be dismissed.

The charge stems from the State's claim that on October 17,

1990, LaFreniere sold approximately 720 pounds of uninsulated copper wire, owned by Union Pacific Railroad, with the knowledge or belief that it was stolen.

At the time of the incident, the 40-year-old LaFreniere was employed by the city of Kearney at its "tree burning dump." While the dump was designed to be used for trees, pallets, and grass, the record demonstrates that other items are quite often discarded there. LaFreniere was responsible for collecting dumping fees when the dump was open for general business, between 1 and 5 p.m. As manager of the dump, LaFreniere had first salvage rights to any recoverable items.

Philip Hilty, foreman of the city's sanitation department, testified that the gate to the dump is frequently left open during off hours and that several individuals have keys and come and go as they please.

Darwin Glinsmann, a manager of signal maintenance for the railroad, testified that on the morning of October 14, 1990, he noticed some line wire missing from his employer's poles which run parallel to certain railroad tracks. The following evening, on October 15, 1990, he noticed more line wire missing. Two sizes of copper wire were taken: Nos. 6 and 10.

Kenneth Schleiger, a senior special agent for the railroad, investigated the missing wire. He opined that more than one person was involved in stealing the wire since a total of 53,800 feet was missing. It was also his opinion that the wire was cut into 110-foot sections, equal to the distance between the poles. Schleiger contacted several of the salvage companies in the area and asked that they report to him if any copper wire was brought in for sale.

On October 17, 1990, Schleiger received a telephone call from Kramer Iron and Metal of Grand Island, informing him that some copper wire had been brought in. Schleiger went to Kramer's, where he found two wheelbarrows containing 714 pounds of rolled Nos. 6 and 10 copper wire. Each roll contained several cuts of wire, but Schleiger did not determine their length. Schleiger concluded that the wire belonged to his employer; Kramer's records listed LaFreniere as the seller.

On October 23, 1990, Schleiger went to LaFreniere's house in Kearney armed with two deputy sheriffs who had a search

warrant; Schleiger found what appeared to be a piece of No. 6 copper wire in a burn barrel located in LaFreniere's backyard and a pair of boltcutters located in LaFreniere's pickup truck. LaFreniere readily admitted he had sold copper wire to Kramer's, and gave Schleiger the receipt as proof.

According to Schleiger, LaFreniere said he had found the wire "at the tree dump and seized control of it and sold it." Schleiger further testified that "[LaFreniere] thought [the wire] possibly belonged to some other people but he never would really divulge the name, if he knew their names; but that he saw it, thought that they possibly left it . . . and he seized control because he indicated he had salvage rights at the tree dump." Schleiger commented that when he told LaFreniere that several people must have cut the wire and asked him about his boltcutters, LaFreniere admitted that some of the wire at Kramer's bore the markings of his cutters, since he had to trim some ends to fit the wire into his pickup truck.

Testifying in his own defense, LaFreniere confirmed that he had sold the copper wire to Kramer's. He explained that since it was fall cleanup in Kearney, the gate to the dump had already been opened the morning he found the pile of wire. He testified that he drove to Kramer's in Grand Island instead of going to the local salvage yard he had used on numerous other occasions because he had been asked by an auction house in Kearney to take some television sets to an auction house in Grand Island. According to LaFreniere, he had three console and seven portable television sets in his pickup truck. He also gave uncontroverted testimony that a number of wire users have from time to time left copper wire at the dump for discard and that he had on one other occasion sold approximately 400 pounds of copper wire. Indeed, Hilty, LaFreniere, a contractor, and one of LaFreniere's neighbors all testified that they had seen wire at the dump on numerous occasions. There is further evidence that it was not unusual for LaFreniere to have in his possession wire, tin, aluminum, brass, lead, and other metals found at the dump. Admitted into evidence as well were a series of receipts provided by LaFreniere, showing that he regularly sold wire and metals to local salvage yards.

At the close of all the evidence, LaFreniere's renewal of his

motion for directed verdict was denied by the court.

In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen. § 28-517. The central focus of the crime, therefore, is on the accused's knowledge or belief.

"The meaning of 'knowingly' in a criminal statute commonly imports a perception of facts required to make up the crime. [Citation omitted.] Knowledge, like intent, may be inferred from the circumstances surrounding the act." *State v. Mills*, 199 Neb. 295, 300, 258 N.W.2d 628, 632 (1977). The U.S. District Court for the District of Nebraska has stated that an "act is done knowingly if it is done voluntarily and intentionally, and not because of mistake or accident or innocent reason." *Casbah, Inc. v. Thone*, 512 F. Supp. 474, 486 (D. Neb. 1980), *aff'd in part and rev'd in part* 651 F.2d 551 (8th Cir. 1981).

Perhaps the clearest explanation of "knowingly" by this court is found in *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983). Therein, the court was concerned with the meaning of "know" as used in a statute dealing with the conduct of one holding a license to engage in the real estate business. Having concluded that the statute was penal in nature, this court wrote that "[i]n construing a penal statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute." 213 Neb. at 811, 331 N.W.2d at 529. In upholding the dismissal of a complaint lodged against a licensee, the *Hancock* court, citing *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946), stated:

> A statute making it a crime to "knowingly" receive stolen goods has been held to require a person to have such information from facts which should convince him that the property was stolen, or which should lead a reasonable man to believe they have been stolen, before, in a legal sense, he knew they were stolen.

213 Neb. at 812, 331 N.W.2d at 530. The *Hancock* court also referred to the Model Penal Code definition of knowledge. " 'When knowledge of the existence of a particular fact is an

element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.' " 213 Neb. at 812, 331 N.W.2d at 530. The *Hancock* court, for the purpose then under consideration, concluded

> from an examination of these authorities and the statute here involved that a broker or salesperson will be considered to "know" of a prior listing contract if he had actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such contract existed.

213 Neb. at 813, 331 N.W.2d at 530.

Finally, Model Penal Code and Commentaries § 2.02, comment 9 at 248 (Official Draft & Revised Comments 1985), provides a broader meaning of "knowledge," identified as " 'wilful blindness.' " Under the willful blindness concept, the actor "is aware of the probable existence of a material fact but does not determine whether it exists or does not exist." *Id.* In other words, the actor has reason to believe or know something is true but refuses to investigate, in order to later deny knowledge and appear ignorant. See *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). See, also, *State v. Douglas*, 217 Neb. 199, 280, 349 N.W.2d 870, 911 (1984) (dissent of Shanahan and Grant, JJ., and Moran, D.J., concluding that the accused was willfully blind of certain facts and "thus 'knew' or had 'knowledge' of the" improper financial arrangement).

When these definitions are applied to the instant statute, the State was required to prove LaFreniere guilty under one of three standards: (1) that he had actual knowledge to convince him that the wire was stolen, (2) that he knew of facts which would lead a reasonably prudent person to believe that the wire was stolen, or (3) that he was willfully blind to facts showing the wire was probably stolen.

It should be pointed out that while the record is replete with evidence regarding the theft of the wire from the railroad's poles, LaFreniere was not charged with stealing the wire. Whether intentional or otherwise, the proliferation of this evidence creates an implication that perhaps LaFreniere stole

the wire originally and thereafter disposed of the stolen goods. The State's strategy appeared to be an attempt to indirectly paint LaFreniere as the thief. But as LaFreniere was not charged with the theft of the wire itself, the only evidence relevant to the charge prosecuted is that which relates to LaFreniere's finding, seizing, and selling the wire.

While LaFreniere said he thought the wire "possibly belonged to some other people," he also thought they may have left it at the dump for burning purposes; he seized control of it because he had salvage rights. The belief that the wire may have belonged to someone, standing alone, does not lead to a conclusion that the copper wire was stolen any more or less than it implies that it was discarded. The State failed to show that LaFreniere either knew the owner or knew that the owner did not intend to discard the wire. Neither is there any evidence which demonstrates that a reasonably prudent person would believe the wire was stolen.

It must be borne in mind that according to the uncontroverted evidence, the wire was found at a dump, a place where permanently abandoned items are put. The fact that LaFreniere sold the wire to Kramer's and not to his usual salvage yard is noteworthy but does not, in and of itself, tend to support LaFreniere's guilt.

Circumstantial evidence is sufficient to support a conviction if the evidence and the reasonable inferences which may be drawn from the evidence establish guilt beyond a reasonable doubt. *State v. Jones*, 230 Neb. 968, 434 N.W.2d 333 (1989). However, in determining the sufficiency of circumstantial evidence to support a conviction, "[a]ny fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." *State v. Earlywine*, 191 Neb. 533, 535, 215 N.W.2d 895, 896 (1974). Accord *State v. Dawson*, *ante* p. 89, 480 N.W.2d 700 (1992). Moreover, while the State need not disprove every hypothesis except that of guilt, an accused is presumed to be not guilty and cannot be convicted unless the State has proved the accused guilty beyond a reasonable doubt. Thus, in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations

must be resolved most favorably to the accused. *State v. Dawson, supra.*

As a matter of law, the evidence presented fails to establish that LaFreniere had actual knowledge that the wire was stolen, that he knew facts which would lead a reasonably prudent person to believe the wire was stolen, or that he was willfully blind to facts showing the wire was stolen.

Accordingly, the district court erred in determining that the evidence was sufficient to sustain a verdict of guilt and thus erred in failing to sustain LaFreniere's motion for directed verdict. See *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992) (directed verdict appropriate where there is a complete failure of evidence to establish essential element of crime charged or evidence so doubtful in character and lacking in probative value that finding of guilt cannot be sustained).

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

BROEKEMEIER FORD, INC., ET AL., APPELLANTS, V. DUANE CLATANOFF ET AL., APPELLEES.

481 N.W.2d 416

Filed March 20, 1992. No. S-89-665.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Limitations of Actions: Damages.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known.
3. **Limitations of Actions: Words and Phrases.** "Discovery," as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
4. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a

cause of action, must show some excuse tolling the operation and bar of the statute.

5. **Limitations of Actions: Pleadings: Proof.** If a petition, challenged under the statute of limitations, facially shows that a cause of action is barred by the statute of limitations, a plaintiff must allege facts sufficient to avoid the bar of a statute of limitations and, at trial, must prove facts avoiding the statute of limitations.
6. _____: _____: _____. If a petition, on its face, does not disclose that an action is barred by a statute of limitations, a defendant must plead the statute of limitations as an affirmative defense and has the burden to prove that affirmative defense.

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

E. Terry Sibbernsen and, on brief, John M. Peebles, of Domina, Gerrard, Copple & Stratton, P.C., for appellants.

Larry L. Brauer, of Allan, Brauer & Mullally, for appellee Clatanoff.

Terrance A. Poppe, of Hecht, Sweet, Alesio, Morrow, Poppe & Otte, P.C., for appellees Langmeier et al.

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

SHANAHAN, J.

In 1987, Broekemeier Ford, Inc.; Twin Oaks Lincoln Mercury, Inc.; Willis J. Broekemeier; and Lu Ann Broekemeier, all as sellers, but collectively designated "Broekemeiers," commenced an action in the district court for Seward County against Duane Clatanoff; Roland Langmeier, doing business as Landmark Realty; Forrestt F. Combs; and R. James Pearson, who were involved in the 1979 sale and purchase of corporate property owned by the Broekemeiers' automobile dealerships, Broekemeier Ford and Twin Oaks Lincoln Mercury. Broekemeiers claimed that the defendants' fraud induced the sale of the dealerships' property. In their answers, the defendants asserted that Broekemeiers' cause of action was barred by the statute of limitations expressed in Neb. Rev. Stat. § 25-207 (Reissue 1989) (a tort action for fraud must be commenced within 4 years after discovery of the fraud). Pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1989), the statute

of limitations question was tried separately to the court, which found that the action was barred by the 4-year statute of limitations and dismissed Broekemeiers' action.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See, *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

THE SALE IN QUESTION

After more than a decade in automobile dealerships, Broekemeiers, as sole shareholders in their corporate automobile dealerships, listed the dealerships' property for sale in December 1978 at $597,000 through Landmark Realty and its agent, Clatanoff. On January 16, 1979, Combs and Pearson extended an oral offer to purchase the dealerships' property for $526,000 in cash. Thereafter, on February 16 and February 20, 1979, the parties executed two identical contracts of sale for the property. Each contract document consisted of 5 pages and contained 24 numbered paragraphs, including provisions for payment of the $490,000 purchase price, that is, $240,000 paid before closing, with the $250,000 balance payable over a term of 10 years, with interest. The contracts also required that the purchasers, Combs and Pearson, would grant their mortgage on the dealerships' Seward County real estate, valued at $350,000, as security for payment of the contract price.

On May 23, the parties met to close the sale in accordance with the February contracts. Although a lawyer was representing Broekemeiers in the transaction, Willis Broekemeier, without the lawyer, attended the closing. A

"Seller's Settlement Sheet" was circulated at the closing and reflected a sale price of $490,000, with a "Contract amount carried back by seller . . . $250,000.00." Willis Broekemeier placed his signature on the settlement sheet at the closing. Combs and Pearson executed a $250,000 mortgage on the real estate purchased from the dealerships. That mortgage was recorded in Seward County in May 1979. According to Willis Broekemeier, he assumed that a copy of the contracts would be delivered to his lawyer. When the copies were not forthcoming, Willis Broekemeier, at some unspecified time, requested that the defendants supply him with a copy of each contract, but this request was unfulfilled.

In 1982, Broekemeier Ford, by its president, Willis Broekemeier, assigned to The Cattle National Bank of Seward the 1979 Combs-Pearson mortgage. The assignment was collateral for Broekemeier Ford's indebtedness to the bank and expressly referred to the Combs-Pearson real estate mortgage granted as a result of the 1979 contracts, including reference to the book and page of the mortgage records of Seward County, where the mortgage had been on record since May 1979.

BROEKEMEIERS' LAWSUIT

Broekemeiers' Allegations.

When Broekemeiers filed their action in 1987, some 8 years after the sale of the automobile dealerships, they contended that Clatanoff, while representing Broekemeiers, conspired with Combs and Pearson to effectuate the sale ultimately closed on May 23, 1979, and that any February 1979 contract in the defendants' possession "is a false and fraudulent document misstating the agreement of the parties." Broekemeiers did not allege any specific conduct as fraud by the defendants in conjunction with the sale of dealership property. Further, Broekemeiers alleged nothing to explain how or when they discovered the alleged fraud. Broekemeiers claimed that they were damaged as the result of the contracts of February 16 and 20, 1979, since they were compelled to accept the lesser price of $490,000 vis-a-vis the real price of $530,000 specified in another agreement which Broekemeiers assert was signed for sale of the dealership property.

Trial on Statute of Limitations Issue.

Copies of the contracts signed on February 16 and 20, 1979, were introduced in evidence at the trial on the statute of limitations issue.

Although Willis Broekemeier, president of Broekemeier Ford and Twin Oaks Lincoln Mercury, acknowledged that he signed the contracts for sale, he claimed that the signature page, that is, the last page signed by Broekemeier, is the only authentic page in each of the five-page contracts. Additionally, Willis Broekemeier testified that on February 19 and 20, 1979, he signed another contract calling for a "$530,000.00 cash payment with no terms" for installment payments of the purchase price. However, Willis Broekemeier was unable to explain how the page bearing his signature became attached to the "wrong contract," which specified the $490,000 price in installment payments. Moreover, Broekemeiers were unable to produce a copy of what they claimed to be the true contract, which required the purchasers to pay $530,000 in 1979, with no provision for installment payments.

According to Broekemeiers, before the closing on May 23, 1979, they never agreed to installment payments secured by a real estate mortgage, but they did agree to accept a cash payment of the purchase price in full at the closing on May 23, 1979. Willis Broekemeier testified that Broekemeiers did, in fact, receive $240,000 from Combs and Pearson in 1979 and that, although Broekemeiers were unaware of the installment payment format followed by Combs and Pearson, Broekemeiers, nevertheless, accepted mortgage payments for 3 years before the assignment to The Cattle National Bank of Seward in 1982. Moreover, notwithstanding that Willis Broekemeier felt that "something was wrong" at the closing in May 1979, he proceeded with the closing in accordance with the settlement sheet. On cross-examination, Willis Broekemeier testified regarding his realization that something was "wrong" in the sale:

> [Lawyer:] In May of 1979 after this deal was closed, you didn't like the outcome. Right?
>
> [Broekemeier:] On May 23rd, I was very angry.
>
> Q You were angry with the way the matter closed?

A The way I was slammed on with a $250,000.00 mortgage that I never did agree to.

Q Angry that you didn't get all of your money?

A Definitely.

Q In May of 1979?

A May 23rd approximately, give or take a day.

Willis Broekemeier testified that he did not become aware of the discrepancy between the 1979 contracts and the missing contract document until June 1986, when he obtained copies of the February 16 and 20, 1979, documents in the course of a transaction involving the Small Business Administration.

The district court concluded that Broekemeiers' action was barred by the 4-year statute of limitations in § 25-207 and dismissed Broekemeiers' action.

ASSIGNMENT OF ERROR

The District Court erred in finding that the Plaintiffs' action was barred by the statute of limitations and in dismissing the action with prejudice at Plaintiffs' cost. The Court erred in finding that the Plaintiffs were possessed of the facts sufficient to put a person of ordinary intelligence and prudence on notice of fraud in May of 1979, thereby holding that the Plaintiffs' cause of action accrued in May of 1979.

LIMITATION OF ACTIONS

" 'A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known.' " *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 246, 440 N.W.2d 664, 666-67 (1989) (quoting from *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984)). Accord, *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985) (statute runs even though plaintiff is ignorant of an existing cause of action); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

"Statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in human affairs. In this manner statutes of limitations stimulate activity and punish

unreasonable delay in prosecuting claims." *Rosnick v. Marks*, 218 Neb. at 501, 357 N.W.2d at 188. Accord *L.J. Vontz Constr. Co. v. Department of Roads, supra.*

Neb. Rev. Stat. § 25-207 (Reissue 1989) provides in pertinent part: "The following actions can only be brought within four years . . . (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . ."

"*Discovery*, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer." *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985).

> To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.

Edwin Bender & Sons v. Ericson Livestock Comm. Co., 228 Neb. 157, 165-66, 421 N.W.2d 766, 771 (1988). Accord, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

As we construe Broekemeiers' amended petition in view of its lack of specificity concerning the defendants' conduct constituting fraud, Broekemeiers alleged that the contracts bearing Broekemeiers' signatures were not in fact the contracts drafted in accordance with the agreement of the parties and, therefore, the misrepresented documents fail to express the true agreement of the parties; hence, the contracts bearing Broekemeiers' signatures are fraudulent. On the assumption that our interpretation expresses a cause of action under the circumstances, we proceed to examine the statute of limitations question in Broekemeiers' appeal.

"If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute." *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 355, 343 N.W.2d 753, 754 (1984). Accord *League v. Vanice, supra*. Therefore, if a petition, challenged under the statute of limitations, facially shows that a cause of action is barred by the statute of limitations, a plaintiff must allege facts sufficient to avoid the bar of a statute of limitations and, at trial, must prove facts avoiding the statute of limitations. See, *DeSciose v. Chiles, Heider & Co.*, 239 Neb. 195, 476 N.W.2d 200 (1991); *League v. Vanice, supra*; *S.I.D. No. 145 v. Nye, supra*. However, if a petition, on its face, does not disclose that an action is barred by a statute of limitations, a defendant must plead the statute of limitations as an affirmative defense and has the burden to prove that affirmative defense. See, *DeSciose v. Chiles, Heider & Co., supra*; *League v. Vanice, supra*; *S.I.D. No. 145 v. Nye, supra*.

The allegations of Broekemeiers' amended petition show that their action for fraud is ostensibly barred by the statute of limitations. Therefore, to avoid the bar of the statute of limitations, Broekemeiers must allege and evidentially establish facts exempting their claim from operation of the statute of limitations.

To avoid application of the 4-year statute of limitations prescribed in § 25-207, Broekemeiers contend that they could not have reasonably discovered the alleged fraud until June 1986, when, during the transaction involving the Small Business Administration, Willis Broekemeier obtained copies of the 1979 contracts. Broekemeiers contend that "[a]lthough the evidence at trial indicated that Willis knew at the time of closing in May 1979 that something 'was wrong' with the transaction, it was not until June 1986 that Willis became aware of the cause of harm." Brief for appellants at 6. Also, Broekemeiers contend that the cause of their harm was unknown until 1986, when Willis Broekemeier acquired a copy of the 1979 contracts and realized that Clatanoff, Langmeier, Combs, and Pearson "were the appropriate defendants in this matter." Brief for appellants at 8. Accordingly, Broekemeiers argue that the statute of

limitations did not begin to run until June 1986, when Broekemeiers discovered the fraud, and, therefore, Broekemeiers' action was timely filed in 1987.

Broekemeiers misconstrue the discovery rule pertaining to the statute of limitations for actionable fraud. The gist of Broekemeiers' argument is that since they did not obtain copies of the contracts until 1986, they were unable to discover that the 1979 contracts had been altered and were also unable to ascertain who was responsible for alterations of those contracts. In *Lee v. Brodbeck*, 196 Neb. 393, 397-98, 243 N.W.2d 331, 334 (1976), we stated:

> An action for relief on the ground of fraud must be commenced within 4 years after the discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made. Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N.W.2d 327 (1941). To avoid the statute of limitations for fraud, plaintiff must plead and prove the impediments to an earlier prosecution of the claim, all facts which relate to or explain the failure to prosecute, and when he first obtained knowledge of the fraud. Reed v. Barnes, 113 Neb. 414, 203 N.W. 567 (1925).

See, also, *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

Further, while Broekemeiers contend that they believed that the sale of dealership property called for payment in full in 1979 and that they were unaware that the transaction was a time sale with installment payments secured by a real estate mortgage, the record presents facts which are undisputed or virtually conclusively established and, therefore, are conspicuously present for successful invocation of the statute of limitations as a bar to Broekemeiers' action. For instance, Broekemeiers received $240,000 from Combs and Pearson in 1979, a sum which coincides with the amount to be paid before closing in accordance with the contracts bearing Broekemeiers'

signatures, but made no further inquiry or demand concerning the additional payment of $290,000, the balance of the $530,000 purchase price supposedly reflected in the "missing" contract. Then, rather than pressing for full payment of the $290,000 balance in 1979, if the "missing" contract actually existed and prescribed such payment, Broekemeiers accepted installment payments from Combs and Pearson until 1982, payments which admittedly related to the mortgage on dealership real estate sold to Combs and Pearson. Also, in 1982, as a part of financing at The Cattle National Bank of Seward, Broekemeier Ford, through Willis Broekemeier as president of that corporation, assigned to the bank the Combs-Pearson mortgage. The document embodying that assignment specifically referred to the 1979 recorded mortgage granted by Combs and Pearson. Moreover, apparently referring to installment payments and a real estate mortgage to secure those payments, Willis Broekemeier knew that "there was something wrong" at the closing, and yet proceeded to close the sale and thereafter accept installment payments from Combs and Pearson, as previously mentioned.

In light of the foregoing facts, we are extremely incredulous of Broekemeiers' transactional ignorance from 1979 until 1986. However, it is not our view of the facts which is important, for the appellate question is whether the district court's decision is clearly erroneous on the statute of limitations issue. Although the district court may have shared our skepticism about Broekemeiers' version of events leading to the lawsuit, the evidence is such that we are unable to state that the district court was clearly erroneous in its conclusion that Broekemeiers possessed sufficient information to constitute discovery of the alleged fraud and require their filing of an action for fraud within 4 years after May 23, 1979, the date on which the parties closed the sale of dealership property.

Since we are unable to conclude that the district court was clearly erroneous in its conclusion that the statute of limitations prescribed in § 25-207 barred Broekemeiers' action, we affirm the district court's judgment dismissing the action.

AFFIRMED.

GERALD MURPHY AND PAMELA S. MURPHY, APPELLANTS, V. SPELTS-SCHULTZ LUMBER CO. OF GRAND ISLAND, A CORPORATION, APPELLEE.

481 N.W.2d 422

Filed March 20, 1992. No. S-89-721.

1. **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 movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
2. **Limitations of Actions: Damages.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known.
3. **Limitations of Actions.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
4. **Limitations of Actions: Negligence.** A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place.
5. _____: _____. Neb. Rev. Stat. § 25-223 (Reissue 1989), as a special statute of limitations concerning negligent construction of an improvement on real estate, applies only to actions, whether based on negligence or breach of warranty, brought against contractors and builders.
6. **Uniform Commercial Code: Sales: Words and Phrases.** Whether a transaction involving both a transfer of goods and the performance of labor is the sale of "goods" as contemplated by Neb. U.C.C. § 2-102 (Reissue 1980) (and thus within the purview of the code) or the sale of "services" (and thus not within the purview of the code) depends upon the predominant purpose of the transaction.
7. **Uniform Commercial Code: Warranty.** The "future performance" exception of Neb. U.C.C. § 2-725(2) (Reissue 1980) applies only to an express warranty and not to an implied warranty.
8. **Uniform Commercial Code: Warranty: Vendor and Vendee.** For existence of an express warranty, a seller must have made a particularized representation constituting a warranty to a buyer.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

John A. Wagoner for appellants.

Robert T. Grimit and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

SHANAHAN, J.

Gerald Murphy and Pamela S. Murphy, designated herein as "Murphy," appeal from the decision of the district court for Hall County, which granted summary judgment to Spelts-Schultz Lumber Co. of Grand Island, in Murphy's suit for damages on account of negligence and breach of warranties pertaining to roof trusses that failed at Murphy's home. We affirm.

BACKGROUND FOR SUMMARY JUDGMENT

The factual foundation for the summary judgment in question is supplied by the pleadings, depositions, and affidavits submitted to the district court. See Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989).

On January 4, 1977, Gerald and Pamela Murphy contracted with Albright Construction for construction of a house in Grand Island. On Murphy's behalf, Albright arranged for Spelts-Schultz Lumber Co. to provide custom design services for the new home. In exchange for the services by the lumber company, Murphy purchased from Spelts-Schultz all the building materials necessary for constructing the house. Pursuant to this arrangement, Spelts-Schultz designed, manufactured, and sold Murphy a number of roof trusses, which were delivered to the construction site on March 9, 1977. Gerald and Pamela Murphy moved into their new home in October 1977.

On July 7, 1978, after a heavy rainstorm, Gerald Murphy noticed that the garage's "drywall [was] starting to crack," and the roof over Murphy's attached garage suddenly sagged and collapsed as he backed his car out of the garage. Subsequent inspection of the damage revealed that metal fasteners on joints of the trusses had apparently pulled away, resulting in failure of the trusses and eventual collapse of the garage roof.

On September 6 and October 25, 1978, Murphy's lawyer wrote two letters to Spelts-Schultz and demanded that the lumber company pay for the damage to the Murphy house; otherwise, suit would be filed. When Spelts-Schultz denied

liability and declined to pay, Murphy sued on May 21, 1981.

Murphy's petition, as amended, asserted two bases for recovery: first, Spelts-Schultz' negligence in the design and construction of the house and inspection of the failed trusses, and, second, breach of an implied warranty that the "trusses were reasonably fit and proper for the use intended" in the Murphy house. In its amended answer, Spelts-Schultz alleged that Murphy's action was "barred by the applicable statute of limitations," but did not specify which statute of limitations applied to any aspect of Murphy's action. Although the matter lay in abeyance for some time, in March 1989 the district court heard the summary judgment motion, and in June 1989 concluded that Murphy's action was barred by the "applicable statute of limitations," without designation of a particular statute of limitations, and, therefore, granted summary judgment to Spelts-Schultz, disposing of Murphy's action for damages.

In this appeal, Murphy contends that the court erred by granting summary judgment for Spelts-Schultz.

STANDARD OF REVIEW

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. [Citation omitted.]

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988). Accord, *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989); *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988).

"On a motion for summary judgment, the question is not

how a factual issue is to be decided, but whether any real issue of material fact exists." *Newman v. Hinky Dinky*, 229 Neb. 382, 385, 427 N.W.2d 50, 53 (1988).

> The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. [Citations omitted.] After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

Wilson v. F & H Constr. Co., 229 Neb. at 819, 428 N.W.2d at 917. Accord *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

ACCRUAL OF CAUSE OF ACTION

" 'A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known.' " *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 246, 440 N.W.2d 664, 666-67 (1989) (quoting from *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984)).

SUNDRY STATUTES OF LIMITATIONS

In view of the lack of specification at the district court level concerning the statute of limitations which is actually the basis for the summary judgment questioned on appeal, our review necessarily follows a process of elimination to determine whether any statute of limitation invalidates the district court's summary judgment.

The first rule for ascertaining the applicable statute of limitations in this case is: A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject. See, *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976); *Nebraska Mil-Nic,*

Inc. v. Hall County, 188 Neb. 345, 196 N.W.2d 522 (1972); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964).

Negligence Actions.

As a general statute of limitations, Neb. Rev. Stat. § 25-207 (Reissue 1989) requires that an action for negligence be commenced within 4 years after accrual of the cause of action. However, there are special statutes of limitations concerning other causes of action based on negligence; for example, an action based on negligence in professional services

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

Neb. Rev. Stat. § 25-222 (Reissue 1989), and an action based on "deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission," Neb. Rev. Stat. § 25-223 (Reissue 1989).

Also, there is a special statute of limitations pertaining to product liability, namely, Neb. Rev. Stat. § 25-224 (Reissue 1989), which provides in pertinent part:

> (1) All product liability actions, except [those involving exposure to certain chemical compounds], shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or [those involving exposure to certain chemical compounds], shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was

first sold or leased for use or consumption.

. . . .

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

As a definitional statute concerning product liability, Neb. Rev. Stat. § 25-21,180 (Reissue 1989) provides:

> As used in sections 25-224, 25-702, and 25-21,180 to 25-21,182, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.

As we construe Murphy's amended petition, the negligence action is, by inference, based on negligence in professional services in custom designing the Murphy house or is based on negligent construction of the Murphy house. Consequently, the general statute of limitations for a negligence action, that is, § 25-207, is superseded by § 25-222 (negligence in professional services) and by § 25-223 (negligent construction of an improvement on real estate).

Negligence in Professional Services; § 25-222.

Based on design services apparently rendered by Spelts-Schultz in planning the Murphy house, Murphy's action might be construed as one somehow based on negligence in architectural or engineering services; for example, see, *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988); *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987); and *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

A cause of action accrues for negligence in professional services when "the alleged act or omission in rendering or failure to render professional services" takes place. § 25-222. See *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). The negligent act or omission claimed is Spelts-Schultz' performance in designing the allegedly defective roof trusses. Although the record lacks information to show precisely when the purported design activity occurred, that activity must have taken place sometime between the date of the construction contract, January 4, 1977, and the date when the trusses were delivered at the construction site, March 9, 1977. Therefore, because the roof on Murphy's garage collapsed on July 7, 1978, the negligence cause of action was reasonably discoverable within 2 years of the allegedly negligent design activity discernible when the roof collapsed, disclosing the claimed imperfection or deficiency in the roof trusses. Thus, at the very latest, Murphy's negligence cause of action concerning design of the trusses accrued on March 9, 1979. Consequently, to the extent that Murphy's action is based on negligent performance of professional services in designing the house and garage, Murphy's action was barred by § 25-222 because Murphy did not file suit until May 21, 1981, more than 2 years after collapse of the roof and discovery of the failure in the roof trusses in 1978.

Negligent Construction; § 25-223.

This court has held that § 25-223, as a special statute of limitations concerning negligent construction of an improvement on real estate, applies only to actions, whether based on negligence or breach of warranty, brought against contractors and builders. See *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 30, 430 N.W.2d 34, 40 (1988): "§ 25-222 applies to professional services," while "§ 25-223 applies to nonprofessional builders or contractors making improvements to real property, and such interpretation harmonizes the two statutes." See, also, *Smith v. Butler Manuf. Co.*, 230 Neb. 734, 433 N.W.2d 493 (1988); *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 433 N.W.2d 485 (1988); *Williams v. Kingery Constr. Co., supra*; *Witherspoon v. Sides*

Constr. Co., supra; *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982).

In this case, Spelts-Schultz acted only as the designer and seller of the roof trusses. The contractor for and builder of the Murphy house was Albright Construction, which is not a party to this action. Therefore, § 25-223 has no application to Murphy's action against Spelts-Schultz.

Product Liability; § 25-224.

Section 25-224 "begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage." *Condon v. A. H. Robbins Co.*, 217 Neb. 60, 68, 349 N.W.2d 622, 627 (1984).

As previously noted, the roof on the garage for the Murphy house collapsed on July 7, 1978, resulting in damage immediately discernible at that time. Hence, Murphy's cause of action based on product liability accrued on July 7, 1978. This brings us to the provision in § 25-224(4): "[A]ny cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date," that is, not later than July 22, 1980. Murphy did not commence the action until May 21, 1981. Therefore, to the extent that Murphy's action is based on product liability, the action is barred by § 25-224(4). See *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

CONTRACT ACTION

The general statute of limitations applicable to actions on written contracts is Neb. Rev. Stat. § 25-205 (Reissue 1989), which provides in pertinent part: "[A]n action upon . . . any agreement, contract or promise in writing . . . can only be brought within five years."

However, there is a special statute of limitations for an action based on a contract for the sale of goods governed by the Uniform Commercial Code:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may

not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Neb. U.C.C. § 2-725 (Reissue 1980). The "comment" for U.C.C. § 2-725 states, "This article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice."

For U.C.C. § 2-725 to become applicable to Murphy's case, we must first determine whether Murphy's agreement with Spelts-Schultz was a contract for the sale of goods governed by the Uniform Commercial Code.

Although the roof trusses involved in Murphy's case are clearly "goods" as defined by Neb. U.C.C. § 2-105(1) (Reissue 1980), Spelts-Schultz also provided Murphy with services in designing the house. In *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 482, 390 N.W.2d 536, 542 (1986), this court stated:

> [W]hether a transaction involving both a transfer of goods and the performance of labor is the sale of "goods" as contemplated by Neb. U.C.C. § 2-102 (Reissue 1980) (and thus within the purview of the code) or the sale of "services" (and thus not within the purview of the code) depends upon the predominant purpose of the transaction. If that predominant purpose is the rendition of a service with the goods incidentally involved, the transaction is not the sale of goods; if, on the other hand, the predominant purpose is the transfer of goods with labor incidentally involved, the transaction does constitute the sale of goods.

See, also, *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

In Murphy's case, the predominant purpose of the contract unquestionably was the purchase and sale of all building

materials for construction of Murphy's new house. Any design services were apparently not separately paid for and, indeed, appear to be merely part of the consideration for Murphy's agreement to purchase all building materials from Spelts-Schultz. Consequently, Murphy's contract with Spelts-Schultz qualifies as a contract for the sale of goods pursuant to article 2 of the Uniform Commercial Code.

In the amended petition's second cause of action, Murphy alleged that Spelts-Schultz impliedly warranted that the "trusses were reasonably fit and proper for the use intended" and that this implied warranty was breached, resulting in damage to Murphy. There are only two implied warranties recognized under article 2 of the Uniform Commercial Code: the warranty of merchantability, under Neb. U.C.C. § 2-314 (Reissue 1980), and the warranty of fitness for a particular purpose, under Neb. U.C.C. § 2-315 (Reissue 1980).

"Merchantability" is defined in U.C.C. § 2-314:

> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

In *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. at 314, 363 N.W.2d at 163, this court stated:

> To establish a breach of implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury. See *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984). In order for the

> goods to be merchantable under [U.C.C.] § 2-314, they must be at least such as are fit for the ordinary purposes for which such goods are used. See *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

Concerning the implied warranty of fitness for a particular purpose, U.C.C. § 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

To differentiate between the implied warranty of fitness for a particular purpose and the implied warranty of merchantability, the "comment" for U.C.C. § 2-315 suggests:

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

Thus, U.C.C. § 2-725 specifies a 4-year statute of limitations and further provides that an action for breach of warranty accrues on tender of delivery, even if the injured party has no knowledge of the breach of warranty. The only exception to this rule is that "where a warranty *explicitly* extends to future performance . . . the cause of action accrues when the breach is or should have been discovered." (Emphasis supplied.) U.C.C. § 2-725(2). "Explicit" is defined as "characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied . . . unreserved and unambiguous in expression: speaking fully and clearly." Webster's Third New International Dictionary, Unabridged 801 (1981). Synonyms for explicit include "unequivocal," "definite," "specific,"

"express," and "categorical." *Id.*

Murphy's suit was filed on May 21, 1981, which is more than 4 years after March 9, 1977, the date on which the goods were delivered. Therefore, Murphy's claim is barred unless the "future performance" exception of U.C.C. § 2-725(2) is available.

However, we conclude that there are two reasons why Murphy's claim does not qualify for the "future performance" exception in U.C.C. § 2-725(2). First, the record contains no evidence that Spelts-Schultz explicitly warranted any future performance of the roof trusses. In the absence of Spelts-Schultz' explicit warranty for "future performance" of the roof trusses, Murphy's cause of action accrued and the 4-year statute of limitations began to run on March 9, 1977. See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

The second reason that the "future performance" exception is unavailable to Murphy is that the exception applies only to an express warranty and not to an implied warranty. The obvious reason is that once a warranty is expressed, the warranty is no longer implied. See *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985) (citing *Grand Island School Dist. #2 v. Celotex Corp., supra*). See, also, *City of Carlisle v. Fetzer*, 381 N.W.2d 627 (Iowa 1986); *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex. 1986); *LR School Dist. v. Celotex Corp.*, 264 Ark. 757, 574 S.W.2d 669 (1978); *Stumler v. Ferry-Morse Seed Co.*, 644 F.2d 667 (7th Cir. 1981); *Standard Alliance Ind. v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978). See, also, 5 Ronald A. Anderson, Anderson on the Uniform Commercial Code § 2-725:90 (3d ed. 1984).

In this appeal, Murphy then argues that this case involves an express warranty in view of *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). An express warranty under article 2 of the U.C.C. is governed by Neb. U.C.C. § 2-313 (Reissue 1980), which provides:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes

part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

According to Murphy's interpretation of *Puget Sound*, Spelts-Schultz' mere representation that the goods were "roofing trusses" constituted a description of goods and results in an express warranty explicitly extended to future performance under U.C.C. §§ 2-313(1)(b) and 2-725(2).

For existence of an express warranty, a seller must have made a particularized representation constituting a warranty to a buyer. Obviously, without a seller's specific representation, there is no basis for the conclusion that any warranty was expressly made. For example, in *Puget Sound* we concluded that an express warranty existed as the result of the parties' mutual understanding that the laminated siding at issue was expected to last the lifetime of the house to which the siding was applied; therefore, premature delamination of the siding supplied a basis for the buyer's action for breach of an express warranty. See, also, *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990) (statements in letter from seller to buyer that roofing material would last 20 years constituted an express warranty under the U.C.C.); *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985) (representations contained in advertising brochure for roofing system designed, manufactured, and supplied by seller constitutes express

warranty under U.C.C. § 2-313); *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984) (contents of seed company's advertising literature may constitute express warranty under U.C.C.); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973) (representations of load capacity in manufacturer's pamphlet constituted express warranty binding both manufacturer and lessor of scaffolding), *overruled on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

In Murphy's case, neither the record nor the pleadings indicate that Spelts-Schultz ever made an express representation, amounting to a warranty, to Murphy concerning any of the building material eventually incorporated into the Murphy house. Consequently, there was no express warranty concerning the roof trusses, and, without such warranty, there is no basis for a court's concluding that an express warranty explicitly extended to the future performance of the trusses.

For the foregoing reasons, we conclude that any action which Murphy may have had under the Uniform Commercial Code accrued on delivery of the trusses and is barred by the 4-year statute of limitations prescribed in U.C.C. § 2-725.

CONCLUSION

Since Murphy's causes of action, alleged in the amended petition, are barred by any applicable statute of limitations, the judgment of the district court is affirmed.

AFFIRMED.

KENDALL PERRY AND KELLAN PERRY, APPELLEES, V. DENNIS L. ESCH AND JOHN RAYNOR, APPELLANTS.

481 N.W.2d 431

Filed March 20, 1992. No. S-89-740.

1. **Contracts: Options to Buy or Sell.** An option is a form of contract.
2. **Contracts: Parties: Penalties and Forfeitures.** One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions unless he is in position to himself meet the conditions required on his part.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Patrick M. Heng, of Raynor, Rensch, Heng & Wills, for appellants.

Richard K. Watts, of Mills, Mills and Papik, for appellees.

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

GRANT, J.

Defendants, Dennis L. Esch and John Raynor, appeal an order of the district court for Polk County, Nebraska, in a declaratory judgment action filed by plaintiffs-appellees, Kendall Perry and Kellan Perry, brothers. The trial court determined that an "Option To Purchase Real Estate" remained in full force and effect, although plaintiffs had not paid the real estate taxes as required by the contract, and that defendants were "equitably estopped from terminating the option contract of August 1, 1987."

Defendants timely appealed and in this court assign five errors. The first two may be summarized into one: that the trial court erred in holding that defendants were equitably estopped from terminating the option agreement and that the contract remained in full force and effect. The other three assignments need not be discussed for the following reasons: One of them is based on the allegation that the trial court erred "in finding that the Appellants waived their right to terminate the Option Agreement," and the trial court made no such finding. The other two alleged errors are not discussed in defendants' brief

and will not be considered by this court. See *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). In consideration of the assignment before us, we affirm.

The record shows the following: In 1985, defendants and a third party, Jon Rose, purchased the real estate in question, a quarter section of land located in Polk County, Nebraska. The land was titled in the two defendants and Rose, but the record does not show how the three took title or the respective interests of the three. Negotiations for the sale of the land to plaintiffs began in 1987, between plaintiffs as potential buyers and the three owners of the land as sellers. Early in the negotiations, it became clear that the sellers were not interested in a land contract because of their concerns about the farm economy and the difficulties which could result if the buyers were forced into bankruptcy proceedings.

Accordingly, all parties agreed to go forward by way of an option agreement to purchase the land. Early in the negotiations, all the parties apparently agreed upon an effective total price of $124,000 (consisting of an initial option payment of $21,000, with a purchase price of $103,000). At this point the three sellers, the two defendants and Jon Rose, were in agreement on the terms of the proposed option agreement. Plaintiffs then discovered that, because of defendant Raynor's unavailability, the three potential sellers had failed to qualify for certain federal farm subsidy programs. Plaintiffs then demanded a price reduction, apparently equivalent to the lost subsidies. At this point, Jon Rose determined the reduced offer was not acceptable to him, and he refused to sell. After Rose's withdrawal, defendants obviously did not have complete title to the land but continued to negotiate with plaintiffs for the ultimate sale of the quarter section.

On August 13, 1987, plaintiffs as "Buyer" and defendants as "Seller" executed the option agreement. The agreement gave "the exclusive option to purchase the real property of Seller . . . described as follows: . . . ." At this point, defendants could sell their interest in the land, but they did not have the right to sell the described property in its entirety. In the agreement, defendants did agree that "[w]ithin sixty (60) days from the execution of this agreement, Sellers shall acquire the interest of

Jon Rose in the described premises in order that unencumbered title may be transferred to Buyers."

The option agreement also contained a provision in which defendants stated that there were "two (2) existing mortgages against the property." Each mortgage was in the amount of $115,000, and each was granted to a separate, identified Iowa bank. Defendants agreed to have one of the mortgages released within 30 days of the agreement and also agreed that if "one of the mortgages . . . is not completely released of record by Sept. 1, 1987, then this option shall become null and void" and plaintiffs' moneys returned.

Plaintiffs' obligations to get this "exclusive option" included payment to defendants of the option price of $16,500 in three installments of $5,500 by December 31, 1987. The purchase price was $103,000, to be paid within 60 days of the exercise of the option. The option had to be exercised by January 30, 1988, but could be extended until September 15, 1988, if notice of extension was given during the "primary period" (ending January 30, 1988) and payment of $10,025 made by September 1, 1988. Six additional 1-year extensions of the option could be obtained by plaintiffs in a similar manner. The option would terminate on September 15, 1994, if not exercised.

It was further agreed that plaintiffs would pay the 1987 and later taxes and that if such taxes were not paid "within thirty (30) days after the same shall become delinquent," the option would terminate. The agreement also provided that "[a]ny notice hereunder shall be given, in writing, to the party for whom it is intended" at specified addresses.

On approximately December 10, 1987, a notice of the 1987 real estate taxes was sent by the Polk County treasurer to Rose. Rose did not forward this notice to plaintiffs or to defendants. The taxes were not paid as required by the agreement.

On January 12, 1988, the plaintiffs gave timely written notice to defendants that they intended to extend the option beyond the original term. As provided in the agreement, plaintiffs were obligated to pay defendants $10,025 on or before September 1, 1988, to obtain the extension. On August 2, 1988, plaintiff Kendall Perry contacted defendant Raynor by telephone, inquiring about the option payment. The exact time and length

(9 minutes) of this call were established by Perry's telephone bill. Kendall Perry testified that he had misplaced his copy of the agreement during a move and was calling to determine when the option payment was due. He testified that Raynor stated the payment was due August 1.

Raynor admitted the August 2 phone call, but testified that Kendall Perry had called to inquire whether any payments were due at that time. Raynor responded that none were due, to his knowledge. Raynor testified that he recalled making this statement, because he already had the payment checks while talking on the phone with Kendall Perry. The two checks for $5,000 each were drawn on an FmHA account, bore an FmHA endorsement, and were dated August 2, 1988. The funds were received and retained by defendants.

Approximately a week or 10 days later, Raynor received a call from Rose, who stated that he had just received a delinquency notice regarding taxes on the Polk County property. Defendants discussed the matter between themselves and with Rose. On August 15, 1988, defendants notified Kendall Perry, in writing, that the option would be terminated because the real estate taxes for the first half of 1987 had not been paid within the time provided in the agreement. On August 23, they sent a copy of the August 15 letter to Kellan Perry. Defendants retained the $10,000.

On August 31, 1988, the plaintiffs commenced this action and simultaneously tendered to defendants, by depositing with the clerk of the Polk County District Court, $1,555.52 (representing payment of the one-half of the real estate taxes delinquent on May 1, 1988, and the other one-half of the taxes that would become delinquent on September 1, 1988). Plaintiffs also paid into the court the $25 which was the remaining amount due on the option payment of $10,025, due September 1, 1988.

On September 15, 1988, plaintiffs notified defendants, in writing, that plaintiffs intended to exercise their right to purchase the land, pursuant to the contract. Defendants refused to honor this notification.

On March 10, 1989, the declaratory judgment action came for trial before the court. After trial, the court entered an order

finding that Raynor's statements in the phone conversation of August 2, 1988, amounted to a false representation or concealment of material facts, in that Raynor did not tell plaintiffs that the taxes were not paid. The court ordered that appellants were "equitably estopped from terminating the option contract of August 1, 1987," and that "the contract of August 1, 1987 is in full force and effect."

On appeal, defendants seek to have the declaratory judgment reversed by this court, with directions on remand to enter judgment in defendants' favor. This court stated in *Union Ins. Co. v. Bailey*, 234 Neb. 257, 260, 450 N.W.2d 661, 664 (1990):

> "An action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985) is sui generis [citations omitted]; whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute [citations omitted]. The essence of the dispute before us sounds in contract. That being so, the action is to be treated as one at law."

Similarly, in the case before us, the essence of this dispute sounds in contract, since an option is a form of contract. See *In re Estate of Michels*, 223 Neb. 286, 389 N.W.2d 285 (1986). The relief sought by plaintiffs and the remedy fashioned by the trial court have overtones of equity, since the court, to maintain the status quo, found that defendants were equitably estopped from terminating the option agreement. Nonetheless, we shall review this case as a law action—the determination of rights under a contract.

In reviewing a judgment in an action at law tried to the court, we do not reweigh the evidence, but consider it in the light most favorable to the successful party and resolve conflicts in favor of the successful party. *Union Ins. Co. v. Bailey, supra.*

As stated above, defendants' two operative assignments of error may, for purposes of our review, be consolidated. Defendants contend that plaintiffs did not prove each element of equitable estoppel sufficiently to have that doctrine imposed, or, in their words, "there is an absolute failure of evidence to establish" misrepresentation or concealment. Brief

for appellants at 10. Defendants' contentions are without merit.

No dispute exists as to the existence of a valid contract, nor is the enforceability of the contract questioned. Both parties agree that plaintiffs did not pay the taxes in a timely fashion, as required by the contract, and therefore, no dispute exists as to whether there was a breach. The issue before the trial court, then, was whether defendants were estopped by their conduct from enforcing plaintiffs' breach.

At trial, plaintiffs asserted, among other theories, that their breach was excused by equitable estoppel. To impose equitable estoppel the court must find

> as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. [Citation omitted.]

Wheat Belt Pub. Power Dist. v. Batterman, 234 Neb. 589, 593, 452 N.W.2d 49, 52 (1990).

Plaintiffs argue that defendants are equitably estopped because of defendants' concealing the fact that taxes were due. Plaintiffs assert that this concealment took place during the phone conversation of August 2. On August 2, the taxes were already delinquent. Though Raynor's statement was a misrepresentation, the fact that it was made at a time when the taxes were already overdue according to the contract prevents us from agreeing with the trial court in finding plaintiffs' breach in this regard was based on defendant Raynor's statement.

There are other adequate bases, however, for the trial court's determinations that the contract remained in full force and effect and that, therefore, defendants did not have the right to terminate the contract.

The operative effect of the entire option agreement in question is controlled by a single provision in the agreement: defendants' obligation to perform their promise to "[w]ithin sixty (60) days from the execution of this agreement . . . acquire the interest of Jon Rose in the described premises . . . ." Without that performance, plaintiffs' rights under the option agreement did not give plaintiffs the right to obtain the title to the land, but amounted only to the right to sue defendants for breach of contract in failing to acquire that which plaintiffs wanted to purchase. The facts as to whether defendants had obtained Rose's interest by October 12, 1987, as required by the contract, were peculiarly within the knowledge of Rose and defendants. No doubt, plaintiffs acted naively in not pursuing the question as to whether defendants had performed their obligation to obtain complete title. Conduct of defendants, however, in accepting a $5,500 option payment in December 1987 (more than 2 months after the time in which defendants were to have acquired Rose's interest) and in accepting a $10,000 payment in August 1988 for an extension of the option resulted in a reasonable belief in plaintiffs that all was going well. Plaintiffs had been permitted to enter on the land and they had farmed the land. Without Rose's permission, plaintiffs were not much more than trespassers as to Rose's interest in the land. In acting as they did, obviously plaintiffs relied on defendants' promise that Rose's interest would be obtained by defendants in such time that they could farm the land without incurring any liability to Rose.

Obviously, Rose is entitled to compensation for the use of his interest in the land. What is to be that compensation and who is to pay it? Confusion reigns—and the resolution of that confusion can rest only with defendants. If defendants could not obtain Rose's interest, as they promised to do, there was no need to prolong this charade. The parties should then proceed directly to the calculation of damages for defendants' breach of the option agreement, which breach, in effect, destroyed the

rights of plaintiffs and, as stated above, changed an alleged option agreement to a right to sue defendants for damages.

Defendants' insistence that they may retain plaintiffs' payments and terminate plaintiffs' contractual rights because of plaintiffs' failure to timely pay the first one-half of the 1987 taxes flies in the face of established Nebraska law. This court stated in *Cadwell v. Smith*, 83 Neb. 567, 572, 120 N.W. 130, 132 (1909): "One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to himself meet the conditions required on his part. He cannot penalize the other party while himself unable to perform." *Cadwell* was approved in *Oman v. City of Wayne*, 152 Neb. 341, 347-48, 40 N.W.2d 916, 920 (1950), where we stated, "One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part." Both *Cadwell* and *Oman* were approved in *Plummer v. Fie*, 167 Neb. 367, 93 N.W.2d 26 (1958).

The record does not set out whether defendants have complied with their specific agreement to remove one of the two existing mortgages on the property, but it is undisputed that defendants have not complied with their obligation to acquire Rose's interest. Defendants have no right to forfeiture of any of plaintiffs' payments or rights under the option agreement. The trial court was correct in holding that defendants could not unilaterally terminate the option contract and therefore in ordering that defendants were estopped from so doing and that the contract was in effect.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBI JO MILLER, ALSO KNOWN AS BARBARA DENISE MILLER, APPELLANT.

481 N.W.2d 580

Filed March 20, 1992. No. S-90-1201.

1. **Criminal Law: Judgments: Verdicts.** Nebraska criminal procedure does not include judgment notwithstanding the verdict.
2. **Jurisdiction: Appeal and Error.** Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
3. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
4. **Jurisdiction: Appeal and Error.** When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the trial court.

Appeal from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed in part, and in part appeal dismissed.

James H. Truell, York County Public Defender, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

SHANAHAN, J.

In a jury trial in the county court for York County, Bobbi Jo Miller was convicted of procuring alcoholic liquor for a minor, in violation of Neb. Rev. Stat. § 53-180 (Reissue 1988): "No person shall sell, give away, dispose of, exchange, or deliver, or permit the sale, gift, or procuring of any alcoholic liquors, to or for any minor or to any person who is mentally incompetent."

In the course of her trial, Miller did not move for a directed verdict. Immediately after announcement of the verdict and the court's entry of judgment on the guilty verdict, Miller's lawyer stated: "Your Honor. I would ask the Court to enter a verdict

not — or a judgment not withstanding the verdict of the jury." Miller's lawyer then proceeded to express reasons for the motion, including both factual and legal aspects of the prosecution, and concluded: "We ask the Court to enter a finding of not guilty." The court, after counsels' arguments concerning Miller's motion for judgment n.o.v., and having considered the factual and legal merits of Miller's motion, overruled the motion for judgment n.o.v. In view of the subsequent presentence report, the court sentenced Miller to a 48-hour term in the county jail and ordered her to pay a fine of $1,000. Miller appealed to the district court for York County, which affirmed Miller's conviction and sentence.

ASSIGNMENTS OF ERROR

In her appeal to this court, Miller asserts: "1. The trial court erred in not directing a verdict of not guilty based upon the evidence in that the conviction was not supported by the evidence and was contrary to law. 2. The sentence imposed by the court was excessive." In the argument contained in her appellate brief, Miller states, "The trial court erred in not granting the directed verdict following the jury's decision." Brief for appellant at 6. Since Miller never moved for a directed verdict, but did request judgment n.o.v., we construe Miller's first assignment of error to be the claim that the county court erred by not entering the requested judgment n.o.v., that is, setting aside Miller's conviction and entering a judgment of acquittal.

CRIMINAL PROCEDURE AND JUDGMENT N.O.V.

Neb. Rev. Stat. § 29-2201 et seq. (Reissue 1989), a segment of the statutes expressing rules for procedure in the trial of criminal cases, contain some of the postverdict procedure concerning a judgment of conviction. In that regard, *State v. Morley*, 239 Neb. 141, 151, 474 N.W.2d 660, 668 (1991), states,

> [A] motion for judgment notwithstanding the verdict, provided for by Neb. Rev. Stat. § 25-1315.02 (Reissue 1989), is limited to civil proceedings, there being no mention of such a remedy in Neb. Rev. Stat. §§ 29-2101 to 29-2106 (Reissue 1989), which detail remedies dealing with criminal procedure after a guilty verdict is entered in a

criminal action.

See, also, *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974) (judgment n.o.v. is limited to civil proceedings). Thus, Nebraska criminal procedure does not include judgment notwithstanding the verdict.

Because a judgment n.o.v. is unauthorized and, therefore, unavailable under Nebraska criminal procedure, the county court's order, as an adjudication of the merits of Miller's motion for judgment n.o.v., was judicial action outside the subject matter jurisdiction of the trial court. For that reason, Miller's motion for judgment n.o.v. may be characterized as a procedural and legal nullity. Since Miller's motion and the county court's action, or decision on the motion, lack legal effect in the determination of any question relative to Miller's trial, nothing is presented for review in this court. "Nothing comes from nothing." In the absence of a legally cognizable final order as a subject for appellate review, see Neb. Rev. Stat. § 25-1902 (Reissue 1989) (final order defined), this court lacks subject matter jurisdiction to evaluate the merits of Miller's assertion concerning her conviction, that is, Miller's contention that a judgment of acquittal should have been entered by the trial court, notwithstanding the verdict by which Miller had been convicted.

> Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. . . . Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.

Glup v. City of Omaha, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). Accord, *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). "Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). Accord, *In re Interest of Adams*, 230

Neb. 109, 430 N.W.2d 295 (1988); *In re Interest of L.D. et al., supra.* When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the trial court. See, *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987); *In re Interest of L.D. et al., supra.*

We point out that Miller's motion at the conclusion of her trial was very definitely expressed in terms of a request for a judgment of acquittal notwithstanding the guilty verdict. Although Miller, in her appeal, refers to her postverdict request as a motion for "directed verdict," that is, a procedural vehicle to test sufficiency of evidence for submission of Miller's case to the jury, we cannot overlook the fact that Miller made no motion for a directed verdict, but did make a motion for judgment notwithstanding the verdict, nonexistent relief in the trial of a criminal case in Nebraska. Our viewing Miller's postverdict request as a motion for a directed verdict would require our considering a motion which was never made before submission of Miller's case to the jury.

Since a judgment n.o.v. is not a part of criminal procedure in Nebraska, we dismiss Miller's appeal on the question concerning her motion for judgment n.o.v.

EXCESSIVE SENTENCE CLAIM

This brings us to the second part of Miller's appeal, her claim that the sentence imposed was excessive. Violation of § 53-180 is a Class I misdemeanor, which, pursuant to Neb. Rev. Stat. § 28-106(1) (Reissue 1989), is punishable by imprisonment for a term not exceeding 1 year, a $1,000 fine, or both such imprisonment and fine. Miller was sentenced to imprisonment for 48 hours in the county jail and fined $1,000, a penalty statutorily authorized by § 28-106(1) for a Class I misdemeanor. " 'A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.' " *State v. Johnson*, 238 Neb. 206, 208, 469 N.W.2d 761, 763 (1991) (quoting *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). Accord, *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556 (1991);

State v. Staten, 238 Neb. 13, 469 N.W.2d 112 (1991). This court has also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord, *State v. Witt, supra*; *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

After a presentence report, which disclosed only two previous traffic violations, the trial court observed that Miller did not accept responsibility for her offense. Miller's sentence is clearly within the range of penalties for a Class I misdemeanor. In view of the nature and seriousness of the offense and relevant information in the presentence report presented at the sentence hearing, we are unable to conclude that the trial court abused its discretion in the sentence imposed on Miller. Hence, the sentence imposed on Miller is affirmed.

CONCLUSION

Accordingly, we dismiss Miller's appeal on the question concerning her motion for judgment n.o.v. and affirm the sentence imposed on Miller.

AFFIRMED IN PART, AND IN PART APPEAL DISMISSED.

WILLIAM CHARLES KARPF ET AL., APPELLANTS, V. CHARLES T. KARPF, INDIVIDUALLY AND AS TRUSTEE OF THE HENRY S. KARPF TRUSTS, APPELLEE.

481 N.W.2d 891

Filed March 27, 1992. No. S-89-729.

1. **Trusts: Intent.** Rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when the language used clearly expresses the settlor's intent.
2. _____: _____. When implicated, the primary rule of construction of trusts is that a court must, if possible, ascertain the intention of the testator or creator.
3. _____: _____. In interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument.
4. **Trusts: Property.** A trust creates a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.
5. _____: _____. Under the provisions of Neb. Rev. Stat. § 30-2813 (Reissue 1989), a trustee shall observe the standards of dealing with trust assets that would be observed by a prudent person dealing with the property of another.
6. _____: _____. Neb. Rev. Stat. § 30-2813 (Reissue 1989) places an external rather than a personal standard of care on a trustee, requiring the trustee to act as would an individual investing property for people to whom the trustee feels morally bound.
7. **Trusts: Words and Phrases.** To be prudent includes acting with care, diligence, integrity, fidelity, and sound business judgment.
8. **Trusts.** A trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his or her own interests where necessary.
9. _____. A trustee is responsible to the beneficiary and only holds the assets in the trust for that purpose.
10. _____. Even trustees given broad discretion are held to a standard of good faith and honesty.
11. _____. A trustee owes the beneficiary of a trust undivided loyalty and good faith, and all of the trustee's acts must be in the interest of the beneficiary and no one else.
12. **Damages.** Damages which are uncertain, speculative, or conjectural cannot be a basis for recovery.

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

Craig A. Knickrehm and Paul J. Halbur, of Heron, Burchette, Ruckert & Rothwell, for appellants.

Michael McCormack, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

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

CAPORALE, J.

I. INTRODUCTION

The plaintiff-appellant Amanda M. Karpf and two of her minor children, William Charles Karpf and Chloe Marie Karpf, through her as their guardian and next friend, seek redress for the breach of the fiduciary duty owed them, as limited beneficiaries of the Henry S. Karpf Trusts, by the defendant-appellee, Charles T. Karpf, as trustee. The district court dismissed the limited beneficiaries' petition, which also seeks damages from the trustee as an individual. They assign as operative errors, in summary, (1) the district court's evidential rulings, and (2) its determination that the trustee did not violate his duty to them. We affirm.

II. FACTS

Lodicea A. Karpf, on December 24, 1979, and February 18, 1982, established eight separate trusts for the ultimate benefit of her four grandchildren, all the offspring of the aforenamed trustee. This action arises out of the two trusts established for the benefit of Henry S. Karpf, the son of the trustee for whom the trusts involved here were named. Henry S. Karpf (hereinafter referred to as the son) married the plaintiff Amanda M. Karpf (hereinafter referred to as the wife) in April 1978. The two were divorced in July 1988, after they had produced three children. The youngest child is not a party to this proceeding, presumably because he was not in existence during any of the period in dispute.

One provision of the 1979 trust, the discretionary distribution provision, reads:

> The Trustee in his sole discretion may accumulate the income of the Trust or may, at any time and from time to time, distribute any part or all of the income and principal of the Trust to [the son], the issue of said [son] and the spouse of said [son], and, in the event of the death of such [son] and all the issue of such [son], thereafter to or among

> the spouse of such [son] and [settlor's] other grandchildren and the issue of such grandchildren.

Another provision of that trust, the withdrawal provision, declares:

> With respect to each donor who transfers assets to this Trust in any one calendar year, [the son], such [son's] spouse and each issue of such [son] shall each have the right to withdraw from the principal of this Trust and to retain as their own separate property the lesser of (a) $3,000, or (b) a pro rata share of the aggregate value for federal gift tax purposes of the assets transferred to the Trust in such calendar year by such donor. Such withdrawals shall be made by a written instrument signed by the person making the withdrawal, or such person's guardian, and delivered to the Trustee at any time prior to the expiration of the calendar year in which the donor's transfer to the Trust is made.

The 1982 trust contained identical provisions, except that the discretionary distribution provision eliminated the wife as a beneficiary and the withdrawal provision increased the maximum amount to $10,000.

The record explains that the withdrawal provision is a tax-planning device used to assist taxpayers in minimizing ultimate estate tax liability by enabling them to make tax-free gifts during their lifetimes to the amount limited by law. In order to qualify as a tax-free gift, the taxpayer must transfer a "present," as contrasted from a "future," interest. To be a present interest, a gift to the beneficiary of a trust must be subject to withdrawal by the beneficiary in the calendar year during which the gift was made. (As an aside, we note that in apparent honor of D. Clifford Crummey, who established that gifts to minors are transfers of present interests, see *Crummey v. C. I. R.*, 397 F.2d 82 (9th Cir. 1968), limited withdrawal provisions are often identified as Crummey provisions, and trusts containing such provisions are frequently referred to as Crummey trusts.)

When the 1982 trust was executed, the exclusion for a single gift was $10,000, 26 U.S.C. § 2503(b) (1982); however, at the time the 1979 trust was executed, the exclusion was limited to

$3,000, § 2503(b) (1976). The amount of the exclusion was and is multiplied by the number of gifts made. See § 2503(b) (1976 and 1982).

Although the trusts refer to "each donor" transferring assets to the trust, there was in each instance but a single such donor, the aforenamed settlor, who transferred to the trusts certain common stock of Bailey & Bailey Co., a Nebraska corporation which owns a farm in Scotts Bluff County and is engaged in agri-business. More specifically, the settlor transferred 10 shares of Bailey & Bailey common stock to the 1979 trust as follows: On December 24, 1979, two shares; on January 2, 1980, two shares; on January 2, 1981, two shares; and on January 9, 1984, four shares. She transferred 14 shares to the 1982 trust as follows: On February 18, 1982, nine shares, and on January 3, 1983, five shares. At the time of the settlor's death in 1985, all 200 outstanding shares of Bailey & Bailey common stock were owned by the trustee and the trusts. No one exercised the right of withdrawal.

The wife claims that neither she nor the two minor limited beneficiaries knew of the existence of the trusts until the fact was revealed during the course of the aforementioned divorce proceeding. She alleges that the trustee breached his fiduciary duty in failing to inform her and the children personally of the trusts. In defense, the trustee claims he did not breach his duty, since the son had been informed of the trusts, and that, in any event, the settlor did not intend anyone to actually exercise the withdrawal rights, having said that if anyone did, she would no longer transfer assets to the trusts.

The trustee admitted he did not inform anyone in writing about the existence of the 1979 trust nor about any of the contributions of Bailey & Bailey stock, but did tell the son of the trust's existence. With respect to the 1982 trust, the son received a copy of a letter written by the attorney for the settlor and trustee which outlined its terms, including the withdrawal rights. The trustee also testified that as he did not consider the wife to be a beneficiary of either trust, he never spoke to her about the trusts, nor made any attempt to keep her informed as to their administration.

The son's testimony confirmed his knowledge of the trusts.

He also testified that the trustee told him in December 1979 that if he "took anything out, it would be the last time." Thereafter, the son learned through the trustee of each transfer of stock into the 1979 trust and of the subsequent formation of the second trust in 1982.

The son reported that he and the wife had discussed the existence of the trusts on numerous occasions. The son also recalled that after the settlor had died and members of the family were cleaning her house, he found a document that listed the shares of stock given to the trusts, which the wife read. She acted perturbed because the son's older brother had received more shares than the son had.

The aforementioned attorney testified that the withdrawal rights under the trusts could be exercised by any of the parties but that the settlor intended not to transfer further assets to any trust if, in fact, the withdrawal rights were actually exercised.

> If they withdraw, illustration in this case, the 1979 trust, the most that [the] wife could have withdrawn is one share. She withdraws one share, it's one out of 200, it's no big deal as far as carrying out the total scope of your estate plan, and it's easily controlled. If anybody exercises any withdrawal rights in any particular year, you'll simply not make any additional transfers in any subsequent years to any trusts for them and you'll have the option of whether you want to do anything for them in the future. So, you put it in there, they clearly have the right to withdraw, but if anybody does exercise the right to withdraw, you simply choose not to make any additional gifts in any future years, and that was her intent.

According to the attorney, it was the settlor's wish to keep control of Bailey & Bailey with the trustee. Since other tax problems would have arisen had the settlor merely given the trustee the stock, the trusts were established, granting the trustee the power to vote the stock, thus effectively giving him control of the corporation while avoiding the other tax problems.

The trustee testified along the same lines, saying that the settlor informed him that the trusts were set up for the benefit of the grandchildren, but were to be controlled by him until he

died. Further, the withdrawal rights were "not to be used indiscriminately," and if there were withdrawals, the settlor would transfer no more stock to the trusts.

The record establishes that both the son and the wife had reasons beyond the prospect of future gifts to the trusts not to antagonize either the settlor or the trustee. The trustee provided the son and the wife with $2,000 a month for a period of 8 months while the son was unemployed. The trustee also paid $5,000 in medical expenses for one of the son's children. The settlor made the downpayment on a house, enabling the son and the wife to purchase it. In addition, the settlor occasionally paid the wife $500 to mow the yard and do yard work.

Against that background, the wife, when asked whether she would have exercised her withdrawal rights had she known of them, responded: "I don't know. I didn't know about it. I don't know what I would have done. I can't say."

III. ANALYSIS

1. Evidential Rulings

The limited beneficiaries claim the district court erred in receiving parol evidence to establish the settlor's intent, as such evidence contradicts the express terms of the trusts. It is their position that the trust agreements are facially unambiguous, and, therefore, such evidence was inadmissible. Conversely, the trustee contends the discretionary distribution and withdrawal provisions are "diametrically opposed" to each other, brief for appellee at 7, requiring the use of extrinsic evidence to settle the ambiguity thus created.

In *Conway v. County of Adams*, 171 Neb. 677, 680, 107 N.W.2d 418, 420 (1961), this court wrote: "[R]ules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when . . . the language used clearly expresses the settlor's intent." When implicated, the "primary rule of construction is that the court must, if possible, ascertain the intention of the testator or creator of the trust." *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 583, 288 N.W.2d 735, 739 (1980). It is also the rule that in interpreting a trust, the entire instrument, all its parts, and its general purpose

and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument. See *County of Holt v. Gallagher*, 156 Neb. 457, 56 N.W.2d 621 (1953).

So read, the discretionary distribution and withdrawal provisions are not in conflict with each other; rather, they combine to provide that the trustee has discretion to make distributions as he sees fit, subject, however, to the various beneficiaries' specified rights of withdrawal. Thus, the trusts are not ambiguous.

However, the lack of ambiguity does not mean the limited beneficiaries are correct in asserting that the challenged evidence is inadmissible, for the evidence does not, as they claim, contradict the express terms of the trust. It is true that, according to the record, any effort to extinguish the withdrawal rights prior to their exercise would have defeated the purpose of the trusts. "Unless the donee is entitled unconditionally to the present use, possession, or enjoyment of the property transferred, the gift is one of a future interest for which no exclusion is allowable under the statute." *French v. Commissioner of Internal Revenue*, 138 F.2d 254, 257 (8th Cir. 1943); *Chanin v. United States*, 393 F.2d 972 (Ct. Cl. 1968); *Estate of McClure*, 608 F.2d 478 (Ct. Cl. 1979). Thus, had the trusts granted withdrawal rights and also expressly provided that the rights could not be exercised, the present interest would be in doubt and the purpose of the trusts would be jeopardized. A taxpayer may not take advantage of a tax law and, concurrently, diffuse its intent.

> The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. [Citations omitted.] But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.

Gregory v. Helvering, 293 U.S. 465, 469, 55 S. Ct. 266, 79 L. Ed. 596 (1935). See *Rolin v. C. I. R.*, 588 F.2d 368 (2d Cir. 1978).

The challenged evidence establishes not that the settlor sought to extinguish the withdrawal rights before they were exercised, but only that once exercised, no future transfers to

the trusts would be made. Neither does the challenged evidence suggest that once the withdrawal rights were exercised, the settlor would have attempted to reclaim any tax-free transfer she had made. There is nothing which suggests that once the settlor made a tax-free transfer to the trusts, she was obligated to continue making them each and every year thereafter as long as she lived. It was her prerogative to make or not to make future transfers and to condition her making of them as she saw fit.

Thus, the district court did not err in receiving the challenged evidence.

2. Breach of Duty

This brings us to the question of whether the trustee breached his duty to the limited beneficiaries. A trust creates a "fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another." *Jaiser v. Milligan*, 120 F. Supp. 599, 612 (D. Neb. 1954); *Parker v. Bourke*, 131 Neb. 617, 269 N.W. 102 (1936). The standard of care to be exercised by a fiduciary in administering a trust is codified in Neb. Rev. Stat. § 30-2813 (Reissue 1989): "[T]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . . ." *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421 N.W.2d 463 (1988), declares that § 30-2813 places an external rather than a personal standard of care on a trustee, requiring the trustee to act as would an individual investing property for people to whom the trustee feels morally bound. Michigan, having adopted the same standard of care, noted that "[t]o be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment." *In re Green Charitable Trust*, 172 Mich. App. 298, 313, 431 N.W.2d 492, 498 (1988).

Furthermore, with respect to a trustee's duty to keep the beneficiaries informed, Neb. Rev. Stat. § 30-2814 (Reissue 1989) provides:

> The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration, and, unless otherwise provided in the trust instrument, in

addition:

(a) Within thirty days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries . . . .

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

In *St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 157, 296 N.W.2d 479, 482 (1980), this court wrote that a "trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his own interests where necessary." In essence, the trustee is responsible to the beneficiary and only holds the assets in the trust for that purpose.

As said in George G. Bogert, The Law of Trusts and Trustees § 961 at 2 (rev. 2d ed. 1983):

> The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.

The fact that the trustee was given discretionary distribution powers did not arm him with the right to act just as he pleased. Even trustees given broad discretion are held to a standard of

good faith, *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956), and honesty, *Moss v. Axford*, 246 Mich. 288, 224 N.W. 425 (1929). "[A] trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the cestui que trust and no one else." *State ex rel. Ebke v. Board of Educational Lands and Funds*, 154 Neb. 244, 249, 47 N.W.2d 520, 523 (1951).

Although there are vague references in the record to moments when the wife may have learned of the trusts, the trustee did not comply with the requirements of § 30-2814. Thus, contrary to the district court's finding, the trustee did breach his duty to the limited beneficiaries, and, as a consequence, they neither knew of nor had an opportunity to exercise their rights or watch over the trusts.

IV. DAMAGES

The determination that the trustee breached his duty to the limited beneficiaries makes it necessary that we reach a question the district court did not, the matter of damages.

The limited beneficiaries' argument assumes that they would have exercised their withdrawal rights each and every time stock was deposited in the trust under which they were limited beneficiaries. The first difficulty with this claim is that, based on the record, they could exercise their withdrawal rights once, and once only; once exercised, no further opportunity would arise.

A further difficulty with the claim from the wife's point of view is that she clearly and unequivocally testified she cannot represent she would have exercised her withdrawal rights even if she had known of them. This is quite understandable, for she knows that the exercise of her withdrawal rights would have caused the settlor to forgo future transfers to the trust. While it is uncertain, speculative, and conjectural to wonder whether exercise of the rights might also have caused the settlor and trustee to be less generous in other matters than they had been in the past, it would be equally uncertain, speculative, and conjectural to grant the wife damages in the face of her inability to swear that she would have exercised her rights. See *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 411 N.W.2d

331 (1987) (damages which are uncertain, speculative, or conjectural cannot be a basis for recovery).

That leaves the minor limited beneficiaries, who could only act through their guardians, the son and the wife. See Neb. Rev. Stat. § 30-2608 (Reissue 1989) (parents are natural guardians of their minor children). Since the wife does not know what she would have done and the son makes no claim he would have exercised the withdrawal rights on their behalf, neither can any damages be awarded to the minor limited beneficiaries.

V. RULING

Inasmuch as a correct result will not be set aside merely because it is based on incorrect reasoning, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991), the judgment of the district court, as first said in part I, is affirmed.

AFFIRMED.

NANCY HELLER LEWIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CLIFFORD MILTON HELLER, DECEASED, ET AL., APPELLEES, V. JAMES D. PODUSKA, APPELLANT, AND ALL PERSONS HAVING OR CLAIMING ANY INTEREST IN LOT 37, BLOCK 8, ORCHARD HILL ADDITION TO THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLEES.

481 N.W.2d 898

Filed March 27, 1992. No. S-89-816.

1. **Actions.** A cause of action consists of the set of facts on which a recovery may be had.
2. **Trusts: Property: Unjust Enrichment.** Where a transfer of property is made to one person and another pays the purchase price in order to accomplish an illegal purpose, a resulting trust does not arise if the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.
3. **Trusts: Gifts: Loans.** Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust.
4. **Trusts: Intent.** A resulting trust arises to give effect to the relationship intended by the parties thereto.
5. **Trusts: Property: Intent.** A resulting trust does not arise where a transfer of

property is made to one person and the purchase price is paid by another if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.

6. **Gifts.** The essential elements of a gift inter vivos are donative intent, delivery, and acceptance.
7. **Gifts: Intent.** Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.
8. **Gifts.** The delivery of a gift may be symbolic or constructive if the delivery is as nearly perfect and complete as the nature of the property and the attendant circumstances will permit.
9. _____. If a gift is absolute, the mere postponement of the enjoyment of it until the death of the donor is not material and will not defeat it.
10. **Adverse Possession: Proof.** One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the full 10-year statutory period.

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

Jeffrey A. Silver for appellant.

Dean J. Sitzmann, of Steier & Kreikemeier, P.C., for appellees Lewis and Heller.

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

HASTINGS, C.J.

The defendant James D. Poduska appeals a judgment of the district court which quieted title to certain real estate in the plaintiff Nancy Heller Lewis and awarded damages in favor of the plaintiffs in the amount of $29,802.02. Defendant Poduska assigns as error generally that the trial court imposed a resulting trust upon Poduska in favor of the plaintiffs and rejected Poduska's theory of a gift.

Plaintiff Lewis is the daughter, sole heir at law, and personal representative of the estate of Clifford Milton Heller, deceased. Plaintiff Alfreda M. Heller is Lewis' mother and Clifford's ex-wife. Clifford and Alfreda jointly owned and managed rental properties in Omaha. They continued this venture even

after the dissolution of their marriage in 1981.

Poduska was Clifford's nephew. He is the record title owner of Lot 37, Block 8, Orchard Hill Addition, known as 3815 Franklin Street in Omaha.

In 1974, Clifford and Alfreda bought the property located at 3815 Franklin. They did not take title to the property; rather, title was conveyed to Poduska. Alfreda herself recorded the deed conveying title to Poduska.

The purpose of conveying the property to Poduska was to allow Clifford, a licensed real estate agent, to collect a commission from the sellers. Clifford and Alfreda completed at least two, and possibly as many as six, transactions of this kind involving Poduska. Poduska would receive title to the property and would then reconvey it to Clifford and Alfreda upon request. On all other occasions, Poduska had reconveyed the property when asked by Clifford to do so. Poduska never reconveyed title to 3815 Franklin to Clifford and Alfreda. In 1980, Alfreda prepared a deed conveying the property from Poduska to her and Clifford. She gave this deed to Clifford when she prepared it. Alfreda next saw the deed, unexecuted, on Clifford's desk in 1981. Clifford died on September 1, 1986. The deed was still on Clifford's desk and unexecuted when he died.

At all times between the purchase of 3815 Franklin and Clifford's death, Clifford and Alfreda treated the property as their own. From 1974 to 1986, they used it for storage, by and large letting it sit idle. After 1980, Clifford and Alfreda began improving the property, eventually spending $21,628 to that end. Clifford and Alfreda paid property taxes and insurance premiums on the property and after 1980 claimed it on their income tax returns. They began renting the property shortly before Clifford's death in 1986. When Clifford and Alfreda secured a decree of dissolution of their marriage, the property was listed in the decree as a marital asset and was awarded to Clifford.

Poduska did not take possession of the property until after Clifford's death. Poduska acquired a copy of the deed to the property at the county courthouse following Clifford's death. After that time he began collecting rent from the tenant living

on the property, paying insurance premiums, and paying property taxes.

Poduska testified that he understood it to be Clifford's intent that he (Poduska) was to have 3815 Franklin when Clifford died. According to Poduska, "[Clifford] told me he has a house that he's going to give me and that I was supposed to take up with the house when he passes away." Clifford told Poduska this at Clifford's home in 1974, shortly after the purchase of the property. Poduska testified that Alfreda was present when the statement was made. He also testified that Clifford reminded him of this promise to give him the property on a number of subsequent occasions.

Clifford also talked about 3815 Franklin with Poduska's wife, Rebecca Poduska, and with Poduska's mother, Betty Poduska. Rebecca Poduska testified that in 1976 Clifford asked her if she knew her husband had a house in Omaha. She also testified that in 1982, Clifford told her he had been working on Poduska's house. Betty Poduska testified that on six or seven occasions, the last being in June 1986, Clifford had told her that her son "owns a house in Omaha."

Clifford's own fiancee, Charmayne Gaye, testified that while reviewing documents in preparing to sign a prenuptial agreement, she saw a reference to 3815 Franklin with Poduska's name handwritten in the adjacent margin. On another occasion, Clifford told her that Poduska was aware that the property was in his name, adding, "[W]hat the hell does he care . . . if I die he's got himself a house." On a third occasion, while visiting 3815 Franklin, Clifford again told her that the property was in Poduska's name and that if something happened to him (Clifford), the property would go to Poduska.

In contrast to the above statements, however, Lewis testified that Clifford once told her that 3815 Franklin would someday be hers.

Poduska further testified that Clifford visited Poduska at Poduska's home in Iowa in June 1986, shortly before he died. Clifford did not at that time, nor at any other time, direct Poduska to deed 3815 Franklin to him and/or Alfreda. In the other instances where Poduska took title to property for the Hellers, according to Alfreda's testimony, "Cliff would put

[the deed] underneath [Poduska's] nose and say, here, Jim, sign this, and Jim did without reading it or anything."

The district court tried the case upon the plaintiffs' amended petition, which listed three "causes of action" based upon the above-stated facts: to quiet title, for return of wrongfully collected rents, and for unjust enrichment. At this point, mention should be made of the fact that there were not three causes of action alleged. All three *theories of recovery* were based on one set of facts. " '[A] cause of action consists of the set of facts on which a recovery may be had.' " *Lewis v. Craig*, 236 Neb. 602, 605, 463 N.W.2d 318, 320 (1990).

In any event, the court determined that the plaintiffs had proved the existence of a resulting trust, and granted them leave to file a second amended petition to conform to the proof. The court then entered its decree, which (1) gave Lewis, as personal representative, fee simple title to 3815 Franklin; (2) ordered Poduska to pay to Lewis, as personal representative, the proceeds from a fire insurance policy covering the property; (3) entered judgment against Poduska in the amount of the rents he had collected from tenants at 3815 Franklin; and (4) taxed to Poduska court costs and postjudgment interest.

If, as claimed by the plaintiffs, Clifford intended that Poduska hold the property in trust for him, Clifford violated Neb. Rev. Stat. § 81-885.24(9) (Cum. Supp. 1974), which prohibited a licensed real estate broker from "[a]cting in the dual capacity of agent and undisclosed principal in any transaction," and § 81-885.24(27), which prohibited conduct "[d]emonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman, whether of the same or of a different character as hereinbefore specified." It is apparent that the true purpose of the structure of the various transactions involving Poduska, including the case at bar, was to work a fraud, in violation of the real estate broker licensing statutes, upon the sellers of the properties by collecting an illegal commission by subterfuge.

Conveyances made for fraudulent purposes fall within an exception to the Restatement rule regarding purchase money trusts.

Where a transfer of property is made to one person and

> another pays the purchase price in order to accomplish an illegal purpose, a resulting trust does not arise if the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.

Restatement (Second) of Trusts § 444 at 405 (1959).

Regardless of the question of fraud, Poduska argues that imposition of a resulting trust was error in that the evidence was at least equally consistent with the theory that Clifford intended to make Poduska a gift of 3815 Franklin. He cites in support *Biggerstaff v. Ostrand*, 199 Neb. 808, 261 N.W.2d 750 (1978). *Biggerstaff* does indeed state, "Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust." *Id.* at 816, 261 N.W.2d at 754. This is a natural corollary of the general definition of a resulting trust: A resulting trust arises to give effect to the relationship *intended* by the parties thereto. See *Superior Hybrids Co. v. Carmichael*, 214 Neb. 384, 333 N.W.2d 911 (1983). A similar corollary obtains in the specific case of a purchase money resulting trust: "A resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise." Restatement (Second) of Trusts § 441 at 396-97 (1959). We are thus presented with the question as to whether a preponderance of the evidence, reviewed de novo, indicates that 3815 Franklin was a gift from Clifford to Poduska.

"The essential elements of a gift inter vivos are donative intent, delivery, and acceptance." *Renner v. Wurdeman*, 231 Neb. 8, 13-14, 434 N.W.2d 536, 540 (1989); *Guardian State Bank & Trust Co. v. Jacobson*, 220 Neb. 235, 369 N.W.2d 80 (1985). We discuss these elements in order.

DONATIVE INTENT

Poduska testified that "[Clifford] told me he has a house that he's going to give me and that I was supposed to take up with the house when he passes away." This statement was made at Clifford's home shortly after the purchase of the property, in

Alfreda's presence, and was repeated in essence on a number of later occasions.

The district court viewed this evidence as insufficient to establish a gift, observing, "There were never any witnesses to these statements," apparently meaning witnesses other than Poduska.

However, other witnesses testified to statements by Clifford of the same nature as those testified to by Poduska. Rebecca Poduska testified that in 1976, Clifford asked her if she knew her husband had a house in Omaha. She testified that in 1982, Clifford told her he had been working on Poduska's house. Betty Poduska testified that on six or seven occasions, the last being in June 1986, Clifford had told her that her son "owns a house in Omaha." Clifford told his fiancee, Gaye, that Poduska was aware that the property was in his name, adding, "[W]hat the hell does he care . . . if I die he's got himself a house." Clifford also told Gaye, while visiting 3815 Franklin, that the property was in Poduska's name and that if something happened to him (Clifford), the property would go to Poduska.

The trial court found that these corroborative statements were made "in no particular context"; Lewis and Alfreda similarly argue that the statements were not "specific as to the exact house or property" being given. Brief for appellees Lewis and Heller at 19. However, that ignores the fact that during this period of time only the one house was titled in Poduska's name.

Clifford's statements were made against a background indicating that he intended something other than a resulting trust. In the other instances where Poduska took title to property for the Hellers, Clifford facilitated the reconveyance of the property to him and Alfreda: "Cliff would put [the deed] underneath [Poduska's] nose and say, here, Jim, sign this, and Jim did without reading it or anything." However, in the instance of 3815 Franklin, Clifford let the deed reconveying the property from Poduska to himself and Alfreda sit on his desk for 6 years without requesting Poduska's signature. He did this even though he was aware, based on the statements recounted above, that Poduska held title to the property, and even though he saw Poduska on several occasions, including one only 2 months before he died.

Lewis and Alfreda argue that Clifford's intent was not to make a gift, but to consummate the kind of sham transaction he had involved Poduska in on previous occasions. While this may have been Clifford's intent at the time of the original conveyance, Clifford's later statements and actions make it clear that his intent changed. If he intended himself to be the beneficial owner of 3815 Franklin, his statements that the property belonged to Poduska, and his failure for over 12 years to have Poduska reconvey the property, are inconsistent with that intent. The evidence is sufficient to indicate that Clifford intended the property as a gift to Poduska, with possession to be taken after Clifford's death.

DELIVERY

" ' "Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. . . ." ' " *Guardian State Bank & Trust Co.*, 220 Neb. at 239, 369 N.W.2d at 83-84 (quoting *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980)). " '[T]he delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit.' " *Rorabaugh v. Garvis*, 198 Neb. 223, 226, 252 N.W.2d 161, 163 (1977) (quoting *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953)). Thus, it appears, the circumstances surrounding the giving of an alleged gift control what is necessary in order to effectuate delivery.

Two circumstances are vital to the analysis of delivery in this case. The first is that Clifford intended Poduska to take actual possession of the Franklin Street property— "to take up with the house"— only after Clifford died. This makes passage of actual possession of the property during Clifford's lifetime unnecessary to sustain the gift. The second is the fact that Poduska was, at the time of the gift, the title owner of the property. This makes delivery of the deed unnecessary to sustain the gift.

Poduska took possession of the Franklin Street property by

collecting rents, paying insurance premiums, and paying property taxes after Clifford's death. This is consistent with the circumstance of Clifford's intent that Poduska "take up with the house when he [Clifford] passes away." Moreover, Alfreda herself recorded the deed in Poduska's name. Even if we assume Clifford and Alfreda's intent was, at the time of recording of the deed, that they consummate one of their customary transactions with Poduska by having him reconvey the property to them, Clifford's knowledge that the deed was in Poduska's name and Clifford's subsequent inaction in the face of this fact could reasonably be construed as delivery of title to the property.

Lewis and Alfreda argue that "the delay in requesting [Poduska] to convey the property was due solely to inadvertence." Brief for appellees Lewis and Heller at 24. This is both misleading and ludicrous. The record does not reflect that there was *ever* a request that Poduska reconvey the property. Moreover, it is beyond belief that Clifford, who was in the business of buying and managing real estate, would "inadvertently" fail to have Poduska reconvey the property for over 12 years. The fact that Clifford had a completed deed awaiting Poduska's signature on his desk for over 6 years further strains the credibility of Lewis and Alfreda's argument in this regard.

Plaintiffs further argue, "The retaining of any control in the hands of the donor over the subject of the gift renders it invalid," *id.* at 20, citing *Jones v. Ewart*, 143 Neb. 717, 10 N.W.2d 708 (1943), for this proposition. Furthermore, they suggest that since Poduska was to "take up on" the property at Clifford's death, brief for appellees Lewis and Heller at 21, the alleged gift was really a bequest, invalid under the law of wills. These arguments are controlled by *Dinslage v. Stratman*, 105 Neb. 274, 180 N.W. 81 (1920). In that case, the plaintiff's decedent gave her granddaughter $1,000, payable when the grandmother died. The decedent held a debt of the defendant, whom she directed to pay $1,000—in satisfaction of the debt—to the granddaughter upon the decedent's death. The plaintiff administrator, upon decedent's death, sued the defendant for the debt, arguing that the gift was conditional

and therefore the debt had reverted to the decedent's estate. The court held that the gift had vested and that the defendant was to pay the $1,000 to the granddaughter, rather than to the decedent's estate. The court said, " 'If the gift is absolute, the mere postponement of the enjoyment of it until the death of the donor is not material, and will not defeat it.' " *Id.* at 280, 180 N.W. at 83.

Clifford intended that 3815 Franklin be a gift to Poduska, the enjoyment of which was deferred until Clifford's death. Clifford placed no conditions on his gift to Poduska. When we assume that the evidence discussed above was sufficient to establish intent, Clifford's inaction in allowing the title to the house to remain in Poduska was sufficient delivery under the circumstances of the gift.

ACCEPTANCE

Poduska accepted the gift by taking possession of it after Clifford's death in accordance with Clifford's intent, as demonstrated by the evidence. Plaintiffs argue that Poduska did not accept the gift when he first became aware of it, and therefore his acceptance is invalid. Once again, plaintiffs misunderstand the nature of the gift. Poduska's possession of the property was to be delayed until after Clifford's death. When Clifford died, Poduska took possession of the property and assumed the responsibilities attached to that possession. Those actions were sufficient to constitute acceptance of the gift.

Our finding that the property constituted a gift from Clifford to Poduska, vesting in Poduska upon Clifford's death, of necessity disposes of the trust theories Lewis and Alfreda urged both in this court and in the trial court. See, *Superior Hybrids Co. v. Carmichael*, 214 Neb. 384, 333 N.W.2d 911 (1983); Restatement (Second) of Trusts § 441 (1959). Lewis and Alfreda also urged a theory of adverse possession, which is no more applicable upon the facts of this case than the trust theories. "One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the full 10-year

statutory period." *Schaneman v. Wright*, 238 Neb. 309, 323, 470 N.W.2d 566, 576 (1991). When we consider the evidence of Clifford's donative intent, it is clear that his claim of ownership, if any, extended only until his death. In other words, the claim was not of fee simple ownership, but one in the nature of a life estate. The district court properly found that adverse possession had not been established.

The evidence having established that the district court erred in impressing a trust upon the property, awarding title to Lewis, and awarding damages against Poduska, the judgment is reversed and the cause remanded with directions to enter judgment in favor of the defendant Poduska.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs.

CHERYL PHYLIS MARSHALL, APPELLANT, V. GARY LYNN MARSHALL, APPELLEE.

482 N.W.2d 1

Filed March 27, 1992. No. S-89-819.

1. **Foreign Judgments: Jurisdiction.** The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587 et seq. (Reissue 1989), provides a means of enforcing accrued judgments and does not permit the enforcement of unaccrued money obligations.
2. _____: _____. Registration of a foreign judgment under the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587 et seq. (Reissue 1989), does not vest subject matter jurisdiction in a Nebraska court for modification of the foreign judgment.
3. **Judgments: Collateral Attack.** A void judgment may be attacked at any time in any proceeding.
4. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
5. **Judgments: Garnishment.** If the judgment underlying a garnishment is vacated, the garnishee is discharged from liability in the garnishment proceedings.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

James R. Place and Scott H. Rasmussen, of Place and Rasmussen, for appellant.

John A. Rickerson, of Rickerson, Welch & Kruger, for appellee.

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

SHANAHAN, J.

The district court for Douglas County vacated its previous child support order, which was a modification of a Texas divorce decree registered in Nebraska under the Uniform Enforcement of Foreign Judgments Act (UEFJA), Neb. Rev. Stat. §§ 25-1587 to 25-15,104 (Reissue 1989), and vacated a related judgment in a garnishment proceeding based on the modified foreign judgment. Cheryl Phylis Marshall, the custodial parent of the child for whom support was ordered under the Texas decree, appeals and claims that the district court erred in vacating the modified support order and garnishment judgment. We affirm.

Cheryl and Gary Lynn Marshall were divorced in the court of domestic relations in Harris County, Texas, on September 13, 1976. The court, in its decree, ordered that Gary Marshall pay child support in the amount of $150 per month for each of the Marshalls' three minor children.

In August 1977, Cheryl moved with the Marshall children to Omaha. On November 10, 1981, in the district court for Douglas County, Cheryl filed her "Application for Registration of a Foreign Judgment," which resulted in registration of the Texas decree in Nebraska on January 15, 1982. Then, on February 12, in the district court for Douglas County, Cheryl Marshall filed an application to modify the support order in the Texas divorce decree, requesting an increase in child support for the only remaining minor Marshall child. On September 10, after a hearing personally attended by Cheryl and Gary Marshall, the court granted Cheryl's modification application and increased Gary's child support payment to $250 per month until February 1983, when child support would automatically increase to $325 per month. No appeal was taken from the modified judgment for child support.

Although the record does not reflect a precise history of Gary's payments of child support, by late 1988, Gary, who lived in Texas, was $7,162.50 in arrears on his support obligation. At that point, Cheryl commenced a garnishment proceeding against Gary's employer, Continental Airlines, which had an office at Eppley Airfield in Omaha. After Continental failed to answer the summons and interrogatories in the garnishment proceeding, the district court, on January 6, 1989, granted Cheryl a default judgment against Continental pursuant to Neb. Rev. Stat. § 25-1028 (Reissue 1989) (judgment based on garnishee's failure to answer garnishment interrogatories).

After the Douglas County Sheriff's Department seized $53 in cash from Continental's Omaha office pursuant to the garnishment judgment, on March 13, 1989, Continental filed its motion to set aside the garnishment judgment and claimed that "the action of the District Court of Douglas County in modifying the Texas decree is of no force and effect." On April 19, Gary Marshall filed his motion to set aside the modified judgment for support, alleging that the Nebraska court, in modifying the Texas judgment, "did not have jurisdiction to increase the child support in the registration of a foreign judgment action." On May 12, the district court granted both motions, vacating the modified child support judgment and the default garnishment judgment against Continental. The district court decided that under *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986), the court lacked subject matter jurisdiction to modify the Texas judgment previously registered in 1982 because Cheryl had filed for registration of her divorce decree under UEFJA.

In *Riedy*, we reversed a district court judgment which decreased the amount of future alimony payments ordered under an Iowa divorce decree registered in Nebraska pursuant to UEFJA. After the ex-wife registered the Iowa decree, her former husband applied for a reduction in future alimony payments. In *Riedy* we held that although Nebraska courts clearly have jurisdiction to enforce accrued alimony payments in a divorce decree registered under UEFJA, Nebraska courts lack subject matter jurisdiction to modify money obligations which have not yet accrued under a foreign judgment registered

in Nebraska. Thus, in *Riedy*, we concluded that UEFJA "provides a means of enforcing accrued judgments and does not permit the enforcement of unaccrued money obligations. Having no jurisdiction to enforce the unaccrued money obligations, the trial court had no jurisdiction to modify those obligations." 222 Neb. at 312, 383 N.W.2d at 744.

Although *Riedy* dealt with alimony to be paid in the future and Marshalls' case involves a registered Texas judgment for child support, the identical principle applies in both cases, since the question is whether a Nebraska court can modify unaccrued money obligations imposed by a foreign judgment registered in Nebraska under the UEFJA. In both situations, a Nebraska court lacks subject matter jurisdiction to modify a registered foreign judgment. Therefore, we hold that registration of a foreign judgment under the Uniform Enforcement of Foreign Judgments Act, § 25-1587 et seq., does not vest subject matter jurisdiction in a Nebraska court for modification of the foreign judgment.

In an effort to support her position on appeal, Cheryl Marshall relies on *Johnson v. Johnson*, 215 Neb. 689, 340 N.W.2d 393 (1983), wherein we reversed a district court's modification of child support obligations under an Illinois divorce decree registered in Nebraska under UEFJA, but did so without reference to the issue of subject matter jurisdiction. Cheryl argues that our statement in *Johnson* that the ex-husband "was free, at any time he chose, to petition the court for modification," 215 Neb. at 693, 340 N.W.2d at 396, shows that a Nebraska court has jurisdiction to effectuate modification of a foreign judgment registered in Nebraska. We disagree with the preceding view of *Johnson*. First, the "court" mentioned in the quoted passage from *Johnson* was the Illinois circuit court which entered the original decree. Second, as demonstrated later in *Riedy*, "the language of [the UEFJA] nonetheless manifests that only accrued money obligations come within the purview of the act . . . ." 222 Neb. at 311, 383 N.W.2d at 743. In any event, to the extent that language in *Johnson* may indicate that a Nebraska court can modify an unaccrued money obligation under a foreign judgment registered in Nebraska and, therefore, conflicts with *Riedy* and

our decision today, *Johnson* is overruled.

Another part of Cheryl Marshall's argument is that the Texas child support judgment, registered under UEFJA, should be subject to modification the same as a child support judgment registered under the Revised Uniform Reciprocal Enforcement of Support Act (URESA), Neb. Rev. Stat. §§ 42-762 to 42-7,104 (Reissue 1988). We disagree with the preceding view.

It is true that Nebraska law does provide a method by which Nebraska courts may obtain jurisdiction to modify unaccrued child support obligations imposed by a foreign divorce decree, namely, URESA. As we stated in *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 268, 465 N.W.2d 773, 775-76 (1991):

> [U]nder the Revised Uniform Reciprocal Enforcement of Support Act, [Neb. Rev. Stat.] §§ 42-762 to 42-7,104 (Reissue 1988), an "obligee may register the foreign support order in a court of this state," § 42-797, and "[u]pon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state," § 42-7,101(a). If there is personal jurisdiction over a child support obligor, an obligee may then seek a modification of a registered foreign child support order in the same manner as an obligee may seek modification of a child support order initially entered by a Nebraska court.

Because the Uniform Enforcement of Foreign Judgments Act and the Revised Uniform Reciprocal Enforcement of Support Act are legislative enactments, availability of either act is limited by the statutory provisions in each act. For instance, under URESA, the remedy of civil contempt is available pursuant to § 42-770:

> All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under sections 42-762 to 42-7,104 including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

As an additional example, modification of a support order is specifically authorized by URESA in § 42-7,101(a):

> Upon registration the registered foreign support order

> shall be treated in the same manner as a support order issued by a court of this state. It shall have the same effect and shall be subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

By contrast, UEFJA has no provision for modification or alteration of a foreign judgment, decree, or order. Under UEFJA, a registering jurisdiction enforces a foreign judgment through remedies such as levy and execution on the judgment debtor's property that is subject to satisfaction of the judgment debt. See §§ 25-1590 and 25-1592. Concerning UEFJA, this court stated in *Sullivan v. Sullivan*, 168 Neb. 850, 855, 97 N.W.2d 348, 352 (1959): "[T]he legislative intent was to grant to the judgment creditor by the right of levy the same right which the holder of a domestic judgment has with reference to the property and rights of a judgment debtor." This differs from the stated purpose of URESA, which is to "improve and extend by reciprocal legislation the enforcement of duties of support." § 42-762.

The Minnesota Supreme Court has construed UEFJA as follows:

> The purpose of the Act is to implement the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and to facilitate interstate enforcements of judgments by providing a summary procedure by which a judgment creditor may enforce the judgment in an expeditious manner in any jurisdiction in which the judgment debtor is found. *See, e.g., Thompson v. Safeway Enterprises, Inc.*, 67 Ill.App.3d 914, 25 Ill.Dec. 561, 385 N.E.2d 702 (1978).
>
> . . .
>
> . . . After a foreign judgment has been duly filed, the grounds for reopening or vacating it are limited to lack of personal or subject matter jurisdiction of the rendering court, fraud in procurement (extrinsic), satisfaction, lack of due process, or other grounds that make a judgment invalid or unenforceable.

Matson v. Matson, 333 N.W.2d 862, 867 (Minn. 1983).

While UEFJA and URESA may have similar registration

requirements, the acts are specific and distinct legislation designed for different situations and results. Consequently, under the circumstances in the Marshall case, one cannot invoke the provisions of one legislative act by complying with the provisions in a different legislative act.

Cheryl Marshall also contends that Gary Marshall is estopped from challenging the validity of the child support modification by virtue of his failure to complain earlier. That contention is a misperception of jurisdiction. Because the district court's 1982 judgment modifying the Texas child support obligation was entered without subject matter jurisdiction, the modified judgment is clearly void. It is the longstanding rule in Nebraska that "a void judgment may be attacked at any time in any proceeding." *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 249, 328 N.W.2d 759, 763-64 (1983). Accord *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988). Moreover, " '[a] void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral.' " *Stanton v. Stanton*, 146 Neb. 71, 75, 18 N.W.2d 654, 656 (1945) (quoting from *Hassett v. Durbin*, 132 Neb. 315, 271 N.W. 867 (1937)). See, also, *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988) (a void judgment is subject to collateral attack); *Griffin v. Vandersnick*, 210 Neb. 590, 316 N.W.2d 299 (1982) (a judgment entered without jurisdiction is void and subject to collateral attack); *Strawn v. County of Sarpy*, 154 Neb. 844, 49 N.W.2d 677 (1951). Gary Marshall's paying any or all sums due under the modified but void judgment does not operate to validate the void judgment. "Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). Accord, *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986).

Finally, Cheryl Marshall urges that even if the modified and underlying child support judgment has been entered without jurisdiction, the district court abused its discretion by also vacating the garnishment judgment against Continental.

Cheryl argues that under § 25-1028, a garnishee who fails to answer a summons and interrogatories is presumed to be indebted to the defendant for the full amount of the plaintiff's claim, and the failure to answer results in a penalty to the garnishee in the amount of the judgment. It has been the rule in Nebraska, virtually since Nebraska's entry into statehood, that if the judgment underlying a garnishment is vacated, the garnishee is discharged from liability in the garnishment proceedings. As stated in *Clough v. Buck*, 6 Neb. 343, 347 (1877):

> [T]he whole proceeding must be supported by a judgment *in esse*. And if after such process has been had the judgment is reversed, set aside, or vacated, the execution falls with it, and the garnishment becomes wholly dissolved, for there is nothing left to support either the one or the other.

When the district court's judgment modifying the registered Texas child support order was nullified by the district court's lack of subject matter jurisdiction for the modification, the resulting garnishment judgment, rendered on the basis of a void judgment, was subject to vacation.

Because Cheryl Marshall's assignments of error are without merit, the judgment of the district court vacating the 1982 modified child support order in the Texas decree and the subsequent garnishment judgment based on the modified Texas judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD S. TEJRAL, APPELLANT.
482 N.W.2d 6

Filed March 27, 1992. No. S-90-1091.

1. **Motions to Suppress: Appeal and Error.** One wishing to preserve a claim of error in the overruling of a motion to suppress must at trial make a specific objection to the offer of the evidence which was the subject of the suppression motion.

2. **Trial: Evidence.** Erroneously admitted cumulative evidence is harmless if other relevant evidence supports the finding of the trial court.
3. **Prior Convictions: Right to Counsel.** Challenges to prior plea-based convictions for enhancement proceedings may only be made for the failure of the record to disclose whether the defendant had or waived counsel at the time the pleas were entered.
4. **Prior Convictions: Proof: Right to Counsel: Waiver.** To prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel.
5. **Prior Convictions: Collateral Attack: Right to Counsel: Waiver.** A defendant cannot in an enhancement proceeding collaterally attack a prior conviction for lack of any indication of a voluntary and intelligent waiver of rights other than the right to counsel.
6. **Prior Convictions: Right to Counsel: Waiver.** At an enhancement proceeding, the focus is on whether a defendant was represented by counsel or waived the right to be so represented, not whether the defendant effectively waived all of his or her other rights.
7. **Drunk Driving: Blood, Breath, and Urine Tests.** Matters of delay between driving and testing go to the weight of the breath test results, rather than to the admissibility of the evidence.
8. **Drunk Driving: Blood, Breath, and Urine Tests: Time.** A valid breath test given within a reasonable time after an accused is stopped is probative of a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988).
9. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of District Court affirmed.

Robert Wm. Chapin, Jr., for appellant.

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

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

CAPORALE, J.

Following a county court bench trial, the defendant-appellant, Richard S. Tejral, was convicted of third-offense driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). He was thereafter jailed for 120 days, was fined $500, and had his

license to operate a motor vehicle suspended for a period of 15 years. The district court affirmed. Tejral now asserts, in summary, that the district court erred in failing to find the county court erred on the record by (1) failing to sustain his motion to suppress certain evidence, (2) admitting certain exhibits into evidence, (3) finding the evidence sufficient to support the charge, and (4) imposing an excessive sentence. We affirm.

At approximately 6:58 p.m. on January 5, 1990, Lincoln police officer John D. Rallis saw the 48-year-old Tejral driving a truck at 10 miles per hour and then quickly accelerating. Rallis paced Tejral for approximately six blocks, during which time the truck swerved several times and came close to hitting the curb. Although Rallis did not use speed radar, he clocked Tejral by following him at a consistent speed. Tejral reached speeds of up to 48 miles per hour in a 40-mile-per-hour zone. After several blocks, Rallis activated his cruiser lights and a block or two later activated the siren. Tejral finally stopped.

Rallis reported that as Tejral exited his vehicle, "he lost his balance and had to grab the vehicle to support himself." Tejral was unable to produce a driver's license, but apparently had a car registration. Rallis noted that Tejral's breath emitted a strong alcoholic odor, that he swayed and was unsteady on his feet, that his eyes were bloodshot, and that his speech was "very slow and deliberate and run together." Tejral first claimed he had not had anything to drink. However, when Rallis commented that Tejral smelled of alcohol, Tejral replied that he had had one drink. In later testimony, Tejral testified that he had had two beers around 5 p.m. Concluding that Tejral was intoxicated, Rallis took him for testing.

At the testing center, Tejral was unsteady when walking across the room. He was unable to walk in a straight line, count his steps, or turn around. He could not stop swaying when asked to close his eyes. Nor could he recite the alphabet.

Officer Katherine F. Heskett tested Tejral's breath alcohol level. After testifying to her training and the testing procedure followed, she reported that at 7:31 p.m., Tejral had a reading of .144 grams of alcohol per 210 liters of breath. Like Rallis, Heskett testified that Tejral had a strong odor of alcohol on his

breath, bloodshot and watery eyes, slurred speech, and a staggered walk. It was her opinion that Tejral was under the influence of alcohol.

Tejral filed a motion to suppress certain evidence, claiming that there existed no probable cause either to arrest him or to test his breath for alcohol. At the hearing, Tejral asserted he "would like to proceed with the motion to suppress evidence which is based on basically whether there was any probable cause for the stop to begin with." In accordance with this characterization of the issue, Rallis testified that Tejral was stopped because he was speeding and driving erratically. At the conclusion of the hearing, Tejral argued that the motion should be sustained because although the State's evidence showed probable cause to stop him for speeding, it did not show probable cause to arrest him for driving while under the influence of alcohol. The county court denied the motion.

At trial, Tejral testified that he had suffered a broken collarbone and rib a few months earlier and was in pain as the result of hauling firewood before he was arrested; he claimed it was this pain that caused him to walk abnormally and appear unsteady. Tejral denied that he crossed the centerline or hit a curb. He first admitted but later denied that he was speeding. Tejral made no objections to the admission of the evidence he had earlier sought to suppress, and that evidence was received as part of the trial evidence.

Thus, the first summarized assignment of error, claiming the county court should have sustained Tejral's motion to suppress, fails. One wishing to preserve a claim of error in the overruling of a motion to suppress must at trial make a specific objection to the offer of the evidence which was the subject of the suppression motion. *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

We therefore need not explore whether Tejral narrowed his suppression motion by stating at the beginning of the hearing that the issue was whether probable cause existed to stop him in the first instance.

The second summarized assignment of error claims the county court erroneously received four exhibits into evidence,

two at trial and two at the enhancement hearing.

At trial, the county court, over a general objection claiming that foundation for their admission was lacking, received a checklist Heskett had used in the course of operating the breath testing machine and received the test result printed by the machine. However, the objections to these exhibits came long after there had been unchallenged testimony both as to the operation of the machine and the result it produced. At the time Tejral made his objection, the challenged exhibits were merely cumulative. Even if the admission of these exhibits was erroneous, a matter we do not decide, the error at that point was harmless beyond a reasonable doubt. See *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992) (erroneously admitted cumulative evidence harmless if other relevant evidence supports finding).

Tejral next contends that two records of prior driving while intoxicated convictions were erroneously admitted for the purpose of enhancing this incident to a third offense. The records concern a 1983 and a 1985 conviction.

Challenges to prior plea-based convictions for enhancement proceedings may only be made for the failure of the record to disclose whether the defendant had or waived counsel at the time the pleas were entered. *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992). In other words, "to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel." *State v. Oliver*, 230 Neb. 864, 869, 434 N.W.2d 293, 297 (1989). However, a defendant cannot in an enhancement proceeding collaterally attack a prior conviction for lack of any indication of a voluntary and intelligent waiver of other rights. *State v. Crane, supra.* Hence, at an enhancement proceeding the focus is on whether a defendant was represented by counsel or waived the right to be so represented, not whether the defendant effectively waived all of his or her other rights.

Tejral claims foundation for admission of the 1983 conviction is lacking because the sentencing court's stamp on the operative waiver of rights form is undated, the form does not bear a case number, and the year is not shown on the

dateline above Tejral's signature. However, the questioned form is part of a record certified by the clerk of the sentencing court to be accurate. The certificate does bear a case number and ties the questioned form to a driving incident taking place on August 5, 1983, which is the subject of a complaint charging that Tejral was then driving while under the influence of alcohol. The questioned form itself bears the signature of the same attorney who is shown by other documents in the certified record as having represented Tejral throughout the proceeding. In addition, although the year is not shown on the dateline of the questioned form, the day and month reflected thereon conform with the dates on other documents in the record. Under these circumstances, the foundation was adequate, notwithstanding the sentencing court's sloppiness. Thus, the county court properly received the record of the 1983 conviction in evidence.

The record of the 1985 conviction clearly establishes that Tejral was represented by counsel; thus, his general objection to its introduction was likewise properly overruled.

Tejral next asserts that the county court erred in finding the evidence sufficient to support the charge. He bases his contention on the fact that the alcohol content of his breath was measured 30 minutes after he was first stopped and that there is no evidence to show what the reading may have been when he was stopped.

This position was resolved against him in *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). The defendant therein was arrested at 3:50 a.m., but was not tested until 4:33 a.m. He complained that the State had failed to show a proper nexus between his breath alcohol level at the time it was measured and its level at the time of his arrest. In concluding that the 43 minutes intervening between the arrest and the test did not destroy the admissibility of the test results, we, after an exhaustive review of cases across the country, concluded:

> [M]atters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence. A valid breath test given within a reasonable time after the accused was stopped is probative of a violation of § 39-669.07. [Citations omitted.] In some cases, the delay

> may be so substantial as to render the test results nonprobative of the accused's impairment or breath alcohol level while driving. In this case, however, the breath test was given less than 1 hour after the defendant was stopped. The evidence was relevant, and the trial court did not err in admitting the Intoxilyzer test result.

Kubik, 235 Neb. at 634, 456 N.W.2d at 501. See, also, *State v. Towler, ante* p. 103, 481 N.W.2d 151 (1992).

In the last assignment of error, in what can only be characterized as a denial of reality, Tejral claims that the sentence is excessive. The steadfast rule in this state is that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992); *State v. Brandon, ante* p. 232, 481 N.W.2d 207 (1992).

Third-offense driving while intoxicated is a Class W misdemeanor, which subjects the offender to imprisonment for a period of from 3 to 6 months and a $500 fine. Neb. Rev. Stat. § 28-106 (Reissue 1989). In addition, the offender's license to operate a motor vehicle is to be suspended for a period of 15 years. § 39-669.07.

The sentence obviously is within the statutorily prescribed limits, and the record shows that Tejral has had more than three convictions for driving while intoxicated. The sentence does not in any sense constitute an abuse of discretion by being excessive.

AFFIRMED.

WHITE, J., concurring in part, and in part dissenting.

I agree that the evidence amply supports the conviction of the substantial offense, but for the reason last stated in *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992) (White, J., dissenting), I dissent from the portion of the opinion which sustains the enhancement proceeding.

SHANAHAN, J., dissenting.

Tejral is another in the growing parade of this court's decisions that a defendant faced with enhancement of penalty due to a prior plea-based conviction cannot inquire into the prior conviction to determine whether the defendant was

informed and, therefore, intelligently and voluntarily waived the constitutional rights to a trial by jury and to confront accusers and the privilege against compulsory self-incrimination, information which is essential to a defendant's valid entry of a guilty plea in accordance with due process. See, *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

Reflected in *Tejral* is this court's relentless reversion to a pre-*Boykin-Irish* presumption that a defendant represented by counsel at the time of a prior plea-based conviction has voluntarily and intelligently waived the constitutional rights mentioned in *Boykin* and *Irish*. As evidenced by *Tejral*, "Nebraska procedure lacks a method to judicially process a *Boykin* or *Irish* claim as an inquiry into the constitutional validity of a prior plea-based conviction used for enhancement of penalty and, hence, fails due process." *State v. Crane, ante* p. 32, 43, 480 N.W.2d 401, 407-08 (1992) (Shanahan, J., dissenting). See, also, *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989) (Shanahan, J., dissenting); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989) (Shanahan, J., dissenting).

There may be, however, eventual resolution to the deficiency of due process in Nebraska's procedure or, more appropriately, lack of procedure pertaining to a constitutional inquiry into a prior plea-based conviction used for enhancement purposes. On March 2, 1992, the U.S. Supreme Court granted certiorari in *Raley v. Parke*, 945 F.2d 137 (6th Cir. 1991), *cert. granted* 60 U.S.L.W. 3593 (U.S. Mar. 2, 1992) (No. 91-719), apparently on the question whether due process under the Fourteenth Amendment requires a state to prove compliance with *Boykin* for constitutional validity of a prior plea-based conviction used for enhancement, when the record for the prior conviction shows that the defendant was represented by counsel, but is silent concerning the colloquy required by *Boykin* for a constitutionally valid plea of guilty.

Thus, the Nebraska decisional parade continues along a route on which the U.S. Supreme Court will love the Nebraska parade, or rain on it. Time will tell. Meanwhile, I dissent to

Tejral as a part of the swelling parade in the denial of due process through use of a prior and unconstitutional plea-based conviction for enhancement of penalty.

IN RE WATER APPROPRIATIONS D-887 AND A-768. BEERLINE CANAL COMPANY ET AL., APPELLANTS, V. DEPARTMENT OF WATER RESOURCES, APPELLEE.

482 N.W.2d 11

Filed March 27, 1992. No. S-91-228.

1. **Administrative Law: Waters: Appeal and Error.** On appeal from a decision of the Department of Water Resources, this court is to search only for errors appearing in the record, i.e., whether the decision conforms to the law, is supported by competent and relevant evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Waters: Irrigation: Statutes.** The only limitation upon the quantity of water available under a pre-1895 water appropriation is that the owner use no more water than he can put to beneficial use, and specific limitations contained in subsequent statutes do not retroactively divest the owners of such appropriations of this vested right.
3. **Administrative Law: Waters: Final Orders.** Administrative agency decisions determining water rights pursuant to statutory authority involve the exercise of quasi-judicial powers, and when no appeal is taken from such a decision it becomes a final and binding adjudication.
4. **Administrative Law: Judgments: Collateral Attack: Jurisdiction: Parties.** Judgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction of the parties and the subject matter.
5. **Administrative Law: Constitutional Law: Appeal and Error.** In reviewing the order of an administrative agency, this court will consider constitutional questions first raised on direct appeal.
6. **Due Process.** The requirements of procedural due process apply only to the deprivation of interests encompassed by the 14th Amendment's protection of liberty and property.
7. **Due Process: Notice.** In the absence of a protected liberty or property interest, the right to notice and some kind of hearing is not implicated.
8. **Property: Claims.** A property interest in a benefit exists only if a person has a legitimate claim of entitlement to it.
9. _____: _____. Property interests are created and their dimensions defined by existing rules or understandings that stem from an independent source, such as

state law, which secures certain benefits and supports claims of entitlement to those benefits.

10. **Waters: Irrigation: Time.** A person cannot acquire the right to water from an irrigation district or canal company merely by using such waters for irrigation purposes for a period of time.

Appeal from the Department of Water Resources. Affirmed.

John P. Heil, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Don Stenberg, Attorney General, Don Blankenau, and, on brief, Laura H. Essay for appellee.

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

WHITE, J.

NATURE OF THE CASE

The Nebraska Department of Water Resources (Department) initiated these proceedings to determine whether certain water appropriations should be canceled because of nonuse for more than 3 consecutive years. See Neb. Rev. Stat. § 46-229.02 (Reissue 1988). The suit involves water appropriation D-887, which has a priority date of October 13, 1894, and grants the right to divert 30 cubic feet per second (cfs) of water from the North Platte River into the Beerline Canal for the purpose of irrigating approximately 2,100 acres of land in Morrill County, Nebraska, and water appropriation A-768, which has a priority date of September 19, 1904, and grants the Beerline Irrigation Canal Company rights to storage water from the Pathfinder Reservoir in Wyoming for the purpose of irrigating much the same land as is covered by appropriation D-887.

After providing notice to the named appellant, Beerline Canal Company, and all persons appearing to own property entitled to water under either appropriation (hereinafter collectively called Beerline), the Department held a hearing on October 4, 1990. Based upon evidence presented at this hearing, the Department found that 1,107 acres granted water rights under appropriation D-887 were not irrigated during the prior 3

years and that no sufficient excuse for such nonuse existed. The Department accordingly canceled water rights under appropriation D-887 for these 1,107 acres. The Department also found that portions of the land granted rights to storage water under appropriation A-768 were unirrigated without excuse during the previous 3 years and canceled water rights under appropriation A-768 for these lands as well. Beerline does not contest these findings.

In addition to canceling water rights for lands not irrigated for 3 consecutive years, the Department reduced the flow rate available to Beerline under appropriation D-887 from 30 cfs to 14.19 cfs. Also, the Department found that two tracts of land in Township 19 North, Range 48 West of the 6th P.M., received irrigation water from the canal, though not included in the lands granted rights under appropriation D-887. The Department concluded that these tracts were no longer entitled to water under appropriation D-887. After the Department overruled Beerline's motion for a rehearing, Beerline appealed to this court.

ASSIGNMENTS OF ERROR

Beerline's eight assignments of error combine to assert that (1) the Department lacked legal authority to reduce Beerline's flow rate from 30 to 14.19 cfs, (2) the Department's determination regarding lands not entitled to water under appropriation D-887 violated Beerline's due process rights because no notice was provided of that issue, and (3) the Department's findings regarding lands not entitled to water under appropriation D-887 are inconsistent with the evidence in the record.

STANDARD OF REVIEW

On appeal from a decision of the Department of Water Resources, this court is to " 'search only for errors appearing in the record.' " *In re Applications T-61 and T-62*, 232 Neb. 316, 323, 440 N.W.2d 466, 471 (1989). Under this standard of review, our inquiry is limited to determining whether the decision conforms to the law, is supported by competent and relevant evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

REDUCTION OF THE FLOW RATE

Beerline's first assignment of error involves a question of law concerning the Department's authority to reduce its flow rate under appropriation D-887. In order to address Beerline's argument, it is necessary for us to briefly review the legal and factual circumstances surrounding construction of the Beerline Canal.

Under the irrigation act of 1889, a person could obtain a water right by posting a notice of the claimed right at the point of diversion, filing a copy of the notice with the county clerk within 10 days of its posting, commencing excavation or construction of the diversion works within 60 days of the posting, and prosecuting the work diligently and uninterruptedly to completion. Comp. Stat. ch. 93*a*, art. I, §§ 8 and 9 (1889). Compliance with these procedures resulted in the claimant's right to use the water relating back to the date the notice was posted. Comp. Stat. ch. 93*a*, art. I, § 11 (1889). The only limitation upon the quantity of water available under an appropriation acquired in this manner was that the person holding the rights use no more water "than good husbandry requires for the crop or crops that [the holder] cultivates . . . ." Comp. Stat. ch. 93*a*, art. II, § 14 (1889). This limitation merely codified the common-law rule that a person could not divert, even under a valid appropriation, more water than he could put to a beneficial use. *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951).

The water appropriation laws were substantially changed in 1895. In that year the Legislature charged a state board of irrigation (Board) with adjudicating the water rights and priorities of all those on record as claiming an appropriation. Comp. Stat. ch. 93*a*, art. II, §§ 4 and 16 (1895). The 1895 act provided that "no allotment for irrigation shall exceed one cubic foot per second for each 70 acres of land for which said appropriation shall be made," but also that "[n]othing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act." Comp. Stat. ch. 93*a*, art. II, §§ 20 and 49 (1895). Finally, the 1895 act established a procedure by which persons aggrieved by a determination of the Board could appeal

to the district court within 60 days of the Board's decision. Comp. Stat. ch. 93*a*, art. II, §§ 22 and 23 (1895).

Pursuant to a "claim affidavit" filed by those claiming rights to water from the "Beerline Ditch," the Board held a hearing on July 14, 1896, to adjudicate the claimants' water rights. The Board found that a notice of appropriation was posted at the point of diversion on October 13, 1894, a copy thereof was filed with the county clerk on October 16, and excavation and construction of the canal began on October 20. Based upon these findings, the Board determined that Beerline held a water right with a priority date of October 13, 1894, for the irrigation of approximately 2,100 acres located in Township 19 North, Range 48 West of the 6th P.M. Regarding the quantity of water available under the appropriation, the Board stated that the amount diverted

> shall not exceed thirty (30) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth (1/70) of a cubic foot per second of time for each acre of land to which water is actually and usefully applied on or before September 1, 1899.

On October 26, 1905, upon the petition of Beerline, the State Engineer held a hearing and determined that certain lands entitled to irrigation from the Beerline Canal were inadvertently omitted from the Board's original adjudication order. The State Engineer accordingly amended the original order to correctly reflect the lands entitled to water from the canal, noting that the original judgment and finding "is in all other respects approved and confirmed." No appeal was taken from either of these adjudications.

Based upon the foregoing, Beerline argues that because it acquired its water right at a time when the only quantity limitation upon water appropriations was that the holder use no more water than good husbandry required, its right to continue diverting this amount is a vested right to which the additional limitations included in the 1895 act do not apply. With this

proposition we agree. See *Enterprise Irrigation District v. Willis*, 135 Neb. 827, 284 N.W. 326 (1939) (provisions in later irrigation statutes limiting the quantity of water available under an appropriation do not apply retroactively to appropriations acquired pursuant to the 1889 act). However, reference to *Willis* is not sufficient to dispose of this case.

In *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.*, 162 Neb. 22, 74 N.W.2d 863 (1956), the Department of Roads and Irrigation granted the North Loup River Public Power and Irrigation District certain water rights for the purpose of irrigation. The department's order required that the irrigation district complete construction of the project and apply water to the beneficial use by October 1, 1944. Thereafter, the irrigation district applied for three separate extensions of the deadline for applying water to the beneficial use. The irrigation works had been completed in 1938, and the water had been available for use for more than 10 years at the time the third application for an extension was filed. The department granted the latter two applications over the objection of the Loup River Public Power District, and the public power district appealed.

On appeal, this court reversed the decision of the department granting the extensions. In so doing the court explained that in adjudicating water rights pursuant to statutory authority, the department exercises "quasi judicial powers." *Id.* at 26, 74 N.W.2d at 866. Noting that the applicable statute granted a party adversely affected by a department decision the right to an appeal, the court held that when no such appeal is taken, a decision of the department becomes a final and binding adjudication. The court reasoned that "[i]f this were not so the public record required to be made in the office of the department would serve no useful purpose as a public notice of the terms, conditions, and limitations of the appropriator's adjudicated grant." *Id.* at 29-30, 74 N.W.2d at 868. Thus, the court concluded that the department's original order requiring the irrigation district to complete construction and apply water to the beneficial use by October 1, 1944, was not subject to subsequent modification.

The principles enunciated in *North Loup River* are directly applicable to this case. In adjudicating Beerline's water rights,

the Board exercised quasi-judicial authority. Though the 1895 act provided a mechanism for aggrieved parties to appeal Board decisions, Beerline did not appeal the Board's 1905 order. The Board's action therefore became a final and binding adjudication of the rights acquired under the 1894 appropriation. Beerline cannot now collaterally attack the Board's decision. See *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980) (the rule that a judgment is not subject to collateral attack if the court had jurisdiction of the parties and the subject matter applies to administrative boards and tribunals acting in a quasi-judicial capacity).

The 1905 adjudication clearly limits Beerline to 1 cfs per 70 acres of land to which water is actually and usefully applied. Though the Board may have erred as a matter of law in imposing that restriction, Beerline did not appeal the Board's decision and cannot now collaterally attack it. Given the uncontested finding that in the 3 years prior to the hearing, Beerline irrigated only 993 acres granted rights under appropriation D-887, the Department did not err in reducing Beerline's flow rate to 14.19 cfs. Beerline's first assignment of error is without merit.

ADEQUACY OF THE NOTICE OF HEARING

Beerline next questions the Department's determinations that certain lands admittedly irrigated with water from the Beerline Canal are not included in appropriation D-887 and, thus, that irrigation under D-887 must cease. The lands at issue are a 10-acre tract in the northeast quarter of the northeast quarter of Section 29 and an 89-acre tract in the south half of Section 28, both located in Township 19 North, Range 48 West of the 6th P.M. Beerline argues that because the notice of hearing raised only the issue of cancellation of certain valid appropriations for nonuse, the Department violated Beerline's "procedural due process" rights by addressing the scope of the appropriation itself. Beerline's second assignment of error raises a constitutional question. In reviewing the orders of administrative agencies, it is the practice of this court to consider such questions when raised on direct appeal. *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783,

140 N.W.2d 626 (1966).

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In the absence of a protected liberty or property interest, the right to notice and some kind of hearing is not implicated. See *id.* See, also, *Heinzman v. County of Hall*, 213 Neb. 268, 328 N.W.2d 764 (1983). A property interest in a benefit exists only if a person has a legitimate claim of entitlement to it. *Roth, supra.* Property interests are created and their dimensions defined "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577. Based upon the foregoing principles, it is apparent that the Department's determination in this case regarding tracts not included under appropriation D-887 deprived Beerline of no protected property interest.

The irrigation act of 1895 required the Board to adjudicate the priority dates, amount, and character of all appropriations previously acquired and on record. Comp. Stat. ch. 93*a*, art. II, §§ 16 and 19 (1895). Such an adjudication occurred in this case on October 26, 1905, when the State Engineer entered an order specifically listing the lands entitled to irrigation water from the Beerline Canal. As discussed above, this order is a final and binding adjudication of Beerline's water rights under appropriation D-887. The order does not mention any land in the northeast quarter of the northeast quarter of Section 29 or in the south half of Section 28, and, thus, these lands are not entitled to water from the canal. Moreover, a person cannot acquire the right to water from an irrigation district or canal company merely by using such waters for irrigation purposes for a period of time. *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951).

Clearly, state law created no legitimate claim of entitlement to water from the Beerline Canal for the purpose of irrigating these tracts. Therefore, in ordering irrigation of these lands under appropriation D-887 to cease, the Department did not

deprive Beerline of a protected property interest, and the strictures of procedural due process do not apply. Beerline's second assignment of error is also without merit.

SUFFICIENCY OF THE EVIDENCE

For its final assignment of error, Beerline argues that the Department's findings regarding lands not entitled to water under appropriation D-887 are not supported by the evidence. In support of this assertion, Beerline relies primarily upon a map (exhibit 11) entered into evidence at the October 4 hearing. This map, dated 1900, purports to correctly show the lands irrigated by the Beerline Canal and seems to include the disputed tracts in the northeast quarter of the northeast quarter of Section 29 and in the south half of Section 28.

However, as noted above, this court will sustain factual determinations made by the Department which are supported by competent and relevant evidence. *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989). The evidence in the record also includes a map created by the Department which clearly excludes the disputed tracts from the areas covered by appropriation D-887 (exhibit 12). More importantly, the Board's 1905 order adjudicating Beerline's water rights does not include these tracts (exhibit 8). Though the map upon which Beerline now relies was apparently available at the time of the 1905 hearing, Beerline did not appeal, and the Board's determination is therefore final and binding. Beerline's third assignment of error is without merit.

Because none of the appellants' assignments of error are meritorious, the action of the Department is in all respects affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. DAVID E. FORAL, APPELLEE.

481 N.W.2d 583

Filed March 27, 1992. No. S-91-249.

1. **Courts: Appeal and Error.** On remand of a cause the trial court has no alternative except to obey and perform the mandate of the appellate court.
2. **Judgments: Appeal and Error.** Where the appellate court remands a cause with directions to enter a particular judgment for a party, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it.
3. **Sentences: Jurisdiction: Appeal and Error.** As a general rule, the trial court's jurisdiction to modify a sentence after appeal is limited by the terms of Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) to cases in which the original sentence was affirmed or the appeal was dismissed.
4. **Judgments: Sentences: Appeal and Error.** When the Supreme Court affirms a judgment or dismisses the appeal, ordinarily it has not given plenary consideration to the sentence and has not determined its propriety. In other words, on affirmance, the appellate court has not decided that the sentence imposed necessarily was the correct one, but, rather, that it did not embody an abuse of the trial court's discretion. The same cannot be said of a judgment which is reversed and the cause remanded with directions.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

James S. Jansen, Douglas County Attorney, and Gregory R. Abboud for appellant.

Martin J. Kushner, of Kushner Law Office, for appellee.

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

HASTINGS, C.J.

The State has appealed from the judgment of the district court which reduced defendant's sentence of imprisonment to 15 months from its sentence of 5 years imposed as the result of a mandate of this court in *State v. Foral*, 236 Neb. 597, 462 N.W.2d 626 (1990) (*Foral I*). We again reverse, and remand with directions to the trial court to impose a sentence of imprisonment of 5 years.

In *Foral I*, defendant was sentenced to a term of

imprisonment of 5 years for the offense of operating a motor vehicle while his license was suspended for life or 15 years, a Class IV felony. On motion to reduce sentence under the provisions of Neb. Rev. Stat. § 29-2308.01 (Reissue 1989), the trial court reduced the sentence to one of probation for a term of 5 years. The State appealed, as permitted by Neb. Rev. Stat. § 29-2320 (Reissue 1989), claiming the sentence was excessively lenient. We agreed, pointing out that the defendant had been convicted of driving while intoxicated six times and twice of driving while under suspension, and of driving while intoxicated in the instant case when the defendant's license had been suspended. Accordingly, we determined that the sentence was excessively lenient and vacated the sentence of the trial court and remanded the cause with directions to resentence the defendant to the original sentence of imprisonment for 5 years. Neb. Rev. Stat. § 29-2323(1) (Reissue 1989) provided: "If [the Supreme Court] determines that the sentence imposed is excessively lenient, [it shall] set aside the sentence, and: (a) Remand the case for imposition of a greater sentence; (b) Remand the case for further sentencing proceedings; or (c) Impose a greater sentence." In *Foral I* this court, in effect, opted for the third alternative. We did not suggest that the trial court impose a greater sentence within its discretion, nor did we require further sentencing procedures. We directed the district court to impose a specific sentence, i.e., a resentencing of the defendant to the original sentence of 5 years' imprisonment.

"[O]n remand the district court has no alternative except to obey and perform the mandate of the Supreme Court." *State v. Rolling*, 219 Neb. 800, 801, 366 N.W.2d 441, 442 (1985). Accord *Jameson v. Nelson*, 216 Neb. 26, 28, 341 N.W.2d 596, 597 (1983) ("on remand, the trial court has no alternative except to follow the directions given"). Moreover,

> " '[w]here the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on, or taken from it.' "

Gates v. Howell, 211 Neb. 85, 89, 317 N.W.2d 772, 775 (1982).

Contrary to the defendant's argument, *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989) does not require the application of an exception created by § 29-2308.01. Section 29-2308.01 states:

> Any court which imposes a sentence for a criminal offense may reduce such sentence within one hundred twenty days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued *upon affirmance of the judgment or dismissal of the appeal*. No hearing shall be required concerning any request for reduction denied under this section.

(Emphasis supplied.) Thus, in *State v. Horr*, which may very well need to be revisited when the proper occasion arises, we held that when the county court received the mandate of this court affirming the defendant's conviction and sentence, it was then free to consider and grant the defendant's motion to reduce sentence under § 29-2308.01.

However, at most, the trial court's jurisdiction to modify a sentence after appeal is limited by the terms of § 29-2308.01 to cases in which the original sentence was affirmed or the appeal was dismissed. In either instance the appellate court, this court, has not given plenary consideration to the sentence and has not determined its propriety. Where the appeal was dismissed, this court obviously has not considered the merits of the sentence—or, for that matter, any other substantive aspect of the case. Where the judgment and sentence were affirmed, this court has not decided that the sentence was the correct one—it has only decided that the sentence does not embody an abuse of the trial court's discretion. *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992).

However, once this court has considered the merits of a sentence and has found it to be excessively lenient and remands the cause with directions to enter a specific sentence, the trial court is without authority to reconsider the sentence under § 29-2308.01.

The judgment of the district court is reversed and the cause remanded with directions to sentence the defendant to a term of imprisonment of 5 years, with credit for any time served in

connection with this case.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF D.M.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

481 N.W.2d 905

Filed March 27, 1992. No. S-91-329.

1. **Appeal and Error.** Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
3. **Juvenile Courts: Jurisdiction: Time: Appeal and Error.** An adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed.
4. **Juvenile Courts: Jurisdiction: Appeal and Error.** This court ordinarily does not review the validity of an adjudication order in the absence of a direct appeal. However, this rule does not apply when the facts pleaded and the facts developed at the adjudication hearing are not sufficient for a juvenile court to acquire jurisdiction of a juvenile.
5. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.
6. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning the jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the matter before it.
7. _____: _____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a

reviewing court to raise and determine the issue of jurisdiction sua sponte. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks power to adjudicate the merits of the claim.

8. **Parental Rights: Trial: Time.** A parent and a child, both being parties, have a right to a speedy adjudication hearing.
9. _____: _____: _____. A delay of 8 months between the time a child is temporarily taken from the child's parent until the child and parent are given the evidentiary safeguards of an adjudication hearing cannot be condoned, even when the parties agree to repeated continuances.
10. **Juvenile Courts: Trial: Time.** To preserve the integrity of the juvenile justice system, a juvenile court judge must control his or her docket to prevent long delays in the processing of juvenile cases.
11. **Juvenile Courts: Trial: Time: Parental Rights.** The fact that a parent may be indicted or charged in a criminal court in connection with alleged conduct toward a child is no excuse for prolonged delays of an adjudication hearing.
12. **Juvenile Courts: Parental Rights: Jurisdiction: Criminal Law: Proof.** Even though a parent is acquitted of a criminal charge for conduct detrimental to the parent's child, the parent's conduct may still be grounds for a juvenile court to acquire jurisdiction of the juvenile involved. This is because the standard of proof in a criminal case is beyond a reasonable doubt, while the lesser standard of proof for acquiring jurisdiction of a child in a juvenile case is by a preponderance of the evidence.
13. **Juvenile Courts: Jurisdiction: Parental Rights.** The juvenile court shall have jurisdiction of any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.
14. **Words and Phrases.** A juvenile means any person under the age of 18.
15. **Juvenile Courts: Records.** Juvenile courts are courts of record, and a verbatim record of all proceedings is required.
16. **Juvenile Courts: Parental Rights: Records.** After an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) of the Nebraska Juvenile Code and before entering an order containing a rehabilitation plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitation plan and thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitation plan. The juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitation plan shall be stated in the record.
17. **Juvenile Courts: Records: Parental Rights: Appeal and Error.** Without an adequate record reflecting the parental shortcomings or the parental conduct to be corrected, eliminated, or ameliorated through a rehabilitation plan, it is virtually impossible for this court to evaluate the efficacy of a rehabilitation plan.
18. **Attorney and Client: Due Process: Waiver.** Counsel cannot waive rights which

are personal to their clients. Personal rights of a litigant must be waived by the litigant personally.

19. **Parental Rights: Words and Phrases.** A rehabilitation plan, within the purview of Neb. Rev. Stat. § 43-292(6) (Reissue 1988), is a court-ordered plan, that is, a judicially fashioned and determined plan, for parental rehabilitation.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Reversed and remanded with directions to dismiss.

James J. Regan, of Kelley & Lehan, P.C., for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

PER CURIAM.

T.B. appeals an order of the separate juvenile court of Douglas County terminating her parental rights to her 3-year-old natural daughter, D.M.B.

Because plain error permeates both the adjudication and the disposition proceedings in this case, we have elected to conduct a de novo review of the entire record under both our review and supervisory powers.

We find the juvenile court committed plain error (1) when it found, after an adjudication hearing, that it had jurisdiction of D.M.B., and (2) when it denied T.B. procedural due process in the adjudication and disposition proceedings. Because of plain error, the orders of the juvenile court entered following the adjudication and the disposition hearings must be vacated, and the case must be dismissed.

None of the plain errors we discuss was assigned as error by T.B. Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991). See, also, *Phelps v. Phelps*, 239 Neb. 618, 477

N.W.2d 552 (1991); *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). Here, we find that a failure to correct the plain errors in this case would result in damage to the integrity, reputation, and fairness of the juvenile justice system.

In view of our findings, T.B.'s first, third, and fourth assignments of error are moot. We will, however, in our supervisory capacity, consider T.B.'s second assignment of error: that the juvenile court erred in ordering a rehabilitation plan which was not reasonable and material to the rehabilitative objective of correcting the conditions on which the earlier adjudication had been obtained.

On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991); *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991).

We have held that an adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed. See, *In re Interest of C.W. et al.*, 238 Neb. 215, 469 N.W.2d 535 (1991); *In re Interest of P.L., S.L., and A.L.*, 236 Neb. 581, 462 N.W.2d 432 (1990). That being true, this court ordinarily does not review the validity of an adjudication order in the absence of a direct appeal. However, this rule does not apply when the facts pleaded and the facts developed at the adjudication hearing are not sufficient for a juvenile court to acquire jurisdiction of a juvenile. If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.

In her assignments of error, T.B. has not challenged the juvenile court's acquisition of jurisdiction over D.M.B. The

theory behind our ruling in *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991), is helpful in determining the jurisdictional issue we consider in this case. There, we held, in substance, that whether a question is raised by the parties concerning the jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the matter before it. In *Nebraska State Bar Found.*, we also held, in substance, that when lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks power to adjudicate the merits of the claim. *Id.*

In D.M.B.'s case, the juvenile court's lack of jurisdiction over D.M.B. is apparent on the face of the record. Therefore, this court raises the issue sua sponte. The allegations in the original petition in this case, if proven, without question would have conferred jurisdiction upon the separate juvenile court of Douglas County over D.M.B. The original petition in substance alleged:

> COUNT I
>
> [D.M.B.] was born out of wedlock on March 31, 1987; and said child is now living or to be found in Douglas County, Nebraska.
>
> COUNT II
>
> [D.M.B.] comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-247 (3a), being under the age of eighteen years, and lacking proper parental care by reason of the faults or habits of [T.B.], natural mother of said child, *in that*:
>
> A. On or about November 8, 1988, said child was fondled about the genital area by [T.B.]
>
> B. On or about November 8, 1988, the three siblings of said child were subjected to fondling of the genitals, oral sex and digital penetration by [T.B.]
>
> C. Said child and her siblings have been subjected to sexual contact by [T.B.] on several other occasions in the

past six months.

D. [T.B.] has been involved with the Juvenile Court for two years in an effort to resolve poor parenting skills in reference to said child's three siblings; [T.B.] has failed to comply with the Court's recommendations . . . .

(Emphasis supplied.)

The prayer of the petition asked the juvenile court to make such order or orders concerning the care, custody, control, and support of the said child as deemed appropriate in the premises and, further, that the court terminate the parental rights of T.B., the natural mother of said child, in D.M.B.

The transcript reflects that on Friday, November 11, 1988, T.B. was arrested for sexually assaulting D.M.B.'s sisters and that D.M.B., incorrectly identified as "Diana B.," was placed in foster care. A report by the Omaha Police Division explaining T.B.'s arrest and the placement of "Diana B." in foster care was filed with the juvenile court on Monday, November 14. On that date, without stating a factual basis for its boilerplate order other than that a probation officer investigated the nature and circumstances of the events surrounding the juvenile "Diana B." being taken into custody, the court released the juvenile to the custody of the Department of Social Services for placement with a responsible person. The court found that the continuation of the juvenile, "Diana B.," in her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to her home. The order continued that "[f]rom the [unspecified] information provided to the Court, the Court finds and orders that further detention or placement of the above-named juvenile(s) [who at the time was 20 months old] is a matter of immediate and urgent necessity for the protection of the above-named juvenile." The court then ordered, "The juvenile(s) shall be returned to the custody of his/her/their parent(s) unless a petition is filed within eight (8) judicial days from today's date [November 14, 1988,] with a request for continued detention."

On November 28, 1988, the eighth judicial day, the Douglas County Attorney's office, using the correct name of D.M.B.,

filed with the juvenile court the original petition heretofore set forth. On the same day, on the basis of the original verified petition and the county attorney's motion, an order was entered continuing temporary placement with the Department of Social Services.

At a temporary detention hearing on November 28, 1988, there was hearsay evidence that T.B. had sexually molested her children, including D.M.B. Without reciting the facts upon which its ruling was based, the juvenile court continued the temporary custody of D.M.B. in the Department of Social Services for placement in foster care pending an adjudication hearing. T.B. was given rights of supervised visitation with D.M.B.

This court takes judicial notice of the record in *In re Interest of L.B., A.B., and A.T.*, 235 Neb. 134, 454 N.W.2d 285 (1990), which shows that on August 27, 1986, D.M.B.'s three siblings were adjudicated to be juveniles within the juvenile court's jurisdiction because on July 14 two of the siblings were found to be in a filthy condition; the residence was in disarray and infested with flies and roaches; there was no food in the refrigerator or cupboards; and there had been Child Protective Services referrals in the past 1 1/2 years regarding T.B., relating to filthy home conditions and improper care of said children. Because T.B. failed to follow the juvenile court's rehabilitation plans, T.B.'s parental rights in D.M.B.'s three siblings were terminated by the juvenile court on April 24, 1989. In that case, allegations of sexual abuse by T.B. of D.M.B.'s three siblings had been dismissed on April 10. From the records that we have in regard to D.M.B.'s siblings, it would appear that the siblings did not reside with T.B. after July 1986. Sexual abuse charges against T.B. in regard to her children were dismissed in criminal court in December 1988.

An adjudication hearing in regard to D.M.B. was not held until July 20, 1989, more than 8 months after the child was taken into "*temporary* detention" and "*temporary* custody." A parent and a child, both being parties, have a right to a speedy adjudication hearing. See Neb. Rev. Stat. § 43-279.01(1)(f) (Reissue 1988). A delay of 8 months between the time a child is "temporarily" taken from the child's parent until the child and

parent are given the evidentiary safeguards of an adjudication hearing cannot be condoned, even when, as here, the parties agreed to repeated continuances. Keeping a child in limbo for 8 months by way of a "temporary" custody order on the basis of hearsay does not instill confidence in the integrity and fairness of our juvenile justice system. To preserve the integrity of the juvenile justice system, a juvenile court judge must control his or her docket to prevent long delays in the processing of juvenile cases. The fact that a parent may be indicted or charged in a criminal court in connection with alleged conduct toward a child is no excuse for prolonged delays of an adjudication hearing. Even though a parent is acquitted of a criminal charge for conduct detrimental to the parent's child, the parent's conduct may still be grounds for a juvenile court to acquire jurisdiction of the juvenile involved. This is because the standard of proof in a criminal case is beyond a reasonable doubt, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), while the lesser standard of proof for acquiring jurisdiction of a child in a juvenile case is by a preponderance of the evidence, *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511 (1991).

On July 20, 1989, without explanation on the record, the original petition was amended to remove any reference to sexual misconduct on the part of T.B. regarding any of her children. As amended, the petition alleged:

> COUNT I
>
> [D.M.B.] was born out of wedlock on March 31, 1987; and said child is now living or to be found in Douglas County, Nebraska.
>
> COUNT II
>
> [D.M.B.] comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-247(3a), being under the age of eighteen years, and lacking proper parental care by reason of the faults or habits of [T.B.], natural mother of said child, *in that*:
>
> . . . .
>
> . . . [T.B.] has been involved with the Juvenile Court for two years in an effort to resolve poor parenting skills in reference to said child's three siblings; [T.B.] has failed to comply with the Court's recommendations, resulting in

the termination of her parental rights of those siblings. (Emphasis supplied.)

Upon request of a deputy county attorney, that portion of the prayer requesting termination of T.B.'s parental rights in D.M.B. was dismissed from the original petition.

As relevant here, Neb. Rev. Stat. § 43-247 (Reissue 1988) provides: "The juvenile court . . . shall have jurisdiction of . . . (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian . . . ."

A "juvenile" means any person under the age of 18. Neb. Rev. Stat. § 43-245 (Reissue 1988).

It is noted that the amended petition does not allege that T.B. had exhibited poor parenting skills in regard to D.M.B. T.B.'s poor parenting skills are alleged only with respect to D.M.B.'s three siblings, in that T.B. had failed to comply with the juvenile court's recommendations in regard to D.M.B.'s three siblings, which resulted in the termination of T.B.'s parental rights in D.M.B.'s siblings.

There is no allegation in the amended petition that T.B.'s poor parenting skills in reference to D.M.B.'s three siblings had a detrimental effect upon D.M.B. or that T.B.'s poor parenting skills adversely affected D.M.B. As amended, the petition does not even allege that T.B.'s poor parenting skills placed D.M.B. at risk or that D.M.B. was in a situation dangerous to life or limb or injurious to her health or morals, as provided in § 43-247(3)(a). It is to be remembered that D.M.B. was not even born when, on August 11, 1986, the juvenile court took jurisdiction of D.M.B.'s siblings and ordered them removed from T.B.'s home. The State has not directed our attention to, nor have we found, anything in the record that reflects, from the time of D.M.B.'s birth on March 31, 1987, until November 11, 1988, when D.M.B. was taken into custody by law enforcement officers, that D.M.B. was in a filthy condition; that she was living in a residence that was in disarray, infested with flies and roaches, and without food in the refrigerator or cupboards; or that she was receiving improper care from T.B. These conditions comprised the factual basis upon which D.M.B.'s siblings were removed from T.B.'s home

and found to be within the jurisdiction of the juvenile court. The record discloses that juvenile probation officers and a social service worker visited T.B.'s home on occasion from the time D.M.B. was taken into custody until T.B.'s rights to D.M.B. were terminated by the court. We fail to find that any of those visitors complained about any unsanitary conditions in T.B.'s living quarters.

At the July 20, 1989, adjudication hearing, T.B., with her counsel present, admitted the allegations in the amended petition in D.M.B.'s case. The court then inquired of the deputy county attorney, "Now, it's the Court's understanding, although, you're dismissing the prayer to terminate parental rights between mother and child here, that this would not preclude the State at some future date to filing a motion to terminate?" The deputy county attorney replied, "No, it would not, based on other allegations."

> THE COURT: Failing to comply with the orders of the Court?
>
> [Deputy county attorney]: That's correct. I will not refile it on the basis contained in the petition.
>
> THE COURT: Well, I don't think there's a need in view of this plea to go into a factual explanation *because this Court is well aware of the previous dealings at the other docket involving the three siblings, and I think it would be rather repetitious to recite.*
>
> [T.B.'s counsel]: We would waive that and specifically state the Court just went through the entire file in your office.
>
> THE COURT: With counsel.
>
> [T.B.'s counsel]: Yes, with counsel and the Guardian ad litem.

(Emphasis supplied.)

There is no indication in the record that T.B. was present in chambers when the juvenile court judge apparently made some kind of factual determination which resulted in the juvenile court purportedly acquiring jurisdiction of D.M.B. in this case. Nor does the record reflect that T.B. was ever informed of the facts from the "other docket" upon which the juvenile court, at least partially, purportedly acquired jurisdiction over D.M.B.

Juvenile court judges are reminded that juvenile courts are courts of record and that a verbatim record of all proceedings is required. See *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987), *overruled on other grounds, In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). We have also held:

> [A]fter an adjudication under § 43-247(3)(a) of the Nebraska Juvenile Code and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan and thereafter shall hold an evidential hearing *to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. . .* . The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. *The juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.*

(Emphasis supplied.) *In re Interest of J.S., A.C., and C.S.*, 227 Neb. at 272-73, 417 N.W.2d at 161. Accord *In re Interest of L.P. and R.P., ante* p. 112, 480 N.W.2d 421 (1992). We have also held, "Without an adequate record reflecting the parental shortcomings or the parental conduct to be corrected, eliminated, or ameliorated through a rehabilitative plan, it is virtually impossible for this court to evaluate the efficacy of a rehabilitative plan . . . ." *In re Interest of J.S., A.C. and C.S.*, 227 Neb. at 272, 417 N.W.2d at 161. Accord *In re Interest of L.P. and R.P., supra.* Not only did the juvenile court fail at the adjudication hearing to recite the factual basis for assuming jurisdiction of D.M.B., it later failed to find facts to support the rehabilitative steps it ordered. Each failure constitutes plain error that results in damage to the integrity, reputation, and fairness of the judicial process. It is to be remembered that termination of T.B.'s parental rights to D.M.B.'s siblings was because of unsanitary conditions in the home, not for any sexual abuse of her children.

T.B. was never personally given the opportunity to challenge the factual basis upon which the juvenile court claimed to acquire jurisdiction. She was never addressed personally as to whether she waived recitation by the judge of the factual basis upon which the court purportedly acquired jurisdiction of her child. Counsel cannot waive rights which are personal to their clients. Personal rights of a litigant must be waived by the litigant personally. See *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). Yet, the juvenile court judge permitted T.B.'s counsel to waive T.B.'s personal right to hear the factual basis upon which the juvenile court acquired jurisdiction of D.M.B. The manner in which a factual basis for acquiring jurisdiction of D.M.B. was determined, the judge's given reasons for not reciting that factual basis, and the judge's statement "I don't think there's a need . . . to go into a factual explanation" discouraged any inquiry or challenge by T.B. to the factual basis, if any, upon which the court assumed jurisdiction in this case. The way in which a purported factual basis was established, if one in fact was established, denied T.B. a fair adjudication hearing and procedural due process. This was plain error.

On the basis of the record before us, neither the State's petition as amended, nor the facts in the amended petition admitted by T.B., support an adjudication that D.M.B. was a juvenile covered by the provisions of § 43-247(3)(a). The juvenile court judge seemed to recognize that in a proceeding subsequent to the adjudication hearing.

At a hearing on March 7, 1990, which was held to review whether T.B. was complying with a court-ordered rehabilitation plan, the juvenile court judge expressed concern about T.B.'s not having addressed "sexual abuse issues."

> THE COURT: . . . And that's why we're here.
>
> [T.B.'s counsel]: No, we're not, Your Honor.
>
> . . . .
>
> THE COURT: Well, these are allegations set forth in the petition.
>
> [T.B.'s counsel]: They were dismissed.
>
> THE COURT: If they're dismissed, what are we doing? Must have been some part of them found to be true.

[T.B.'s counsel]: That's inaccurate. That part of the petition — those allegations were also dismissed as part of the petition on the other three children.

THE COURT: If the petition was dismissed, will someone tell me why we're here today?

After a discussion of the contents of the amended petition, the court continued:

Well, as far as I can tell, the reports I have received, and the exhibits, and after hearing [a probation officer's] report, the Court ordered this woman, on September 7, 1989, to do eight things. Three of them have been reasonably followed through on. That leaves five things unattended. I meant all eight things.

I didn't say if it's convenient, if you feel like it. Don't do it if you have to rearrange your life. None of those things were put out there. I think the order of September 7 was a reasonable order, *meant to correct the situation that brought this case to the attention of the Court.* I want those things done.

. . . .

THE COURT [addressing T.B.]: Therefore, I'll repeat myself one more time.

You are to participate in weekly parenting classes; follow through with all recommendations of the instructor, whether it's convenient or inconvenient for you.

You're to complete the outpatient co-dependency counseling and follow all recommendations of the counselor. You've been assigned with two counselors and dropped because of nonattendance.

You are to maintain adequate income and independent housing to meet the needs of yourself and your child.

You are to cooperate with all professionals involved in both announced and unannounced home visits.

You are to maintain weekly supervised visits with the child [D.M.B.] as arranged by the State Department of Social Services.

You must notify the probation officer within 48 hours of any change of residence, income or any situation.

> You are to participate in Parents United support group on a regular basis and follow all directions of the counselor.

(Emphasis supplied.) On February 25, 1991, at a hearing to terminate T.B.'s parental rights, a probation worker explained that Parents United is a group program for families who have been involved in sexual abuse whether they are a perpetrator or a victim. T.B. testified that she understood Parents United dealt with sexually abused children or sexually abused parents of children and that she was told that the purpose of Parents United was "to reunite children that has been sexually molested." The sexual assault charges regarding her children were dismissed in criminal court in December 1988.

On March 7, 1990, the court further stated, "Each of these items is meant to change the situation as it was when you first came into the Court back in November, 1988." In November 1988, T.B. was charged with sexual abuse of her children. Before the date of the March 7 hearing, the sexual abuse charges had been dismissed not only in the amended petition, but also in the petition regarding T.B.'s other children.

Two plain errors appear on the record in regard to the rehabilitation plan ordered by the juvenile court. First, after the original petition was amended in this case, T.B. was no longer charged with, nor was she adjudicated as, having sexually abused any of her children. The juvenile court never made any specific finding of fact that the Parents United provision of T.B.'s parental rehabilitation plan was reasonable as is required by *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). It, therefore, was not reasonable for the juvenile court to require T.B. to attend the Parents United program. Secondly, not only was the provision of the rehabilitation plan for T.B. to attend the Parents United program not reasonable, but the juvenile court's requirement that T.B. follow *all* of Parents United's recommendations was an improper delegation of the court's authority. It is the court's duty, not that of counselors, Department of Social Services workers, social workers, child protection workers, or probation officers to fix the terms and limitations of a rehabilitation provision. See, *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d

173 (1992); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). A rehabilitation plan, within the purview of Neb. Rev. Stat. § 43-292(6) (Reissue 1988), is a court-ordered plan, that is, a judicially fashioned and determined plan, for parental rehabilitation. *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991). The juvenile court's delegation of its authority to evaluators and to Parents United in this case is a superb example of why delegation of a judge's authority cannot be tolerated. In regard to T.B., the court said: "Now, if they asked her to stand in the corner and stack beebees, then that was the recommendation she would have to follow unless she came back in and had the order redone." In the first place, under *In re Interest of J.S., A.C., and C.S., supra*, the juvenile court is required to make specific findings of fact supporting the provisions contained in the parental rehabilitation plan, which provisions must be reasonable. The judge must state his or her findings of fact in the record. Secondly, an evaluator, counselor, probation officer, child protection worker, social worker, or Department of Social Services worker does not have the authority to require a parent to perform unreasonable acts such as "to stand in the corner and stack beebees." Any request of a parent in a rehabilitation plan must be reasonable and in keeping with the specific provisions of the rehabilitation plan approved by the court. If a parent does not comply with an unreasonable request of a counselor, the parent should not be penalized. By the same token, a parent should be made aware that it is the court, not the parent, which determines whether a recommendation by a counselor is unreasonable.

In summary, we find that the separate juvenile court of Douglas County erred in finding that it had jurisdiction over D.M.B. following the adjudication hearing herein and that, therefore, the juvenile court lacked jurisdiction to terminate T.B.'s parental rights in D.M.B.

We therefore vacate the orders of the juvenile court entered following the adjudication and disposition hearings herein and direct the juvenile court to dismiss this case.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

GRANT, J., dissenting.

I respectfully dissent. I am well aware of the frustration expressed by the majority at the actions of the trial court and all concerned with the disposition of this case. It is, however, only the latest in a long series of cases raising questions in connection with the juvenile court system and those participating in it. For a random sampling of past orders of this court which apparently have had no impact on juvenile court cases, see, *In re Interest of S.R., D.R., and B.R.*, 239 Neb. 871, 479 N.W.2d 126 (1992) (in circumstances of this case, 5 years in the juvenile system too long); *In re Interest of R.G.*, 238 Neb. 405, 425, 470 N.W.2d 780, 794 (1991) (practice caution concerning the bill of exceptions; conduct of the trial court in polling those present to determine if conduct of the mother was appropriate held "unfortunate, inappropriate, and not to be condoned"); *In re Interest of N.W. and R.W.*, 238 Neb. 620, 472 N.W.2d 887 (1991) (no service of summons on father; record so confusing that it was difficult to find adjudication hearing; not all hearings on record; no copy of court-ordered rehabilitation plan in record); *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991) (within Neb. Rev. Stat. § 43-292(6) (Reissue 1988) reasonable efforts under the direction of the court means efforts in relation to court-ordered plan for parental rehabilitation, not an extrajudicial agreement between a parent and an administrative agency regarding the parent's lifestyle, as has been said many times before); *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991) (total denial of due process to a person ordered to show cause why he should not be held in contempt); *In re Interest of D.S. and T.S.*, 236 Neb. 413, 417, 461 N.W.2d 415, 419 (1990) (court improperly restricted activities of guardian ad litem; "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 . . . be fulfilled"); *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990) (resolution of case left to Department of Social Services, which apparently made no efforts to reunify family; 12 years in juvenile court system too long); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989) (leaving one child in unsanitary home while using the fact that the home was

unsanitary as the reason to terminate parental rights to another child was inconsistent); *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987) (separate juvenile courts are courts of record and are not free to shield their actions behind a cloak of secrecy by failing to make a verbatim record of the evidentiary proceedings before them); and *In re Interest of D.R. and S.B.*, 217 Neb. 883, 351 N.W.2d 424 (1984) (13 years in juvenile court system too long).

Two of these cases deserve special note: In 1984, we said in *In re Interest of D.R. and S.B.* that 13 years in the system for one of two children was too long, and in 1990, in *In re Interest of L.C., J.C., and E.C.*, we said 12 years in the system was too long. The system may be improving.

Nonetheless, in the case before us, I think it is improper to hold that the juvenile court does not have jurisdiction. The bases for the majority's order seem to be the way the amended petition seeking adjudication was submitted to the court and the kind of evidence submitted at that time.

When the adjudication hearing convened on July 20, 1989, the juvenile court had before it a petition filed November 28, 1988, and amended on July 20, 1989, seeking adjudication that D.M.B. was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), in that she had been subjected to specified sexual abuse and that "[T.B.] has been involved with the Juvenile Court for two years in an effort to resolve poor parenting skills in reference to said child's three siblings; [T.B.] has failed to comply with the Court's recommendations, resulting in the termination of her parental rights of those siblings." At this point, there cannot be any doubt that the juvenile court had jurisdiction to determine if the child was within the meaning of § 43-247(3)(a).

Pursuant to a plea agreement (although not so stated in the record), T.B., with her counsel, admitted the allegations as to D.M.B.'s birth and residence and the allegations that T.B. had been involved with the juvenile court for 2 years in an effort to resolve poor parenting skills with regard to D.M.B.'s three older siblings, that T.B. had not complied with plans to improve those skills, and that T.B.'s lack of compliance resulted in the termination of her parental rights to those three children. The

State then dismissed sexual abuse allegations which had been testified to, in revolting detail, at D.M.B.'s detention hearing on December 6, 1988.

The admitted facts, then, at D.M.B.'s adjudication hearing were that between November 1986 (2 years before the initial petition in this case) and April 24, 1989 (the date of the termination of T.B.'s rights to the older three children, as set out in *In re Interest of L.B., A.B., and A.T.*, 235 Neb. 134, 454 N.W.2d 285 (1990)), T.B. had not been able to comply with plans to improve her parenting skills sufficiently to avoid termination of her parental rights. On March 31, 1987, D.M.B. was born, and she apparently lived under such conditions. This fact should concern any court. See *In re Interest of P.M.C., supra*. The court also had before it the facts from the detention hearing of December 6, 1988.

At that December 6, 1988, hearing, T.B., her counsel, a Deputy Douglas County Attorney, a representative of the Attorney General's office, an attorney and two employees from the Department of Social Services, a member of the Omaha Police Division, and others were present. Testimony was adduced. The police officer testified that D.M.B. was present during a visit scheduled for T.B. and her three older children, L.B., A.B., and A.T. L.B. told the police officer that at that visitation, A.B. "had got hurt" in A.B.'s vaginal area when "tickled" by T.B. and that L.B. and A.T. had also been tickled. The police officer testified that L.B. and A.B. had been taken to a doctor, who found A.B. had hemorrhaging and L.B. had hemorrhaging and five adhesions "between the labia and the vaginal opening." In separate interviews with L.B. and A.B., both told the police officer of similar "ticklings." A.B. told the police officer that T.B. had "tickled" D.M.B. in the same way on another occasion and that "the baby had cried, but [T.B.] just kept on tickling her." Other details were elicited, both on direct and cross-examination.

A Department of Social Services employee testified as to activities of the three older children after the visit with T.B. on November 8, 1988, and recommended that D.M.B. be detained and not be returned to T.B. The witness testified that her concern for D.M.B.'s welfare was "based on what happened to

the other kids." T.B. also testified and denied she had done anything wrong.

At the conclusion of the December 6, 1988, hearing, the court ordered detention for D.M.B. The matter came on for adjudication on July 20, 1989. For whatever reason, the county attorney agreed to dismiss all the sexual abuse charges and rested the case involving D.M.B. on the sole allegation, for adjudication purposes, that

> [T.B.] has been involved with the Juvenile Court for two years in an effort to resolve poor parenting skills in reference to said child's three siblings [not named, but L.B., A.B., and A.T.]; [T.B.] has failed to comply with the Court's recommendations, resulting in the termination of her parental rights of those siblings.

Why the county attorney was willing to proceed on such a flimsy allegation, and why the juvenile court permitted the procedure, cannot be known, but for the purpose of an adjudication hearing, we should construe the allegation as meaning that T.B. has no parenting skills and has refused to try to learn those skills and that she was therefore unable to properly care for and protect D.M.B.

I think that construction is appropriate, particularly as the adjudication order was not appealed from and is apparently the result of an agreement between counsel. To hold otherwise is to permit lawyers' skills to oust a juvenile court of jurisdiction, when a child in need of protection is before the court.

I cannot say that T.B. has not been denied procedural due process in these proceedings, but I do not agree that the juvenile court is without jurisdiction as to D.M.B. It is true that the case could be refiled, but why run that risk? D.M.B. is entitled to as much due process as her mother, T.B. I would reverse, and remand the cause for further proceedings, including a new termination hearing, if that is necessary.

HASTINGS, C.J., and BOSLAUGH, J., join in this dissent.

DARLENE HOHNDORF, APPELLANT, V. ALAN WATSON AND NEBRASKA CHRISTIAN SERVICES, A NEBRASKA CORPORATION, APPELLEES.

482 N.W.2d 241

Filed March 27, 1992. No. S-91-544.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by an appellate court de novo on the record, and in that de novo review, where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Adoption: Proof.** The burden is on the natural parent challenging the validity of a relinquishment to prove that the relinquishment was not voluntarily given.
3. **Parental Rights: Adoption.** In the absence of fraud, coercion, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.

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

David A. Christensen, of Christensen & Phillips, P.C., for appellant.

Deborah D. McLarney, of Erickson & Sederstrom, P.C., for appellees.

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

GRANT, J.

Darlene Hohndorf, an unwed mother, appeals from the district court's denial of her petition for a writ of habeas corpus seeking recovery of the custody of her newborn child. She assigns three errors, which may be summarized as contending that the trial court erred in determining the relinquishment for adoption signed by petitioner was valid; was executed voluntarily, knowingly, and intelligently; and was not procured by fraud. We affirm.

Respondent-appellee Alan Watson is an agency director and a caseworker for respondent-appellee Nebraska Christian Services (NCS), an adoption agency licensed under Nebraska

law. See Neb. Rev. Stat. § 43-701 (Reissue 1988). On November 1, 1990, petitioner visited Watson at his office. She was accompanied by a friend, La Donna Cole. This was the only meeting attended by Cole.

During the November 1 meeting, petitioner told Watson that she was 5 months' pregnant and that she wanted to place her child for adoption after the child was born. Petitioner told Watson that she was financially unable to keep the child and that she did not have support from her family.

Petitioner and Cole both testified that Watson told petitioner she would have 6 months to change her mind after she signed the relinquishment documents. Petitioner testified that Watson mentioned the 6-month period at least three times at the initial meeting, but that she did not think it was important. Cole testified that she was frustrated because she felt Watson was trying to talk petitioner out of placing the child for adoption.

Watson testified that he did not make any statements to petitioner or Cole regarding petitioner's having a period of 6 months to change her mind about relinquishing the child and that he had never made such statements during his 4 years at NCS. He testified that he did tell her that "the baby is in the agency's custody after she relinquishes, and then six months later the adoptive parents finalize the adoption." Both petitioner and Watson testified that the 6-month timeframe was never mentioned again in later meetings between the two.

At the first meeting, Watson testified, they generally discussed the relinquishment document and the affidavits. He testified that NCS has affidavits the mothers sign in connection with adoption. No documents were executed at that initial meeting, but Watson testified that he showed petitioner all the documents she ultimately signed and that they went over the documents in detail at the initial meeting. He said that he explained the effect of the documents and that petitioner said she understood the forms. Watson testified that he made the point that once the papers were signed, the baby was no longer the mother's baby, but was NCS' baby.

Petitioner testified that Watson did not show her any documents at the initial meeting, although he did tell her she would need to sign various documents. She testified she did not

remember specifically what Watson said about the documents. She did testify, however, that Watson showed her some papers at some point after the initial meeting, but he did not read them to her. Cole, on the other hand, testified that Watson showed petitioner and Cole several documents at the initial meeting, including "profiles on prospective parents or an example of one [profile]" and that Watson said petitioner "would be able to actively participate in choosing those [parents] so she would be comfortable and know her child had a good home." Petitioner did not testify to any such documents or conversation.

After the initial meeting, petitioner met with Watson in his office nine more times. Watson testified the forms were also discussed at one of the subsequent meetings. He stated that petitioner never indicated any doubt about placing the baby for adoption.

The child was born March 10, 1991, at 3 a.m. Petitioner called NCS in the afternoon on March 10 and told the agency that the baby had been born. On March 11, Watson visited petitioner at the hospital. Watson testified that petitioner was very tired and that she had the baby with her, but told him it was the first time that she had seen the child. Watson testified that they discussed only petitioner's health and that he did not stay very long.

Watson met with petitioner again the next day, March 12, at approximately 11:20 a.m. Petitioner signed the forms that day with Scott A. Bruner, the hospital patient financial counselor, present, as well as a hospital nurse who served as a witness. Watson testified that while Bruner was out of the room searching for someone to serve as a witness, he went over each form with petitioner, although he did not read them all aloud to her. Petitioner testified that Watson "briefly explained to me what the papers were when I signed them" and that Watson's explanation included telling her that one document gave the agency custody of the child. Watson testified that while they were waiting for Bruner, petitioner read the forms again. Petitioner also testified that "I did not read through all of them very carefully. I did read through two of them, and the third I don't remember very well."

Petitioner signed the "Relinquishment and Consent to

Adoption" form, which contained the following language:

> Now I, Darlene Hohndorf, the mother of said child, do hereby voluntarily relinquish to [NCS] all rights to and custody of and power and control over said child and all claim and interest in and to [the child] . . . to the end that the [NCS] may become the legal guardian of said child and do hereby authorize the said [NCS] to place said child with any person deemed suitable by said Institute for adoption . . . to a suitable person, family, or institution for temporary or permanent care, and I do hereby authorize said [NCS] to consent to such adoption without any further notice to me.

The relinquishment was signed by petitioner, witnessed by the nurse, and notarized by Bruner.

In addition, petitioner signed an affidavit which stated that she was aware of the alternatives to adoption, that she was placing her child for adoption, and that "[s]he understands that her signature on the Relinquishment and Consent to Adoption indicates her understanding that this is a permanent decision and cannot be revoked." This affidavit was notarized by Bruner and witnessed by Watson. When asked what she thought that language meant, petitioner replied, "I just thought that it meant that the agency would . . . proceed to have custody of her, but I still in my mind, I thought I had that six months to change my mind." Petitioner testified that she knew what the words "revoked" and "permanent" mean, that she did not have any questions about the documents at the time she signed them, and that the documents seemed "simple."

This affidavit also set out, in part, that petitioner acknowledged she was a client of NCS, that she requested NCS place her newborn child for adoption, and that petitioner was aware of the various alternatives and community resources for the child, such as temporary foster care and the availability of certain benefits. Attached to this affidavit was a four-page "Nebraska Adoption Medical History, (Birth Mother)." The affidavit also set out the name of the putative father. The putative father executed similar forms on March 14, 1991.

The nurse who witnessed the "Relinquishment and Consent to Adoption" testified that Bruner asked petitioner if she

understood a document she was to sign. The nurse testified that petitioner said she understood, that petitioner read the document over out loud, and that Bruner again asked her if she understood. Petitioner again responded that she did. Bruner then notarized the relinquishment.

A second affidavit, signed by petitioner and notarized by Bruner, set out that petitioner had been shown a "nonconsent form" and that by signing the affidavit, petitioner understood she consented to the release of "the adoptive person's records to the adoptive person." See Neb. Rev. Stat. § 43-143 (Reissue 1988).

The third affidavit signed by petitioner was a "Direction to Deliver Custody of Child" and was also notarized by Bruner. Bruner testified that he told petitioner this was not a relinquishment and that it only gave the hospital permission to allow Watson to leave the hospital with the baby. Bruner stated that petitioner said she understood and that she signed the document voluntarily.

Watson testified that petitioner's sister called him on March 14 and stated that petitioner wanted her baby back. Watson then telephoned petitioner, who confirmed what her sister had said. Watson testified he received a letter and a "Revocation of Relinquishment" signed by petitioner, both dated March 26, 1991, from petitioner's attorney. The revocation provided: "I hereby revoke my Relinquishment of Parental Rights and Consent to Adoption, signed approximately August, 1985."

We have held that a decision in a habeas corpus case involving the custody of a child is reviewed by an appellate court de novo on the record, and in that de novo review, where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990); *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 419 N.W.2d 531 (1988).

We have also held that the burden is on the natural parent challenging the validity of a relinquishment to prove that the relinquishment was not voluntarily given. *Hensman v. Parsons, supra*; *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d

687 (1987). Further, in the absence of fraud, coercion, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid. *Hensman v. Parsons, supra*; *Gaughan v. Gilliam, supra*; *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991).

In *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985), we considered a similar case. In that case, petitioner contended that her relinquishment was invalid because of her mental incompetence, caused by financial stress, and her impression that she had 2 weeks after the relinquishment to change her mind. The petitioner testified she had a vague memory of the attorney who handled the adoption making some statement during their second meeting about a 2-week waiting period, but the attorney and his associate denied making such a statement. We stated: "The evidence indicates the petitioner changed her mind and succumbed to the influence of relatives only *after* the relinquishment had been signed. A change of attitude subsequent to signing a relinquishment is insufficient to invalidate it." *Auman*, 220 Neb. at 74, 368 N.W.2d at 462.

In the situation before us, the evidence is in irreconcilable conflict. Petitioner and Cole testified that Watson told them petitioner would have 6 months to change her mind after the relinquishment. Watson testified that he did not make such a statement. The trial court accepted Watson's testimony. After a careful review of the entire record, in our de novo review, so do we.

AFFIRMED.

IN RE INTEREST OF E.G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. B.B., APPELLANT.

482 N.W.2d 17

Filed March 27, 1992. No. S-91-715.

1. **Trial: Evidence: Waiver.** If, when evidence is offered, the opposing party consents to its introduction or fails to object or to insist upon a ruling on an

objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, the opposing party waives whatever objection may have existed, and the evidence is in the record for consideration the same as other evidence.

2. **Parental Rights: Abandonment.** The abandonment contemplated in Neb. Rev. Stat. § 43-292(1) (Reissue 1988) exists when, for a minimum of 6 months before the operative pleading is filed, the parent intentionally withheld 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.
3. _____: _____. Fulfillment of a parent's obligation requires a continuing interest in and a genuine effort to maintain communication and association with the child.
4. _____: _____. 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.
5. **Parental Rights: Abandonment: Proof.** To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities; mere inadequacy is not the test.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Affirmed.

Leonard G. Tabor for appellant.

Sara Olsen, Deputy Scotts Bluff County Attorney, for appellee.

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

CAPORALE, J.

Sitting as a juvenile court, the tribunal below found that the 23-year-old appellant mother had abandoned her then 3-year-old son, as had the child's purported legal father. Based on that finding, the juvenile court terminated the mother's and purported legal father's parental rights in and to the child. Only the mother has appealed, asserting that the juvenile court erred in (1) granting the appellee State leave to amend the pleading on which the juvenile court based its judgment, (2) finding the evidence sufficient to support the claimed abandonment, and (3) finding that termination of her rights is in the child's best interests. We affirm.

We begin by noting that the paternity of the child is less than clear. The mother claims that one L.S. is the child's biological father. On the other hand, the State, through a caseworker employed by its Department of Social Services, asserts that one K.G., the individual named in this action, is the legal father, as he "signed paternity on" the child. It appears K.G. did so because he was living with the mother at the time of the child's birth and the couple was planning to marry. However, no marriage took place, and K.G. has since relinquished to the State all rights he may have in and to the child. Inasmuch as only the mother has appealed and the alleged biological father was not made a party to these proceedings, we do not concern ourselves with the rights of anyone who may be any type of father to the child.

From the time of the child's birth on April 7, 1988, until May 31, 1990, the mother lived and worked in Alliance, Nebraska. She and a girl friend then went to Greeley, Colorado, to visit the girl friend's boyfriend. The mother took the child with her. For the next month the mother stayed at the boyfriend's house or in motels. On June 23, 1990, she took a job with a carnival, which traveled to various states in the region. She continued with this employment until November 4, 1990. On occasion, she would take the child with her; at other times, she left the child with the girl friend. When she was away, the mother gave the girl friend money for the child's food and clothing. The mother's then paramour, not the purported legal father of the child, would also help in supporting the child.

In August 1990, the carnival was in Rapid City, South Dakota. For whatever reason, the girl friend was with the mother and the child. The mother let the girl friend use her automobile. The girl friend, without permission, took the child and returned to Greeley. Although not expressly stated, the relationship between the girl friend and the mother appears to have been strained at this point; the mother testified that the girl friend frequently lied to her and was later imprisoned for selling marijuana. The mother has not seen or talked to the girl friend since the events in August.

Upon returning to Greeley, the girl friend telephoned the child's maternal grandmother in Gering, Nebraska, and told

her to come to Greeley and pick up the child, apparently because the mother was failing to take care of him. The grandmother returned to Nebraska with the child on August 22, 1990, and asked the aforementioned caseworker to place the child in foster care, stating that she could not take care of him.

The child seems to have been placed in the custody of the State on or about August 31, 1990. Physical possession of the child was initially placed with the grandmother. However, on September 10, 1990, his physical possession was placed with the mother's stepbrother and his wife. On May 10, 1991, physical possession of the child was placed in a foster home, where it has remained.

At some point which is not clear, the grandmother told the mother that the child had been placed in foster care. The mother had no communication or physical contact with the child from approximately August 18, 1990, until July 11, 1991, the day of the hearing resulting in the termination of her parental rights in and to the child.

Between October 5, 1990, and June 5, 1991, the caseworker engaged in six telephone conversations with the mother. It appears therefrom that the mother had been traveling with the carnival until May 1991, when she returned to Colorado, and that the mother knew of the child's placement in foster care sometime before the first conversation. She also knew of two scheduled court hearings, neither of which she attended. She said she could not be at the first because of her carnival commitments and had been unable to attend the other because of lack of finances. On one occasion, the mother told the caseworker she wanted her child, but planned to live in Arizona. The caseworker explained the mother's rights under the interstate compact system, but there is no indication the mother ever contacted the Arizona authorities.

According to the caseworker, she initiated conversations with the mother regarding the child's welfare. The mother did not send money or clothes for the child, nor did she send him gifts or cards.

The caseworker further testified that when the child was taken into custody,

> [h]e was very small, his gross motor coordination was

> fairly slow, his fine motor coordination was fairly slow. He had a hard time playing with fine toys that took a lot of fine motor skills, of fine hand movements. And his speech was very far behind. I believe, on the growth charts he was under 25 percent, the 25 percentile on growth and height.

According to the caseworker, by the time of the subject hearing, the child was "doing great. . . . wonderfully"; his chipped front teeth had been repaired, and he enjoyed a good relationship with his foster parents, who would like to adopt him.

The mother testified that lack of financial means was the primary reason she did not retrieve the child. While she continued to work in the carnival after the child was taken to Nebraska in August, she was unable to collect enough money to return. Both the mother and her paramour testified that after the carnival job ended on November 4, they intended to return to Nebraska, but their vehicle broke down on the border of Texas. Because it was not easily repairable, they sold the vehicle for $20 and caught a ride with some friends back to Arizona, as they "had no choice but to go to Arizona." Once in Arizona, neither worked until mid-January, when they rejoined the carnival in an unsuccessful effort "to try and raise the money to get up here to Nebraska and settle down."

The mother testified that she had contacted her father about living at his home in Nebraska until she and her paramour could get on their feet, but the father declined.

After learning about the scheduled termination hearing, the mother and paramour borrowed an automobile to attend court. The mother stated she felt her

> son was kidnapped and because of the circumstances that [the paramour] and I were in, we could not get back up here to Nebraska. And I feel that it's not a choice of somebody else to make the decision where my son should be. And because I love my son and I know I haven't been up here, we have not had sufficient funds to get back up here and it has been really hard getting up here. But now we are here and we are trying to get this worked out.

When working with the carnival, the mother earned between $50 to $100 a week and was responsible for paying all motel and eating expenses. The paramour made approximately $100 to

$200 a week. When asked why they remained with the carnival if they were not making enough money to return to Nebraska, the mother responded: "Because we . . . both looked for jobs in Arizona and nothing came through. And we knew that the carnival, there was money there, and we were hoping to be out for a couple weeks, get up enough money to get up here and get settled." However, further testimony revealed that when the mother and her paramour returned to the carnival on January 18, 1991, they had to borrow money from their boss, since it was a cold winter and business was slow. In May 1991, the mother and her paramour moved to Greeley by pawning her diamond engagement ring and two wedding rings, which they had purchased in South Dakota approximately a year before the hearing.

In the first assignment of error, the mother claims the juvenile court erred in allowing the State to amend its motion to terminate parental rights. The motion, as filed on March 25, 1991, read: "In support of this Motion, the State alleges that [the mother] and [the purported legal father] have each abandoned the [child] for six months or more *proceeding* the filing of a Petition in this case on August 31, 1990 alleging parental neglect and abandonment." (Emphasis supplied.)

The August 31 date apparently refers to the date on which the State signed the initial petition, on the basis of which the juvenile court asserted jurisdiction. This petition was not filed, however, until September 5, 1990. In any event, the confusion began when, after the State rested, the mother moved to dismiss the action "for a complete lack, failure by the State to show abandonment prior to August 31st, 1990." The mother then went on to say, "[T]he motion says abandonment for six months or more *preceding* the following [sic] petition, on August 31, 1990. So, actually what's happened since then, to my way of thinking, is irrelevant under the law." (Emphasis supplied.) Based on her mistaken substitution of the word "preceding" for "proceeding," the mother obviously concluded that since in the 6 months prior to August 31, 1990, the child had not been abandoned, the State had failed to prove its case.

Seemingly without verifying the language it had written, the

State moved for leave to amend its motion so as to conform with the evidence, as all parties appeared to know that the period at issue was from August 1990 to March 1991. The juvenile court, to all appearances also without reading the motion, accepted the mother's reading and permitted the State to amend by striking from the motion the word "Petition" and substituting in its place the phrase "Motion to Terminate Parental Rights." Thus, it appears the mother, the State, and the judge all assumed the original petition read "preceding" instead of the actual language, "proceeding." The motion as amended now reads: "In support of this Motion, the State alleges that [the mother] and [the purported legal father] have each abandoned the [child] for six months or more *proceeding* the filing of a Motion to Terminate Parental Rights in this case on March 25, 1991 alleging parental neglect and abandonment." (Emphasis supplied.)

However, although not phrased in the usual or best language, the motion as it originally read nonetheless correctly expressed the State's intended allegation. "Proceed" means, among other things, to move forward. 12 The Oxford English Dictionary 544 (2d ed. 1989). "Proceeding" is the action verb of proceed and means going onward. *Id.* at 545. See, also, Webster's Third New International Dictionary, Unabridged 1807 (1981). Thus, as originally written, the motion included the period between September 5, 1990, when the initial petition was filed, and March 25, 1991, when the motion at issue was filed.

As a result of the reliance on the mother's misreading of the motion, the State sought, and the juvenile court allowed, an inappropriate change which, but for the consideration written about later, would require the State to show abandonment for 6 months following the filing of the motion—an impossibility, since the hearing was held but 3 1/2 months after the motion was filed.

Although the motion now reads incorrectly, the record nevertheless demonstrates that the mother knew it was the events occurring after September 5, 1990, which were at issue, and by her conduct waived any objection she may have had to the receipt of evidence relating to that time period, for she presented extensive evidence of post-September 5, 1990, and

pre-March 25, 1991, events.

> "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence."

In re Estate of Kaiser, 150 Neb. 295, 308, 34 N.W.2d 366, 374-75 (1948). See, also, *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *In re Estate of Hill*, 214 Neb. 702, 705, 335 N.W.2d 750, 752 (1983) ("[a] party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence [by a] failure to object"). Thus, if the mother truly thought the motion sought to prove abandonment for the 6 months preceding September 5, 1990, she should have objected when post-September events were raised in the testimony, and under no circumstance should she have contributed to such testimony.

Under these circumstances, the hearing resulting in the judgment at issue was controlled by the motion as originally written, and there is thus no merit to the mother's first assignment of error.

The mother next complains that the evidence does not clearly and convincingly establish that she abandoned the child during the 6 months following the filing of the petition in September 1990.

Neb. Rev. Stat. § 43-292(1) (Reissue 1988) provides that parental rights may be terminated when a child has been abandoned "for six months or more immediately prior to the filing of the petition," in this case the motion of March 25, 1991.

The abandonment contemplated in the foregoing statute exists when, for a minimum of 6 months before the operative pleading is filed, the parent intentionally withheld " '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 K.M.S.*, 236

Neb. 665, 670, 463 N.W.2d 586, 590 (1990). According to the testimony in *K.M.S.*, the father asserted that he wanted to create a relationship with his offspring, but had made no effort to see, support, or care for the juvenile. In affirming the termination of the father's rights, we observed that fulfillment of a parent's obligation requires a continuing interest in and a genuine effort to maintain communication and association with the child. As noted in *In re Interest of T.E.*, 236 Neb. 53, 57, 458 N.W.2d 753, 756 (1990), "[a]bandonment 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 *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990), the father had been in and out of prison over a 14-year period and had made no attempt when he was not incarcerated to pay child support or learn the whereabouts of his son, being "spurred to action only after receiving notice that his parental rights were to be terminated." 235 Neb. at 736, 457 N.W.2d at 297. In affirming the termination of the father's rights, we declared:

> To prove abandonment, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Mere inadequacy is not the test.

235 Neb. at 735, 457 N.W.2d at 296.

Having considered the evidence de novo, as we are required to do, *In re Interest of L.P. and R.P., ante* p. 112, 480 N.W.2d 421 (1992), we conclude, independent of the finding of the juvenile court, that the evidence outlined earlier clearly and convincingly establishes that the mother abandoned the child for at least 6 months prior to the filing of the March 25, 1991, motion. Her appearance at the last hearing was but a token gesture which could not undo the past repudiation of her parental responsibilities; she was less than inadequate in that she completely surrendered her responsibilities toward the child and conducted herself in a manner which evidenced a settled

purpose to be rid of all her parental obligations and to forgo all parental rights.

Contrary to the mother's assertion in her third and last assignment of error, there is no question that terminating her parental rights serves the child's best interests. He has been in a state of limbo for half of his 4 years of life; he had no stability while he was with his mother, and even after his grandmother retrieved him, he was, until placed in his present foster home, shunted from place to place. Perhaps the most significant piece of evidence bearing on this issue is that away from his mother, the child's arrested state of development is being reversed.

AFFIRMED.

JOSEPH S. CANNIA, APPELLEE, V. DOUGLAS COUNTY, NEBRASKA, APPELLANT.

481 N.W.2d 917

Filed March 27, 1992. No. S-91-722.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
4. **Workers' Compensation.** Generally, when an employee is required to travel on business for his employer, and an accident occurs while he is so engaged, the accident arises out of and is in the course of his employment.
5. _____. The test to determine whether any act or conduct of an employee which is not a direct performance of his work arises out of his employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.
6. _____. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort not in conflict with specific instructions, as an employee may normally be expected to

indulge in under the conditions of his work, are regarded as being within the scope or sphere of the employment.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James S. Jansen, Douglas County Attorney, and Michael W. Amdor for appellant.

William Stillmock for appellee.

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

BOSLAUGH, J.

The defendant, Douglas County, Nebraska, has appealed from the award of compensation on rehearing by the Nebraska Workers' Compensation Court to the plaintiff, Joseph S. Cannia, for a knee injury which he sustained while attending a course in jail management at the Law Enforcement Training Center in Grand Island, Nebraska. The principal issue is whether the plaintiff's injury arose out of and in the course of his employment by the defendant.

After the one-judge hearing on January 28, 1991, the plaintiff was awarded $231.44 per week for temporary total disability for 9 2/7 weeks and payment of his medical expenses.

On rehearing, with one judge dissenting, the compensation court affirmed the award made after the one-judge hearing and awarded an attorney fee in the amount of $1,000, together with interest.

> " 'Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. . . . In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme

> Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . . As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.' "

Schmid v. Nebraska Intergov. Risk Mgt. Assn., 239 Neb. 412, 412-13, 476 N.W.2d 243, 244 (1991), quoting *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991).

The record shows that in March 1990 the plaintiff was employed as a Correction Officer I by the defendant at the Douglas County Corrections Department. On May 3, 1990, the plaintiff was advised by his superior officers that in order to keep his job he was required to attend and successfully complete a course in jail management at the Law Enforcement Training Center.

On June 17, 1990, the plaintiff reported to the Grand Island training center. After arrival at the center, he attended an orientation class where he, as well as the other jail management trainees, was given the rules and regulations of the center.

At the orientation class the student monitor read the rules and regulations to the students. The rules and regulations stated that jogging and walking were encouraged.

On Monday, June 18, 1990, the plaintiff went jogging with fellow trainees at approximately 6:30 a.m. After that, he had breakfast and attended classroom activities, including another orientation class, by the center's assistant director and one of its instructors.

The assistant director and the instructor reviewed the rules of the center and discussed the self-defense class that the jail management trainees would be participating in on Thursday of that week. The instructor advised the trainees that they would be engaged in physical activities with each other and the instructors, which activities would include "pressure points and arm bar takedowns and some kicking on a dummy bag." The instructor told the trainees to wear appropriate dress for physical contact, such as jogging shorts and tennis shoes.

On Tuesday, June 19, 1990, the plaintiff, after receiving his 6

a.m. wake-up call, prepared his room and dress for classes and then went outside to jog. While stretching preparatory to jogging, the plaintiff's right knee buckled, and he fell to the ground. The injury to the plaintiff's knee required surgery and subsequent medical treatment.

During the year prior to his attendance at the training center, the plaintiff had not jogged.

In its first three assignments of error, the defendant argues that the evidence was insufficient to show that the plaintiff was injured as a result of an accident arising out of and in the course of his employment because the plaintiff was injured while participating in a personal activity that was not required as part of his employment.

Generally, when an employee is required to travel on business for his employer, and an accident occurs while he is so engaged, the accident arises out of and is in the course of his employment. *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986).

It is undisputed that the plaintiff was required by the defendant to travel to the Law Enforcement Training Center in Grand Island to attend the course in jail management and that the plaintiff was on the premises of the training center when the accident and injury occurred. Under the facts in this case, we believe the compensation court could find that the plaintiff was in the course of his employment at the time of the injury. See *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964).

The defendant argues that the plaintiff's accident and injury did not arise out of his employment because the plaintiff was engaged in a personal activity at the time it occurred.

The test to determine whether any act or conduct of an employee which is not a direct performance of his work arises out of his employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. *Chrisman v. Farmers Coop. Assn.*, 179 Neb. 891, 140 N.W.2d 809 (1966).

In *Uzendoski v. City of Fullerton*, 177 Neb. at 782, 131 N.W.2d at 196, this court held:

> "All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment."

While the plaintiff in this case was not required to jog as part of his employment, he was required to attend and successfully complete the jail management course at the Law Enforcement Training Center. The evidence shows that trainees were encouraged to jog or walk while attending the course at the training center. Furthermore, Deputy Warden William McPhillips testified that there would be a reasonable expectation on his part as an employer that correction officers who were sent to the training center would jog while they were there.

Under the circumstances of this case, the plaintiff's jogging while attending the jail management course at the training center was reasonably incidental to his employment; therefore, the plaintiff's injury arose out of his employment.

With regard to the defendant's assignment of error pertaining to the compensation court's award of an attorney fee to the plaintiff on rehearing, the defendant concedes that the assignment is without merit if this court finds the compensation court was not clearly wrong in its finding that the plaintiff's injury arose out of and in the course of his employment.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. L. VANCE LILLIE, APPELLANT, V. COSGRIFF COMPANY AND ROBERT P. COSGRIFF, APPELLEES.

482 N.W.2d 555

Filed April 3, 1992. No. S-89-814.

1. **Mandamus.** 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.
2. _____. To warrant issue of a writ of mandamus against an officer to compel him to act, the duty must be imposed on him by law, the duty must still exist at the time the writ is applied for, and the duty to act must be clear.
3. _____. A writ of mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear.
4. _____. Neb. Rev. Stat. § 21-2050 (Reissue 1991) of the Nebraska Business Corporation Act specifically provides that that section does not deprive a shareholder or a holder of voting trust certificates who has exhibited proof of a proper purpose of the common-law right to utilize a court of competent jurisdiction to compel a reluctant corporation to share its corporate records and minutes pertinent to that purpose.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded.

Paul A. Rauth, of Marks & Clare, for appellant.

Martin G. Cahill for appellees.

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

WHITE, J.

Appellant, L. Vance Lillie, seeks a writ of mandamus compelling appellee Cosgriff Company to furnish to appellant its most recent financial statements and to permit appellant's examination of its books, records of accounts and minutes, and records of Cosgriff Company's shareholders.

FACTS

In September 1986, appellant, a retired office manager of the Cosgriff Company, offered to sell back his stock in Cosgriff Company, which amounted to 15 percent of the outstanding corporate stock, for $50,000. Appellees counteroffered to purchase appellant's stock for $10,000.

In an effort to determine the value of his stock, appellant delivered a letter to the Cosgriff Company authorizing the

release of information to his attorney and requesting that his attorney be allowed to examine the corporate books and records. After receiving no response from appellees, on October 31, 1988, appellant filed his amended petition for alternative writ of mandamus. The writ was issued directing appellees to immediately permit Lillie's attorney to examine Cosgriff Company's books, records of accounts and minutes, and records of shareholders. Appellees did not comply.

On November 21, 1988, a hearing took place wherein appellees' attorney stated that their only objection to the examination of the records was the difficulty in getting the records together; appellees requested more time. The trial court directed that the appellees immediately supply appellant with the most recent financial statements and that the appellees turn over the other records as soon as the records could be made available. Some, but not all, of the materials were produced.

The procedural route to the ultimate dismissal of the appellant's petition is difficult to reconcile with the accepted rules of pleading.

Appellant, on March 17, 1989, filed a motion in the district court requesting "the issuance of a Peremptory Writ of Mandamus" and included with the motion excerpts from a deposition of appellee Robert P. Cosgriff. The procedure suggests a motion for summary judgment, but the motion was not so denoted, nor was the summary judgment procedure followed.

At the same time, a motion to strike appellees' answers was filed, the basis of which is unclear. The court, in its order of June 1, 1989, overruled all of the appellant's motions. On its own motion (since no application, demurrer, or motion requesting such relief was on file), however, the court summarily dismissed appellant's petition with prejudice, holding that appellant had a plain and adequate remedy at law. The court specifically determined that Neb. Rev. Stat. § 21-2050 (Reissue 1991) of the Nebraska Business Corporation Act and Neb. Ct. R. of Discovery 27 and 34 (rev. 1989) prohibited the court from issuing the peremptory writ of mandamus.

After the trial court overruled his motion for new trial, Lillie

appealed to this court.

ASSIGNMENTS OF ERROR

Appellant alleges that the district court erred in (1) dismissing appellant's amended petition because the order was contrary to law, was not supported by the evidence, and was entered without trial; (2) determining that appellant had a plain and adequate remedy at law, by reason of § 21-2050 of the Nebraska Business Corporation Act; and (3) determining that appellant may also proceed under rules 27 and 34 of the Nebraska Discovery Rules, as authorized by Neb. Rev. Stat. § 25-1273.01 (Reissue 1989), in appellant's attempt to enforce his right of inspection of the appellee corporation's books and records.

DISCUSSION

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); *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990). To warrant issue of a writ of mandamus against an officer to compel him to act, the duty must be imposed on him by law, the duty must still exist at the time the writ is applied for, and the duty to act must be clear. *Id.*; *Connot v. Monroe*, 193 Neb. 453, 227 N.W.2d 827 (1975).

A writ of mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear. *State ex rel. Thompson v. Alderman*, 230 Neb. 335, 431 N.W.2d 625 (1988).

The applicable provision from appellant's "remedy [at] law," § 21-2050 of the Nebraska Business Corporation Act, provides and requires that all corporations keep correct and complete books and records of account, as well as minutes of shareholder and director proceedings. Anyone who has held shares or trust certificates for the 6 months immediately preceding his demand *or* who is the holder of record of at least 5 percent of all outstanding shares may, upon written demand stating a proper purpose, examine and make extracts of the relevant books, records of accounts, minutes, and records of the shareholders.

> Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder or holder of voting trust certificates, or his agent or attorney, so to examine and make extracts from its books and records of accounts, minutes, and records of shareholders, for any proper purpose, shall be liable to such shareholder or holder of voting trust certificates in a penalty of ten percent of the value of the shares owned by such shareholder, or in respect of which such voting trust certificates are issued, in addition to any other damages or remedy afforded him by law. . . .
>
> Nothing in this section shall impair the power of any court of competent jurisdiction, upon proof by a shareholder or holder of voting trust certificates of proper purpose irrespective of the period of time during which such shareholder or holder of a voting trust certificate shall have been a shareholder of record or a holder of record of voting trust certificates, and irrespective of the number of shares held by him or represented by voting trust certificates held by him, to compel the production for examination by such shareholder or holder of voting trust certificates, of the books and records of accounts, minutes and records of shareholders of a corporation.

§ 21-2050.

Upon proof of status as a shareholder and proposal of a proper purpose for the information sought to be obtained through the examination of the corporate records, the penalty for failure to comply with the shareholder's request is 10 percent of the value of the shares owned by the shareholder. Common sense would dictate that since the entire purpose for this shareholder's request for access to corporate records is to ascertain the value of his shares, mandamus should lie here. We are not prepared to hold that a writ of mandamus can never lie to compel corporations to permit shareholders' examination of corporate records.

Appellant's "plain and adequate remedy [at] law," § 21-2050 of the Nebraska Business Corporation Act, specifically provides that that section does not deprive appellant of his common-law right to utilize a court of competent jurisdiction

to compel the reluctant Cosgriff Company to share its information. The company has clearly been biding time. At no point have appellees asserted a defense or given reasons justifying their disregard for Lillie's right to examine the corporate books.

As the matter has not yet been tried, it is perhaps premature to speculate on the reasons for the delay in the inspection of the company books. In the event the trial court determines that the delay is intentional, the court can then determine whether the extraordinary writ should issue.

REVERSED AND REMANDED.

RONALD W. STOVER, APPELLEE, V. JACQUELINE SUE STOVER, APPELLANT.
482 N.W.2d 244

Filed April 3, 1992. No. S-89-1146.

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

Frank Meares for appellant.

Charles I. Scudder for appellee.

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

PER CURIAM.

Jacqueline Sue Stover appeals from the judgment dated July 18, 1989, of the district court for Douglas County which decreased the monthly child support payments by Ronald W. Stover, a decrease from $500 per month to $350 per month for the Stovers' two children. The court also ordered Ronald Stover to pay $60 per month to cover health and accident insurance for the two minor children and an additional $50 per month on a child support arrearage of $4,212.14.

STANDARD OF REVIEW

> In an appeal involving an action for dissolution of marriage, an appellate 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 appellate 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.

Stuhr v. Stuhr, ante p. 239, 243, 481 N.W.2d 212, 215 (1992).

Based on our de novo review, we find no abuse of discretion by the district court, except for the amount of the decreased monthly child support ordered by the court. Although the district court awarded child support in the total of $350 per month for the two Stover children, we conclude that the Nebraska Child Support Guidelines, applied on the basis of the financial information in the record, require a child support order of $310 per month, that is, $155 per month per child, rather than the $175 per month per child ordered by the district court. See *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991). Therefore, we affirm the district court's judgment, subject to the modification that Ronald Stover shall pay $155 per month per child as support for Stovers' minor children during the periods specified by the district court in its judgment entered July 18, 1989.

Although we have considered the matter of an attorney fee regarding counsel's representation in this court, we decline to order any attorney fee concerning the proceedings in this court.

AFFIRMED AS MODIFIED.

STEVEN A. EGGLAND, APPELLANT, V. CAROL A. EGGLAND, APPELLEE.

482 N.W.2d 245

Filed April 3, 1992. No. S-89-1202.

1. **Res Judicata: Appeal and Error.** An appellate court may raise the issue of res judicata sua sponte.
2. **Res Judicata.** Res judicata bars relitigation of those matters which have been litigated to finality.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Tom A. Wilson and, on brief, James Michael Edgar, of Edgar & Wilson Law Offices, for appellant.

Paul E. Galter, of Bauer, Galter & O'Brien, for appellee.

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

FAHRNBRUCH, J.

Under the doctrine of res judicata, an issue raised sua sponte by this court, Steven A. Eggland's appeal of an order of the district court for Lancaster county denying his petition for a partnership accounting must be dismissed. An appellate court may raise the issue of res judicata sua sponte, which this court has elected to do. See *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991).

The issues in this partnership accounting case were determined in the dissolution of marriage proceedings of the parties, which determination was not appealed. We therefore dismiss this appeal.

The marriage of the parties to this action for a partnership accounting was dissolved in 1982 in docket 358, page 167, of the records of the district court for Lancaster County. Through the property settlement agreement which was approved by that court, the parties established an equal partnership in three parcels of real estate. Under the settlement, the ex-husband was required to pay his ex-wife $132,071 to equalize the distribution of marital property. The partnership assets were to be sold, and the ex-wife was to be paid her award of $132,071 from the

ex-husband's share of the proceeds.

Some real estate in the partnership was sold, and the ex-husband paid some additional money on the debt to his ex-wife. However, a dispute arose between the parties, and on August 29, 1988, the ex-wife filed an application in the dissolution proceedings to determine her ex-husband's liability to her. A hearing, originally set for October 21, 1988, on "the Application of [the wife] to determine liability of [the husband] and for entry of judgment *and the Responsive Pleading, Claim for Set Off, and Counter-Claim of [husband]*" (emphasis supplied) was continued until November 2, 1988. At the November 2 hearing, the court, pursuant to stipulation, ordered the ex-husband to satisfy the ex-wife's then existing judgment against him in the sum of $117,071, together with interest at the rate of 10 percent per annum from July 26, 1985. The ex-wife was to be paid $25,000 forthwith, and the ex-husband was ordered to place $35,000 in escrow. The ex-wife was given full ownership of 28 rental units known as the J Street property, plus real estate located at 1910 A Street, all in Lincoln, Nebraska.

The sum of $35,000 was to be held in escrow "until such time as it is determined whether [the ex-husband] is entitled to set offs, damages, compensation, or other credits by reason of actions of [the ex-wife] with reference to the 'J' Street property, property at 1910 'A' Street, or other actions in connection" with the partnership.

The ex-husband was given until January 2, 1989, to take action with reference to any claims that he had for damages, setoffs, compensation, or credits referred to in the court's order, which, if any, were to be paid to the ex-husband out of the escrow account, with the balance of the escrow account to be disbursed to the ex-wife.

On December 30, 1988, the ex-husband filed a separate action for accounting of partnership funds, naming his ex-wife as the defendant.

Issues were joined in the accounting action, and pursuant to stipulation, the ex-wife's application for determination of liability in the dissolution proceedings was joined for trial with the accounting action brought by the ex-husband. On August

17, 1989, after an evidentiary hearing, the trial court found that the ex-husband failed to satisfy his burden of proof with reference to the allegations set forth in the petition for accounting. *By separate order*, the trial court dismissed the accounting action. The ex-husband has appealed that order of the district court.

On August 17, 1989, following the same hearing referred to in the preceding paragraph, the trial court, in the dissolution of marriage proceedings, *by separate order*, found: "[T]he evidence fails to establish that the [ex-husband] is entitled to any set offs, damages, compensation or other credits by reason of actions of Petitioner with reference to property previously owned by 'Eggland Partnership' . . . ." The court ordered that the $35,000 in escrow, together with accrued interest from that sum, be turned over to the ex-wife. The court ordered the ex-wife, upon receipt of the escrow money and interest, to satisfy her judgment against the ex-husband. In its order in the dissolution proceedings, the court also dismissed the ex-husband's partnership accounting action. The ex-husband filed no notice of appeal in the dissolution proceedings.

The major issue in both the dissolution and the partnership accounting proceedings was whether the ex-husband was entitled to any setoffs, damages, compensation, *or other credits* by reason of the actions of his ex-wife in regard to the partnership property. It is readily apparent that the ex-husband's counterclaim in the dissolution proceedings and petition for partnership accounting are based upon the alleged misconduct of the wife in handling the parties' partnership property. The ex-husband's pleadings in the dissolution proceedings and in the partnership accounting action merely set forth different theories of recovery.

We take judicial notice that no appeal was taken in regard to the district court for Lancaster County's order in the dissolution proceedings and that that order became final. That being true, the issues in the ex-husband's claim for a partnership accounting are controlled by the doctrine of res judicata. Res judicata bars relitigation of those matters which have been litigated to finality. See *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991).

In an order to show cause why the appeal in this partnership accounting case should not be dismissed, this court pointed out that in both the accounting and the dissolution cases the issues revolved around whether Steven Eggland was entitled to any damages, compensation, or other credits from Carol Eggland because of the manner in which she handled property of the Eggland Partnership, of which each party owned one-half as a result of the dissolution of their marriage. This court also pointed out that no notice of appeal had been filed in the dissolution proceedings and that it appeared that those proceedings had become final and dispositive of the issues in the accounting case. In his response to the show cause order, Steven Eggland claimed that because the dissolution proceedings and partnership accounting action were consolidated for trial in the district court, to appeal both cases it was necessary to perfect an appeal in only one of the cases. For that position, appellant relied upon our holding in *Southwest Bank of Omaha v. Moritz*, 203 Neb. 45, 277 N.W.2d 430 (1979):

> Where, by stipulation of the parties and order of the court, two lawsuits, having a common issue determinative of both, are consolidated for trial and *only one judgment* is entered affecting two adverse parties on the common issue, the parties have, in effect, made one lawsuit out of two and the appealing party need file only one notice of appeal to this court.

(Emphasis supplied.) (Syllabus of the court.)

In the Eggland dissolution and accounting cases, there are two separate judgments. In the dissolution proceedings order, the trial court found that the ex-husband was not entitled to any setoffs, damages, compensation, or other credits by reason of the actions of the ex-wife with reference to property previously owned by the Eggland Partnership commonly known as the J Street property and property at 1910 A Street, and that by reason thereof, the $35,000 held in escrow, plus all accrued interest, was to be turned over to the ex-wife as her sole and separate property, free and clear of any claim by the ex-husband. The trial court also dismissed the ex-husband's accounting petition. In its posttrial order dismissing the partnership accounting, the court did not mention the $35,000

award to Carol Eggland in the dissolution proceedings or that she was ordered to satisfy the judgment in her favor in the dissolution proceedings. In the partnership accounting order, the trial court found that the ex-husband had failed to satisfy his burden of proof with reference to the allegations set forth in his petition for accounting.

We hold that because the issues in this partnership accounting action are the same issues decided in the dissolution proceedings and because the dissolution proceedings became final, the trial court's holding denying Steven A. Eggland's request for a partnership accounting must be affirmed under the doctrine of res judicata.

AFFIRMED.

CLIFFORD STEWART, APPELLANT, V. HOWARD W. CLARKE, WARDEN, NEBRASKA STATE PENITENTIARY, AND FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

482 N.W.2d 248

Filed April 3, 1992. No. S-90-205.

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

John C. Lindsay, of Lindsay & Lindsay, for appellant.

Don Stenberg, Attorney General, and Elaine A. Chapman for appellees.

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

PER CURIAM.

Petitioner, Clifford Stewart, appeals from an order of the district court for Lancaster County denying his petition for writ of habeas corpus. The appellant has been continuously under the supervision of the Department of Correctional Services

(DCS) since his initial sentence in 1971. Since that time, appellant has been either incarcerated or on parole. He has been sentenced on three different occasions. The second sentencing was for crimes committed while on parole granted on the first sentence, and itself consisted of two sentences—12 years for assault with intent to rob and a consecutive 5-year term for use of a firearm to commit a felony. The sentence on the third occasion was for a crime committed while on parole granted on the consolidated first three sentences.

The good time law in effect at all times in question provided that the maximum terms of all consecutive sentences, "whether received at the same time or at any time during the original sentence," would be added together to determine the total consolidated maximum sentence. Neb. Rev. Stat. § 83-1,110 (Reissue 1987). See *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981).

The law in effect at the time of appellant's initial sentencing (Neb. Rev. Stat. § 83-1,118 (Reissue 1971), hereinafter referred to as the "old law") provided that good time would be subtracted from the maximum consolidated sentence to determine the mandatory parole date. The law was changed in 1975 to provide that good time would be subtracted from the maximum consolidated sentence to determine the date of mandatory discharge from custody (§ 83-1,110 (Reissue 1987), hereinafter referred to as the "new law").

The last sentence imposed on the appellant was after the 1975 change in the law. However, because appellant was still on parole, under the supervision of DCS, when he committed the last crime, his sentences were consolidated and controlled by the law in effect at the beginning of appellant's continuous and ongoing relationship with DCS.

Appellant argues, in essence, that he has been denied due process and equal protection because he has been treated differently from an individual who was initially sentenced after 1975. These identical arguments were advanced by individuals in appellant's position, and rejected by this court, in *Boston v. Black*, 215 Neb. 701, 709-10, 340 N.W.2d 401, 407 (1983), where we said:

> Section 83-1,110 . . . defines an offender's sentence, for

> the purpose of good time computations, to be the sum of all sentences he receives, regardless of when incurred. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin. Consequently, any good time credited toward the consolidated sentence of an offender sentenced prior to the effective date of [the new law] which would reduce the period such offender is to remain subject to the penal authority of the state (but for [the new law]) would result in the commutation of a sentence by legislative action. This is a power denied to the Legislature by this state's Constitution.

We also disposed of the equal protection claims when we stated in *Black*, 215 Neb. at 712-13, 340 N.W.2d at 408-09:

> The question is whether the difference in treatment is based upon some rational justification. As stated previously, due to the consolidation of all sentences required under both [the old law] and [the new law], after that consolidation it is not possible to distinguish [terms imposed under the old law] from [terms imposed under the new law]. Consequently, application of the [new] good time sentence reduction provisions serves to reduce the term an offender spends subject to the penal authority of the state. Application of those [new] provisions to offenders first sentenced prior to its effective date is impermissible, under the Constitution of this state, without Board of Pardons approval. . . . Preservation of our government's constitutional separation is a rational, if not compelling, reason for the different treatment accorded those first sentenced prior to and those first sentenced subsequent to the effective date of [the new law].
>
> We also note that the application of the rule this second group of offenders request, that once an offender commits a crime while subject to the penal authority of the state he is automatically entitled to a more liberating good time scheme, could have the effect of encouraging the commission of crimes in order to receive the desired [new] good time provisions.

See, also, *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987).

The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY J. ALCORN, APPELLANT.

481 N.W.2d 921

Filed April 3, 1992. No. S-90-1185.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the trier 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.** On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence.
3. _____: _____. Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt.
4. **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.
5. **Criminal Law: Intent: Circumstantial Evidence: Proof.** 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.
6. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

HASTINGS, C.J.

Defendant appeals from a jury verdict finding him guilty of possession of cocaine with intent to deliver and from a sentence of imprisonment of not less than 2 nor more than 4 years. He assigns as error the insufficiency of the evidence and the excessiveness of the sentence. We affirm.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the trier 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. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992).

On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence. Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt. *State v. Williams, supra.*

On February 1, 1990, police officers Sears, Uryasz, Saalfeld, and Kyle were searching the bars in North Omaha for a robbery suspect. They entered the Bali Hi bar at 1402 North 24th Street. Upon entering, the officers immediately dispersed. Officer Kyle testified that as he walked in he noticed the defendant, Billy J. Alcorn, sitting at the bar. The defendant looked at the officers twice and then made a "furtive gesture," *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979), by pulling both hands from underneath the bar top and putting them down between his legs. The defendant drew Officer Kyle's attention because he was looking down at a waste can between his legs,

while everyone else in the bar was observing the officers. Officer Kyle approached the defendant until he was about a foot and a half away from the defendant. The defendant did not look at Officer Kyle, which Kyle found to be unusual in that all of the other bar patrons were intently looking at the officers. See, also, *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

Officer Kyle then looked underneath the bar between the defendant's legs and saw that the carpet on the base of the bar had been pulled away right where the defendant's hands had been. Kyle testified that he leaned over, saw a paper towel, and pulled it out. He opened the towel and found plastic bags containing 11 "snow seals." A "snow seal" is a parcel of cocaine packaged for street sale. The contents of the packages appeared to be cocaine, and the defendant was placed under arrest. The packages later were tested by a chemist and found to be cocaine. According to Officer Kyle, the patron in closest proximity to the defendant was sitting about two or three seats down, at a distance of about 6 feet. The defendant was searched incident to the arrest and was found to have in his possession $112.51, including five $20 bills. There was a great deal of testimony from various police officers as to the "profiles" of drug activity in Omaha. One of the particular aspects of such activity was that the person who held the drugs for sale would "stash" the contraband in a hiding place close by, where it would readily be available for sale. Also, there was testimony that the seller of drugs would keep the money on his or her person and that the average price of a snow seal was $20.

Defendant's motion to dismiss at the close of the State's case was overruled by the court. The defendant then submitted his evidence. " ' " 'A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.' ". . .' " *State v. Green*, 238 Neb. 492, 507-08, 471 N.W.2d 413, 425 (1991).

" '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. Oldfield*, 236 Neb. 433, 444, 461 N.W.2d 554, 562 (1990).

"Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance." *State v. Garza*, 239 Neb. 98, 99, 474 N.W.2d 246, 248 (1991). In *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987), this court held that the evidence adduced supported the inference that the defendant was in possession of marijuana found in a corn chip canister on a coffee table in a living room of a house owned by a third party. In *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987), we found the evidence sufficient to establish that defendant had the intent to possess marijuana found in an apartment leased to a third party.

The record, viewed in a light most favorable to the State, shows that the defendant made a "furtive gesture" by pulling both hands from underneath the bar and reaching downward, just after he saw the officers enter the bar. The defendant drew attention by staring at a waste can between his legs, while everyone else in the bar was observing the officers. Officer Kyle found a bag with cocaine behind the carpet underneath the bar, at the place where defendant's hands had been. The defendant admitted that the cocaine was located at arm's-length distance from him. The patron in closest proximity to the defendant, according to Officer Kyle, was sitting two or three seats down, at a distance of about 6 feet.

The record supports a finding that there was no drink in front of the defendant at the bar. The parcel was found near the defendant's seat, within arm's distance, and contained 11 snow seals. The quantity and the manner of packaging indicate that the cocaine was intended for sale and not personal use. The package was found underneath the bar, behind the carpet between the defendant's legs. In addition, the defendant could not adequately account for the $112.51 he had in his possession. The State effectively rebutted his story that he had cashed his paycheck that day at the Hy-Vee store.

There was sufficient evidence to establish a prima facie case

of guilt and to support the jury's finding beyond a reasonable doubt of the defendant's guilt of the offense charged.

As to the claimed excessiveness of the sentence, a sentence imposed within the statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court. *State v. Wounded Arrow, ante* p. 44, 480 N.W.2d 205 (1992).

Possession with intent to deliver a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989) is a Class II felony under § 28-416(2) and is punishable by not less than 1 nor more than 50 years' imprisonment. The defendant has a prior record which includes possession of a concealed weapon, a gambling offense, obstruction of an officer, and eight traffic offenses. He admitted to having sold drugs "once or twice to make ends meet."

There was no abuse of discretion on the part of the trial court in imposing the sentence which it did.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF L. V., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. W. V., APPELLANT.

482 N.W.2d 250

Filed April 3, 1992. No. S-91-716.

1. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
2. **Parental Rights: Due Process.** Procedural due process is applicable to a proceeding for termination of parental rights.
3. **Due Process.** Procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.
4. **Parental Rights: Due Process.** Parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded

procedural due process for the hearing to terminate parental rights.

5. **Parental Rights: Due Process: Appeal and Error.** If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion.
6. **Parental Rights: Due Process.** In deciding whether to allow a parent's attendance at a hearing to terminate parental rights, notwithstanding the parent's incarceration or other confinement, a court may consider the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.
7. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
8. **Parental Rights.** Although parental rights may not be terminated solely for a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated.
9. **Parental Rights: Abandonment: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.
10. **Parental Rights: Abandonment.** Parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights.

Appeal from the County Court for Saline County: J. PATRICK MCARDLE, Judge. Affirmed.

Bernard J. Ach for appellant.

Chris Horacek, Deputy Saline County Attorney, for appellee.

Vicky L. Johnson, guardian ad litem.

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

SHANAHAN, J.

W.V., biological father of L.V., appeals from the judgment of the county court for Saline County, sitting as a juvenile court pursuant to Neb. Rev. Stat. § 43-245 (Cum. Supp. 1990), which terminated W.V.'s parental rights concerning L.V. Termination was based on Neb. Rev. Stat. § 43-292(1) (Reissue 1988) (abandonment of a juvenile for at least 6 months immediately before the filing of a petition to terminate parental rights), § 43-292(2) (substantial and continuous or repeated neglect of a juvenile and refusal to provide parental care and protection for the juvenile), and the court's conclusion that termination of parental rights was in L.V.'s best interests. L.V.'s biological mother entered her voluntary appearance in the proceedings, but is not involved in this appeal. We affirm.

STANDARD OF REVIEW

> In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.

In re Interest of M.P., 238 Neb. 857, 858-59, 472 N.W.2d 432, 434 (1991). Accord, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

> The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that the termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two

preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."

In re Interest of J.S., A.C., and C.S., 227 Neb. at 267, 417 N.W.2d at 158. Accord, *In re Interest of M.P., supra*; *In re Interest of T.C., supra*.

"In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence." *In re Interest of T.C.*, 226 Neb. at 117, 409 N.W.2d at 609. Accord, *In re Interest of J.S., A.C., and C.S., supra*; *In re Interest of M.P., supra*. " '[C]lear and convincing evidence 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.S., A.C., and C.S.*, 227 Neb. at 266, 417 N.W.2d at 157 (quoting from *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984)).

PROCEDURAL BACKGROUND FOR TERMINATION HEARING

Adjudication.

The child, L.V., was born on August 10, 1977, of her mother's marriage to W.V. As a result of a marital dissolution decree in 1979, the mother received custody of L.V. However, at an adjudication hearing in 1988, the court determined that L.V. was a juvenile in a situation which was dangerous to her life or limb or was injurious to her health or morals. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) (jurisdiction of juvenile courts). L.V.'s custody was thereafter placed with the Nebraska Department of Social Services (DSS). No appeal was taken from the adjudication.

Petition to Terminate W.V.'s Parental Rights.

On August 31, 1990, the State filed a petition to terminate W.V.'s parental rights concerning L.V. Among the bases for its petition, the State alleged W.V.'s 6-month abandonment of L.V., see § 43-292(1), and his failure to provide parental care and protection for L.V., see § 43-292(2).

When notified of the termination hearing, W.V. was

incarcerated in the state penitentiary at Kyle, Texas, where he had served approximately 8 years of his 25-year sentence for aggravated sexual assault of a 6-year-old victim. In reference to the prospective hearing, W.V. filed a motion asserting that his "mandatory supervision release date" from the Texas penitentiary was December 8, 1991, and, therefore, requesting that the termination proceeding be postponed until W.V. might be physically present at the termination hearing. After counsel's argument on the motion, the court, on October 10, 1990, concluded: "There is no due process requirement for [W.V.] to be personally present" at the termination hearing, which eventually took place on December 20. However, the court ordered that on completion of the State's evidence at the December 20 hearing, the proceeding would be recessed, testimony from the State's witnesses would be transcribed, and the county attorney, W.V.'s lawyer, and L.V.'s guardian ad litem would then proceed to Texas at state expense and obtain W.V.'s deposition in light of the transcription. Also, the court ordered that W.V., after his examination of the transcribed testimony given at the December 20 hearing and on resumption of the termination hearing, would be allowed to recall any of the State's witnesses for further cross-examination and call his own witnesses. Although the record indicates that W.V.'s deposition was not taken, the transcription of the December 20 hearing, at which W.V. was represented by a lawyer, was filed with the court on January 10, 1991. W.V.'s lawyer sent a copy of the transcript to W.V. in Texas. W.V. examined the transcript and corresponded with his lawyer about some aspects of the testimony at the hearing of December 20, 1990. There is no complaint that W.V.'s deposition was not obtained in accordance with the order of October 10, 1990.

TERMINATION HEARING

The termination hearing resumed on May 13, 1991, although W.V. was still incarcerated in Texas. However, by telephone, W.V., who was sworn in in the presence of his Texas lawyer, listened to and participated in the resumed termination hearing, at which W.V. was represented by a lawyer in Nebraska.

According to the transcription of the December 20, 1990,

hearing and evidence adduced at the resumed termination hearing, W.V.'s presence and involvement in L.V.'s life was sparse. For instance, in March 1978, when L.V. was a little over 6 months old, W.V. began serving a sentence in the Nebraska Penal and Correctional Complex, and was released in November 1978, but visited L.V. only once during 1978. In October 1979, W.V. reentered the Nebraska penitentiary, where he served his sentence until discharged in June 1980. W.V. remained in the Lincoln area and had sporadic employment, but very little personal contact with L.V. In October 1982, W.V. moved to Texas without supplying L.V. or her mother with information about his departure, destination, or whereabouts in Texas. Within 1 week after his arrival in Texas, W.V. was arrested on a charge of aggravated sexual assault on a 6-year-old child and was later convicted in a jury trial and sentenced to 25 years' imprisonment for that conviction. W.V. sent L.V. a Christmas card in 1983.

L.V. testified that she does not recall seeing W.V. in person and does not remember any type of contact with him, such as letters or phone calls, before 1988, when she was in custody of DSS. After 1988, while she was in custody of DSS, L.V. received two or three telephone calls from W.V. Also, W.V. sent L.V. cards and letters, as well as some gifts; for example, a jewelry box made from matchsticks, $10 on two occasions, a framed picture of W.V., and a painting by W.V. At the termination hearing on December 20, 1990, L.V., who was then 13 years old, stated that she does not want to see W.V. or develop any relationship with him, because "he was never there when I was growing up."

Dr. Scott Moore, a psychiatrist, examined L.V. three times during the year preceding the initial part of the termination hearing. According to Dr. Moore, L.V.'s conduct was consistent with an "adjustment disorder with mixed emotional and behavioral response," that is, a condition which is

> the result of experiences that the person has gone through rather than being a basic innate mental disorder of some type.
>
> I think that [L.V.'s] problems — current problems result from the environmental factors that have impinged upon

> her rather than because she has some biochemical abnormality of the brain.

Dr. Moore further testified that L.V. is experiencing behavioral and emotional problems, because she "has been abandoned in the mind of a child by losing her family." Contributing to L.V.'s feeling of abandonment is the fact that she does not know who W.V. is,

> has never met him, has had no contact with him in terms of what you and I would think of as contact. But at the same time she is told this is her father. She doesn't believe that . . . [and] my feeling is that contact with a man who is known to her to have forcibly sexually assaulted another young girl will flood back into her all of the things that happened to her all over again and in great measure may put her back to ground zero again.

Consequently, Dr. Moore stated, "It is my opinion it is in [L.V.'s] best interest to discontinue entirely and permanently any kind of relationship with W.V." In response to a question about L.V.'s receipt of cards and letters from W.V., Dr. Moore explained,

> [I]t's been my observation that frequently those who commit sexual crimes attempt to atone for that by expressions of love for people who either they have abused or who were not part of the abuse, but might be expected to somehow bolster their own feeling that they're really not a bad guy after all.

A counselor with the Child Guidance Center who has been associated with L.V. for 2 years testified that she has seen L.V. approximately 150 times in various counseling sessions. The counselor expressed the opinion that it was in L.V.'s best interests that W.V.'s parental rights be terminated, because, in the counselor's words:

> I believe that his history and the fact that they have no current relationship, it would set her up to be hurt again and that there is no evidence that this man could parent her and would be in any way trustworthy to have her in his care. So, it would be just a set up for her to be abandoned once again.

W.V. telephonically participated in the resumed termination

hearing and expressly acknowledged that he had received and examined a copy of the transcribed testimony from the hearing in December 1990. In fact, W.V. had the transcription in front of him during the hearing on May 13, 1991. W.V. verified that he had been incarcerated in Nebraska from March 1978 to November of that year and from October 1979 through June 1980 and that he has been imprisoned in Texas since October 1982. While W.V. was in Lincoln after his discharge from prison in 1980, he had various jobs, but contributed only $100 or $200 as support for his family, including L.V. In his testimony, W.V. admitted that he had not personally seen L.V. since 1981. After 1988, he had telephoned L.V. twice, in calls which lasted "between five to seven minutes," and had written to her on occasion. Finally, W.V. expects to be under the supervision of the Texas department of correctional services, either as a prison inmate or under mandatory supervised release, until the year 2007. As W.V. expressed the situation, "I don't really expect to be anywhere around the children anytime real soon. I don't know, it's going to be a while to . . . get back up there . . . because I'm going to have to get everything squared away with Texas . . . ."

After his telephonic participation in the termination hearing, W.V. did not recall any witness who had previously testified at the hearing in December 1990 and did not call any other witnesses; therefore, the hearing was concluded.

The court determined that the evidence clearly and convincingly established that W.V. "has abandoned [L.V.] throughout her entire life [and] has neglected [L.V.] and failed to provide necessary parental care and protection" since at least November 1982. The court also found "it is beyond a reasonable doubt in the best interests of [L.V.] that the parental rights of [W.V.] be terminated."

ASSIGNMENTS OF ERROR

First, W.V. alleges that he was denied procedural due process in the termination hearing, when the court refused a postponement so that W.V. might physically attend the hearing. Second, W.V. claims that the evidence is insufficient to justify termination of his parental rights concerning L.V.

PROCEDURAL DUE PROCESS

W.V. contends that he, as L.V.'s biological father, is constitutionally entitled to his personal attendance at a hearing to terminate parental rights, and, consequently, denial of his request to attend the termination hearing is a violation of due process.

We recognize that the parent-child relationship is afforded due process protection. See, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. at 753-54.

Consequently, procedural due process is applicable to a proceeding for termination of parental rights. See, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

As the U.S. Supreme Court observed in *Smith v. Organization of Foster Families*, 431 U.S. 816, 847-48, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977):

> Where procedural due process must be afforded because a "liberty" or "property" interest is within the

> Fourteenth Amendment's protection, there must be determined "what process is due" in the particular context. . . .
>
> . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 405 U. S. 471, 481 (1972).

The concept of due process embodies the notion of fundamental fairness and defies precise definition, or, as the U.S. Supreme Court noted:

> For all its consequences, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. at 24-25.

Since due process is applicable and adaptable to various situations and, therefore, necessarily and inherently flexible, adaptability and flexibility of due process should not be mistaken for, or equated with, an absence of minimal procedural protection against a governmental attempt to restrict or eliminate personal rights guaranteed by the Constitutions. As stated in *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972): "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . .' " When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to

confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker. See, *Fuentes v. Shevin, supra*; *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); *State v. Kingery*, 239 Mont. 160, 779 P.2d 495 (1989); *Hladys v. Commonwealth*, 235 Va. 145, 366 S.E.2d 98 (1988); *In re Griffith*, 304 Or. 575, 748 P.2d 86 (1987); *Schexnider v. Blache*, 504 So. 2d 864 (La. 1987); *In re Nelson*, 78 N.M. 739, 437 P.2d 1008 (1968); *People v. Acevedo*, 216 Ill. App. 3d 195, 576 N.E.2d 949 (1991).

PHYSICAL ATTENDANCE AT A HEARING TO TERMINATE PARENTAL RIGHTS

In the present case, for the first time in Nebraska, we are asked to decide whether procedural due process requires a parent's physical presence at a hearing to terminate parental rights.

In *Caynor v. Caynor*, 213 Neb. 143, 144-45, 327 N.W.2d 633, 635 (1982), this court stated, "A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action . . . ." Similarly, in *State v. Otey*, 212 Neb. 103, 104-05, 321 N.W.2d 453, 454 (1982), we reaffirmed that "although a prisoner could not be prevented from testifying in support of his [postconviction] motion, he [has] no right to be personally present at an evidentiary hearing on the motion." See, also, *State v. Woods*, 180 Neb. 282, 142 N.W.2d 339 (1966).

In *In re Interest of F. H.*, 283 N.W.2d 202, 209 (N.D. 1979), the Supreme Court of North Dakota addressed the question whether a prison inmate had a procedural due process right to physical attendance at a hearing for termination of the prisoner's parental rights and stated:

> [W]e are compelled to conclude that a convict does not have a constitutional right to personally appear in a civil suit where he has been permitted to appear through counsel and by deposition, if appropriate. Any right to appear personally would have to rest upon convincing

reasons and would ultimately be left to the sound discretion of the trial court.

In making its determination the trial court may take into account the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

As an additional factor in cases involving termination of parental rights, the North Dakota court noted that in the "interest of the child," the proceeding "should not drag on" indefinitely. *Id.* at 210.

Several other courts have concurred with the reasoning for the result reached in *In re Interest of F. H., supra*; for example, *In re Juvenile Appeal*, 187 Conn. 431, 446 A.2d 808 (1982) (parent incarcerated outside the state was afforded procedural due process in a parental rights termination proceeding when a transcript of the state's evidence was sent to the prisoner parent for review and the parent later testified telephonically and had the opportunity to cross-examine witnesses for the state); *Matter of Welfare of HGB*, 306 N.W.2d 821 (Minn. 1981) (a parent incarcerated outside the state was afforded procedural due process in a parental rights termination proceeding when the parent was represented by court-appointed counsel who appeared at the termination hearing); *In re Interest of J.S.*, 470 N.W.2d 48 (Iowa App. 1991) (procedural due process in a parental rights termination proceeding is satisfied when an incarcerated parent receives notice of the hearing for termination of parental rights, is represented by counsel, and has the opportunity to present depositional testimony for the termination hearing); *State in Interest of M.A.V. v. Vargas*, 736 P.2d 1031 (Utah App. 1987) (telephonic participation with assistance of counsel satisfies procedural due process in a proceeding to terminate parental rights); *Pignolet v. State*

Dept. of Pensions & Sec., 489 So. 2d 588 (Ala. Civ. App. 1986) (procedural due process was afforded a parent in a proceeding to terminate parental rights when the parent received notice of the hearing, was given the opportunity to be heard through a deposition, and was represented by counsel); *In re Darrow*, 32 Wash. App. 803, 649 P.2d 858 (1982) (due process was afforded a parent, incarcerated outside the forum state in which a parental rights termination hearing was held, when the parent received notice of the termination hearing, had the opportunity to appear by deposition, and was represented by counsel).

After our consideration of the foregoing decisions and the judicial reasoning expressed in those opinions, we conclude and hold that parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights.

If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. In deciding whether to allow a parent's attendance at a hearing to terminate parental rights, notwithstanding the parent's incarceration or other confinement, a court may consider the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.

In light of the foregoing, we now determine (1) whether the

trial court afforded W.V. procedural due process in the proceeding to terminate W.V.'s parental rights and (2) whether the court abused its discretion in disallowing W.V.'s physical attendance at the termination hearing.

W.V. received notice of the termination hearing and was represented by counsel throughout that proceeding. Also, before the termination hearing, W.V. was notified of the specific accusations against him, namely, his abandonment of L.V. and his continued or repeated neglect or refusal to provide parental care and protection for L.V. Regarding the termination hearing, W.V. was given the opportunity to recall and cross-examine witnesses for the State and to call witnesses on his behalf. Actually, as a result of the transcribed testimony, examined by W.V. apparently several months before the resumed termination hearing, W.V. was afforded an opportunity greater than that usually available to other litigants, who are required to cross-examine a witness contemporaneously with direct examination of the witness. W.V. telephonically participated in the resumed termination hearing. Through that telephonic communication, W.V. presented evidence on the accusations against him. In the final analysis, we conclude that W.V. was afforded procedural due process regarding the hearing to terminate his parental rights. However, we hasten to add that the procedure utilized by the county court surpassed the requirements of procedural due process applicable to W.V.'s case; hence, the procedure used in W.V.'s case should not be construed as *the* standard to determine procedural due process for one who has a constitutional right to be heard in a proceeding.

> [A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *Stewart v. Amigo's Restaurant, ante* p. 53, 480 N.W.2d 211 (1992); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d

56 (1988); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

In light of the factors which we have set out above concerning a parent's physical attendance at a parental rights termination hearing, notwithstanding the parent's incarceration or confinement in custody of a government, we cannot conclude that the county court abused its discretion in disallowing W.V.'s physical attendance at the termination hearing. Accordingly, W.V.'s first assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

Next, W.V. contends that the evidence is insufficient to sustain the trial court's finding that W.V.'s parental rights should be terminated.

Although parental rights may not be terminated solely for a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated. See, *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989); *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982).

> Incarceration of a parent, standing alone, does not furnish a ground for automatic termination of parental rights. . . . Incarceration, however, does not insulate an inmate from the termination of his parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent.

In re Randy Scott B., 511 A.2d 450, 455 (Me. 1986).

Several other courts have concluded that a parent's incarceration may be considered in determining whether parental rights should be terminated; for example, *In re Pawling*, 101 Wash. 2d 392, 679 P.2d 916 (1984) (parent's incarceration, conduct resulting in incarceration, and person against whom criminal act committed are factors to be considered in determining whether to terminate parental

rights); *In re Welfare of Staat*, 287 Minn. 501, 178 N.W.2d 709 (1970) (incarceration may combine with other factors, such as neglect and withholding of parental affection, to support termination of parental rights); *In re Interest M.L.K.*, 804 S.W.2d 398 (Mo. App. 1991) (parental rights may be terminated while a parent is incarcerated, when the parent fails to maintain a continuing relationship with the child); *Matter of Delores B.*, 141 A.D.2d 100, 533 N.Y.S.2d 706 (1988) (incarceration and conduct leading to incarceration may be considered for termination of parental rights); *In re Juvenile Appeal*, 2 Conn. App. 705, 483 A.2d 1101 (1984) (incarceration and conduct which resulted in incarceration may be considered in proceeding to terminate parental rights); *Matter of Adoption of Doe*, 99 N.M. 278, 657 P.2d 134 (1983) (incarceration coupled with other factors such as neglect, lack of affection, failure to maintain a relationship, and failure to provide financial support for a child may be considered concerning termination of parental rights); *In re Brannon*, 340 So. 2d 654 (La. App. 1977) (incarceration may be considered in relation to a parent's failure to provide for the child).

Section 43-292(1) provides that the court may terminate parental rights when the parent has "abandoned the juvenile for six months or more immediately prior to the filing of the petition" to terminate parental rights. " '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 the display of parental affection for the child." *In re Interest of J.L.M. et. al.*, 234 Neb. 381, 398, 451 N.W.2d 377, 388 (1990). Accord, *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990); *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 B.A.G.*, 235 Neb. at 735, 457 N.W.2d at 296. Accord *In re Interest of A.G.G., supra*.

This court, in *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989), considered a mother's incarceration for theft and stated, "[W]hile the fact of incarceration was

involuntary as far as [the mother] was concerned, her illegal activities leading to incarceration were voluntary on [her] part." 233 Neb. at 487, 446 N.W.2d at 16.

Several courts considering a parent's incarceration in relation to abandonment as a ground for terminating parental rights have concluded that parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights. In *In re Pawling*, 101 Wash. 2d 392, 679 P.2d 916 (1984), the Supreme Court of Washington reviewed a judgment that terminated a father's parental rights on the ground of abandonment as a result of the father's incarceration in the Washington State Penitentiary, where the father was serving a sentence of 37 years for burglary and rape. Noting that the applicable Washington statute defined "abandonment" as "a wilful substantial lack of regard for parental obligations," the Washington court stated:

> Obviously, incarceration hinders the ability of a parent to fulfill [parental] obligations. [Citation omitted.]
>
> Neither criminal conduct nor imprisonment alone necessarily justifies an order of permanent deprivation. [Citations omitted.] However, in termination proceedings we do consider "a parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated are all relevant to the issue of parental fitness and child welfare, as [is] the parent's conduct prior to imprisonment and during the period of incarceration." *In re Sego*, [82 Wash. 2d 736, 513 P.2d 831 (1973)].
>
> . . . .
>
> . . . [W]e affirm the trial court and hold appellant did in fact abandon [his child] "under circumstances showing a wilful substantial lack of regard for parental obligations." The trial court did not rely solely on the fact appellant is incarcerated. . . . Rather, all relevant circumstances were evaluated. The fact appellant intended and continued to commit criminal acts, which resulted in incarceration, became the equivalent of abandonment. Moreover, appellant failed to meet parental obligations. He has not

> expressed "love and affection", "personal concern", or "social and religious guidance" to [the child] for over 5 years. . . . He has supplied negligible financial support for his son and the prospects of his doing so in the future are questionable. The termination order is sustained by clear, cogent, and convincing evidence.

101 Wash. 2d at 397-98, 400, 679 P.2d at 919-21.

In *Hutson v. Haggard*, 475 S.W.2d 330 (Tex. 1971), the court considered the contention that a parent's imprisonment for 2 years should not be considered in reference to abandonment. Hutson, the appellant, was serving a sentence for 10 to 25 years for armed robbery. In concluding that abandonment had been proved, the court stated:

> It was appellant's voluntary acts which brought about his confinement in the penitentiary. There is no hint in our record that anyone other than appellant was in any degree responsible for appellant's inability to visit with his child or to contribute to her support. Only his course of criminal conduct has prevented his exercising parental authority or making any parental contribution to the child since she was nine months old. He will not even be eligible for a review of his sentence for another three years.
>
> . . . [W]e are of the opinion that appellant's wilful criminal acts and course of conduct has been such as implies a conscious disregard and indifference to [the child] in respect to his parental obligations that he as a parent owed to her. Thus, we reject the contention that imprisonment does not constitute voluntary abandonment . . . .

475 S.W.2d at 333. See, also, *Matter of Adoption of Doe*, 99 N.M. 278, 282, 657 P.2d 134, 138 (1983):

> Not every act of a parent which results in incarceration, nor every criminal act perpetrated between parents, can be deemed to be abandonment as a matter of law. Abandonment rests upon incarceration coupled with other factors such as parental neglect, lack of affection shown toward the child, failure to contact the child, financially support the child if able to do so, as well as disregard for the general welfare of the child.

See, also, *Matter of B. A. M.*, 290 N.W.2d 498 (S.D. 1980); *State in Interest of M.W.H. v. Aguilar*, 794 P.2d 27 (Utah App. 1990); *In Interest of B.A.F.*, 783 S.W.2d 932 (Mo. App. 1989); *Matter of I.R.*, 153 A.D.2d 559, 544 N.Y.S.2d 216 (1989); *Matter of C.P.*, 103 N.M. 617, 711 P.2d 894 (N.M. App. 1985); *Matter of Moyer*, 42 Or. App. 655, 601 P.2d 821 (1979).

Consequently, we now hold that parental incarceration may be considered in reference to abandonment as a basis for termination of parental rights under § 43-292(1).

Although W.V.'s incarceration is likely not a matter of his choice alone, since the people of Texas have expressed their voice in determining his location for some time to come, we cannot ignore the fact that the conduct which led to W.V.'s Texas incarceration was voluntary and intentional in the aggravated sexual assault of a 6-year-old victim. See Texas Penal Code Ann. § 22.021 (West 1989) (aggravated sexual assault). When W.V. committed the criminal act for which he is serving a lengthy sentence in Texas, his conduct had a bearing on the question of abandonment of L.V., whom he had left behind in Nebraska. W.V.'s incarceration in Texas furnishes no justification or excuse for W.V.'s failure in parental obligations to L.V. The same can be said about W.V.'s two prison terms served in Nebraska, because we view neither Nebraska sentence as justification or an excuse for W.V.'s absence from L.V.'s life and his failure to provide care, love, protection, and maintenance for his daughter. We point out the paltry child support, at the most $200, supplied by W.V. when he was outside prison. Moreover, after his discharge from prison in Nebraska and his surreptitious departure from the state, W.V. embarked on despicable conduct in Texas, an intentional act which evidenced disregard for the parent-child relationship and welfare of L.V. in Nebraska, not to mention the effect of his conduct on the welfare of the child victim in Texas. W.V.'s conscious decisions supply circumstances for the conclusion that he had abandoned L.V. Therefore, from our de novo review of the record, we find that the evidence clearly and convincingly establishes that W.V. abandoned L.V. for a period of at least 6 months before the State filed its petition to terminate his parental rights. See § 43-292(1).

Moreover, considering all aspects of W.V.'s intentional conduct in both Nebraska and Texas, we find, from our de novo review, that the evidence clearly and convincingly establishes that W.V. has substantially and continuously or repeatedly neglected L.V. and has refused to provide parental care and protection for her, all without any justifiable reason or excuse for such parental failure. See § 43-292(2).

Consequently, in our de novo review, we find, by evidence which is clear and convincing, that W.V.'s parental rights concerning L.V. must be terminated, as authorized by § 43-292(1) and (2) of the Nebraska Juvenile Code.

Finally, from our de novo review, we find, by clear and convincing evidence, that W.V.'s parental rights must be terminated in the best interests of L.V. Hence, W.V.'s second assignment of error is without merit.

Our independent conclusion, reached as a result of our de novo review, coincides with the findings by the trial court. For that reason, the judgment of the trial court is affirmed.

AFFIRMED.

DIXIE BERNHARDT, APPELLANT, V. COUNTY OF SCOTTS BLUFF, A POLITICAL SUBDIVISION, APPELLEE.

482 N.W.2d 262

Filed April 3, 1992. No. S-91-723.

1. **Workers' Compensation: Proof.** A claimant has the burden to prove by a preponderance of the evidence that the claimant's employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
2. **Workers' Compensation: Appeal and Error.** The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Appeal and Error.** An appellate court may not

substitute its judgment for that of the Workers' Compensation Court but, rather, may simply review the decision for error.

5. **Pleadings: Limitations of Actions.** When it is not apparent from the face of the petition that the action is barred, the affirmative defense of the statute of limitations must be raised in the answer.
6. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
7. **Workers' Compensation: Evidence: Expert Witnesses.** Expert medical testimony based upon "could," "may," or "possibly" lacks the definiteness required to support an award from the Workers' Compensation Court.
8. **Trial: Expert Witnesses.** Triers of fact are not required to take an expert's opinion as binding upon them.
9. _____: _____. A fact finder or trier of fact may accept or reject an opinion from an expert witness.
10. _____: _____. The sufficiency of an expert's opinion is judged in the context of the expert's entire statement.
11. _____: _____. The value of an opinion of an expert is no stronger than the facts upon which it is based.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

James R. Hancock, of Hancock & Denton, P.C., for appellee.

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

FAHRNBRUCH, J.

Dixie Bernhardt appeals a Workers' Compensation Court three-judge panel's finding that she failed to prove that an injury to her left wrist was caused by a November 23, 1985, work-related accident. The panel dismissed Bernhardt's claim. We affirm.

In summary, Bernhardt's assignments of error claim that the Workers' Compensation Court failed to find that the appellant sustained her burden of proving that there was a causal connection between the work-related injury and her current disability.

STANDARD OF REVIEW

An appellate court in reviewing an appeal from the Workers' Compensation Court is controlled by the following legal principles:

> [A] claimant has the burden to prove by a preponderance of the evidence that the claimant's employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. . . . The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.

Liberty v. Colonial Acres Nsg. Home, ante p. 189, 190, 481 N.W.2d 189, 191 (1992). "In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party." *Morton v. Hunt Transp., ante* p. 63, 64, 480 N.W.2d 217, 219 (1992). An appellate court "may not substitute its judgment for that of the compensation court but, rather, 'simply review[s] the decision for error.' " *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 263, 475 N.W.2d 513, 517 (1991).

BERNHARDT'S MEDICAL HISTORY

The record reveals that Bernhardt has a history of medical problems with her hands prior to November 23, 1985, the date of the incident for which she now claims disability.

The appellant was in a car accident in 1978, in which she fractured a bone in her right wrist and required surgery. As a direct result of the injuries suffered in the car accident, Bernhardt developed carpal tunnel syndrome in her right hand and underwent surgery for that condition in 1980. Added stress was placed on her left hand during recovery from the right hand surgery. Bernhardt then developed carpal tunnel syndrome in her left hand that required surgery, which was performed 6 weeks after the right hand surgery. Her right hand was weaker and slower than it had been prior to 1978. Bernhardt claims that she compensated for the weakness by using her left hand more than she ordinarily would have. In 1984, the appellant was stabbed in her right hand when she was working for the Game

and Parks Commission.

On November 16, 1985, 1 week prior to the date of the accident for which she claims disability, Bernhardt was working in the juvenile facility of the Scotts Bluff County Jail when she slammed a jail door shut, spraining her right index finger.

In 1988, Bernhardt suffered from tendinitis in her left wrist; distal radioulnar joint degenerative arthritis of her left wrist; and midcarpal instability, or ligamentous laxity between two rows of wrist bones, in her left hand. The appellant underwent two surgeries in 1989 to fuse the wrist bones for treatment of the midcarpal instability. While the fusion relieved most of her pain, she lost some flexibility of her left wrist, rendering her 30 percent permanently disabled in her left upper extremity.

BERNHARDT'S CURRENT CLAIM

On November 1, 1989, Bernhardt filed a petition with the Nebraska Workers' Compensation Court claiming that her disability was caused by a latent injury to her left wrist caused by an accident she had suffered 4 years earlier on November 23, 1985, while she was employed as a matron at the Scotts Bluff County Jail.

The date and circumstances of discovery of the latent injury were not pled.

Ostensibly, this petition is subject to being barred by the statute of limitations: a claim for compensation must be filed within 2 years from the date of the accident, Neb. Rev. Stat. § 48-137 (Reissue 1988), and this petition was filed after approximately 4 years. If an injury is deemed to be, at the outset, latent and progressive, the statute of limitations does not begin to run until the employee discovers or should have discovered she or he has a compensable disability. See *Cemer v. Huskoma Corp.*, 221 Neb. 175, 375 N.W.2d 620 (1985). The petition must allege some excuse tolling the operation and bar of the statute, see *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984), or be subject to demurrer, see *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989). Bernhardt's petition does not state facts sufficient to allege the date of discovery of a latent injury. When it is not apparent from the face of the petition that the action is

barred, the affirmative defense of statute of limitations must be raised in the answer. *Id.*

The defendant in Bernhardt's case has waived the statute of limitations as a defense by failing to demur to the petition or raise that affirmative defense in its answer. See *id.*

Bernhardt began her employment as a matron at the Scotts Bluff County Jail in early October 1985. Her duties required her to move about the various cellblocks within the facility. She had to pass through many sets of jail doors which were made of heavy steel bars. Bernhardt carried a set of keys to these doors which she kept behind her on a ring hooked to her belt.

On the morning of November 23, 1985, one of her tasks at the adult jail was to "pull mop buckets," or remove from the cells the cleaning supplies that had been placed there earlier so that the inmates could do their own cleaning. Bernhardt was assisted on November 23 by an inmate trustee. The trustee and the appellant were at the last cell tank when Bernhardt placed her left hand against the cell doorframe as she spoke to an inmate. The trustee slammed the door closed, catching Bernhardt's ring and middle fingers of her left hand in the mechanism of the door. The door automatically locked. Bernhardt was unable to free her fingers from the door until she reached around with her right hand and obtained the keys off her belt and unlocked the door.

The appellant's fingers began to swell and throb, her whole left hand began to discolor, and she was in great pain. She testified that her whole hand hurt. Bernhardt went to the West Nebraska General Hospital emergency room, where she was treated for contusions to the ends of her left hand's ring and middle fingers.

Bernhardt argues that this injury was the cause of her alleged latent disability for which she now seeks compensation. The record supports the Workers' Compensation Court's conclusion that no such causal connection was established.

Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

To support her position that there was a causal relationship between her accident of November 23, 1985, and her present disability, Bernhardt offered the opinions of three experts.

In reviewing expert medical testimony, we are reminded that expert medical testimony based upon "could," "may," or "possibly" lacks the definiteness required to support an award from the Workers' Compensation Court. *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992). Moreover, triers of fact are not required to take an expert's opinion as binding upon them, *Liberty v. Colonial Acres Nsg. Home, ante* p. 189, 481 N.W.2d 189 (1992), and a fact finder or trier of fact may accept or reject an opinion from an expert witness, *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992).

Shortly after the jail door incident of November 23, 1985, Bernhardt made two followup visits to her family doctor, Dr. Alan Johnson of Gering, Nebraska. On November 27, 1985, Bernhardt related to Dr. Johnson that she had gotten her "left hand slammed in the jail bars." His notes indicate that x rays revealed undisplaced minimal tuft fractures to the third and fourth fingers of the left hand. The appellant related that the ends of her fingers were "still fairly numb." On December 5, 1985, Dr. Johnson found Bernhardt's fingers were "getting better."

Neither the emergency room report nor any of Dr. Johnson's records reflect that the appellant complained of any pain in her left wrist. The emergency room report and Dr. Johnson's records reflect that Bernhardt complained only about the injury to her two fingers which had been involved in the jail door incident.

The next time Bernhardt complained of or sought treatment for her left hand was on February 3, 1987, approximately 14 months following the jail door incident. She made one visit to Dr. Johnson. His office notes show her complaint to be "[left] hand - fingers going numb- Sore" at bedtime or during the night. Dr. Johnson's notes indicate, "I think more related to old accident (car) [and history] of carpal tunnel release bilat[.] than finger smash of 11/85." Dr. Johnson told Bernhardt that it was either arthritis or recurring carpal tunnel syndrome. He ordered

medication and wanted to check Bernhardt in 3 weeks, possibly to make an orthopedic referral. There is nothing in the record to indicate that Bernhardt received any followup treatment, visited Dr. Johnson again, or was examined upon a referral until an additional 18 months had passed.

In the summer of 1988, after a series of referrals, Bernhardt was examined by a neurosurgeon, Dr. Ernest Beehler, who saw her only once, on July 15, 1988. This was almost 20 months after the jail door incident involving the two fingers of her left hand. She complained of pain in the left thumb, wrist, and forearm. The history the appellant related to Dr. Beehler was that "a jail door closed on the fingers of her left hand and since that time she's had pain at the base of the left thumb and into the wrist and . . . up the forearm." He considered these symptoms to be unusual and suggestive of carpal tunnel syndrome. He testified that he originally thought that these symptoms began right after the jail door injury. When he learned at his deposition that there had been a substantially longer period of time than he originally had thought between the jail door injury and the complaints for which he was examining her, Dr. Beehler said he would have difficulty correlating the two: "The impression I was getting was that this other came on immediately after the accident," so "if in truth there was a long time in there, then I would say it probably wasn't related to the finger incident."

Dr. Beehler referred Bernhardt to the Fort Collins Orthopaedic Associates in Colorado, where she was initially examined on July 25, 1988, by Dr. Dale Kaiser. He wrote that Bernhardt's symptoms indicated tendinitis or carpal tunnel syndrome. After two examinations, Dr. Kaiser referred the appellant to his partner, Dr. Kenneth Duncan.

On September 6, 1988, Bernhardt complained to Dr. Duncan of pain and tenderness in her left wrist joint, in the tendons on the thumb side of the wrist, and over one of the nerves in the wrist which go up to the elbow. Dr. Duncan was under the impression, because of the history Bernhardt had related, that her *hand and/or wrist* had been slammed in the jail door and that she had suffered wrist pain following the injury. He finally diagnosed distal radioulnar joint degenerative arthritis and

midcarpal instability, a ligamentous laxity between two rows of wrist bones. Bernhardt had had some symptoms of carpal tunnel syndrome during her treatment, but it was not a major complaint, and he did not specifically treat her for carpal tunnel syndrome.

Dr. Duncan performed a partial left wrist fusion in January 1989 and a complete wrist fusion in November 1989, both for midcarpal instability.

The only expert opinion supporting the appellant's assertion that the jail door incident of November 23, 1985, caused her disability is that of Dr. Duncan. Under all the circumstances, a fact finder might well find that Dr. Duncan's opinion was less than sufficient to support Bernhardt's claim regarding the cause of her disability and that the doctor's opinion was based upon incorrect and incomplete information.

Dr. Duncan initially testified in regard to the medical cause of Bernhardt's problem that "[b]y history, it appears to be her hand getting caught in the jail door." He stated that the condition directly and medically followed the injury suffered in the jail door incident. Upon cross-examination, Dr. Duncan admitted that he had been under the assumption that Bernhardt had had an actual injury to the hand and the wrist in the jail door incident. He did not know that Dr. Johnson had been of the opinion that the condition was not caused by the jail door incident. Apparently, Dr. Duncan saw Dr. Johnson's office notes for the first time at the taking of Dr. Duncan's deposition. Dr. Duncan mistakenly thought that the office visit of February 3, 1987, was approximately 10 weeks following the accident when in reality it was approximately 14 months. However, even based upon the assumption that only 10 weeks had lapsed between the accident and the examination by Dr. Johnson, Dr. Duncan stated, "The information from her family physician that shows there were no wrist symptoms during the 10 weeks following the finger injury makes me question whether or not there is a direct relationship between that injury and the wrist symptoms that I saw her for." Dr. Duncan lacked certainty as to whether her symptoms were due to the jail door incident. He wondered why the "first time we see wrist complaints is two years [actually 14 months] later," when his understanding of the

history was that she had wrist pain from the time of the jail door injury.

Dr. Duncan stated that appellant's midcarpal instability could be latent. Upon redirect examination, Dr. Duncan again opined that based upon the history he had obtained, which was that appellant had suffered a "crush-type injury to the hand and wrist," the injury Bernhardt received in the jail door incident caused the appellant's current condition.

When asked to explain how the wrist could be injured when the fingers were caught in the door, Dr. Duncan said, "If the fingers are trapped and you wind up pulling on them, trying to get them out, you certainly can stretch the ligaments in the wrist, causing inflammation in that area, or if you pull hard enough, you certainly could actually tear the ligaments." It is important to note that nowhere in any medical reports, or in the appellant's written explanation of the incident prepared for her employer shortly after the incident, is there any evidence that appellant pulled at her hand to free it from the door. The record does not reflect that Dr. Duncan had any such history when he rendered his opinion at his deposition, which was taken following a single-judge hearing at which the appellant testified. It appears that the first evidence relating to Bernhardt pulling her hand free from the jail door is the appellant's own testimony before the three-judge panel of the Workers' Compensation Court. That took place approximately 1 week after Dr. Duncan's deposition was taken.

The sufficiency of the expert's opinion is judged in the context of the expert's entire statement. *Morton v. Hunt Transp., ante* p. 63, 480 N.W.2d 217 (1992). Moreover, the value of an opinion of an expert is no stronger than the facts upon which it is based. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981); *Liberty v. Colonial Acres Nsg. Home, ante* p. 189, 481 N.W.2d 189 (1992). When the entire evidential record is considered, it cannot be said that the Workers' Compensation Court was clearly wrong in rejecting Dr. Duncan's conclusions regarding causation of Bernhardt's current disability.

The Workers' Compensation Court, the trier of fact herein, concluded that there was insufficient evidence to prove a

compensable causal connection between Bernhardt's work and the condition for which she requests compensation. After reviewing the record, we cannot say that the compensation court was clearly wrong.

AFFIRMED.

GORDON CARLSON, APPELLANT, V. DICK ZELLAHA, MAYOR OF THE CITY OF ALLIANCE, AND THE CITY OF ALLIANCE, APPELLEES, AND EMPLOYERS MUTUAL CASUALTY COMPANY, GARNISHEE-APPELLEE.

482 N.W.2d 281

Filed April 10, 1992. No. S-89-416.

1. **Appeal and Error.** This court will not consider errors which are assigned but not argued.
2. **Judgments: Collateral Attack: Fraud.** A consent judgment is subject to collateral attack when the facts demonstrate that the judgment or settlement was entered into fraudulently, collusively, or in bad faith.
3. **Fraud: Words and Phrases.** Collusion implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.

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

Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

Gary D. Denton, of Hancock & Denton, P.C., for garnishee-appellee.

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

BOSLAUGH, J.

The plaintiff, Gordon Carlson, has appealed from the order of the district court dismissing his application to determine the liability of the garnishee, Employers Mutual Casualty Company.

The plaintiff, Carlson, sued Dick Zellaha, in his official

capacity as mayor of the City of Alliance, Nebraska, and the City of Alliance to recover damages alleged to have been caused by the defendant Zellaha in publishing false and defamatory statements about Carlson. The garnishee insurance company had issued several liability policies to the city which Zellaha claimed provided coverage for the claim of Carlson. The insurance company declined to defend the action on the ground that Zellaha was not acting within the scope of his employment or official capacity at the time the alleged statements were made.

On March 18, 1988, the plaintiff and Zellaha executed a written "Consent to Judgment," which provided that Zellaha consented to the plaintiff's taking judgment against Zellaha for $100,000 and costs in this action and another case in which Carlson had sued Zellaha in his personal capacity. The agreement further provided that the judgment would not be a lien upon real estate owned by Zellaha and would not be the basis of garnishment or execution against Zellaha except to the extent to which he might be covered by insurance. The agreement between the plaintiff and Zellaha further provided that Zellaha would be paid $575 from the first $4,000 that the plaintiff collected from his judgment against Zellaha.

On March 30, 1988, the plaintiff recovered judgment against Zellaha in this case in the amount of $100,000 and costs as provided in the "Consent to Judgment."

On May 20, 1988, the plaintiff filed an affidavit for garnishment alleging the insurance company had property of and was indebted to Zellaha as the judgment debtor.

On May 31, 1988, the garnishee filed its answers to interrogatories propounded by the plaintiff, in which the garnishee denied that it was indebted to the judgment debtor Zellaha or was liable to the plaintiff under any policy of insurance.

On June 6, 1988, the plaintiff filed his application to determine the liability of the garnishee.

On June 24, 1988, the garnishee filed its reply denying any liability to the judgment debtor Zellaha.

The matter was heard on September 21, 1988. On December 5, 1988, the trial court found generally in favor of the

garnishee, finding that the garnishee had no duty to defend the action brought by the plaintiff against Zellaha and that the consent judgment against Zellaha was the product of collusion. The garnishment proceeding was dismissed, with costs taxed to the plaintiff.

On December 8, 1988, the plaintiff filed a motion for new trial. On December 30, 1988, the trial court filed its order sustaining the motion with respect to the issue of whether Zellaha was acting in his official capacity as mayor at the time of the alleged wrongful conduct. There was a further hearing on February 1, 1989, and on March 13, 1989, the trial court found that its finding and order dated December 5, 1988, was correct, overruled the plaintiff's motion for new trial, and again dismissed the proceeding, with costs taxed to the plaintiff. The plaintiff again filed a motion for new trial, which was overruled on April 11, 1989. The plaintiff has now appealed to this court.

The plaintiff assigns as error the district court's finding that an issue for determination was whether Zellaha was acting in his official capacity; the district court's finding that Zellaha was not acting in his official capacity as mayor; the district court's finding that the defendant garnishee had no duty to defend Zellaha in the action filed by the plaintiff; the district court's considering whether there was collusion between the plaintiff and the mayor, Zellaha; the district court's finding that there was collusion between the plaintiff and Zellaha; and the district court's failure to find that the plaintiff was entitled, as a matter of law, to judgment for $100,000 from the garnishee, pursuant to the consent to judgment.

While the plaintiff assigns as error the district court's finding that Zellaha was not acting in his official capacity, the plaintiff does not argue that the evidence presented does not support the district court's conclusion that Zellaha was not acting in his official capacity. Accordingly, we do not consider the plaintiff's assignment of error in that regard because this court will not consider errors which are assigned but not argued. *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991).

Relying on *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964), the plaintiff asserts that whether Zellaha was acting in his official capacity was not a proper issue

for consideration for the district court because that issue was resolved by the consent judgment and may not be relitigated.

A consent judgment is subject to collateral attack when the facts demonstrate that the judgment or settlement was entered into fraudulently, collusively, or in bad faith. *Metcalf, supra.* See, also, *Wolff v. Royal Ins. Co. of America*, 472 N.W.2d 233 (S.D. 1991).

Also, the plaintiff argues that the district court erred in considering whether there was collusion between Zellaha and the plaintiff because the garnishee did not plead collusion as a defense to the garnishment action.

In the garnishee's answer to the plaintiff's interrogatories in aid of garnishment, the garnishee alleged: "The Judgment now claimed by Gordon Carlson was procured by the fraud of Gordon Carlson and Dick Zellaha contriving to present a claim to the City of Alliance and its Insurer, Employers Mutual Companies."

The plaintiff contends this allegation is insufficient to allow the district court to consider whether the consent judgment was obtained by collusion because the garnishee did not use the term "collusion" in its pleading and because the garnishee did not allege the elements for a fraud and deceit cause of action.

In *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987), we defined collusion as a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.

Collusion is defined in Black's Law Dictionary 264 (6th ed. 1990) as

> [a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.

See, also, *Point Pleasant Canoe Rental v. Tinicum Tp.*, 110 F.R.D. 166 (E.D. Pa. 1986); *Dickerman v. Northern Trust Company*, 176 U.S. 181, 20 S. Ct. 311, 44 L. Ed. 423 (1900).

Fraud is defined in Black's Law Dictionary 660 (6th

ed. 1990) as

> [a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. . . . "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc.

See, also, *Johnson v. McDonald*, 170 Okla. 117, 39 P.2d 150 (1934).

The garnishee was not required to allege the elements for a cause of action in fraud and deceit. The garnishee was alleging only that the consent judgment had been obtained by fraud, or in other words, by collusion. Accordingly, collusion was an issue to be considered.

The plaintiff's claim that the district court erred in finding the consent judgment was obtained by collusion is also without merit.

The district court's finding that the consent judgment was procured by collusion is supported by the following evidence: (1) The amount of the judgment was unreasonable given the improbability of the plaintiff's success against Zellaha in his individual capacity and the questionable likelihood of insurance coverage for the plaintiff's claim against Zellaha in his official capacity, see *Wolff v. Royal Ins. Co. of America, supra* (one ground for concluding that a consent judgment between an injured party and the insured was obtained through collusion was that the amount agreed upon was unreasonable in view of a slight probability of the injured party's success against the insured); (2) Zellaha testified that he did not know how the amount was determined and that he thought the amount was "ridiculous"; (3) Zellaha's meager annual income motivated the plaintiff to suggest a consent judgment; and (4) Zellaha was to be compensated $575 out of the first $4,000 collected in exchange for consenting to the judgment.

Since the evidence supports the finding that the consent judgment was obtained by collusion, it is unnecessary to consider the other assignments of error.

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

AFFIRMED.

WHITE, J., concurring.

A demurrer by the City of Alliance addressed to the appellant's petition was sustained by the trial court. The petition was dismissed without prejudice as to the City of Alliance by the plaintiff. As the city was no longer a party to the suit, any judgment against Mayor Zellaha was not binding on it either factually or legally.

While Zellaha could not question the court's finding that he was acting officially as mayor, the city was under no such constraints, nor was its insurer. And as the dismissal was without prejudice, the issue was finally properly presented for the first time to the trial court, which held against the appellant. There is sufficient evidence in the record to support that finding. Therefore, the case is properly affirmed.

I do not, however, agree that the judgment was produced by collusion or fraud. The Employers Mutual Casualty Company voluntarily declined to defend Zellaha and the city. Zellaha was entitled to take such steps as he deemed convenient, including the entry of a consent judgment to protect himself from possible financial ruin. Any holding to the contrary would permit the insurer to deny coverage or representation, and thus to deny to the insured any protective remedy, and give the insurer the right to try the issue of the validity of the judgment. The law does not allow this result. See *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

LAWRENCE W. DOWD ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF BOONE COUNTY, NEBRASKA, ET AL., APPELLEES.

482 N.W.2d 583

Filed April 10, 1992. No. S-89-424.

1. **Taxation: Valuation: Equity: Appeal and Error.** An appeal from action by a county board of equalization is an equity action tried de novo in the district court.

2. _____: _____: _____: _____. On appeal from the district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Taxation: Valuation: Proof: Appeal and Error.** The burden is on the property owner to prove that the action of the board of equalization, in fixing or determining the value of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation.
4. **Taxation: Valuation.** Real property shall be subject to taxation at its actual value.
5. _____: _____. The section of the statutes which specifies factors for determining actual value of real estate for tax purposes does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of the real estate for tax purposes.
6. _____: _____. In tax valuation cases actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
7. **Taxation: Valuation: Words and Phrases.** "Actual value" has been held many times to mean exactly the same as "market value" or "fair market value."
8. **Taxation: Valuation: Evidence: Appeal and Error.** Where the evidence shows the assessed value of property has been determined by a formula in substantial compliance with Neb. Rev. Stat. § 77-112 (Reissue 1986), which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation.
9. **Taxation: Valuation.** Nothing requires a county assessor or county board to use all the factors set forth in Neb. Rev. Stat. § 77-112 (Reissue 1986) to arrive at a proper valuation. In the final analysis the test is not what factors the assessor considered or failed to consider, but whether the property in question was valued for tax purposes at its actual value.
10. **Taxation: Valuation: Appeal and Error.** The district court shall affirm the action taken by the board of equalization unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary.
11. **Taxation: Valuation: Proof: Appeal and Error.** In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his or her property has been arbitrarily or unlawfully fixed by the board in an amount greater than its actual value.
12. **Taxation: Valuation: Evidence.** The purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Reversed and remanded with directions.

Duane J. Dowd for appellants.

Larry D. Bird, Boone County Attorney, for appellees.

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

HASTINGS, C.J.

Plaintiffs have appealed from the order of the district court which affirmed the action of the board of equalization of Boone County (Board) in denying plaintiffs' protest of the valuation of their hog confinement unit located on a fraction of the northeast quarter of Section 32, Township 20 North, Range 6 West of the 6th P.M., in Boone County, Nebraska, referred to as Parcel 282. This case is a consolidation of two separate appeals from the Board involving the tax years 1987 and 1988. The plaintiffs assign as error that the assessed valuation of the property which was approved by the Board and affirmed by the district court was far in excess of its actual value.

An appeal from action by a county board of equalization is an equity action tried de novo in the district court. *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989). On appeal from the district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. *First Nat. Bank, supra.* However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *First Nat. Bank, supra.*

On appeal, a court presumes the board of equalization faithfully performed its duties in making an assessment of value and acted upon sufficient competent evidence to justify its action. The presumption remains until there is competent evidence to the contrary. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989). From that point on, the question of unreasonableness of valuation fixed by the board of equalization becomes one of fact based upon the evidence, unaided by the presumption. *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201

(1988).

The presumption amounts to a burden on the property owner to prove that the action of the board of equalization, in fixing or determining the value of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *First Nat. Bank, supra.*

The property involved in these proceedings is a hog confinement unit located on 13 acres of land and consisting of a garage, office, gestation barn, farrowing barn including farrowing crates, nursery shed, hopper units, loading chute, concrete walkways, and a metal canopy. On December 27, 1985, 10 acres of land were purchased by the plaintiffs as a part of the sale of the entire operating confinement unit, and the additional 3 acres were purchased on January 20, 1986. According to the testimony of Lawrence W. Dowd, one of the plaintiffs and the farm manager of the unit, referring to the 10-acre sale, the land and improvements were purchased for $75,000 and the existing herd and personal property for $150,000.

The testimony of Dowd was corroborated by exhibit 7, a bill of sale which listed a purchase price of $150,000 for 474 sows, 21 boars, 1,500 pigs, a 460 International tractor, and various other tools, equipment, and supplies, and a warranty deed, exhibit 5, covering the 10 acres, listing a consideration of $75,000. Both documents are dated December 27, 1985. It was stipulated by the parties that the transactions involving the sale of the unit, both the real estate and the personal property, were arm's-length transactions. Exhibit 6 is a warranty deed dated January 20, 1986, conveying the adjoining 3 acres to the plaintiffs for a consideration of $5,000.

According to the property card record for Parcel 282, exhibit 1, the improvements were valued in 1985 at $190,505, and the same valuation was carried through 1987 and 1988. The total valuation for Parcel 282, including the underlying land, was set at $197,165 for both 1987 and 1988. It is these valuations of which the plaintiffs complain.

John Fritz, a qualified real estate appraiser, testified for the Board. He stated that he inspected the premises and used the cost approach to evaluate the property. Fritz explained that he

could not use the income and market approach because the state could not provide him with enough income and market data.

Fritz went on to testify that he determined the new cost price of the various buildings comprising the hog confinement unit by using the Marshall-Swift manual and the Nebraska Department of Revenue supplement. This involves inspecting the various buildings, making measurements, and applying a square foot cost factor. Subsequently, he used a measurement for depreciation, added a current cost multiplier for depreciation, and added a current cost multiplier and local multiplier to ascertain the present cost replacement price. Other than testifying that in 1986 he had valued the "real estate at $190,505," which obviously he meant to identify as the improvements, and that "[t]he land value was at in '86 $6,660 [sic], for total valuation of the parcel of $197,165," Fritz never mentioned another figure. He concluded his testimony by stating that he was of the opinion that the property was valued equally and fairly with the other property in the county and that "[t]he actual value I believe is the value that we have on the property at the present time." He added that the actual value would apply to both the 1987 assessment year and the 1988 assessment year for the hog confinement unit.

When asked on cross-examination why he had not used the December 1985 sale price in calculating the value of the property, Fritz answered that the sale occurred after the initial evaluation and involved a considerable amount of livestock. He looked at the agreement which included all the personal property and livestock (exhibit 7, the bill of sale, which set forth a sale figure of $150,000) and acknowledged that the livestock was the majority of the value.

Frances Berlin, the Boone County assessor, also testified in behalf of the Board. She was not asked if nor did she testify that she had ever inspected Parcel 282. She did state that she compiles information with regard to property sales in Boone County. She compares the sale prices of the property with the value assessed. The tract of land in this case, she said, would be classified as commercial and industrial. She also admitted that there were not enough commercial and industrial property sales

in Boone County in 1987 to make a good ratio study. However, she said, there were sufficient sales in 1988 to determine a sales-assessment ratio of 92.67. Berlin did not offer an opinion as to the value of Parcel 282.

Dowd testified in court that the acquisition of the property in December 1985 included real estate and personal property. He stated that a separate price was negotiated for the personal property and the herd. Of the total sale price of the hog confinement unit as a going concern, $75,000 was paid and was allocated to the real estate and improvements, and $150,000 was paid for the herd and miscellaneous personal property. Dowd stated that two separate offers in dollars for those amounts were made and were accepted by the sellers. The record contains two deeds. One deed conveyed the original 10-acre tract and improvements for a consideration of $75,000, and a second deed conveying the adjoining 3-acre tract recited a consideration of $5,000. The bill of sale, exhibit 7, as previously stated, enumerated the various animals making up the herd, as well as other personal property, and revealed a purchase price of $150,000. Both parties agree that the transaction was at arm's length.

Dowd was permitted to testify over the objection of the Board that plaintiffs had purchased a similar hog confinement unit in Richardson County in 1986. The only difference was that the Richardson County unit has a 25-percent larger nursery. The price paid for the real estate in Richardson County, which contains approximately 9.2 acres (see exhibit 8, 500 by 800 feet equals 400,000 square feet, which when divided by the area of an acre, 43,560 square feet, equals 9.18 acres), was $79,500. This unit also contained a herd of pigs that was separately purchased. The bill of sale for the personal property, exhibit 9, recited a consideration of $197,200, which included 509 sows for $152,700, 22 boars for $11,000, and 1,275 feeder pigs for $31,875. This livestock, together with various items of personal property totaling $1,625, made up the purchase price of $197,200.

Admittedly, the value of real estate in Richardson County generally would have no relationship to that located in Boone County. However, the evidence was relevant to show how the

total value of the total purchase price and presumably the value of the hog confinement unit purchased in Boone County could reasonably be divided between the value of the real estate and the value of the herd.

Bailey Griffith, a consultant in hog farm management, testified on behalf of the plaintiffs. Among other things, after having consulted market reports for the time applicable to the assessment date in Boone County, he determined that the fair market value for sows was $230, for boars, $550, and for feeder pigs, $15. When those values are applied to the hogs included in the bill of sale, exhibit 7, for the personal property included in the sale of the Boone County unit, 474 sows, 21 boars, and 1,500 feeder pigs would result in a value of $143,070 of the total consideration of $150,000 set forth in the bill of sale, including the hogs, a tractor, an electrical generator, a pump, handtools, and supplies.

Although Griffith conceded that he was a hog businessman and not a real estate expert, he gave as his opinion that the sum of $150,000 paid for the personal property listed as covering the hog confinement unit, including the herd, was its fair and reasonable market value.

It was the conclusion of the district court that evidence of a sale by itself indicating a price difference from the value for tax purposes is not sufficient competent evidence to overcome the presumption that a board of equalization performs its official duties faithfully and acts upon sufficient competent evidence in making its assessment. In arriving at this conclusion, the trial court noted that both sales, i.e., the sale of the real estate and the sale of the herd, "were dependent upon each other and in fact they were one sale which the buyer and seller had attempted to allocate part to the real estate and part to the non-real estate components." The court concluded that although the evidence did show an arm's-length transaction as to the total sale, it did not as to the separate components, and that the plaintiffs had not met their burden of proof of establishing that the tax assessment was erroneous. The court dismissed the plaintiffs' case.

Real property shall be subject to taxation at its actual value. Neb. Rev. Stat. § 77-112 (Reissue 1986); *Greenwood Ranch v.*

Morrill Cty. Bd. of Equal., 232 Neb. 114, 439 N.W.2d 760 (1989). Section 77-112 provided in part:

> [A]ctual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.

This section, which specifies factors for determining actual value of real estate for tax purposes, does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of the real estate for tax purposes. *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989); *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988).

In tax valuation cases actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. *First Nat. Bank, supra.*

"Actual value" has been held many times to mean exactly the same as "market value" or "fair market value." *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

Where the evidence shows the assessed value of property has been determined by a formula in substantial compliance with § 77-112, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to the valuation. *First Nat. Bank, supra*; *Greenwood Ranch, supra.*

In *Greenwood Ranch, supra*, the parties agreed on the three recognized methods to determine the actual value as set forth in § 77-112. Since there was no earning capacity and since suitable comparable sales were not available, the only appraisal method that could be used in that case was the replacement cost less depreciation. The assessor in *Greenwood Ranch* used the Marshall-Swift manual and considered replacement cost,

physical depreciation, relative location, functional depreciation, and the local market. The taxpayer did not dispute the method which the assessor used, but contested the amount of depreciation to be deducted from the replacement cost. Although the dispute involved a difference of opinion as to valuation only, the court concluded that the taxpayer failed to show that "the method used by the assessor and the Board was unauthorized by or contrary to the constitutional and statutory provisions governing taxation." *Greenwood Ranch*, 232 Neb. at 118-19, 439 N.W.2d at 763.

As we have seen, nothing requires a county assessor or county board to use all the factors set forth in § 77-112 to arrive at a proper valuation. In the final analysis the test is not what factors the assessor considered or failed to consider, but whether the property in question was valued for tax purposes at its actual value. *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983).

However, the plaintiffs argue that the mathematical formulas based on manuals used by the assessor should be adjusted when the assessment is disproportionate with regard to the price sold in an arm's-length sale. The plaintiffs base their argument on *Potts v. Board of Equalization*, 213 Neb. 37, 328 N.W.2d 175 (1982).

Neb. Rev. Stat. § 77-1511 (Reissue 1990) provides: "The [district] court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary. . . ."

In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his or her property has been arbitrarily or unlawfully fixed by the board in an amount greater than its actual value. *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982).

Potts v. Board of Equalization, supra, is of particular significance in deciding this case. There, the taxpayers had bought residential real estate for the price of $150,000. The sale was an arm's-length transaction. In the same year, the State Board of Equalization and Assessment increased the valuation of urban, commercial, and industrial real property by 29

percent. The assessor valued the Potts residence for the year 1980 at $129,205, which was then increased by 29 percent to $166,670. The board of equalization subsequently reduced the value to $165,590.

The taxpayers appealed, and the district court set the actual value of the property at $150,000. The board of equalization appealed the decision to the Supreme Court. The taxpayers cross-appealed, arguing that the value should have been assessed at $125,055. The court noted that none of the witnesses testified as to the actual value at trial and that no appraisers, except for the county assessor, testified. However, documentary evidence such as the sale agreement was introduced into evidence. Potts also introduced into evidence two exhibits in which he compared the value of his property with other real estate and on that basis concluded that the appraisal of the assessor was erroneous. The county assessor in *Potts* testified that he had used the Nebraska Construction Cost Manual, which he was required to use as a guide in assessing real estate. He also considered depreciation, location, and market value, and he compared the real estate with other properties. The taxpayers argued that no consideration was given to functional or economic obsolescence, which should have been done under the Nebraska Construction Cost Manual. The assessor was aware that the property was purchased for $150,000, but did not use this information in his assessment because he found that the owners had received a bargain. This court held:

> It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes . . . .
>
> . . . " '[O]ther matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. . . .' "

Potts, 213 Neb. at 46-47, 328 N.W.2d at 180. However, the court went on to adopt the dissent of Justice Boslaugh in *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb.

415, 138 N.W.2d 641 (1965), which held:

> "Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under the compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration."

Potts, 213 Neb. at 47-48, 328 N.W.2d at 181.

This court then pointed out that its review was de novo as an equitable proceeding and, considering the evidence anew, concluded that the actual value for tax purposes of the property was $150,000, "and not the amounts contended for by the respective parties to this appeal and cross-appeal . . . ." *Id.* at 48, 328 N.W.2d at 181.

We realize that a taxpayer may not control the valuation of his or her property for tax purposes by assigning an arbitrary sale price to the real estate and to the personal property included in a purchase, nor is the actual sale price conclusive on the question of valuation. Nevertheless, in this case it is difficult to ignore the portion of the total sale price represented by the value of a herd of hogs, the market price of which was as realistic and specific as the quotations for stocks, bonds, or commodities listed on recognized exchanges. For that reason we have concluded that the valuation placed on plaintiffs' property by the assessor and the Board was unreasonable and arbitrary, and accordingly, we have subtracted the value of the herd, $143,070, from the combined total sale price of $230,000, and find that the actual value of Parcel 282 for tax purposes for the years in question is the sum of $86,930. The county assessor of Boone County is directed to correct her records accordingly.

The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WESTERN SECURITY BANK, FORMERLY KNOWN AS AMES BANK, A NEBRASKA CORPORATION, APPELLEE, V. TERRY A. LAMBERT PLUMBING, INC., APPELLANT.

482 N.W.2d 278

Filed April 10, 1992. No. S-89-739.

1. **Summary Judgment: Appeal and Error.** In reviewing an order entered pursuant to a motion for summary judgment, the appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
2. **Summary Judgment: Proof.** A 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 a 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.
3. **Judgments: Res Judicata.** Any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same.

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

Jeffrey A. Silver for appellant.

Patrick M. Heng, of Raynor, Rensch, Heng & Wills, for appellee.

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

GRANT, J.

Plaintiff-appellee, Western Security Bank, filed a petition in replevin against defendant-appellant, Terry A. Lambert Plumbing, Inc. The bank sought recovery of certain personal property owned by defendant and described in security agreements between the bank and defendant. The security agreements secured two promissory notes executed by defendant to the bank. The bank alleged that defendant had

defaulted on the notes and that under the terms of the security agreements, the bank was entitled to possession of the collateral.

In its answer, defendant admitted the execution of the promissory notes and the security agreements, but denied that it was in default. Defendant also filed a counterclaim against the bank. The bank demurred to the counterclaim.

A hearing was held on the bank's demurrer on February 14, 1989. On March 16, 1989, the court ordered that the bank's "demurrer be and hereby is sustained as to all counts in defendant's counterclaim."

On April 20, 1989, the bank filed a motion for summary judgment on its petition. A hearing was held on May 11, 1989, on the motion. On June 6, 1989, the court sustained the motion and ordered the property delivered to the bank. On July 3, 1989, defendant filed its notice of appeal to this court. Defendant assigns two errors, alleging that the trial court erred in (1) "sustaining Plaintiff's Motion for Summary Judgment" and (2) "sustaining Plaintiff's Demurrer to Defendant's Counterclaim and in failing to allow Defendant to amend said Counterclaim." We affirm the trial court's action in sustaining the motion for summary judgment, and we dismiss defendant's appeal as to the second assignment of error.

With regard to the alleged error of the trial court in sustaining the bank's demurrer, the second assignment of error, we note that at oral argument it was pointed out that the issues between the parties on defendant's counterclaim had been disposed of by a decision in the federal court in an action affirmed on appeal June 4, 1991, *Terry A. Lambert Plumbing v. Western Sec. Bank*, 934 F.2d 976 (8th Cir. 1991). Counsel for defendant withdrew defendant's appeal on the issue presented in its second assignment of error, and we therefore need not consider whether the appeal on that issue concerns a final order, the timeliness of the appeal, or other possible dispositive questions. Defendant's appeal will not be considered insofar as the issues raised in its second assignment of error.

Regarding the issues raised as to the granting of the bank's motion for summary judgment, the record shows the following: In connection with its motion, the bank submitted

an affidavit, dated April 20, 1989, of a senior vice president of the bank. In this affidavit, the affiant stated that defendant had signed two promissory notes dated February 26, 1988; that no payments had been made on said notes from July 26, 1988, up to the date of the affidavit; and that defendant had filed bankruptcy on August 25, 1988, but that the bankruptcy court had dismissed the petition on December 20, 1988, at defendant's request. Each of the notes provided that the bank could declare the entire sum due if defendant failed to make agreed payments on the note or if defendant declared bankruptcy.

In reviewing an order entered pursuant to a motion for summary judgment, the appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

> A 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 a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

Id. at 976, 479 N.W.2d at 807.

At the hearing on the motion, defendant introduced the affidavit of defendant's president. This affidavit said, in general, that if the bank had performed its obligation to defendant, "no default would have occurred." The affidavit did not deny the bank's allegations that defendant was in default for not making agreed payments on the loans and filing a bankruptcy petition, but made allegations which allegedly would excuse defendant's defaults.

Defendant's position was summarized in paragraph 23 of the bank president's affidavit, which stated:

> If Western had fulfilled its contractual obligations under

> its Credit Agreement with Lambert, not breached its implied covenant of good faith and fair dealing, not been negligent, not injured Lambert's business reputation, or breached its fiduciary duty, Lambert would have been able to remain in business, make its scheduled loan payments on Exhibit "D" and no default would have occurred.

The issues suggested in that paragraph, and in the entire affidavit, were disposed of in the federal court action referred to above, filed by defendant in the Nebraska state court and removed to federal court. In the federal case, defendant's suit against the bank "sought monetary damages for racketeering ('RICO Claim') under 18 U.S.C. § 1961 (1988), breach of contract, breach of implied covenant of good faith and fair dealing, injury to business reputation, negligence, and breach of fiduciary duty." *Terry A. Lambert Plumbing*, 934 F.2d at 979. The federal court of appeals in that case affirmed a judgment entered in favor of the bank on the bank's motion for summary judgment. The underlying issues in this case are identical with those in the federal court case and have been decided in favor of the bank and against defendant. The decision in the federal case between these same two parties is res judicata as to those issues. See, *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

We said in *State v. Gerdes*, 233 Neb. 528, 531, 446 N.W.2d 224, 227 (1989), quoting from *Security State Bank v. Gugelman*, 230 Neb. 842, 434 N.W.2d 290 (1989), that

> "[a]ny right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of the action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by the judgment and may not be litigated again between the parties, whether the claim, demand, purpose, or subject matter of the suits would or would not be the same."

In considering the motion for summary judgment, the trial court had before it undisputed allegations that defendant was in default. In this court, it is clear that the defenses to the motion

sought to be raised by defendant have been determined adversely to defendant in another case between the two parties.

In that state of the record, the district court for Douglas County did not err in sustaining the bank's motion for summary judgment and entering judgment for the bank.

AFFIRMED.

DAVID DISHMAN AND BARBARA DISHMAN, APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE.

482 N.W.2d 580

Filed April 10, 1992. No. S-89-850.

1. **Constitutional Law: Property: Damages.** Neb. Const. art. I, § 21, which prohibits the state from taking or damaging property without just compensation, is self-executing.
2. **Constitutional Law: Property: Damages: Actions.** A cause of action under the provisions of Neb. Const. art. I, § 21, can be stated without specifically mentioning the provision; a litigant need only allege and prove facts constituting a cause of action under the constitutional language.
3. **Constitutional Law: Property: Damages: Political Subdivisions Tort Claims Act: Actions.** That a landowner could have sued under the Political Subdivisions Tort Claims Act does not prevent the landowner from suing under Neb. Const. art. I, § 21.
4. **Constitutional Law: Property: Damages: Eminent Domain: Political Subdivisions Tort Claims Act: Actions.** When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Remanded with direction.

Claude E. Berreckman, of Berreckman & Berreckman, P.C., for appellants.

Gary L. Scritsmier and Lori J. Siewert, of Kelley, Scritsmier & Byrne, P.C., for appellee.

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

CAPORALE, J.

The appellants, David and Barbara Dishman, husband and wife, brought an action seeking to enjoin the appellee, Nebraska Public Power District, from flooding the basement of their home in the future and to recover damages for the flooding it had caused in the past. The trial court dismissed the action in its entirety. The Dishmans complain only of the trial court's failure to award them damages, asserting, in summary, that the court erred in concluding they had not complied with the notice requirement of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-905 (Reissue 1991). For the reasons detailed hereinafter, we remand for further proceedings consistent with this opinion.

While the parties focus on the notice requirement of the tort claims act, we do not concern ourselves with that issue, for the Dishmans' petition states an action for inverse condemnation, which is not subject to the act.

The applicable law is found in *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985). Therein, a landowner brought an action seeking to enjoin Nance County and others from flooding his land in the future and to recover damages from the county for the past flooding. The district court enjoined the county from flooding the land in the future but concluded the landowner could not recover damages from the county because he had complied neither with the provisions of the tort claims act nor with the requirements of the inverse condemnation statute, Neb. Rev. Stat. § 76-705 (Reissue 1990). The *Kula* court reversed the denial of damages, noting that the constitutional provision which prohibits the state from taking or damaging property without just compensation, Neb. Const. art. I, § 21, was self-executing. The court further ruled that a cause of action under the provision could be stated without specifically mentioning the provision, declaring that a litigant need only "allege and prove facts constituting a cause of action" under the constitutional language. 219 Neb. at 629, 365 N.W.2d at 443. *Kula* also proclaimed that the fact that the landowner could have sued under the tort claims act did not prevent the landowner from suing under the Constitution.

In holding the defendant county liable for flood damages,

Slusarski v. County of Platte, 226 Neb. 889, 416 N.W.2d 213 (1987), again applied the rule that when a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation. See, also, *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990) (landowners who failed to comply with the tort claims act held to nonetheless have adequately pled constitutional inverse condemnation action); *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 410 N.W.2d 97 (1987).

The petition before us alleges that on July 25, 1986, the Dishmans sustained flood damage as the result of the district's actions. Inasmuch as the district enjoys the power of eminent domain, Neb. Rev. Stat. § 70-670 (Reissue 1990), the petition does indeed state a constitutional inverse condemnation action.

However, the abbreviated record brought to us deals only with the notice issue; consequently, although we determine that the Dishmans have stated a cause of action, we cannot determine whether they have proved what they stated.

REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. SCOTT A. DIXON, APPELLANT.

482 N.W.2d 573

Filed April 10, 1992. No. S-90-727.

1. **Trial: Rules of Evidence: Appeal and Error.** A ruling pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion.
2. **Trial: Rules of Evidence.** All relevant evidence is admissible. Evidence which is not relevant is not admissible.
3. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. **Evidence: Words and Phrases.** There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the

propositions for which the evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove.

5. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
6. **Trial: Evidence.** Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
7. **Trial: Rules of Evidence.** Otherwise relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
8. _____: _____. Admissibility of evidence is controlled by the Nebraska Evidence Rules, and not by judicial discretion, except in those circumstances when judicial discretion is factored in the rules of evidence.
9. _____: _____. It is well established that trial courts have broad discretion to exclude evidence under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989).
10. **Testimony: Appeal and Error.** Only in exceptional circumstances will reversible error be found in the district court's determination of the probative value of testimony in a particular case.
11. **Constitutional Law: Criminal Law: Witnesses.** The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her. This right means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.
12. **Trial: Witnesses: Testimony.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness, and anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.
13. **Constitutional Law: Trial: Testimony.** Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
14. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
15. **Trial: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

16. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, and Terri M. Weeks for appellee.

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

HASTINGS, C.J.

Defendant appeals a jury verdict finding him guilty of robbery and use of a weapon in the commission of a felony. He assigns as error the exclusion of relevant evidence, the interference with his Sixth Amendment right to confront his accusers, and the excessiveness of the sentences. We affirm.

"A ruling pursuant to Neb. Evid. R. 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion." *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 741 (1991).

On the evening of November 21, 1989, Ed Hines, an Omaha Coastal Mart employee, was robbed at gunpoint by two unmasked black men, one short, one tall. After withdrawing currency from the cash register, the two men escorted the victim outdoors, telling him that they planned to kill him. As they approached an area of the lot that was not well lit, the store clerk refused to go any further. The two robbers fled, and the clerk immediately returned to the store and called the police.

Two days later, the clerk selected the photo of Scott A. Dixon, the defendant, from a "mug book." The following January, the clerk again selected the defendant after observing him in a lineup consisting of three black males. The defendant was charged with one count of robbery and one count of use of a weapon in the commission of a felony.

Prior to trial, the State filed a motion in limine to prohibit the defendant from inquiring of Hines about a second robbery of which Hines was the victim. The prosecution argued that

evidence of the second robbery would confuse the jury, since it occurred the day after the November 21 robbery in question. The defense objected, asserting the possibility of mistaken identity and suggesting that the victim's ability to recall the events of November 21 may have been clouded by the second robbery. The court sustained the motion in limine, stating that in the second robbery, the robber was masked and the clerk could only testify that the robber was a black male, and therefore the relevance of the evidence of the second robbery was questionable and would tend to confuse the issue.

The defendant appeals a jury verdict of guilty as to both charges and the subsequent sentences of 5 to 10 years' imprisonment for the robbery count and 3 to 5 years' imprisonment on the count of use of a weapon in the commission of a felony. The two sentences were to be served consecutively, with credit given for 110 days served.

Dixon claims that the district court erred (1) in granting the State's motion in limine, which (a) excluded relevant evidence not excludable under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), and (b) interfered with defendant's Sixth Amendment right to confront his accusers through cross-examination, and (2) in imposing excessive sentences.

In his first assignment of error, the appellant contends that the district court erred in preventing him from inquiring about the second robbery, because that excluded relevant evidence not excludable under rule 403.

In order to decide this issue, this court must determine first whether the testimony as to the second robbery would have been relevant to the issues in the case and therefore admissible. "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is

> offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . . A fact that is "of consequence" is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force. . . . Such evidence often is said to have "logical relevance," while evidence lacking in probative value may be condemned as "remote" or "speculative."

McCormick on Evidence § 185 at 773-75 (John W. Strong 4th ed. 1992). " 'To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.' " *State v. Coleman*, 239 Neb. 800, 813, 478 N.W.2d 349, 358 (1992). Accord, *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991).

" ' "Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case." ' " *State v. Messersmith*, 238 Neb. 924, 931, 473 N.W.2d 83, 90 (1991).

The modern view is that evidence is probative if it tends in any degree to alter the probability of a material fact. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988), citing 1A John H. Wigmore, Evidence in Trials at Common Law § 37.4 (Peter Tillers rev. 1983).

The pleadings charge the appellant with taking money from the personal protection of Hines, the victim, with the intent to steal, and with use of a firearm to commit a felony. The defense argued that the evidence pertaining to the second robbery should have been admitted to show the possibility of mistaken identity. In addition, the defense counsel stated that the victim's ability to recall the events of November 21 could have been

clouded by the second robbery.

Since the identity of the robber was at issue during the trial, testimony as to the second robbery would have been material. Similarly, testimony to the effect that the clerk was robbed again the subsequent night would make this material fact appear slightly less probable than it would appear without that evidence. Testimony concerning the subsequent robbery is relevant to issues material to the appellant's defense, since it would tend to disprove the charges against him.

However, rule 402 is subject to the overriding protection of rule 403, which provides for exclusion of otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991), this court disapproved of the general proposition " 'The admission or exclusion of evidence is a matter within the discretion of the trial court.' " The court expressly stated that the admissibility of evidence is controlled by the Nebraska Evidence Rules, and not by judicial discretion, except in those circumstances when judicial discretion is factored in the rules of evidence. The court added that judicial discretion as a factor in admissibility is implicit in rules 401 and 403, regarding admission and exclusion of relevant evidence, even though these rules do not mention the word "discretion."

The trial court's reason for sustaining the motion in limine was that since the robber in the second robbery was masked and the victim could not see his features, testimony as to the second robbery would have questionable relevance to an identification issue and would only tend to confuse the issue in the case. Although we have concluded that testimony as to the second robbery does have some relevance to the issue in the case, we agree with the trial court that the probative value was low.

The fact that the second robber was masked rebuts the defense's argument that the victim could have mistaken the identities of the robbers. But there is nevertheless some merit to defense counsel's second argument, that the experience of the subsequent robbery might have clouded the victim's ability to

recall the events of the first robbery. However, since the victim was robbed by two unmasked men on the first night and a masked man on the second night, this argument is weak. This contention would have been more persuasive had the victim been robbed by a masked man on the first night and the two unmasked men on the second night. The argument then could have been made that the victim was emotionally upset as a result of the first robbery and therefore not able to identify the second robbers as well. Nevertheless, since there is a possibility that the victim's memory could have been clouded by the experience of the second robbery, the testimony as to the subsequent robbery has some minimal probative value.

However, in accordance with rule 403, the trial judge had the duty to weigh the probative value of the testimony against the possible confusion of the issues by the jury. "It is well established that district courts have broad discretion to exclude evidence under this rule." *United States v. Kepreos*, 759 F.2d 961, 964 (1st Cir. 1985), *cert. denied* 474 U.S. 901, 106 S. Ct. 227, 88 L. Ed. 2d 227. "Only in exceptional circumstances will reversible error be found in the district court's determination of the probative value of testimony in a particular case." *Id.* "Besides, a wide assortment of relevant evidence is, constitutional arguments notwithstanding, deliberately excluded by trial courts by reason of counterbalancing factors that are believed to be of greater moment than the unfettered admission of relevant testimony." *Id.*

The U.S. Court of Appeals for the Ninth Circuit stated in reference to rule 403:

> "[W]e give wide latitude to the trial judge in determining the admissibility of evidence because he is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings of a trial, while we can review only a cold record." *United States v. Ford*, 632 F.2d 1354, 1377 (9th Cir.1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1399, 67 L.Ed.2d 369 (1981). However, this is not the sole basis for reposing the trial court with wide discretion under Rule 403; there are other important policies embodied in Rule 403 that mandate appellate deference.

> One important basis for the wide discretion exercised by the district courts in these cases is found in the broad contours of Rule 403 itself. The considerations which arise under Rule 403, such as the potential for undue prejudice or confusion of the issues, are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues. *See* D. Louisell & C. Mueller, *Federal Evidence* § 124, at 10 (1978). Thus, it is more difficult in these cases for appellate courts to formulate rules of decision to govern future cases. As one commentator has stated: "Many issues that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization. . . . When the ruling under attack is one that [cannot be controlled] by a rule that can be formulated or criteria that can be indicated, prudence and necessity agree it should be left in the control of the judge at the trial level." Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L.Rev. 635, 662 (1971) (Rosenberg, *Judicial Discretion*). *See also* Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 Wash.L.Rev. 497, 499 (1983) ("Implicit in the creation of this discretionary power is the assumption that truth and justice cannot be captured by mere language, but require the intervention of human sensibilities.").

United States v. Layton, 767 F.2d 549, 554 (9th Cir. 1985). See, also, *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977) ("[t]he task of balancing the probative value of evidence against danger of confusion of the issues is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited").

The trial judge excluded the testimony concerning the subsequent robbery on the basis of his legitimate concern that it might confuse the jury. The robberies were very similar and only 1 day apart. The incidents took place at the same location and involved the same victim, the only differences being that the second robber acted alone and was masked. Admittance of

this evidence could have diverted the jurors from the basic issue in the case—charges concerning appellant's participation in a robbery on November 21, 1989, instead of November 22, 1989. Noting that the probative value of the testimony concerning the second robbery was weak, this court defers to the evidentiary decision of the trial judge and concludes that the judge acted within his discretion in excluding the evidence. See, also, *United States v. Hendrix*, 549 F.2d 1225 (9th Cir. 1977), *cert. denied* 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d 74 (in a prosecution for transportation of illegal aliens, exclusion of evidence of subsequent similar incident occurring in the same area as previous interception but at which defendant was not arrested was not abuse of discretion, since the probative value was at best minimal and the danger of confusion of the issues was great).

The appellant next contends he was denied his constitutional right of confrontation by the trial court's ruling prohibiting the defense from adducing, on cross-examination, evidence pertaining to the second robbery.

The right to cross-examination is grounded in the Sixth Amendment.

> The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." [This] right . . . "means more than being allowed to confront the witness physically." . . . Indeed, " '[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*' "

(Citations omitted.) (Emphasis in original.) *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). See, also, *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (the right of cross-examination is more than a desirable rule of trial procedure; it is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process).

As to a party's right of cross-examination, this court has noted that " 'cross-examination is proper as to anything

tending to affect the accuracy, veracity, or credibility of the witness' " and " 'anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.' " *State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982).

The right of cross-examination, however, is not unlimited. *Van Arsdall, supra*; *Chambers, supra*. The U.S. Supreme Court has held:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, *confusion of the issues*, the witness' safety, or *interrogation* that is repetitive or *only marginally relevant*.

(Emphasis supplied.) *Van Arsdall*, 475 U.S. at 679.

This court has also recognized the well-established rule in this jurisdiction that " ' "the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion." ' " *State v. Thaden*, 210 Neb. at 627, 316 N.W.2d at 321; Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 1989). Accord, *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Moore*, 221 Neb. 706, 380 N.W.2d 288 (1986).

> "[A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system."

State v. Reynolds, 235 Neb. 662, 690, 457 N.W.2d 405, 422 (1990).

The trial judge did not commit error by preventing the defense from cross-examining the witness about the second robbery. As previously mentioned, the testimony as to the subsequent robbery had very little probative value and would have confused the jurors. As a result, the trial judge acted within his discretion when he decided to exclude that evidence.

As to the claimed excessiveness of the sentences, a sentence

imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

Robbery is a Class II felony under Neb. Rev. Stat. § 28-324(2) (Reissue 1989), punishable by not less than 1 year and not more than 50 years of imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1989). Use of a firearm to commit a felony is a Class III felony under Neb. Rev. Stat. § 28-1205(2) (Reissue 1989), punishable by a maximum sentence of 20 years' imprisonment, a $25,000 fine, or both, and a minimum sentence of 1 year's imprisonment. § 28-105. Sentences imposed on use of firearms to commit a felony shall be consecutive to any other sentence imposed. § 28-1205(3).

The defendant received sentences of 5 to 10 years' imprisonment on the robbery count and 3 to 5 years' imprisonment on the count of use of a weapon in the commission of a felony. The court ordered the sentences to be served consecutively and gave credit for 110 days served. The appellant has a prior record which includes burglary, attempted robbery, shoplifting, gambling, assault and battery, receiving stolen items, disorderly conduct, obstruction of an officer, false information, and a no contest plea to a charge of attempted first degree sexual assault.

A reduction of the sentences would depreciate the seriousness of the crimes involved. The facts of the case show that violence was involved in these crimes. There was no abuse of discretion on the part of the trial court in imposing the sentences which it did.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

This court has held that evidence which tends to impeach a witness for the State in a criminal prosecution is ordinarily admissible to discredit the witness and the weight to be given to his testimony. *State v. Matejka*, 186 Neb. 454, 183 N.W.2d 917 (1971).

The U.S. Supreme Court, after holding that to be denied the right to effective cross-examination is " 'constitutional error of the first magnitude and no amount of showing of want of

prejudice would cure it,' " *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966), backed away from that position 2 decades later and held that

> [a] constitutionally improper denial of [an accused's] opportunity to impeach a witness for bias [is not grounds for automatic reversal of a conviction but] is subject to . . . harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

While Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989) does provide, inter alia, that relevant evidence may be excluded if its probative value is substantially outweighed by the potential for confusion of the issues or for misleading the jury, the fact that a jury may be confused by presented evidence does not, in and of itself, justify exclusion of the evidence—and certainly not when presented by way of cross-examination of witnesses on the issue of defendant identification and the compromise in perceptual accuracy which may have resulted from an intervening traumatic event.

Evidence exists to support the notion that the subsequent robbery was a traumatic event, and the effect on previous memory was a relevant and crucial inquiry. When the issue before the trial court is whether to allow the defense to cross-examine on issues of identification and perceptual abilities, the court should be encouraged to allow such examination rather than unduly restrict it.

I cannot agree with the majority position that the exclusion of the testimony concerning the subsequent robbery was harmless error. I believe that the trial court abused its discretion by failing to allow the defense to cross-examine the witness on the second robbery and its impact on the witness' perceptions, and thus would hold that reversal and remand of the cause would be the appropriate remedy. I respectfully dissent.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ELLEN J. SEXTON, APPELLANT.

482 N.W.2d 567

Filed April 10, 1992. No. S-90-885.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate 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 the conviction.
2. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor.
3. **Circumstantial Evidence: Evidence: Words and Phrases.** Direct evidence is proof of facts by witnesses who saw acts done or heard words spoken. Circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the fact sought to be established in fact existed.
4. **Trial: Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.
5. **Theft: Value of Goods.** The value of property stolen is not an element of the crime of theft, but it is important only in determining the penalty.
6. **Theft: Value of Goods: Sentences.** Theft of property having a value of more than $1,000 is a Class III felony and is punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both.
7. **Theft: Value of Goods: Proof.** The value of articles stolen from a stock of merchandise may be established by proof of the price at which they and other like articles are being offered and sold at the place where the articles were stolen.
8. **Theft: Value of Goods: Juries.** The determination of the value of property stolen, upon a conviction of theft, is a question of fact to be determined by the jury.
9. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
10. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence. Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

J. Mark Barnett, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

FAHRNBRUCH, J.

In appealing her jury conviction of theft by shoplifting, Ellen J. Sexton claims, in summary, (1) that the statute under which she was convicted is overbroad and unconstitutional as applied and (2) that the trial court erred in (a) admitting certain evidence, (b) failing to direct a verdict in Sexton's favor, and (c) failing to give a requested jury instruction.

We affirm Sexton's conviction in the district court for Douglas County.

In reviewing a criminal conviction, an appellate 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 the conviction. See *State v. Towler, ante* p. 103, 481 N.W.2d 151 (1992).

To convict Sexton, the State relied upon a combination of direct and circumstantial evidence. In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. See, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. McCaslin, post* p. 482, 482 N.W.2d 558 (1992). Direct evidence is proof of facts by witnesses who saw acts done or heard words spoken. Circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the fact sought to be established in fact existed. See *State v.*

Loveless, 234 Neb. 463, 451 N.W.2d 692 (1990).

Based upon the direct and circumstantial evidence and the reasonable inferences to be drawn therefrom, the following facts could be determined by a jury.

Kathryn Hearn, an Omaha police officer, worked part time as a security officer at Dillard's department store at the Crossroads Mall in Omaha. At approximately 7:30 p.m. on December 30, 1989, Hearn was on duty at Dillard's as a security agent in plain clothes when her attention was attracted to two women in the Clubhouse area of the store, located on the second floor. At the time, the second floor was devoted to the sale of women's clothing. In the center of the floor there was an escalator. Directly ahead of the escalator were exit doors leading to the fourth level of a parking garage. There was a passenger elevator inside the store to the right of the exit doors. The Clubhouse area was to the left of the escalator. One of the two women who attracted Hearn's attention was identified at trial as the defendant, Sexton. Hearn watched as the two women scanned the store. They appeared to be looking at people rather than at merchandise. Hearn observed Sexton pick up two sweaters and several items of leather clothing. Carrying the items she had picked up, Sexton walked to a dividing wall and bent down out of Hearn's sight while the second woman remained standing. When Sexton stood up, she was no longer holding the items of clothing she had been carrying. Thereafter, both women continued to walk around the same area of the store. Hearn watched the second woman pick up items of clothing and carry them to the area by the dividing wall. While Sexton remained standing, the second woman disappeared behind a rack. When Sexton's companion reappeared, she was no longer carrying the clothes she had picked up earlier. Later, when Hearn checked the second floor and the racks in the area by the dividing wall, she could not find any articles of clothing like those she had seen the women carry.

At trial, Hearn was able to identify 10 women's garments the two women had removed from the store's clothing racks and placed in a large Younkers department store sack, which they later concealed. Circumstantial evidence reflects that the women also placed an additional 10 garments in the same sack.

Subsequently, without paying for the garments, Sexton dragged the sack containing the garments from the confines of the store to a vestibule located between two sets of doors leading to the fourth level of a parking garage. There is evidence from which the jury could conclude that when they thought they were being watched, the women returned the sack containing the garments to within the Dillard's store, boarded an elevator, and concealed the sack in the linen and bedding department on the third floor of the store for later retrieval.

A store employee reported riding in the elevator to the third floor of the store with Sexton and another woman. The employee testified that Sexton and her companion went to the back wall in the linen and bedding department. The employee did not recall if the women had any parcels or a sack with them. A short time later, Hearn, who had remained on the second floor, saw Sexton and her companion, whom she had been watching earlier, get off the elevator and leave the store. The women no longer had the sack with them.

After Sexton and her companion left the third floor, Cindy Johnston, another Omaha police officer and Dillard's security agent, searched the third-floor linen and bedding department. Stuffed behind a curtain and some pillows, she found a very heavy plastic Younkers sack filled with women's clothing. Johnston and Hearn took the sack to the store's executive offices, where they inventoried the contents. Thereafter, the sack and its contents were locked in a storage room.

At trial, over objections regarding foundation and chain of custody, Hearn identified 20 items of women's clothing as being items she and Officer Johnston removed from the Younkers sack and inventoried on December 30, 1989. Hearn testified that each item was in the same condition at the time of trial as it was when it was inventoried. Each item inventoried carried a tag setting forth the price for which Dillard's would sell the item. There was testimony that customers paid Dillard's the prices listed on its price tags.

At the conclusion of the State's evidence, Sexton moved to dismiss the case against her on the ground that the statute under which she was charged is unconstitutionally overbroad and violates due process. The defendant's dismissal motion as well

as her motion for a directed verdict was overruled. The defendant did not present any evidence, and she was found guilty by the jury of shoplifting merchandise valued at $2,454.06. She was sentenced to prison for 1 year and 1 day.

In her first assignment of error, Sexton claims that Neb. Rev. Stat. § 28-511.01 (Reissue 1989), under which she was prosecuted, is unconstitutionally overbroad.

One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). An attack based on the overbreadth of a statute asserts that the questioned language impermissibly infringes upon some constitutionally protected right. *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991). A statute may be overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *Id.*

As relevant here, § 28-511.01 reads:

> (1) A person commits the crime of theft by shoplifting when he or she, *with the intent of appropriating merchandise to his or her own use without paying for the same* or *to deprive the owner of possession of such property or its retail value*, in whole or in part, does any of the following:
>
> (a) *Conceals or takes possession of the goods* or merchandise of any store or retail establishment;
>
> . . . .
>
> (c) *Transfers the goods* or merchandise of any store or retail establishment *from one container to another.*

(Emphasis supplied.)

The defendant contends that § 28-511.01 applies equally to lawful and unlawful conduct in that it fails to set forth the requisite criminal intent. Sexton argues that any time a shopper takes possession of an item and it is somehow concealed from view, the shopper has violated the statute. That argument overlooks the portion of the statute that clearly provides that the concealment must be "*with the intent of appropriating*

merchandise to his or her own use without paying for the same." Sexton's first assignment of error is patently frivolous and requires no further discussion.

Secondly, Sexton claims that the trial judge erred when he overruled her objections to the introduction of the items of clothing which the State charged were shoplifted by her. She complains that the State did not establish a complete chain of custody tracing the possession of the items to the final custodian.

Such a showing is not necessary. Officer Hearn testified that the items that were introduced in evidence were the same items and were in the same condition as when they were taken from the Younkers sack on December 30, 1989. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been. *State v. Kosmicki*, 239 Neb. 358, 476 N.W.2d 550 (1991). The prosecution laid sufficient foundation for the clothing to be introduced into evidence. Sexton's assignment of error is meritless.

Thirdly, Sexton claims that there was insufficient evidence regarding the value of the items the State charged her with shoplifting. The value of property stolen is not an element of the crime of theft, but it is important only in determining the penalty. See *State v. Weaver*, 237 Neb. 185, 465 N.W.2d 470 (1991). As relevant here, theft of property having a value of more than $1,000 is a Class III felony and is punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. §§ 28-518 and 28-105(1) (Reissue 1989). The value of articles stolen from a stock of merchandise may be established by proof of the price at which they and other like articles are being offered and sold at the place where the articles were stolen. *Robinson v. State*, 107 Neb. 591, 186 N.W. 977 (1922).

Officer Hearn testified that each item contained in the Younkers sack Sexton was seen dragging toward the parking

garage had a tag reflecting the price for which the item was being bought and sold at Dillard's on December 30, 1989. The determination of the value of property stolen, upon a conviction of theft, is a question of fact to be determined by the jury. *State v. Weaver, supra.* From all of the facts and circumstances of this case, the jury could conclude beyond a reasonable doubt that the items they found Sexton had shoplifted had a value in excess of $1,000.

Defendant's fourth assignment of error complains that the evidence was insufficient to sustain a conviction and that the trial judge erred in failing to sustain her motion for a directed verdict.

On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. McCaslin, post* p. 482, 482 N.W.2d 558 (1992). On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence. Only where the evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt. *State v. Alcorn, ante* p. 400, 481 N.W.2d 921 (1992).

In this case, the probative evidence was more than sufficient for a jury to find beyond a reasonable doubt that the defendant was guilty of shoplifting. Based upon the direct and circumstantial evidence and the inferences that could be drawn from the evidence that the defendant furtively moved about Dillard's department store, that she took women's clothing bearing price tags off the rack and placed them in a sack from a different department store, that she filled or assisted in filling the sack with items of women's clothing belonging to Dillard's to such a capacity that it could only be dragged across the floor, that she dragged the sack through one set of the store's exit doors and back again, and that she took the sack to a department on another floor and concealed it behind a curtain and pillows, a jury could, without question, find beyond a reasonable doubt that Sexton violated Nebraska's shoplifting

statute, § 28-511.01, by concealing or taking into her possession women's apparel belonging to Dillard's with the intent of appropriating the apparel to her own use without paying for the same.

Defendant's final assignment of error claims that the trial judge incorrectly instructed the jury. The contested instruction is not contained in the record. We are, therefore, unable to review the appropriateness of the instruction. See *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

The evidence being sufficient to convict Sexton of theft and the trial court having committed no error, Sexton's conviction must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROOSEVELT PARTEE, ALSO KNOWN AS ROOSEVELT PARTEE, JR., APPELLANT.

482 N.W.2d 272

Filed April 10, 1992. No. S-90-1018.

1. **Motions to Suppress: Appeal and Error.** In order to preserve error attributed to the overruling of a motion to suppress evidence, it is necessary that the movant make a specific objection at trial to the offer of the evidence which was the subject of the suppression motion.
2. **Trial: Time.** In order to be timely, an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent.
3. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
4. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court recognizes that the trial court observed the witnesses.
5. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by U.S. Const. amends. IV and XIV and by Neb. Const. art. I, § 7, may be waived by consent.
6. **Search and Seizure.** In order for consent to a search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
7. **Search and Seizure: Duress.** Consent to a search must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.

8. **Search and Seizure.** Mere submission to authority is insufficient to establish consent to a search.
9. _____. The question of whether consent to a search was given voluntarily is to be determined from all the circumstances surrounding the search.
10. **Search and Seizure: Proof.** The State carries the burden of showing that consent to be searched was voluntary.
11. **Prior Convictions: Proof: Habitual Criminals: Right to Counsel: Waiver.** In order to prove a prior plea-based conviction for a habitual criminal determination, the State need only establish that at the time of the prior conviction the defendant had, or waived, counsel.
12. **Prior Convictions: Collateral Attack: Right to Counsel: Waiver.** Challenges claiming that a plea-based conviction is constitutionally infirm because the defendant did not voluntarily and intelligently waive the rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), other than the right to counsel, constitute an impermissible collateral attack on the conviction.
13. **Prior Convictions: Collateral Attack: Habitual Criminals.** A defendant cannot in a habitual criminal determination collaterally attack a prior plea-based conviction.
14. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, Mark D. Starr, and, on brief, Susan M. Ugai for appellee.

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

CAPORALE, J.

Defendant-appellant, Roosevelt Partee, was convicted of being a felon in possession of a firearm, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1989), and was determined to be a habitual criminal within the purview of Neb. Rev. Stat. § 29-2221 (Reissue 1989). He was thereafter sentenced to imprisonment for a period of not less than 20 nor more than 50 years. He asserts the district court erred in (1) overruling his motion to suppress certain evidence, (2) receiving an exhibit concerning a prior conviction, and (3) imposing an allegedly excessive sentence. We affirm.

Shortly after 5 p.m. on December 23, 1989, Officer Michael

Kottwitz and Sgt. John Stevens of the police force of the city of Hastings were dispatched to a "shots fired" scene, where they were joined by Officer Charles Morgan.

After the three officers drew their service revolvers, Stevens knocked on the door of the Hastings house to which they had been sent. The knock was answered by James Thomas, who stated that he "wasn't the one, that the guy with the gun was in the" house. The officers entered and, for purposes of safety, conducted a pat search of Thomas; no weapon was discovered on him.

When Kottwitz entered the living room, he found Partee sitting on a chair. Partee and the immediate surroundings, including the chair on which he had been sitting, were then searched. The officers found no gun or other weapons. After this search was completed, the officers reholstered their revolvers. Next, Kottwitz asked Partee where the gun was, and Partee responded that his sister had taken it to Arkansas.

Stevens then questioned Partee's wife, twice asking her about the gun. Each time, the wife denied knowing anything about it. Stevens then went outside and talked to Thomas and Partee's daughter. The daughter told Stevens that when she arrived at the house, Partee, Kathy Schilling, and others were on the porch and that Partee later produced a weapon and fired at Schilling. Based on this statement, Stevens again talked to the wife.

Stevens told the wife that he knew there was a gun in the house which had been involved in a shooting and that he wanted her to produce it. He told her he could get a search warrant and would search the house if he had to, but that "it would be best if she would produce the gun." Stevens testified that he did not threaten the wife, nor did he tell her that she would be arrested if she did not produce the gun. According to Stevens, there were no promises made to her about what would happen if she did produce the weapon. At this point the wife took Stevens into a back bedroom and lifted the mattress on the bed; an automatic handgun was lying on the supporting inner springs.

Stevens took the gun and handed it to one of the other officers, who removed the clip. A fired shell was found jammed in the breech of the weapon. Partee was then arrested and

transported to the sheriff's department, where he was read the *Miranda* warnings.

Partee filed a motion to suppress "any and all evidence seized which was the fruit and product of any illegal search of the defendant's person and immediate surroundings . . . ." The testimony detailed above was elicited at the hearing regarding the motion to suppress. In addition, the wife testified that she was under the impression that if she gave up the gun, no one would be arrested. She also stated that an officer told her that "if they didn't get that gun they were going to tear the house apart to get it." She said she got the gun because she was scared and did not know what the officers were going to do.

Although the wife testified that she had the impression no one would be arrested if she got the gun, she admitted that all the officers did was to request the weapon:

> Q- When the officer asked you if the gun was there and you said that it wasn't, why did you tell them that?
>
> A- Because I was scared.
>
> Q- Who were you scared of?
>
> A- Of the situation.
>
> Q- Had any of the officers threatened you?
>
> A- No, they didn't threaten me. That was all he said to me.
>
> Q- Did anybody at any time, any of the officers threaten you?
>
> A- No, that was the only thing they said to me.
>
> Q- Was this kind of an exciting and upsetting experience for you?
>
> A- Yeah, you could call it that.
>
> Q- Did anybody promise you anything in order to get you to produce the gun?
>
> A- Well, I was under the impression that if I gave up the gun nobody would be arrested.
>
> Q- When you had that impression where did it come from?
>
> A- From the policeman.
>
> Q- What did he say that supported that impression?
>
> A- All he said was they just wanted the gun. That was all they wanted was the gun. And I can't remember if that was

before he told me they would tear the house apart to get it or after because I can't remember.

The wife also testified that she lived at the house in question and that she shared with Partee the bedroom where the gun was found.

The district court overruled Partee's motion. Partee thereafter waived his right to a jury, and the matter proceeded to a bench trial. The onscene officers again testified to the events they described at the hearing on the suppression motion. In addition, two eyewitnesses identified Partee as the individual they had seen firing a gun. Julie Wills, another occupant of the house, also testified that she had seen Partee firing the gun inside the house earlier in the day.

In addition, Hastings police officer Lee Beach testified that a test he conducted revealed heavy tracings of metal on Partee's right hand, a finding consistent with Partee's handling of a weapon. A gunpowder residue test conducted by Beach also "indicated [Partee] had fired a weapon with his right hand."

At the enhancement hearing held after Partee had been adjudicated guilty, the district court received into evidence three exhibits which attest to Partee's convictions of two prior felonies, a 1970 case from the State of Arkansas and a 1976 case from Douglas County in this state.

Partee first asserts the district court erred in overruling his motion to suppress the gun and clip retrieved by the police. It is well established that in order to preserve error attributed to the overruling of a motion to suppress evidence, it is necessary that the movant make a specific objection at trial to the offer of the evidence which was the subject of the suppression motion. *State v. Tejral, ante* p. 329, 482 N.W.2d 6 (1992); *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). It is also well established that in order to be timely, an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. *Bloomquist v. ConAgra, Inc., ante* p. 135, 481 N.W.2d 156 (1992); *State v. Archbold,* 217 Neb. 345, 350 N.W.2d 500 (1984). Here, Partee allowed the State to adduce evidence concerning the gun and clip and to display them to the finder of fact long before they were offered in evidence, when Partee objected for the first time. Indeed,

Partee cross-examined various witnesses concerning the items prior to their admission. Under these circumstances, Partee may well have waived any objection he may otherwise have had to the receipt of the gun and clip into evidence. However, we do not decide that question, for the district court did not err in overruling Partee's motion to suppress the articles.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Kimminau, ante* p. 176, 481 N.W.2d 183 (1992); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court recognizes that the trial court observed the witnesses. *Kimminau, supra*; *Tingle, supra*.

Before commenting on the evidence in regard to the search in this case, we recall that the right to be free from an unreasonable search and seizure, as guaranteed by U.S. Const. amends. IV and XIV and by Neb. Const. art. I, § 7, may be waived by consent. See, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). In order for the consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne. *Schneckloth v. Bustamonte, supra*; *State v. Prahin, supra*. In essence, any consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *State v. Prahin, supra*. Mere submission to authority is insufficient to establish consent to a search. *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984).

Partee does not question the wife's standing to consent to the search, but claims she did not consent voluntarily. The question of whether a consent to search was given voluntarily is to be determined from all the circumstances surrounding the search. *Schneckloth v. Bustamonte, supra*; *State v. Prahin, supra*; *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Walmsley, supra*. Finally, it is the State that carries the burden of showing

the consent was voluntary. *State v. Prahin, supra.*

The defendant in *State v. Rathburn*, 195 Neb. 485, 489-90, 239 N.W.2d 253, 256 (1976), contended he did not consent to a search of his automobile trunk because he had originally refused to open it and agreed to open it only after the police officer stated: " 'Okay, I'll get a warrant.' " In rejecting the claim that the officer's statement was coercive, we stated at 195 Neb. at 490, 239 N.W.2d at 256:

> There is no doubt that false assertions that one already *has* a warrant will vitiate a consent to search. Bumper v. North Carolina, [391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)]. However, under the facts of the instant case, all the officer said was that he would *get* a warrant. In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.

(Emphasis in original.)

The evidence here supports the conclusion that all the officers told the wife was that a warrant to search the house could be obtained, but that it "would be best" if she produced the gun. The wife admits that she was not threatened. Her impression that no one would be arrested if the gun were produced was unfounded. Whatever the source of the impression, it was not a reasonable interpretation of what she was told. It therefore cannot be said the district court was clearly wrong in finding that the wife's consent was given voluntarily.

Partee next contends that the district court erroneously received the record of his 1970 plea-based Arkansas conviction because it does not reveal that he voluntarily and intelligently waived his rights as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

The matter is significant because Partee could not be sentenced as a habitual criminal unless the record establishes that he was "twice convicted of crime." § 29-2221. In the absence of a specified greater punishment for an offense, a

habitual criminal is subject to imprisonment for a period of not less than 10 nor more than 60 years. § 29-2221. In contrast, a nonhabitual criminal convicted of being a felon in possession of a firearm is subject to imprisonment for a maximum period of 5 years. Neb. Rev. Stat. § 28-105 (Reissue 1989); § 28-1206.

The difficulty from Partee's point of view is that we have consistently held that in order to prove a prior plea-based conviction for habitual criminal and other enhancement determinations, the State need only establish that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Tejral, ante* p. 329, 482 N.W.2d 6 (1992); *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992); *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Challenges claiming that a plea-based conviction is constitutionally infirm because the defendant did not voluntarily and intelligently waive his or her other *Boykin* rights constitute an impermissible collateral attack on the conviction. *Tejral, supra*; *Crane, supra*; *Oliver, supra*. A defendant cannot in a habitual criminal or other enhancement determination collaterally attack a prior plea-based conviction. *Tejral, supra*; *Crane, supra*; *Johns, supra*; *Oliver, supra*.

The exhibit in question, an authenticated copy of the Arkansas court's docket sheet, reflects that Partee pled guilty to second degree murder and that the plea was "concured [sic] in by his attorney." In addition, the name of the attorney listed on the docket sheet after Partee's name is the same as that of the attorney for Partee listed on an Arkansas Department of Corrections' document. The exhibit thus clearly establishes that Partee was represented by counsel at the time of the subject conviction. Accordingly, the district court committed no error in receiving the exhibit in evidence.

Partee's claim in his third and last assignment of error, that the district court abused its discretion in sentencing him as it did, can only be described as outrageous.

The record reveals that Partee has a long history of violent criminal conduct, including two murder convictions, one of which was for killing his then wife. The incident in question occurred within 5 days of his most recent release from jail.

As we repeatedly reaffirm, a sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Schumacher, ante* p. 184, 480 N.W.2d 716 (1992); *Tejral, supra*; *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Kosmicki*, 239 Neb. 358, 476 N.W.2d 550 (1991). In no sense can the sentence imposed be said to constitute an abuse of the district court's discretion.

AFFIRMED.

WHITE, J., concurring in part, and in part dissenting.

I agree that the evidence amply supports the conviction of the substantive offense, but for the reason last stated in *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992) (White, J., dissenting), I dissent from the portion of the opinion which sustains the enhancement proceeding.

SHANAHAN, J., dissenting.

As noted in my dissent filed in *State v. Tejral, ante* p. 329, 482 N.W.2d 6 (1992), and as previously observed in my dissents in *State v. Crane, ante* p. 32, 480 N.W.2d 401 (1992), *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989), and *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), Nebraska's criminal procedure, evolving through decisions of this court, precludes a defendant's inquiry to determine whether the defendant's prior plea-based conviction used for enhancement of penalty is constitutionally valid in accordance with due process required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Hence, I dissent to the continuous denial of due process reflected by and inherent in *Partee*.

STATE OF NEBRASKA, APPELLEE, V. BONNIE MCCASLIN, APPELLANT.

482 N.W.2d 558

Filed April 10, 1992. No. S-90-1025.

1. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss the charges against him or her for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
2. **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.
3. **Trial: Evidence: Motions to Dismiss: Appeal and Error.** Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
4. **Perjury: Proof.** There are two essential elements of proof in perjury cases. First, the statements made by the defendant must be proven to be in fact false. Second, it must be proven that the defendant did not believe the statements to be true when made.
5. **Criminal Law: Testimony: Oaths and Affirmations: Proof.** A person can be convicted of making a false statement under oath when making a statement based on a belief that he or she knows is false. It is up to the jury to decide whether the defendant believed in the truth of his or her testimony when uttered. The knowledge of falsity may be inferred by the trier of fact from the surrounding circumstances, and such an inference may be derived from several sources: the objective falsity itself, a motive to lie, or facts tending to show generally that defendant knew his or her affirmation was false.
6. _____: _____: _____: _____. Proof of the falsity of a response may circumstantially imply knowledge that such was untrue when uttered.
7. **Perjury: Proof.** No person shall be convicted of an offense under Neb. Rev. Stat. § 28-915 (Reissue 1989) when proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.
8. **Perjury: Proof: Witnesses: Corroboration.** The degree of proof necessary to prove the crime of perjury is such that if the oath of the accused is met by a single oath, the corroborating circumstances ought at least to equal the testimony of a single witness. This rule does not require the testimony of two witnesses to the same fact, but it does require that the proof of the corroborative facts shall be such as to give a clear preponderance of the evidence in favor of the State and thus, by such preponderance, establish the falsity of the oath beyond a reasonable doubt.
9. **Trial: Evidence: Photographs.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to

represent at times pertinent to the inquiry.

10. **Trial: Evidence: Photographs: Appeal and Error.** The admission of photographs shown to be correct representations is within the discretion of the trial court as to relevancy, and unless an abuse of discretion is shown, error may not be predicated thereon.
11. **Trial: Evidence: Photographs: Time.** A photograph adequately identified as correctly portraying conditions as they existed at the time of the event under consideration is admissible, even though taken at some distance in time from the occurrence of the event. Inaccuracies and unreliability can be exposed by cross-examination.
12. **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 is an abuse of discretion.
13. **Sentences: Probation and Parole.** In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.
14. **Trial: Perjury.** Deliberate false testimony in a court proceeding tends to destroy the integrity of the judicial system and cannot be tolerated.
15. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
16. **Trial: Appeal and Error.** An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
17. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
18. _____. It is the minimum portion of an indeterminate sentence which measures its severity.

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

James H. Truell for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

HASTINGS, C.J.

Defendant appeals her convictions following a jury trial of the offenses of perjury, a Class III felony under Neb. Rev. Stat.

§ 28-915 (Reissue 1989), and making a false statement under oath, a Class I misdemeanor within the meaning of Neb. Rev. Stat. § 28-915.01 (Reissue 1989). She was sentenced to prison terms of 1 to 20 years and 1 year, to be served concurrently. Defendant assigns as error the insufficiency of the evidence because of the lack of corroboration of eyewitness testimony, the admission of certain photographic exhibits, and the excessiveness of the sentences. We affirm.

On a criminal defendant's motion to dismiss the charges against him or her for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991).

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. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990), *cert. denied* ____ U.S. ____, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991).

Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

Both charges against the defendant arose out of her testimony during the trial of her son on a charge of failing to stop at a stop sign in the case *State of Nebraska v. Michael McCaslin* in the county court for York County, case No. TR90-181.

The testimony allegedly amounting to perjury was as follows:

> BY MS. McCASLIN:
>
> I — I was sitting in Chances R at a little corner table where I always sit if I can. And I was having a drink. And he [her son] was going by wondering if I was out there yet. And I did see him stop.

THE COURT: Okay. Is there anything else?

MS. McCASLIN: Nothing that I can think of. Except that, you know, he definitely did stop.

. . . .

Q. And you're telling us that you just happened to notice him as he comes by, approaches the intersection and you see him stop at the intersection?

A. Yes. He had taken a few cruises by seeing if I was out there ready.

The testimony relating to the defendant's making false statements under oath was more involved and was as follows:

Q. Have you ever been convicted of a crime involving dishonesty?

A. No.

. . . .

Q. Or any other crime that involves dishonesty?

A. No.

Q. Which includes bad checks, theft by deception. Those sorts of activities.

A. I've had problems with my family, but it was strictly family problems.

Q. Well, I'll ask you again. Have you been — ever been convicted of any crime involving dishonesty?

A. I wasn't convicted. I've had problems with my family. Yes.

Q. Well, is that - - -

A. But it was strictly family problems.

Q. Is that a yes or a no?

A. I'd say from my point of view it's a no.

Q. Okay. So, again, asking you - - -

A. Perhaps from yours it's a yes. But from mine, it's no.

Q. Well, it's — it's a very simple question. Have you ever been convicted of a crime that involves - - -

A. No.

Q. - - - dishonesty?

A. Although I've had family problems.

Q. Well, Ms. Mac — Ms. McCaslin, I want you to answer yes or no to this question.

A. No.

Q. Okay. I'm going to ask you one more time.

A. I paid fines on — on things. But - - -

Q. I'm going to ask you one more time - - -

A. - - - it was strictly family problems.

Q. Okay. Ms. McCaslin - - -

THE COURT: Ms. McCaslin, just allow Mr. Campbell to ans — to ask the question and then answer his question yes or no, and then we can get on.

A. I don't believe I've ever been convicted.

THE COURT: No. Let him ask his question. He hasn't asked his question. Wait until he asks the question and then answer yes or no to the question.

MS. McCASLIN: Okay. Sorry, Your Honor.

THE COURT: All right. You may proceed.

Q. (By Mr. Campbell) Have you ever been convicted of a crime that involves dishonesty?

A. I don't believe I've ever been convicted. I have paid fines because I had a lot of problems with my family.

Q. Well, can you tell us how you would pay fines for these crimes without being convicted?

A. When I came home from LA my family was determined that they were going to cause a lot of problems for me. And I have a lot of problems because my — because of my family.

Q. Well, I don't understand how you would pay a fine without having been convicted. Can you explain that?

A. I don't think I was convicted. I mean the charges were, like dropped, as far as I'm concerned, and I paid some fines.

Q. Okay.

A. But it was all due — it was all family problems.

Q. Again, you don't know why you would pay a fine if you hadn't been convicted.

A. No.

The foregoing questions and answers were taken from the trial involving *State of Nebraska v. Michael McCaslin* and were alleged in full in the information filed against the defendant here.

We deal first with the charge of making a false statement

under oath. The State submitted evidence of defendant's prior convictions of theft by deception, insurance fraud, and of issuing an insufficient-fund check. As a result there was sufficient evidence for the jury to find the defendant guilty of the charge of making a false statement under oath.

However, appellant argues that she "personally did not feel convicted although the judicial system may have." Brief for appellant at 11. She contends that she has been charged with making a false statement based upon her *belief* that she had never been convicted, in violation of § 28-915.01, which states in part: "A person who makes a false statement under oath . . . when he or she does not *believe* the statement to be true, is guilty of a Class I misdemeanor . . . ." (Emphasis supplied.)

Although neither the research of the parties nor that of the court discloses any cases in Nebraska directly on this particular point, there are cases involving perjury in other jurisdictions which are helpful in deciding this issue.

There are two essential elements of proof in perjury cases. First, the statements made by the defendant must be proven to be in fact false. Second, it must be proven that the defendant did not believe the statements to be true when made. *La Placa v. United States*, 354 F.2d 56 (1st Cir. 1965), *cert. denied* 383 U.S. 927, 86 S. Ct. 932, 15 L. Ed. 2d 846 (1966).

In *People v. Watson*, 85 Ill. App. 3d 649, 406 N.W.2d 1148 (1980), the court, in reversing a dismissal of the indictment by the trial court because of the defendant's use of words such as "possibly," "to the best of my knowledge," and "not that I remember," noted that a statement of belief may constitute perjury when, as a matter of fact, the witness had no such belief.

The appellant in *Cassady v. State*, 18 Okla. Crim. 568, 197 P. 171 (1921), was charged with perjury by making a false affidavit to procure a marriage license. Although his bride-to-be was only 12 years old, the defendant wrote in the affidavit that she was 18. The defendant argued that the girl told him she was 18 years old and he believed her. The court concluded that there was sufficient evidence before the jury to warrant a finding that the defendant knew when he made the application for a marriage license that his bride was under the

age of 18 years.

A defendant charged with perjury in *People v. Dixon*, 99 Cal. App. 2d 94, 221 P.2d 198 (1950), unsuccessfully argued against his conviction because he couched his testimony in the form of opinion or belief.

The California appellate court did not agree with this argument and stated:

> If this is the true rule no defendant could ever be convicted of perjury in California if he was careful to qualify his testimony, no matter how willfully false, by the words, "In my opinion," "to the best of my belief" or an equivalent, since no witness can testify directly to the state of another's mind.

Id. at 96, 221 P.2d at 199. The court added:

> "If a person willfully swears falsely to a belief in the existence of a fact which he knows does not exist he is as guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist." . . .
>
> In every case perjury must be knowingly false, and in every case the defendant's actual state of mind cannot be directly proved. It is for the jury to say in every case of perjury whether the defendant believed the truth of his testimony when he gave it.

Id.

In *Brasher v. State*, 715 S.W.2d 827 (Tex. App. 1986), the defendant, a police officer, testified before a grand jury that his partner shot a drunk driver to prevent him from running his truck into the defendant. At the defendant's perjury trial there were witnesses who testified they saw a flash and heard a shot at a time when the defendant, Brasher, was at the rear wheel of the truck. Brasher argued that the evidence was not sufficient to sustain a conviction because he merely expressed an opinion when he told the grand jury that his partner shot the driver to prevent him from running over the defendant.

The Texas court held that defendant's testimony was at most an opinion concerning a matter of objective fact. The court cited to *People v. Dixon, supra*, and stated that "[a] person who willfully swears to a belief in the existence of a fact which he knows does not exist is as guilty of perjury as if he has sworn

directly to the existence of a fact which he knew did not exist." *Brasher v. State*, 715 S.W.2d at 831. The court found that defendant's state of mind when he testified must be considered a " 'representation of fact' "; otherwise, a witness could be allowed to frustrate the inquiries of a grand jury by prefacing his sentences with words like " 'I believe' " or " 'I feel.' " *Id.*

The defendant in *United States v. Ponticelli*, 622 F.2d 985 (9th Cir. 1980), *cert. denied* 449 U.S. 1016, 101 S. Ct. 578, 66 L. Ed. 2d 476, was convicted on two counts of making a false declaration to a grand jury. While testifying, the defendant prefaced his sentences with " 'Not that I can recall [and] It's news to me' " and " 'I have been of the opinion . . . .' " 622 F.2d at 987. The defendant, on appeal following his conviction, argued that he testified only as to his memory and opinions and that given the subjective nature of his testimony, the jury could not conclude beyond a reasonable doubt that his testimony was knowingly false.

The appellate court disagreed and stated that if defendant's argument were accepted, a grand jury witness could deceive a grand jury or frustrate its inquiry with impunity, simply by prefacing each sentence with the words "I believe."

Although there is some authority which would be considered contrary to that expressed above, we believe the holdings of those courts which we cited express the more reasonable position, and it is the one which we adopt.

We therefore hold that a person can be convicted of making a false statement under oath when making a statement based on a belief that he or she knows is false. It is up to the jury to decide whether the defendant believed in the truth of his or her testimony when uttered. The knowledge of falsity may be inferred by the trier of fact from the surrounding circumstances, and such an inference may be derived from several sources: the objective falsity itself, a motive to lie, or facts tending to show generally that defendant knew his or her affirmation was false. Objective falsity as proof of knowledge arises when actual falsity is established and defendant's awareness of it is inescapable and self-evident. *State v. Boratto*, 80 N.J. 506, 404 A.2d 604 (1979). Proof of the falsity of a response may circumstantially imply knowledge that such was

untrue when uttered. *People v. Toner*, 55 Ill. App. 3d 688, 371 N.E.2d 270 (1977).

The evidence was sufficient for a jury to find beyond a reasonable doubt that the defendant was guilty of making a false statement under oath, and the claimed error in that regard is without merit.

We next deal with defendant's contention that her conviction of perjury was in error because the State failed to provide proper corroborative evidence to exclude all reasonable doubt as to the guilt of the defendant on the charge of perjury. It is therefore her position that her motion to dismiss at the close of the State's evidence should have been sustained.

Section 28-915 states:

> (1) A person is guilty of perjury, a Class III felony, if in any official proceeding he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he or she does not believe it to be true.
>
> . . . .
>
> (7) No person shall be convicted of an offense under this section when proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

In *State v. Mayhew*, 216 Neb. 761, 767, 346 N.W.2d 236, 240 (1984), we held:

> In the degree of proof necessary to prove the crime of perjury, Nebraska has long adopted the rule set out in *Gandy v. State*, 23 Neb. 436, 450, 36 N.W. 817, 823 (1888), where we stated with regard to the degree of corroboration necessary to prove perjury: " 'If, therefore, the oath of the accused is met by a single oath, the corroborating circumstances ought at least to equal the testimony of a single witness; the lowest quantity of testimony it has been said upon which a human being can be found guilty.'
>
> "This perhaps, is the better and safer rule. It does not require the testimony of two witnesses to the same fact, but it does require that the proof of the corroborative facts shall be such as to give a clear preponderance of the

> evidence in favor of the state, and thus, by such preponderance, establish the falsity of the oath, beyond a reasonable doubt. . . ."

This indicates that in Nebraska, perjury can be proved either by two witnesses or by one witness, together with material and independently established corroborative facts sufficient to amount to the testimony of another witness. The State argues that the corroborative evidence and the single eyewitness prove the appellant's guilt beyond a reasonable doubt.

McCaslin concedes that Officer Roger Wolfe's testimony given at the trial of Michael McCaslin directly contradicts her testimony. However, she argues that the corroborative evidence given by the State in the form of testimony by Officer Michael Hanke, who was also at the scene, is insufficient.

The record of Michael McCaslin's trial shows that Officer Wolfe saw the blue Chevette being driven by Michael McCaslin entering the intersection without stopping at the stop sign. Michael McCaslin entered the intersection of 5th Street and Platte Avenue coming from the east on 5th Street and turned right, or north, on Platte Avenue. Officer Wolfe was proceeding south on Platte Avenue just north of 5th Street, and Officer Hanke was also proceeding south on Platte Avenue a distance of approximately two car lengths behind Wolfe. Hanke testified that he first saw Michael McCaslin's car when it was approximately 6 to 10 feet east of or short of the intersection. He testified that Michael McCaslin's automobile made such a wide turn that it almost ran into Officer Wolfe's patrol unit. Hanke said that the car never did come to a stop during this period of time "that I saw."

It seems to be McCaslin's position that because Officer Hanke had not seen the Michael McCaslin automobile until it was within 6 to 10 feet of the intersection that he was not able to say that it did not stop at some point farther from the intersection. Therefore, she claims, this is insufficient corroboration of the testimony of Officer Wolfe. Such a claim is without substance.

In any event, there were several photographs received in evidence which showed the location where the defendant was seated in the Chances R restaurant and lounge, including what

her view would have been of the street where this incident occurred. These exhibits cast doubt as to her ability to see what she claims to have seen. The evidence was sufficient to support a verdict of guilty on the charge of perjury.

Referring to the photographs, the defendant claims that the court erred in overruling her foundation objection to the reception of these exhibits.

" 'Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. . . .' " *State v. Red Kettle*, 239 Neb. 317, 326, 476 N.W.2d 220, 226 (1991). The admission of photographs shown to be correct representations is within the discretion of the trial court as to relevancy, and unless an abuse of discretion is shown, error may not be predicated thereon. *Red Kettle, supra.* "A photograph adequately identified as correctly portraying conditions as they existed at the time of the event under consideration is admissible even though taken at some distance in time from the occurrence of the event. Inaccuracies and unreliability can be exposed by cross-examination." *Jenkins v. Associated Transport, Inc.*, 330 F.2d 706, 710 (6th Cir. 1964).

Raymond Reetz, the owner of Chances R restaurant and lounge, as a witness to provide foundation for the introduction of the photographs, testified that they accurately depicted the interior of his lounge area as it existed for the last 5 years, including January 23, 1990, the date of the incident testified to by defendant. It seems to be the defendant's position that because Reetz, in his testimony, was not certain whether he was in this area between the hours of 11 and 12 p.m. on January 23, 1990, and therefore did not know whether the table where the defendant claimed to have been sitting and the chairs had been moved that night, the foundation for introduction of the photographs was insufficient.

It seems to us that testimony that furniture in a lounge area had been in the same place for 5 years supports a permissible inference that the setup of the furniture remained the same during this crucial 1-hour period. Besides, defendant's own testimony given in the case *State of Nebraska v. Michael McCaslin*, and which appears as exhibit 27 in this proceeding,

describes in detail the location and position of the table and chairs where she was sitting, which conforms to the description manifested by the photographs. There is no merit to this claim of error.

Finally, McCaslin argues that sentences of imprisonment of 1 to 20 years for perjury and 1 year for making a false statement under oath were excessive. The sentences were ordered to be served concurrently.

The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there is an abuse of discretion. *State v. Hird*, 239 Neb. 331, 476 N.W.2d 229 (1991).

In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law. Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 1989); *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991). Deliberate false testimony in a court proceeding tends to destroy the integrity of the judicial system and cannot be tolerated.

A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Red Kettle, supra.*

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). Moreover, it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Haynie, supra.*

Defendant's prior record includes a 1982 incident in Los Angeles where she was placed on probation for 5 years on a

count of insurance fraud; a fine and restitution ordered on an insufficient-fund check; fines for two cases of no operator's license and for no valid registration; a fine for shoplifting, followed by a conviction 2 months later for criminal trespass arising out of trespassing in the same store; and probation for 5 years for theft by deception.

There clearly was no abuse of discretion on the part of the trial court in imposing the sentences which it did. The judgment is affirmed.

AFFIRMED.

BILLY BILLUPS, INDIVIDUALLY AND AS REPRESENTATIVE OF THOSE INDIVIDUALS SET FORTH HEREIN, APPELLANT, V. JADE, INC., A NEBRASKA CORPORATION, AND LA PEN, INC., A NEBRASKA CORPORATION, APPELLEES.

482 N.W.2d 269

Filed April 10, 1992. No. S-91-734.

1. **Actions: Courts: Dismissal and Nonsuit.** A court has inherent authority to dismiss a civil action as the result of a lack of diligent prosecution.
2. _____: _____: _____. Since authority to dismiss a civil action for failure to prosecute with due diligence is within a court's inherent powers, judicial authority to dismiss an action for lack of prosecution exists independent of, and in the absence of, a statute authorizing such dismissal.
3. **Actions: Dismissal and Nonsuit: Appeal and Error.** Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal.
4. **Dismissal and Nonsuit.** A dismissal for lack of prosecution is without prejudice and does not result in a disposition on the merits of a controversy.
5. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
6. **Actions: Dismissal and Nonsuit: Rules of the Supreme Court.** In the absence of a showing of good cause, a litigant's failure to prosecute a civil action, resulting in noncompliance with the Nebraska Supreme Court's Case Progression Standards for civil actions in district courts, is a basis to dismiss an action on account of a lack of diligent prosecution.

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

A. James McArthur for appellant.

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

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

SHANAHAN, J.

On August 4, 1988, in the district court for Lancaster County, Billy Billups, a Nebraska penitentiary inmate, filed an action against Jade, Inc., and its corporate subsidiary, La Pen, Inc. As the result of an agreement with the Nebraska Department of Correctional Services, Jade, and correspondingly La Pen, has a manufacturing business at the state penitentiary and employed penitentiary inmates to turn out sewn products. According to Billups, Jade and La Pen violated both state and federal labor laws by paying prison inmates less than the statutory minimum wage.

On May 16, 1989, the district court issued an order to show cause why Billups' case should not be dismissed for want of prosecution. However, apparently for good cause shown, which is undisclosed in the record, the court removed Billups' case from the dismissal docket. On August 3, Billups filed an amended petition to include himself and other Nebraska penitentiary inmates as plaintiffs, but continued to base the action on an alleged violation of state and federal labor laws which prescribed minimum wages. Billups' action was brought to issue when Jade and La Pen filed an amended answer on September 27. On October 31, Jade and La Pen served interrogatories on Billups, and answers to the interrogatories were signed in December 1989.

Billups' case, on May 8, 1990, was again placed on the dismissal docket, but was removed on June 4, apparently on the assurance that Billups would prosecute his pending case. Nothing transpired until March 11, 1991, when Jade and La Pen received the answers to interrogatories which had been signed in December 1989. No explanation was given for the hiatus between the signing of the answers to interrogatories and

their receipt by Jade and La Pen. On March 18, Jade and La Pen filed a motion for dismissal on account of Billups' failure to prosecute the action.

On May 3, at the hearing on the dismissal motion, Billups informed the court that he had believed that La Pen was about to file in bankruptcy, and, therefore, he withheld prosecution of the action. At the conclusion of the hearing, the court dismissed Billups' action "for want of prosecution." Billups appeals from that dismissal.

Billups argues that the district court erred in dismissing the action because Neb. Rev. Stat. § 25-601 (Reissue 1989) requires that a civil action be decided on its merits, unless certain statutorily prescribed situations authorize dismissal; for example, a plaintiff's voluntary dismissal of an action before submission for determination, a plaintiff's failure to appear for trial, or a dismissal for want of necessary parties.

This court has addressed the propriety of dismissing a civil action for want of diligent prosecution. In *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 805, 366 N.W.2d 751, 752 (1985), we recognized that a court has inherent authority to dismiss a civil action as the result of a lack of diligent prosecution, when we stated:

> There is no doubt that the district court has the inherent power to dismiss a case for failure to prosecute with due diligence. *A. Hirsh, Inc. v. National Hair Co.*, [210 Neb. 397, 315 N.W.2d 236 (1982)]; *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978). As we noted in *Schaeffer* at 223, 263 N.W.2d at 104: "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts."

See, also, *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978) (sanction by dismissal is necessary to prevent undue delay in disposition of pending cases and to avoid congested dockets in trial courts). Since authority to dismiss a civil action for failure to prosecute with due diligence is within a court's inherent powers, judicial authority to dismiss an action for lack of prosecution exists independent of, and in the absence of, a statute authorizing such dismissal. See, *Wilson v. Bryan*

Memorial Hosp., 215 Neb. 446, 338 N.W.2d 796 (1983); *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982); *Brown v. Lincoln*, 157 Neb. 840, 61 N.W.2d 836 (1954). Dismissal of a civil action for lack of prosecution is addressed to the discretion of a trial court, whose ruling, in the absence of an abuse of discretion, will be upheld on appeal. See *Schaeffer v. Hunter, supra*. A dismissal for lack of prosecution is without prejudice and does not result in a disposition on the merits of a controversy. *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962). Cf. § 25-601 (dismissals without prejudice).

Consequently, the issue which we must address is whether the district court abused its discretion in dismissing Billups' action under the circumstances.

> [A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). Accord, *Stewart v. Amigo's Restaurant, ante* p. 53, 480 N.W.2d 211 (1992); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

Billups' action was twice placed on the district court's dismissal docket after months of inactivity in the litigation, but apparently escaped dismissal solely on the basis that Billups would diligently prosecute the action. Moreover, although Neb. Ct. R. of Discovery 33(a) (rev. 1989) requires that interrogatories be answered within 30 days after service of the interrogatories, Billups' answers to interrogatories were not served on Jade and La Pen until a full 16 months had elapsed after service of the interrogatories. That unexplained delay in the litigation is attributable entirely to Billups. Furthermore, we note that pursuant to the Case Progression Standards for civil actions in district courts of Nebraska, Billups' case should have been tried or heard on its merits within 18 months after the action was filed. Neb. Ct. R. of Case Progression Standards (rev. 1989). Billups' action, filed in August 1988, had been

pending almost 3 years, and nearly twice as long as the period allowed for disposition in accordance with the Case Progression Standards, before dismissal on May 3, 1991. Even with the additional plaintiffs in August 1989, the Billups action had been pending 21 months before dismissal in May 1991. As this court observed in *Wilson v. Bryan Memorial Hosp., supra*, regarding the Case Progression Standards:

> To fail to affirm the decision of a trial court on [a motion] to dismiss for want of diligent prosecution, involving a delay twice as long as the total recommended disposition time, would be a travesty and an affront to courts and counsel who are in good faith attempting to support this court's determination to insure speedy resolution of cases in all the courts of Nebraska.

215 Neb. at 448-49, 338 N.W.2d at 798. Thus, in the absence of a showing of good cause, a litigant's failure to prosecute a civil action, resulting in noncompliance with the Nebraska Supreme Court's Case Progression Standards for civil actions in district courts, is a basis to dismiss an action on account of a lack of diligent prosecution. Billups' belief, expressed at the hearing on the Jade-La Pen dismissal motion, namely, that there was a possibility of La Pen's filing a petition in bankruptcy, is an insufficient showing of good cause relative to the Case Progression Standards. In view of desired docket control at the trial level, dismissal of an inactive civil action allows a court to turn its attention to other pending litigation and reduce the number of cases awaiting disposition. Consequently, we find no abuse of discretion in the district court's dismissal of Billups' action; hence, the judgment of the district court is affirmed.

AFFIRMED.