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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 11, 1992 and MARCH 18, 1993

IN THE

Supreme Court of Nebraska

VOLUME CCXLII

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

WILLIAM C. HASTINGS, Chief Justice
LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice[1]
DALE E. FAHRNBRUCH, Associate Justice
DAVID J. LANPHIER, Associate Justice[2]

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

RICHARD D. SIEVERS, Chief Judge
WILLIAM M. CONNOLLY, Associate Judge
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge
JOHN F. WRIGHT, Associate Judge

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

[1]Until January 7, 1993
[2]Appointed January 2, 1993

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
		William B. Rist	Beatrice
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	James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Paul J. Hickman	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett Inbody	Wahoo
		Robert R. Steinke	Columbus
		John C. Whitehead	Columbus

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman Robert E. Otte Darvid D. Quist	Fremont Dakota City Blair
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel Ronald D. Olberding	Ainsworth Burwell
Ninth	Buffalo, Hall	John P. Icenogle James Livingston Joseph D. Martin	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Alfred J. Kortum Robert O. Hippe John D. Knapp Brian Silverman	Chadron Gering Gering Kimball Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson		
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Larry F. Fugit	Papillion
		William B. Zastera	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	David A. Bush Philip M. Martin, Jr.	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Gerald R. Jorgensen Graten D. Beavers	Kearney Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava Kent E. Florom	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	Charles Plantz James T. Hansen	Rushville 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	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gerald E. Rouse Gary F. Hatfield Lyle Winkle	Columbus Central City Columbus

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No. S-90-486: **In re Estate of Martin.** Appeal dismissed.
No. S-91-190: **State v. Stewart.** Affirmed.
No. S-91-668: **State v. King.** Affirmed.
No. S-91-746: **State v. McGurk.** Affirmed.
No. S-91-1259: **In re Interest of Arnold.** Affirmed.
No. S-91-1260: **In re Interest of Arnold.** Affirmed.
No. S-92-447: **State v. Frickel.** Affirmed.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-87-335: **Circle 4 Fertilizer v. Fox.** Stipulation allowed; bankruptcy stay lifted; appeal dismissed.

No. S-89-393: **West v. Rothenberg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-90-590: **Kramper Fam. Farm Partnership v. Nebraska Pub. Power Dist.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-90-971: **Perry Grain Co. v. First Nat. Bank of McCook.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-90-982: **Keefe v. Keefe.** Stipulation allowed; appeal dismissed.

No. S-90-994: **Fish v. Daniels.** Stipulation allowed; appeal dismissed.

No. S-90-1064: **Goracke v. Ferguson.** Cause having not been shown, appeal dismissed for want of a final order.

No. S-90-1240: **Snyder Indus. v. FirsTier Bank.** Stipulation allowed; appeal dismissed with prejudice.

No. S-90-1245: **Armstrong v. Meints.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-91-098: **In re Name Change of Huck.** Stipulation allowed; appeal dismissed at cost of appellant.

No. S-91-330: **BMI Management, Inc. v. Blackstone.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-91-918: **Alexander & Alexander, Inc. v. Coffey.** Cause having not been shown, appeal dismissed as moot.

No. S-92-398: **Main Street Movies v. Wellman.** Cause having not been shown, appeal dismissed. See Rule 7A(2).

No. S-92-434: **State v. Foral.** Affirmed. See Rule 7A(1).

No. S-93-163: **State ex rel. NSBA v. Ogborn.** Motion

sustained; Michael J. Ogborn suspended from the practice of law in Nebraska.

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. A-90-162: **Mann v. State**, 1 NCA 1795 (1992). Petition of appellant for further review overruled.

No. S-90-582: **In re Estate of Smatlan**, 1 NCA 1892, 1 NCA 2653 (1992). Petition of appellant for further review sustained.

No. A-90-782: **Annis v. Turtle Creek Homeowners Assn.**, 1 NCA 1813 (1992). Petition of appellee for further review overruled.

No. A-90-792: **Knight v. Knight**, 1 NCA 2665 (1992). Petition of appellee for further review overruled.

No. A-90-908: **Metropolitan Life Ins. Co. v. Schrader**, 1 NCA 2085 (1992). Petition of appellee for further review overruled.

No. A-90-921: **Von Tour v. Knight**, 1 NCA 2668 (1992). Petition of appellee for further review overruled.

No. A-90-987: **Hankins v. Aita**, 1 NCA 2092 (1992). Petition of appellant for further review overruled.

No. A-90-1099: **Trinidad Bean & Elev. Co. v. Frosh**, 1 NCA 1819 (1992). Petition of appellant for further review overruled.

No. A-90-1188: **Florist Supply of Omaha v. Prochaska**, 2 NCA 78 (1993). Petition of appellee for further review dismissed as premature.

No. A-91-023: **Koziol v. Koziol**, 1 NCA 2115 (1992). Petition of appellant for further review overruled.

No. A-91-100: **Abdullah v. Gunter**, 1 NCA 2442 (1992). Petition of appellant for further review overruled.

No. A-91-293: **State v. White**, 1 NCA 1834 (1992). Petition of appellant for further review overruled.

No. A-91-293: **State v. White**, 1 NCA 1834 (1992). Petition of appellant for further review overruled.

No. S-91-518: **State v. Schrein**, 1 NCA 1581 (1992). Petition

of appellee for further review sustained.

No. S-91-848: **K N Energy, Inc. v. Cities of Broken Bow et al.**, 1 NCA 2185 (1992). Petition of appellee for further review sustained.

No. S-91-849: **K N Energy, Inc. v. Cities of Cozad et al.**, 1 NCA 2185 (1992). Petition of appellee for further review sustained.

No. S-91-850: **K N Energy, Inc. v. Cities of Arapahoe et al.**, 1 NCA 2185 (1992). Petition of appellee for further review sustained.

No. S-91-851: **K N Energy, Inc. v. Cities of Albion et al.**, 1 NCA 2185 (1992). Petition of appellee for further review sustained.

No. A-91-898: **State v. Sanchez**, 1 NCA 1925 (1992). Petition of appellant for further review overruled.

Nos. A-91-923, A-91-924, A-91-925: **Waite v. Carpenter**, 1 NCA 2014 (1992). Petition of appellant for further review overruled.

Nos. A-91-926, A-91-927, A-91-928, A-91-929: **State v. Hammond**. Petition of appellant for further review overruled.

No. S-91-977: **State v. Morrison**, 1 NCA 2262 (1992). Petition of appellee for further review sustained.

No. A-91-984: **State v. Dainton**. Petition of appellant for further review overruled.

No. A-91-1004: **State v. Schulte**, 1 NCA 2526 (1992). Petition of appellant for further review overruled.

No. A-91-1036: **State v. Kerns**, 1 NCA 2321 (1992). Petition of appellant for further review overruled.

No. A-91-1050: **State v. Turner**, 1 NCA 2543 (1992). Petition of appellant for further review overruled.

No. A-91-1122: **Haag v. Speedway Transp.**, 1 NCA 2215 (1992). Petition of appellee for further review overruled.

No. A-91-1191: **State v. Myles**, 1 NCA 2393 (1992). Petition of appellant for further review overruled.

No. A-92-012: **State v. Egbert**, 1 NCA 2612 (1992). Petition of appellant for further review overruled, the same having been untimely filed.

No. A-92-315: **McGuire v. Avis Rent-A-Car Sys.** Petition of appellant for further review overruled as having been untimely

filed.

No. A-92-390: **Ferrell v. Hopkins**, 1 NCA 2557 (1992). Petition of appellant for further review overruled.

Nos. A-92-481, A-92-488: **State v. Williams**. Petition of appellant for further review overruled.

No. A-92-510: **State v. Bryson**. Petition of appellant for further review overruled.

No. A-92-690: **Midwest Electric v. Bogiot**. Petition of appellant for further review overruled.

No. A-92-881: **Allen v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled.

No. A-92-1076: **State v. Harig**. Petition of appellant for further review overruled.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

FRANK AND DELDINE YOUNG, HUSBAND AND WIFE, APPELLEES, V. DODGE COUNTY BOARD OF SUPERVISORS ET AL., APPELLANTS.

493 N.W.2d 160

Filed December 11, 1992. No. S-89-1476.

1. **Actions: Mandamus.** An action for a writ of mandamus is a law action.
2. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
3. **Mandamus: Counties: Public Officers and Employees: Highways.** A writ of mandamus is a proper remedy to compel a county board, in accordance with Neb. Rev. Stat. §§ 39-1713 and 39-1716 (Reissue 1988), to lay out a public road for access to isolated land.
4. **Attorney Fees.** In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee.
5. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee 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.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed as modified.

Dean Skokan, Dodge County Attorney, and Joe Stecher for appellants.

Warren R. Whitted, Jr., and Christopher R. Knust, of Lieben, Dahlk, Whitted, Houghton & Jahn, P.C., for appellees.

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

SHANAHAN, J.

The Dodge County Board of Supervisors appeals from the

judgment in a bench trial of a mandamus action, see Neb. Rev. Stat. § 25-2156 et seq. (Reissue 1989), in which the district court for Dodge County ordered the board to provide public "access" to isolated real estate owned by Frank and Deldine Young since its acquisition in 1977.

The mandamus was based on Neb. Rev. Stat. § 39-1713 (Reissue 1978), which provided:

> When any person shall present to the county board an affidavit satisfying it (1) that he is the owner of the real estate described therein located within the county, (2) that the same is shut out from all public roads, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, (3) that he is unable to purchase from any of such persons the right-of-way over or through the same to a public road or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, and (4) asking that a public road be laid out in accordance with section 39-1716, the county board shall appoint a time and place for hearing the matter . . . .

Neb. Rev. Stat. § 39-1716 (Reissue 1978) stated: "The county board shall, if it finds that the conditions set forth in section 39-1713 . . . exist, proceed to lay out a public road of not more than four nor less than two rods in width, to such real estate . . . ."

STANDARD OF REVIEW

An action for a writ of mandamus is a law action. *Nuss v. Pathfinder Irr. Dist.*, 214 Neb. 888, 336 N.W.2d 584 (1983); *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979); *State ex rel. Goetz v. Lundak*, 199 Neb. 585, 260 N.W.2d 589 (1977); *State ex rel. Rittenhouse v. Newman*, 189 Neb. 657, 204 N.W.2d 372 (1973); *State, ex rel. Charvat, v. Sagl*, 119 Neb. 374, 229 N.W. 118 (1930); *State v. Porter*, 90 Neb. 233, 133 N.W. 189 (1911).

> 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

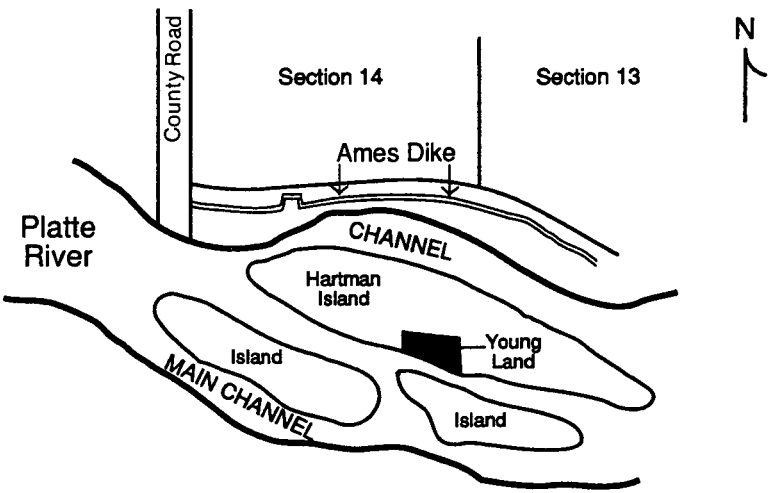
> awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Broekemeier Ford, Inc. v. Clatanoff, 240 Neb. 265, 267, 481 N.W.2d 416, 418 (1992). Accord, *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992); *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Justice v. Hand*, 227 Neb. 856, 420 N.W.2d 704 (1988); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). Accord, *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Albee v. Maverick Media, Inc.*, *supra*; *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

FACTUAL BACKGROUND

Following is a diagram based on introduced exhibits that shows various locations pertinent to the proceedings:



Hartman Island consists of 280 acres surrounded by the Platte River. There is no public road on the island. Youngs' tract, located on the south side of the island, is bounded on three sides by real estate owned by others and on the fourth side by the main channel of the Platte River.

When Youngs bought their island property in 1977, Hartman Island was accessible as follows: After exiting from the county road, which ended at the Platte's north bank, one drove eastward one-half mile on Ames Dike, which was situated near the river's north bank and was maintained by Ames Diking and Drainage District, a political subdivision of the State of Nebraska. At that 1/2-mile point, and after leaving Ames Dike, one proceeded south to the river across land owned by Tom Wolf, and then forded the Platte's channel for entry at the northwest corner of Hartman Island. Once on the island, and to reach their property, Youngs crossed tracts of adjacent landowners.

In 1988, Ames Diking and Drainage District, prompted by liability concerns, prohibited vehicular traffic on Ames Dike. Although Youngs filed an action for judicial acknowledgment of their prescriptive right to travel on Ames Dike, Youngs dismissed their suit. See, *State v. Cheyenne County*, 123 Neb. 1, 241 N.W. 747 (1932) (title by adverse possession cannot be acquired against the State); Neb. Rev. Stat. § 39-1404 (Reissue 1988) (title by prescription cannot be acquired in a political subdivision's real estate).

After Youngs were unable to acquire a right-of-way for access to their insular property, they filed their affidavit with the Dodge County Board of Supervisors (County Board) on July 7, 1988, and requested that the county provide public access to Youngs' island property pursuant to the "isolated land" statutes, §§ 39-1713 and 39-1716. After a hearing, the County Board, on August 10, 1988, rejected Youngs' request for public access to their island property.

Youngs sued the County Board in a mandamus action to compel access to Youngs' island property. At trial, Youngs, without factual dispute by the County Board, established that Youngs' island tract lacked public access. The district court declined to apply the 1982 amendment of § 39-1716, namely, § 39-1716 (Reissue 1988), which, in addition to the

requirements expressed in § 39-1713, required

> (2) that the isolated land was not isolated at the time it was purchased by the owner, (3) that the isolation of the land was not caused by the owner or by any other person with the knowledge and consent of the owner, and (4) that access is necessary for existing utilization of the isolated land [and] that the amount of use and the number of persons served warrants such action . . . .

Consequently, applying the isolated land statutes that existed when Youngs acquired their island property, that is, §§ 39-1713 and 39-1716 (Reissue 1978), the court ordered Dodge County and its supervisors to provide Youngs with "access" to their island property and awarded Youngs an attorney fee pursuant to § 25-2165 (writ of mandamus granted; recoverable costs may include an attorney fee for plaintiff's lawyer).

ASSIGNMENTS OF ERROR

The County Board contends that the district court erred in (1) failing to apply § 39-1716 (Reissue 1988), one of the isolated land statutes amended after Youngs acquired their real estate; (2) using the isolated land statutes as a basis for mandamus; (3) concluding, as a matter of law, that Youngs' island property was isolated land within the purview of §§ 39-1713 and 39-1716; (4) failing to rule that the county could not utilize the power of eminent domain to take real estate of another governmental subdivision, and (5) awarding an attorney fee as part of the costs recoverable by Youngs in their mandamus action.

1982 AMENDMENT OF § 39-1716

First, the County Board contends that the district court should have applied § 39-1716 (Reissue 1988) in disposing of Youngs' mandamus action. Section 39-1716 (Reissue 1988) contains in part: "For any real estate purchased or otherwise acquired after January 1, 1982, for which public access is granted pursuant to sections 39-1713 to 39-1719, the person petitioning for such access shall also reimburse the county for all engineering and construction costs incurred in providing such access."

"Statutes covering substantive matters in effect at the time of

the transaction govern, not later enacted statutes." *Schall v. Anderson's Implement*, 240 Neb. 658, 662-63, 484 N.W.2d 86, 89-90 (1992). Accord *Holthaus v. Parsons*, 238 Neb. 223, 469 N.W.2d 536 (1991). "A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." *Moore v. Peterson*, 218 Neb. 615, 617, 358 N.W.2d 193, 195 (1984). Accord, *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988); *Welsh v. Anderson*, 228 Neb. 79, 421 N.W.2d 426 (1988); *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

Youngs' right to obtain access in the form of a public road for their isolated land was governed by §§ 39-1713 and 39-1716 (Reissue 1978), the law existing when Youngs acquired the real estate for which access was later sought. Moreover, the 1982 amendment of § 39-1716 contains: "For any real estate purchased or otherwise acquired after January 1, 1982 . . . ." Quite apart from the acquisition date for Youngs' real estate, the express language of § 39-1716 (Reissue 1988) does not evidence an intent for retroactive application of the statute, but evidences a legislative intent that the 1982 amendment of § 39-1716 apply prospectively, that is, apply to any real estate acquired after January 1, 1982. We conclude that the 1982 amendment to § 39-1716 was inapplicable to Youngs' mandamus action and, consequently, the district court correctly employed §§ 39-1713 and 39-1716 (Reissue 1978) in disposing of Youngs' mandamus action.

WAS MANDAMUS AN AVAILABLE REMEDY?

The County Board argues that mandamus is unavailable to obtain a public road for access pursuant to §§ 39-1713 and 39-1716, but, rather, that review by petition in error, see Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1989), is the appropriate procedure in Youngs' case.

As stated in *State ex rel. Pederson v. Howell*, 239 Neb. 51, 56, 474 N.W.2d 22, 26 (1991):

> Mandamus is defined as an extraordinary remedy, not a writ of right, *State ex rel. Thompson v. Alderman*, 230

Neb. 335, 431 N.W.2d 625 (1988), issued to compel the performance of a purely ministerial act or duty, *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), imposed by law upon an inferior tribunal, corporation, board, or person, see Neb. Rev. Stat. § 25-2156 (Reissue 1989), where (1) the relator has a clear legal right to the relief sought; (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87 (1983), *cert. denied* 463 U.S. 1214, 103 S. Ct. 3554, 77 L. Ed. 2d 1400; and (3) there is no other plain and adequate remedy available in the ordinary course of law, *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990).

In *Singleton v. Kimball County Board of Commissioners*, 203 Neb. 429, 279 N.W.2d 112 (1979), a writ of mandamus was recognized as a proper remedy to compel a county board, in accordance with §§ 39-1713 and 39-1716, to lay out a public road for access to isolated land. In *Singleton*, this court concluded that compliance with the isolated land statutes is a ministerial duty and, "[a]s the duty is ministerial, petition in error proceedings are . . . not available," 203 Neb. at 435, 279 N.W.2d at 116; hence, mandamus is an appropriate remedy for obtaining access to isolated land. See, also, *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983) (establishment of a public road on satisfaction of the statutory requirements of isolated land statutes is a ministerial duty).

Youngs' case is controlled by *Singleton v. Kimball County Board of Commissioners, supra*, which, as Nebraska precedent, authorizes mandamus as a proper remedy to compel the County Board to act consistent with Neb. Rev. Stat. §§ 39-1713 to 39-1719 (Reissue 1978), the isolated land statutes.

IS YOUNGS' TRACT "ISOLATED"?

The question of law raised by Youngs and the County Board, concerning the isolated land statutes is based on undisputed facts: Youngs' island tract is bounded on three sides by land owned by others and on the fourth side by the main channel of the Platte River. Youngs have been unable to acquire access to

their island property. From the north, Youngs' property was previously accessible via the county road and the Ames Dike with permission of the Ames Diking and Drainage District and by crossing land owned by others. The County Board argues that there is an "island exception" to § 39-1713. However, in examining § 39-1713 we find no "island exception"; rather, land may be isolated, and, therefore, the subject of § 39-1713(2), if the land is shut off from all public roads, other than a waterway, by (1) being surrounded on all sides by real estate belonging to other persons or (2) by being surrounded on all sides by real estate belonging to others and by water. In view of its location on Hartman Island, Youngs' tract meets the requirement of § 39-1713(2) for qualification as isolated land. Thus, Youngs are entitled to a writ of mandamus for access to their island tract in accordance with §§ 39-1713 and 39-1716. The location and type of road eventually provided by the county are matters for decision by the County Board pursuant to §§ 39-1713 and 39-1716, see *Singleton v. Kimball County Board of Commissioners, supra*, and are outside the present appeal and outside the question whether the County Board must provide a public road to Youngs' island property from an existing public road. Concerning the preceding question, we affirm the district court's judgment, subject to the modification that the County Board shall lay out a "public road" in connection with Youngs' island property, see § 39-1716 (Reissue 1978), rather than "public access," see § 39-1716 (Reissue 1988).

CONDEMNATION OF THE AMES DIKE

The County Board claims that the district court erred in failing to hold that the county could not utilize the power of eminent domain to acquire property of the Ames Diking and Drainage District, that is, condemnation for the purpose of access via or across the Ames Dike. The district court properly refrained from deciding whether the county could condemn property of Ames Diking and Drainage District, a political subdivision. Involvement of the Ames Dike as a site or means for access to Youngs' island tract relates to location of a future public road to Youngs' property. As mentioned above, the only

issue presented in Youngs' case is whether the County Board has a ministerial duty to lay out a public road for access to Youngs' insular property. Locating and laying out a public road are matters for the County Board and not matters for judicial consideration and determination in the present posture of Youngs' case. For that reason, the County Board's assignment of error relating to the power of eminent domain regarding property of the Ames Diking and Drainage District need not, and, therefore, will not, be considered for resolution of the issues raised in Youngs' mandamus action.

AN ATTORNEY FEE AS COSTS

The County Board contends that an attorney fee for Youngs' lawyer is unauthorized because Youngs were not entitled to the mandamus granted by the district court. However, we have determined that mandamus was proper under the circumstances.

Section 25-2165 provides for an attorney fee as part of the costs in a successful mandamus action.

As we expressed in *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 765, 472 N.W.2d 391, 402 (1991): "In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee." When an attorney fee is authorized, the amount of the fee 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. *Megel v. City of Papillion*, 194 Neb. 819, 235 N.W.2d 876 (1975); *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972); *Anoka-Butte Lumber Co. v. Malerbi*, 180 Neb. 256, 142 N.W.2d 314 (1966). We find no abuse of discretion in the district court's awarding an attorney fee as part of the costs recoverable by Youngs in their mandamus action. Therefore, the trial court's judgment for costs is affirmed.

Youngs have also requested an attorney fee be awarded for their counsel in this appeal. Youngs have submitted information in compliance with Neb. Ct. R. of Prac. 9F (rev. 1992). In view of the factors for judicial consideration in

awarding an attorney fee, see, *Smith v. Union Ins. Co.*, 218 Neb. 797, 359 N.W.2d 113 (1984); *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978); and *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975), and after reviewing the information supplied by the parties in conjunction with Youngs' request for an attorney fee and expenses to be awarded in this court, we determine that $2,500 is appropriate for an attorney fee and expenses in this appeal and, therefore, order that the County Board shall pay $2,500 as an attorney fee and expenses for Youngs' counsel in proceedings before this court.

CONCLUSION

Subject to the modification hereinbefore expressed, we affirm the district court's judgments and order the County Board to pay the attorney fee for the services of Youngs' lawyer in this appeal.

AFFIRMED AS MODIFIED.

NORTHLAND INSURANCE COMPANY, A CORPORATION, AND THE TRAVELERS COMPANIES, A CORPORATION, APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

492 N.W.2d 866

Filed December 11, 1992. No. S-90-020.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
2. **Tort Claims Act: Negligence: Liability.** A tort claim under Nebraska's State Tort Claims Act is any claim against the State for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the State, while acting

within the scope of his office or employment, under circumstances where the State, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

3. **Tort Claims Act.** Nebraska's State Tort Claims Act is patterned after the Federal Tort Claims Act.
4. **Tort Claims Act: Contribution: Liability.** An action for contribution is covered under Nebraska's State Tort Claims Act only if a private person would be liable to the claimant for the damage, loss, injury, or death.
5. **Tort-feasors: Negligence: Contribution.** The Nebraska Supreme Court has recognized claims for contribution among negligent joint tort-feasors.
6. **Judgments: Torts: Negligence: Contribution: Liability.** A right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he or she discharges more than his or her proportionate share of the judgment.
7. **Equity.** General principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other gives the latter an advantage to which he is not equitably entitled.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

J. Joseph McQuillan and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellants.

Don Stenberg, Attorney General, and Lynne R. Fritz for appellee.

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

FAHRNBRUCH, J.

Succinctly, the issue in this case of first impression is whether under Nebraska's State Tort Claims Act the State of Nebraska may be sued for contribution as an alleged joint tort-feasor.

In sustaining the State's demurrer to the appellants' petition for such relief, the district court for Dawes County held that it lacked subject matter jurisdiction because it found that a contribution claim is not a tort action under Nebraska's State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987). We reverse the holding of the district court and remand the cause for further proceedings.

Appellants' petition alleges that a collision of a tractor-trailer unit operated by Edward Witte and owned by Iten Leasing Company and an automobile operated by Kevin Jech in Dawes County was, in part, proximately caused by the negligence of the State. Jech, his wife, Joyce, and their two sons all received injuries in the accident. Joyce Jech died as a result of the injuries she received. The appellants, Northland Insurance Company and The Travelers Companies (insurance companies), provided liability insurance for Witte and Iten, respectively.

A lawsuit filed in federal district court against Witte and Iten resulted in a $1,250,000 jury verdict in favor of Kevin Jech as personal representative of the estate of Joyce Jech. The petition in the case under consideration alleges that additional lawsuits were filed in the district court for Dawes County against Witte, Iten, and the State by various Jech family members. Following the verdict in federal district court, the insurance companies settled all claims against Witte and Iten for $1,600,000.

Thereafter, in May 1989, in accordance with Nebraska's State Tort Claims Act, the insurance companies filed a claim for contribution with the State Claims Board. The claim was rejected in September 1989. No issue has been raised as to whether the claim was timely filed. The insurance companies instituted this lawsuit on October 12, 1989, alleging that the State was negligent in (1) failing to properly maintain Highway 20 at or near the accident site and (2) failing to warn users of Highway 20 of dangerous conditions existing at or near the scene of the accident. In the prayer of their petition, the insurance companies seek contribution of $800,000 from the State toward the amount paid in settlement of the federal and state court lawsuits.

On November 13, 1989, the State filed a demurrer to the insurance companies' petition, alleging that (1) the petition failed to state a cause of action under Nebraska's State Tort Claims Act and that (2) the court lacked subject matter jurisdiction because a contribution or indemnity claim is not a tort action. The court sustained the demurrer, and the insurance companies appealed to this court.

[W]hen ruling on a demurrer, a court must assume that the

> pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. . . . A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. . . . That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.

(Citations omitted.) *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 270-71, 488 N.W.2d 343, 346 (1992).

As previously indicated, the sole issue to be determined on appeal is whether the district court was correct in holding that it had "no jurisdiction of the subject matter for the reason that a contribution or indemnity claim is not a tort action, under the State Tort Claims Act . . . and therefore the cause of action fails."

> *Tort claim* [*under Nebraska's State Tort Claims Act*] *shall mean any claim* against the State of Nebraska *for money only* on account of damage to or loss of property or *on account of personal injury or death*, caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his office or employment, *under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death* . . . .

(Emphasis supplied.) § 81-8,210(4).

Nebraska's State Tort Claims Act is patterned after the Federal Tort Claims Act. *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

In *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951), the United States argued that, under the Federal Tort Claims Act, it had not consented to be sued for contribution claimed by a joint tort-feasor. The U.S. Supreme Court stated that the Federal Tort Claims Act on its face amply covered such consent and "waive[d] the Government's immunity from suit in sweeping language." *Yellow Cab Co.*,

340 U.S. at 547. The Court noted that "[t]he words '*any claim* against the United States . . . *on account of* personal injury' . . . are broad words in common usage. They are not words of art." (Emphasis in original.) 340 U.S. at 548. In holding that the Federal Tort Claims Act carries the Government's consent to be sued for contribution, the Court also found it significant that claims for contribution were not included in the list of exceptions contained within the Federal Tort Claims Act, to which exceptions the waiver of immunity did not apply. Similarly, Nebraska's State Tort Claims Act has a list of exceptions to its waiver of immunity which does not include claims for contribution. See § 81-8,219(1).

The State cites *Waldinger Co. v. P & Z Co., Inc.*, 414 F. Supp. 59 (D. Neb. 1976), for the proposition that an action for contribution does not fall within Nebraska's State Tort Claims Act. We reject the federal district court's conclusion. We hold that an action for contribution is covered under Nebraska's State Tort Claims Act, but only if a private person would be liable to the claimant for the damage, loss, injury, or death.

The Nebraska Supreme Court has recognized claims for contribution among negligent joint tort-feasors in *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975). The court held that

> in this jurisdiction there is no absolute bar to contribution among negligent joint tort-feasors; and also, as in this case, that a right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he [or she] discharges more than his [or her] proportionate share of the judgment.

Id. at 764, 229 N.W.2d at 190.

Although this court did not directly rule as to contribution between negligent tort-feasors against whom judgments have not yet been rendered, the federal district court applied the principle that it believed the Nebraska Supreme Court would utilize in such a case in the future. *Reese v. AMF-Whitely*, 420 F. Supp. 985 (D. Neb. 1976). We adopt the interpretation of the federal district court, which stated that the language in *Royal Ind. Co.* "encompass[ed] both those against whom a plaintiff

has successfully obtained a judgment and those whose liability remains to be fixed . . . ." *Reese*, 420 F. Supp. at 987. Here, because the insurance companies, before filing a lawsuit in state court, filed a claim under Nebraska's State Tort Claims Act, we need not determine whether it would be proper for a defendant to file a cross-claim in the original plaintiff's suit or institute an independent action for contribution by the original defendant without filing a claim under Nebraska's State Tort Claims Act.

We continue to embrace our language in *Royal Ind. Co.* that

> "general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." George's Radio, Inc. v. Capital Transit Co., 75 App. D. C. [187] at 189, 126 F. 2d [219] at 221 [(1942)]. Thus, an eminent authority has pointed out the ". . . obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered by one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Law of Torts (4th Ed.), § 50, p. 307.

193 Neb. at 763-64, 229 N.W.2d at 189.

Under the circumstances of this case, a private person, if negligent, could be held liable to a joint tort-feasor who had paid more than that person's fair share of the damages or judgment. Therefore, under Nebraska's State Tort Claims Act, the State could be held liable to such a joint tort-feasor.

The district court erred in sustaining the State's demurrer. This cause is remanded to the district court for Dawes County for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARJORIE JEAN STEIER, APPELLANT, V. CROSIER FATHERS OF HASTINGS, NEBRASKA, APPELLEE.

492 N.W.2d 870

Filed December 11, 1992. No. S-90-065.

1. **Fair Employment Practices: Discrimination.** The rights secured to employees by the terms of Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988) are limited to those employees engaged in employment where 25 or more employees are working, in the case of age discrimination; or, in the case of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988), where 15 or more employees are working.
2. **Fair Employment Practices.** Persons seeking relief under alleged violation of rights set out in Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988) and in Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988), the Nebraska Fair Employment Practice Act, must be persons within the definitions set out in those statutes.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Thom K. Cope, of Bailey, Polsky, Cope & Wood, for appellant.

Michael E. Sullivan, of Helmann & Sullivan, P.C., for appellee.

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

GRANT, J.

Plaintiff, Marjorie Jean Steier, appeals from a judgment entered in favor of defendant, Crosier Fathers of Hastings, Nebraska, a nonprofit Nebraska corporation, upon the court's granting defendant's motion for summary judgment.

Defendant's motion for summary judgment was apparently submitted to the trial court on plaintiff's petition, with three exhibits attached; defendant's answer, with an exhibit attached; and defendant's "Affidavit in Support of Motion for Summary Judgment." The parties agree that plaintiff began her employment with defendant in October 1982 and that she was terminated from her employment at the conclusion of a 1-year period ending June 30, 1989, as set out in a written contract between the parties. At the time of her termination, plaintiff was 61 years old and was experiencing "some difficulty with her

knees."

Plaintiff, in her brief, sets out the following facts, which facts are agreed to by defendant:

> The Appellant, Marjorie Jean Steier, sued the Crosier Fathers of Hastings because (she alleges) the Defendant fired her because of her age and a physical disability. The issues were not tried to the Court. Before any evidence was adduced, the Defendant moved to dismiss the case via summary judgment because Crosier Fathers did not have 15 or more employees.
>
> Steier brought her suit pursuant to Neb. Rev. Stat. 20-148, which allows a person to sue a company for a deprivation of rights secured by Nebraska laws. The laws that Steier claimed were breached are a part of the Nebraska Fair Employment Practices [sic] Act (§48-1104) and a part of the Act Prohibiting Unjust Discrimination in Employment Because of Age (§ 48-1004). By affidavit, the Crosier Fathers showed they had less than the 15 employees and 25 employees needed to meet the definitions of FEPA and the Age Act respectively.
>
> Defendant contended and the Court agreed that because Crosiers didn't have the requisite number of employees, the Court didn't have jurisdiction to hear the case. There was no question and the Defendant didn't contest that Crosiers was a "company" as defined in Neb. Rev. Stat. § 20-148.

Brief for appellant at 4.

The trial court granted defendant's motion for summary judgment and entered judgment in favor of defendant. Plaintiff timely appealed and in this court assigns as error the actions of the trial court in granting defendant's motion.

We have held: " ' "A summary judgment is properly granted when the pleadings . . . and affidavits in the record disclose that there is no genuine issue concerning any material fact . . . and that the moving party is entitled to judgment as a matter of law . . . ." ' " *State v. Union Pacific RR. Co.*, 241 Neb. 675, 678, 490 N.W.2d 461, 464 (1992). Accord *Scott v. Mattingly*, 241 Neb. 276, 488 N.W.2d 349 (1992).

Plaintiff's petition alleges, in the first cause of action, that

defendant's termination of plaintiff's employment deprived plaintiff of "rights secured by the Nebraska Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. §§ 48-1001 to 1010 (Reissue 1988)." Her second cause of action alleged that defendant, in terminating her employment, deprived her of "rights secured to her by the Nebraska Fair Employment Practice Act," Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988), in that plaintiff was a disabled person within the meaning of that act.

The petition further alleges that plaintiff's first cause of action "is brought pursuant to Neb. Rev. Stat. §20-148 (Reissue 1987) for redress for the deprivation of said rights" set out in Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988) and that the second cause of action was brought "pursuant to Neb. Rev. Stat. §20-148 (Reissue 1987)."

Neb. Rev. Stat. § 20-148 (Reissue 1991) provides in pertinent part:

> (1) Any person or company . . . who subjects or causes to be subjected any citizen of this state . . . to the deprivation of any rights, privileges, or immunities secured by the . . . laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

Section 48-1002(2) provides that "[e]mployer shall mean any person having in his or her employ twenty-five or more individuals . . . ." Section 48-1102(2) provides that "[e]mployer shall mean a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

By affidavit executed November 29, 1989, defendant stated it employed "four full-time people and six part-time people" and that defendant did not employ, at any time during the year preceding November 29, 1989, more than 12 full-time and part-time employees. Plaintiff does not object to this factual statement.

The "Laws of the State of Nebraska" which plaintiff alleges contain rights which she has been denied are § 48-1001 et seq. and § 48-1101 et seq. The rights secured to employees by the

terms of those statutes are limited to the rights of employees engaged in employment where 25 or more employees are working, in the case of age discrimination; or, in the case of the Nebraska Fair Employment Practice Act, where 15 or more employees are employed. Persons seeking relief under alleged violation of rights set out in § 48-1001 et seq. and in § 48-1101 et seq. must be persons within the definitions set out in those statutes.

The facts are clear that defendant does not fall within the criteria set out in those legislative acts, and therefore, the terms of those acts do not apply to plaintiff and defendant in the case before us.

The trial court was correct in granting defendant's motion for summary judgment and entering judgment for defendant.

AFFIRMED.

IN RE INTEREST OF LAWRENCE J. POWERS, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, V. LAWRENCE J. POWERS, APPELLANT.

493 N.W.2d 166

Filed December 11, 1992. No. S-90-206.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court.
2. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
3. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
4. _____: _____: _____. When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense; it is the court's duty, if possible, to discover the Legislature's intent from the language of the statute itself.

5. **Words and Phrases.** In popular parlance, the word "any" usually means all or every.
6. _____. An issue is a disputed point or question which the parties to a proceeding desire the tribunal to decide.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Sara Fullerton, Deputy Lancaster County Attorney, for appellee.

Rebecca M. Peterson and A. Jocelyn Ritchie for amicus curiae Nebraska Advocacy Services, Inc.

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

CAPORALE, J.

The movant, Lawrence J. Powers, appeals the district court's affirmance of the Lancaster County Mental Health Board's denial of a due process hearing on his motion for a review of his status. He asserts that the district court erred in that, among other things, the relevant statutory scheme provides for such a hearing. That assignment of error having merit, we reverse, and remand with direction.

On January 13, 1986, the State filed a petition under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 through 83-1078 (Reissue 1987 & Cum. Supp. 1992), alleging that Powers was mentally ill, dangerous to others, and unable to meet his basic human needs. More specifically, the State alleged that Powers was psychotic and assaultive and had, on January 11, 1986, assaulted and seriously injured his wife.

Powers admitted the foregoing allegations at a hearing held before the board on January 23, 1986. The board, finding that neither voluntary hospitalization nor other less restrictive treatment alternatives were available, thereafter ordered Powers committed to the care and custody of the Department

of Public Institutions for treatment, where he has remained under a variety of treatment plans.

On July 18, 1989, Powers filed a motion asking that the board review the matter at a hearing, asserting that he was no longer mentally ill and dangerous, that he no longer posed a danger of assaultive behavior, and that a less restrictive plan was now available, as he could benefit from outpatient treatment. On the following day, the board denied the motion, ruling that it lacked statutory authority to grant a hearing upon the request of the committed individual, otherwise referred to in the relevant statutes as the subject.

Powers contends, among other things, that contrary to the determination of the district court, § 83-1046 grants the board authority to hold a review hearing upon the subject's motion.

On the other hand, the State urges that while § 83-1046 empowers the board to terminate or change a subject's treatment plan whenever it is shown that cause for doing so exists, the means by which cause is to be shown is by providing the board the periodic progress reports contemplated by § 83-1045, and that neither statute authorizes, much less requires, the board to conduct a hearing on a subject's own motion for a change.

Section 83-1045 reads:

> The official, agency or other person designated by the mental health board . . . to be responsible for the subject's individualized treatment plan shall submit periodic progress reports to the board, which board shall distribute copies to other interested parties. Each progress report shall summarize progress which has been made under the plan and shall state whether the treatment plan has been modified. Such progress reports shall be filed with the board for review and inclusion in the subject's board file, and served upon the county attorney, the subject and his or her counsel, if he or she has counsel, and his or her parent or legal guardian, if he or she is a minor or legally incompetent, within ten days of the submission of the individualized treatment plan of a subject whose order of final disposition requires full-time inpatient hospitalization or custody. Such progress reports shall be so filed

> and served, in the cases of all subjects undergoing board-ordered treatment . . . no less frequently than every ninety days following the filing of their initial individualized treatment plans for a period of one year from the date of such filing and every six months thereafter.

Section 83-1046 provides:

> Whenever it shall be shown, by any person, to the satisfaction of the mental health board that either cause no longer exists for the care or treatment or a less restrictive alternative exists for a person committed as a mentally ill dangerous person, the mental health board shall order the immediate discharge of that person or change the treatment disposition. When a change in disposition is in issue, due process protections afforded under this act shall attach to the subject.

In the State's view, an aggrieved subject's remedy is through § 83-1066, which provides, in relevant part, that subjects "shall have the right . . . (9) To file, either personally or by counsel, petitions or applications for writs of habeas corpus for the purpose of challenging the legality of such subject's custody or treatment."

We begin our analysis by noting that statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court. See, *Young v. Dodge Cty. Bd. of Supervisors, ante* p. 1, 493 N.W.2d 160 (1992); *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992); *First Nat. Bank v. Heiden*, 241 Neb. 893, 491 N.W.2d 699 (1992); *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992).

As recently reaffirmed, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Morse*, 241 Neb. 40, 486 N.W.2d 195 (1992). Additionally, when considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent

and sensible. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991). Moreover, when asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense; moreover, it is the court's duty, if possible, to discover the Legislature's intent from the language of the statute itself. See *Sarpy County v. City of Springfield, supra*.

Section 83-1066(1) provides that unless declared incompetent by an appropriate authority, a subject has the right to be considered legally competent for all purposes. As there is no claim that any authority has declared Powers to be incompetent, he is unquestionably, as he contends, a "person" as contemplated by § 83-1046. Moreover, in popular parlance, the word "any" usually means all or every. *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W.2d 288 (1987). Thus, contrary to the State's contention, Powers is among those who, under the express terms of § 83-1046, may show the board that cause exists for release or for a change in his treatment.

The State's claim that there nonetheless exists no statutory language authorizing a hearing to make such a showing under the circumstances present here ignores the last sentence of § 83-1046, which attaches to a subject the "due process protections afforded under [the] act" when a "change in disposition is in issue." An issue has been defined as a disputed point or question which the parties to a proceeding desire the tribunal to decide. See *Com. v. Willow Grove Veterans Home Ass'n*, 97 Pa. Commw. 391, 509 A.2d 958 (1986), *questioned on unrelated matter, Appeal of Borough of Churchill*, 525 Pa. 80, 575 A.2d 550 (1990). Since through his motion Powers claims he is no longer mentally ill such as to be dangerous to others and seeks to have his treatment plan changed, Powers has clearly put in issue the appropriateness of a change in disposition, a matter within the board's jurisdiction.

Section 83-1047 provides that in "addition to the rights granted subjects of petitions by any other provisions of this act, such subjects shall be entitled to the rights provided in sections 83-1048 to 83-1064 during proceedings against them under this act." (Emphasis supplied.) The reference therein to more than

one proceeding demonstrates that Powers did not stop being the subject of a petition merely because a hearing had been held when he was first proceeded against. Moreover, while § 83-1048 reads only that the "subject of a petition shall, in advance of the hearing," be entitled to certain enumerated rights relating to notice, § 83-1055 contemplates subsequent hearings by reciting that "[a]ll mental health board hearings under" the act shall be closed to the public. (Emphasis supplied.) As further examples, § 83-1059 provides, among other things, that the "rules of evidence applicable in civil proceedings shall be followed *at all hearings*" held under the act, and § 83-1061 provides that "[a]ll proceedings held" under the act be of record. (Emphasis supplied.)

Thus, the act clearly and plainly contemplates that due process be afforded at hearings other than the one held upon the filing of the initial petition.

That a subject has the right to challenge the board's determinations by writ of habeas corpus does not mean that the subject has no right to a hearing before the board on his or her own motion for a change in the manner he or she is treated.

Accordingly, the judgment of the district court is reversed with the direction that it remand the cause to the board for further proceedings consistent with law.

REVERSED AND REMANDED WITH DIRECTION.

KAREN ANN KLEAGER, APPELLEE, V. ANDREW JAMES KLEAGER, APPELLANT.

492 N.W.2d 873

Filed December 11, 1992. No. S-90-222.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

John W. Ballew, Jr., of Simmons, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

John Sorensen and, on brief, John F. Wright, of Wright, Sorensen & Brower, P.C., for appellee.

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

PER CURIAM.

In this domestic relations case, respondent-appellant Andrew James Kleager, the husband, appeals from the trial court's order denying his application for modification of the decree of dissolution of marriage to reduce the amount of alimony awarded in the original decree of June 14, 1985.

We find that any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of the order. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992); *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

The modification of an alimony award is a matter initially entrusted to the discretion of the trial court. On appeal, such decisions are reviewed de novo on the record and are affirmed in the absence of an abuse of discretion. *Desjardins v. Desjardins, supra*; *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990).

We have reviewed the record de novo as we are required to do, and we have determined that the trial court did not abuse its discretion with regard to any of the matters of which complaint is made. See *Helms v. Helms, supra*. The decree of the district court is affirmed. Appellant is ordered to pay $1,500 to appellee to apply to her attorney fees.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN R. STYSKAL, APPELLANT.

493 N.W.2d 313

Filed December 11, 1992. No. S-91-042.

1. **Criminal Law: Courts: Appeal and Error.** Under Neb. Rev. Stat. § 25-2733 (Reissue 1989), in an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Rules of Evidence: Other Acts.** It is firmly established that Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is a rule of inclusion which permits the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
3. **Rules of Evidence: Words and Phrases.** Most evidence a party offers is prejudicial to the opposing party and is only unfair prejudice if it tends to suggest a decision on an improper basis.
4. **Rules of Evidence: Sexual Assault.** Where a sexual assault victim's accusations of improper contact, standing alone, seem improbable or a result of a misunderstanding in light of the necessary surrounding circumstances, the relevancy and probative value of evidence substantiating the victim's claim is great.
5. **Postconviction: Prisoners: Standing: Probation and Parole: Words and Phrases.** A prisoner on parole is sufficiently restricted to render that person "in custody under sentence" for purposes of the Nebraska Postconviction Act.
6. **Postconviction: Standing: Probation and Parole: Words and Phrases.** Under a broad reading of Neb. Rev. Stat. § 29-3001 (Reissue 1989), court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act.
7. **Effectiveness of Counsel: Proof.** To sustain a successful claim of ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was deficient and that (2) such deficient performance prejudiced the defense.

Appeal from the District Court for Hall County, WILLIAM H. RILEY, Judge, on appeal thereto from the County Court for Hall County, RICHARD E. WEAVER, Judge. Judgment of District Court affirmed.

Steven E. Achelpohl, of Schumacher & Achelpohl, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

WHITE, J.

After a Hall County Court bench trial, defendant-appellant, Stephen R. Styskal, D.D.S., was convicted of sexual assault in the third degree, in violation of Neb. Rev. Stat. § 28-320(1)(a) (Reissue 1989). For this Class I misdemeanor, Styskal was fined $1,000 and placed on 2 years' probation conditioned on certain limitations on his dental practice and his participation in counseling. On appeal, the district court for Hall County affirmed Styskal's conviction and sentence. Styskal appeals, alleging that the district court erred in finding that prior bad act evidence was admissible, refusing to remand the cause to county court for a hearing on the claim of ineffective assistance of counsel, refusing to admit an exhibit at the district court hearing on appeal, and failing to find that defendant was deprived of effective assistance of trial counsel.

The facts alleged at trial are mostly disputed by the defendant; however, when viewed in the light most favorable to the State, the evidence reveals the following: Styskal is a dentist practicing in Grand Island, Nebraska. On February 17, 1989, the victim went to see the defendant with complaints of jaw, back, and chest pain resulting from an automobile accident some 2 months prior. It is undisputed that the victim was suffering from temporomandibular joint disorder (TMJ), a jaw disorder which she hoped the defendant could treat.

Styskal examined the victim in the presence of her husband. During the examination, Styskal had the victim stand up while he lifted her sweater and massaged or palpated her back, starting at her shoulders. As the defendant moved his hands toward her lower back, he pulled down the victim's pants and, unknown to the victim's husband, placed his finger in the victim's anus. Styskal then briefly checked the victim's teeth and proceeded to examine her chest. Styskal lifted the front of the victim's sweater, palpated her sternum, and proceeded to expose and hold her right breast. According to the victim, the defendant then stated, "[O]ops, I'm sorry," and he removed his hand from her breast. The victim's husband was able to observe that his wife's buttocks and right breast were exposed sometime during the respective back and chest examinations.

In his defense, Styskal denies touching the victim's buttocks,

anus, or breast. Instead, Styskal asserts that he merely performed an examination for TMJ, which includes an inspection of the jaw, mouth, muscles of mastication (chewing), and the trapezius muscles (a pair of large back muscles). Because the victim complained of chest pain, his examination also included the sternalis muscle (a chest muscle attached to the breastbone). Defendant offered several excerpts from a medical treatise into evidence, along with a brief technical letter from another Grand Island dentist, both of which described muscle evaluations for head and jaw examinations.

The victim and her husband both testified at trial. The State also called two of Styskal's former patients to testify. These two witnesses were allowed to recall, over a Neb. Rev. Stat. § 27-404(2) (Reissue 1989) objection by the defense, separate and independent incidents when Styskal inappropriately touched their breasts during dental examinations in 1985. The first witness visited Styskal for a routine checkup and had no specific medical complaints or problems. The second witness visited Styskal for her yearly checkup and complained of pain in her right jaw from a suspected bad tooth. Both witnesses related their shock when Styskal unexpectedly examined their axillary and breast area.

At the conclusion of the evidence, the county court found the defendant guilty of the offense charged. After a presentence investigation was completed, Styskal was sentenced as noted above. Styskal appealed his conviction and sentence to the district court for Hall County. In the notice of appeal to the district court, Styskal asserted that the judgment was not supported by the evidence, that the conviction was in contravention of state law, and that the judgment was contrary to the Sixth Amendment of the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

The district court held that the testimony of the two prior patients did not violate the prohibition in § 27-404(2), which holds that prior bad acts are inadmissible to show the defendant's propensity or disposition to commit the crime. The court found the evidence properly admissible to prove the necessary intent required by the definition of sexual contact in

Neb. Rev. Stat. § 28-318(5) (Reissue 1989) and found that the probative value of the testimony was not outweighed by the damage of unfair prejudice. The court also sustained a State objection to an exhibit offered in support of an ineffective assistance of counsel claim. Finding no error on the record nor any abuse of discretion, the district court affirmed the county court's judgment of conviction and sentence, and this appeal ensued.

We note that no assignments of error were filed with the district court, nor were the appeal briefs to the district court made a part of the record brought before this court. However, since the appeal to the district court was filed just prior to our decision in *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), and well before the adoption of Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), this court will consider those errors which could have been properly raised and preserved in the district court.

Under Neb. Rev. Stat. § 25-2733 (Reissue 1989), in an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Erlewine, supra.*

Styskal alleges that the district court erred in upholding the admissibility of the testimony of the two prior patients. Styskal argues that this testimony concerned prior bad acts that were probative only to show his propensity to commit the crime and were therefore inadmissible under § 27-404(2).

It is firmly established that § 27-404(2) is a rule of inclusion which permits the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). The statute states several purposes for which prior bad acts are admissible: as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This list of acceptable uses is illustrative and not

intended to be exclusive. *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991) (citing *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990)).

The crime with which Styskal was charged required that the State prove that Styskal acted with the intent to touch "the victim's sexual or intimate parts" and that the sexual contact included only conduct which could "be reasonably construed as being for the purpose of sexual arousal or gratification of either party." § 28-318(5). In addition to denying that he touched the victim's buttocks, anus, or breasts, the defense attempted to justify the defendant's examination of the chest and back areas as necessary for a diagnostic purpose related to the victim's TMJ condition and chest complaints. The testimony of the two prior patients, who both related similar inappropriate contact during routine dental checkups, was admissible to disprove that the purpose of the examination of the chest area was within specific diagnostic criteria and to prove that the purpose of the examination was instead contact for sexual arousal or gratification.

Aside from the intent issue, the witnesses' testimony was also admissible to demonstrate the absence of consensual contact. Defendant testified that he had explained the procedure he was about to perform, implying that he had received the victim's consent prior to any touching. The testimony of the two prior patients substantiated the victim's claim that he unexpectedly examined her without any prior explanation or forewarning. Finally, the victim's testimony that defendant stated, "[O]ops, I'm sorry," also makes the evidence of the prior incidents admissible for the purpose of proving absence of mistake.

Having found that the testimony of the prior patients was relevant and admissible for a proper purpose under § 27-404(2), we must next determine whether the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, in violation of Neb. Rev. Stat. § 27-403 (Reissue 1989). Most evidence a party offers is prejudicial to the opposing party and is only unfair prejudice if it tends to suggest a decision on an improper basis. *Stephens, supra*. We note that where a victim's accusations of improper contact, standing alone, seem improbable or a result of a

misunderstanding in light of the necessary proximity and contact between a dentist and a patient, the relevancy and probative value of evidence substantiating the victim's claim is great. Balancing the probative value of the testimony against the danger of unfair prejudice is within the discretion of the trial court, and we find no indication in the record to suggest that the court admitted the evidence for an impermissible purpose.

We next address the defendant's assertions that either his cause should have been remanded to county court for a hearing on the claim of ineffective assistance of counsel or the district court should have admitted his proffered exhibit and found that defendant was deprived of effective assistance of trial counsel. Styskal argues that since trial counsel failed to file a motion for new trial, and since he is not entitled to postconviction relief because he is not "in custody" within the meaning of Neb. Rev. Stat. § 29-3001 (Reissue 1989), he was deprived of an opportunity to evidence an ineffective assistance of counsel claim. We find these assertions are without merit.

This court has yet to address whether a defendant on probation is within the "in custody" requirement of our postconviction relief statutes. We have previously held that a prisoner on parole is sufficiently restricted to render that person "in custody under sentence" for purposes of the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989). *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990). The "in custody under sentence" language in postconviction relief statutes is generally patterned after the federal habeas corpus remedies of 28 U.S.C. § 2255 (1988). Noting that probation conditions impose substantial restraints on defendants, other jurisdictions have held that defendants on probation should also be considered "in custody" for purposes of postconviction relief statutes which impose the same or similar restriction as the federal procedure. See, *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), *cert. denied* 469 U.S. 1106, 105 S. Ct. 779, 83 L. Ed. 2d 774 (1985); *United States v. Condit*, 621 F.2d 1096 (10th Cir. 1980); *U.S. v. Sinclair*, 702 F. Supp. 477 (D. Del. 1989); *State v. Bolyea*, 520 So. 2d 562 (Fla. App. 1988); *Adams v. State*, 677 S.W.2d 408 (Mo. App. 1984).

Our postconviction act is a broader basis for relief than the federal remedies. *Thomas, supra*. Under a broad reading of the language of § 29-3001, we hold that court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act. Because Styskal is entitled to ask for postconviction relief, his due process rights were not violated when the district court refused to remand the cause for an evidentiary hearing and refused to admit the exhibit.

Styskal also argues that the district court erred in not finding the record evidenced that he was deprived of effective assistance of counsel. To sustain a successful claim of ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was deficient and that (2) such deficient performance prejudiced the defense. *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

Defendant first asserts that his trial counsel was ineffective because he failed to offer the Department of Health disposition proceeding to rebut the testimony of the two witnesses who were prior patients. Styskal's trial counsel had in fact filed a motion in limine to prevent the admission of the department's disposition. The department's investigation resulted in a negotiated settlement wherein defendant admitted that the validity of the axillary examinations he performed was in question and agreed that he would no longer conduct such examinations. This admission alone would potentially buttress the testimony of the two witnesses instead of rebutting the effect of their allegations as asserted by defendant. Furthermore, if Styskal's trial counsel had offered the department's report, the State could possibly have offered the complete record of the investigation. This investigation included separate allegations, confirmed by at least six of Styskal's employees, that Styskal had inappropriately touched other attractive female patients, as well as the employees themselves, on numerous occasions. Any assertion that Styskal's trial counsel was ineffective because he failed to open the door to have such evidence offered at trial is preposterous.

Styskal further asserts that his trial counsel was ineffective because he did not offer evidence of the standard of care

relating to examinations for TMJ other than the one letter of a local dentist and Styskal's own testimony. Considering that defendant admitted that a proper TMJ examination would not have included contact with a patient's breasts or buttocks, and considering that the State did not offer any expert testimony that contradicted the defendant's medical explanation, defendant has failed to demonstrate how he was prejudiced by this decision of his counsel. The department's investigation, which the trial judge reviewed only for sentencing purposes, reveals that the local dentists and dental schools agreed that a dentist should not touch a patient below the collarbone. We find that Styskal's trial counsel's decision not to call an expert witness, who could have done more harm than good by contradicting the defense, was not deficient or sufficiently prejudicial to support an ineffective assistance of counsel claim.

To reiterate, we find that the district court did not err in refusing to remand the cause to the trial court for an evidentiary hearing or in refusing to admit defendant's proffered exhibit. We also find that the trial court did not err in ruling that the evidence of the defendant's inappropriate contact with other patients was admissible for a proper purpose and did not unfairly prejudice the defendant. Finding the assignments of error without merit and the record void of any plain error, we hold that defendant's conviction and sentence for third degree sexual assault are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY REICHERT, APPELLANT.

492 N.W.2d 874

Filed December 11, 1992. No. S-91-451.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A

conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed in the light most favorable to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.

2. **Assault.** A person commits the offense of assault in the third degree if he intentionally, knowingly, or recklessly causes bodily injury to another person.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance the result of the proceedings would have been different.
4. **Effectiveness of Counsel.** If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed.
5. **Trial: Evidence.** When evidence is merely cumulative to properly admitted testimony of a defendant, the admission of such evidence over objection constitutes harmless error.
6. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion.
7. _____: _____. In considering a sentence, 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.
8. **Appeal and Error.** Assignments of error not discussed are not considered by an appellate court.

Appeal from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES L. MACKEN, Judge. Judgment of District Court affirmed.

Robert L. Gridley, of Robert L. Gridley Law Office, 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.

Terry Reichert appeals his conviction for third degree assault upon Abel Plasencio at the Scotts Bluff County fair, which resulted in Reichert's being sentenced to 15 days in jail and his being fined $500.

Reichert was found guilty of the Class I misdemeanor following a bench trial in Scotts Bluff County Court, which guilty finding and sentence he appealed to the district court for Scotts Bluff County. The district court affirmed Reichert's conviction and sentence. Reichert then appealed to this court.

On appeal to this court, Reichert claims that the district court erred in failing to find that (1) there was insufficient evidence to convict him, (2) he had ineffective assistance of counsel, (3) his sentence is excessive, and (4) the trial judge was prejudiced against him. There being no merit to any of Reichert's assignments of error, we affirm his conviction and sentence.

SCOPE OF REVIEW

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed in the light most favorable to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992); *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

FACTS

Construing the facts of this case most favorably to the State, the evidence shows the following:

About 11 p.m. on August 17, 1990, Reichert was walking along the midway of the Scotts Bluff County fair when he and Plasencio accidentally bumped into each other. Plasencio testified that Reichert then became "hyper" and challenged Plasencio to a fight. Plasencio testified that when he refused to fight, Reichert pointed and said, "Oh, the cops!" While Plasencio was distracted by looking to where Reichert was pointing, Reichert kicked Plasencio in the groin and struck him in the face. Plasencio fought back, and the two wrestled on the ground. When someone in the crowd yelled that the police were coming, Reichert got up and ran.

Raymond Huffman, a Scotts Bluff County deputy sheriff working as a security officer at the county fair, arrived on the scene shortly after Reichert's departure. Huffman testified that Plasencio's clothes were torn and that he had a bloody lip and a bleeding gash on the left side of his nose. Plasencio told Huffman that Reichert had left in a Bronco, which was subsequently determined to be a Blazer. Huffman radioed this information and a possible license plate number to the Mitchell police.

George Harpole, Mitchell's assistant police chief, testified that he and his chief of police stopped a Blazer matching the description given by Huffman a short time after receiving the radio call. Reichert was a passenger in the vehicle, which was being driven by a friend of Reichert's. Reichert was not wearing a shirt at the time. Harpole noted several red marks on Reichert's body and on his face. The two Mitchell police officers asked Reichert to accompany them back to the fairground in the cruiser. Reichert complied with this request. He was not placed under arrest at that time.

Harpole testified that when he asked Reichert what went on at the fairground, Reichert denied knowing anything. Upon further questioning by the officers, Reichert denied striking Plasencio. He later admitted that he and Plasencio had fought and that he had struck Plasencio.

Reichert testified that Plasencio had lowered his shoulder and had deliberately run into him. Reichert claimed he struck Plasencio only in self-defense after Plasencio picked a fight with him. Reichert stated that when the fight was over, he got up and walked away.

As a result of the incident, Reichert was arrested and charged with assault in the third degree pursuant to Neb. Rev. Stat. § 28-310(1) (Reissue 1989).

SUFFICIENCY OF THE EVIDENCE

Under § 28-310(1), "[a] person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person. . . ." Separated, the two elements of the crime are (1) an intentional, knowing, or reckless act which (2) causes bodily injury to

another person.

After Plasencio refused to fight, Reichert first distracted his victim and then mounted an unprovoked attack by kicking Plasencio in the groin and then striking him. These are obviously intentional acts. It is clear from the evidence that Plasencio suffered bodily injury as a result of the attack. These facts are legally sufficient to support a conviction for assault in the third degree. It was not clearly erroneous for the trial court to find beyond a reasonable doubt that Reichert was guilty of the crime with which he was charged.

INEFFECTIVE ASSISTANCE OF COUNSEL

To sustain a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced his defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance the result of the proceedings would have been different. *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). However, the two prongs of the test do not necessarily have to be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Wickline, supra*. Accord *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988).

Reichert alleges he had ineffective assistance of counsel at trial because his attorney failed to file a motion to suppress certain statements Reichert made to Huffman and Harpole while Reichert was in the backseat of the police cruiser on the night in question, and because counsel failed to object to such testimony by the officers at trial. Reichert contends that he was in police custody when such statements were made, that he had not been advised of his *Miranda* rights, and that he had not waived any of his rights. Huffman agreed that Reichert was never told his *Miranda* rights.

It is not necessary for us to determine whether any of Reichert's statements to the officers should have been suppressed or objected to by counsel. Reichert himself testified in detail of his conversations with Huffman on the night of his

arrest. In all material respects, Reichert's testimony was in agreement with that of Huffman.

Reichert also claims that his counsel should have objected to Huffman's testimony that in his opinion, Reichert was lying to him. Reichert seems to imply that his conviction was based upon this claimed pivotal piece of evidence. This is a rather disingenuous argument which completely ignores the fact that Reichert conceded on cross-examination that he had lied to the police officers about his involvement in the incident "because of the situations." Obviously, Huffman's testimony was cumulative to that of Reichert's.

Finally, Reichert argues that Harpole should not have been allowed to testify that "[Reichert] said something to the fact that he had—they'd gotten into it and he'd punched [Plasencio] or something to that effect." Again, Reichert admitted at trial that he had struck Plasencio, although he maintained this was in self-defense.

When evidence is merely cumulative to properly admitted testimony of a defendant, the admission of such evidence over objection constitutes harmless error. See, *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Castor*, 193 Neb. 86, 225 N.W.2d 420 (1975). Because Reichert himself testified to all of the facts he contends should have been excluded from evidence, the testimony of both officers was merely cumulative. Therefore, the admission of such cumulative evidence would have constituted harmless error even if counsel had made a proper objection.

Reichert has failed to demonstrate a reasonable probability that but for the alleged deficient performance of his trial counsel, he would not have been convicted. It was not the conduct of counsel that prejudiced Reichert's case, it was Reichert's in-court statements that corroborated the victim's testimony that convicted Reichert. This assignment of error is without merit.

EXCESSIVENESS OF SENTENCE

Reichert claims his sentence of 15 days in jail plus a $500 fine and court costs is excessive. A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion.

State v. Miller, 240 Neb. 297, 481 N.W.2d 580 (1992); *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992); *State v. Wounded Arrow*, 240 Neb. 44, 480 N.W.2d 205 (1992). Upon conviction of assault in the third degree, Reichert could have received a maximum sentence of not more than 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. § 28-106(1) (Reissue 1989). His sentence is well within the statutory limits.

Furthermore, in considering a sentence, 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. *State v. Wounded Arrow, supra*. In this case, the sentencing judge noted Reichert's continuing lack of remorse and denial of any responsibility for the incident. The court expressed the belief that Reichert had perjured himself in his testimony, thus constituting a fraud upon the court, and that a lesser sentence would depreciate the seriousness of the event. The factors considered by the court were entirely proper and did not constitute an abuse of discretion.

PREJUDICE OF TRIAL JUDGE

Reichert assigned as error that the trial judge was prejudiced, to Reichert's injury. Reichert failed to discuss this assignment of error in his brief. Assignments of error not discussed are not considered by an appellate court. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). Moreover, counsel conceded at oral argument that the record does not support this alleged error. Therefore, this assignment of error has been waived.

There being no merit to any of Reichert's assigned errors, the order of the district court affirming Reichert's conviction and sentence is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY DRINKWALTER, APPELLANT.

493 N.W.2d 319

Filed December 11, 1992. No. S-91-487.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party.
2. _____: _____. An appellate 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.
3. **Rules of Evidence: Hearsay.** The state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant if the state of mind of the declarant at the time the statement was made is an issue in the case.
4. **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.
5. **Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.
6. **Rules of Evidence: Hearsay.** A victim's extrajudicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule only if there is a manifest need for such evidence and it is relevant to a material issue in the case.
7. **Trial: Evidence: Hearsay.** Where there is a substantial likelihood of prejudice to the defendant's case in the admission of a victim's extrajudicial declarations of fear of the defendant, it is inadmissible if it bears only a remote relationship to the legal or factual issues raised in the case.
8. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
9. **Trial: Judges.** It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury, but also on the examination of witnesses and otherwise during the course of the trial.
10. **Jury Instructions: Appeal and Error.** Failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
11. **Criminal Law: Intent: Words and Phrases.** Premeditation is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous, provided that the intent to act is formed before the act, and not simultaneous with the act.

12. **Homicide: Intent: Words and Phrases.** Premeditated means to have formed a design to commit an act before it is done. A person kills with premeditated malice if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.

Appeal from the District Court for Cherry County: EDWARD E. HANNON, Judge. Reversed and remanded for a new trial.

David C. Huston and John R. Higgins, Jr., of Paine, Huston & Higgins, and David T. Schroeder for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

The appellant, Randy Drinkwalter, was convicted of first degree murder and use of a deadly weapon to commit a felony in the beating death of Esther Drinkwalter. The defendant was sentenced to death on the murder count and to imprisonment for 6 to 12 years on the weapon count.

Upon appeal, the defendant has assigned as error that the trial court erred (1) in permitting the defendant's cousin, Jim Drinkwalter, to testify that the victim told him some 5 months prior to her murder that she was fearful of the defendant, over objection on foundation, relevancy, and hearsay grounds; (2) in failing to strike an expert's conclusion that fragments of glass found in a rug in the defendant's apartment were from the scene of the crime; (3) in instructing the jury at the commencement of the trial that "in a criminal case the judge determines only whether or not there is enough evidence to support a verdict"; and (4) in defining "premeditation" and "reasonable doubt" in the instructions to the jury both at the commencement of the trial and in its final instructions to the jury.

In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party. An appellate 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. *State v. Davis*, 240 Neb. 631, 483 N.W.2d 554 (1992). See, also, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992).

On appeal, the defendant does not challenge the sufficiency of the evidence to sustain his conviction. In that respect the record shows that the victim, who was the defendant's grandmother, was 87 years of age and lived by herself in a duplex in Valentine, Nebraska.

At approximately 10 p.m. on November 1, 1989, the victim's neighbor, Emma Ohlmann, heard a knocking sound on the wall that separated the victim's and Ohlmann's duplex. Ohlmann also heard a noise that sounded like a chair dropping. After a failed attempt to reach the victim by telephone, Ohlmann contacted Don Kenan, a next door neighbor. Kenan immediately walked over to the duplex to check on the victim and found the door of her apartment to be ajar. When Kenan entered the apartment, he discovered the victim's nude body lying on the floor.

Melvin Christiansen, the sheriff of Cherry County, who investigated the murder, testified that when he entered the apartment he saw the badly mutilated body of a female lying inside the door of the apartment next to a couch. A large amount of tissue from the head was lying on the floor. Some brain tissue, bone fragments, and a large amount of blood were near the head of the body. A 16-ounce ball peen hammer was lying on the floor next to the head. A knife was visible embedded in the victim's face directly below the eye.

Sheriff Christiansen also testified that only one drawer in the kitchen of the apartment was open, which drawer appeared to contain various tools. The victim's body was nude, but clothing was found next to a table in the same room. Four photographs were lying on or near the body. The photographs appeared to be family-type photographs that came from broken picture frames that had been hanging on the south wall of the apartment. A pack of Marlboro cigarettes was lying on the back of the victim. Several cigarettes were lying on the floor by the arm of the victim in a pool of blood. Broken glass from the broken picture frames lay on the floor and on the davenport. Two

cigarette butts were found in the apartment. The telephone cord to the telephone in the living room had been cut. Sheriff Christiansen also testified that there was no sign of forced entry to the victim's apartment.

On November 2, 1989, Dr. Joe Auch Moedy performed an autopsy on the victim's body in Kearney, Nebraska. Dr. Auch Moedy testified that the victim's face showed evidence of very extensive injury, including multiple wounds causing jagged, irregular lacerations, incised wounds, and fractures of the bones of the face and the skull. An ordinary table knife was embedded in the face just below the left eye, entering into the left maxillary sinus. A great deal of dried blood was present on the victim's face, on her chest, and on her abdomen. Dried blood was also present on the victim's legs and arms. According to Dr. Auch Moedy, the cause of the victim's death was multiple wounds of the head, face, and brain. The injuries to the victim's head were consistent with both blunt trauma and sharp, incised trauma. Dr. Auch Moedy also testified to multiple fractures of the bones of the face and skull. Some of the bone fragments had indentations in them that were consistent with a blow caused by a hammer. Dr. Auch Moedy testified that it was not possible to count the actual number of individual wounds to the head and face, but he estimated the number of blows to be at least 10 and as many as 20. A number of injuries to the victim's ribs were described as mirror fractures and were consistent with a heavy individual sitting on the victim. Dr. Auch Moedy testified that in his opinion, the victim was alive when the blows to her head first started. However, he believed that she was dead at the time the knife was inserted in her face, based on no evidence of active bleeding into the tissues surrounding the knife. However, he stated that it was possible that the victim was alive when the knife was inserted. There was also evidence that the victim tried to defend herself against her assailant, based on the presence of a defense wound on the back of one of the victim's hands.

The defendant, Randy Drinkwalter, is 27 years old, is 6 feet 4 inches tall, and weighs approximately 425 pounds. The murder investigation did not begin to center on the defendant until the day following the murder. At the time of the murder, the

defendant was employed as a mechanic at Hass Texaco Oil station in Valentine, Nebraska. James Lutter, chief of police of the Valentine Police Department, testified that on the day after the murder, he met with the defendant at approximately 11 a.m. at the defendant's place of employment. Lutter noticed four scratch marks across the back of the defendant's left hand that appeared to be fresh. At that time the defendant told Lutter that on the previous evening he had remained at work for the purpose of working on his pickup until 8:30 p.m., then he had gone to Bruce Kneifl's house for a few minutes, and then had driven to the Dairy Sweet to eat supper. The defendant also told Lutter that after he had eaten he went home around 9:30 and did not leave again that evening. Bruce Kneifl testified that he did not see the defendant on the night of November 1, 1989.

The victim's grandson and defendant's cousin, Jim Drinkwalter, testified that at a family gathering later in the week after the victim's murder, he noticed scratches across the back of the defendant's hand.

On November 13, 1989, in a search of the defendant's apartment, a throw rug and a trap from the defendant's lavatory were seized. Body fluid samples were also obtained from the defendant on this day, including blood and saliva samples.

Reena Roy, a forensic serologist with the Nebraska State Patrol, analyzed blood and saliva samples from the victim and from the defendant. Roy also analyzed trace evidence taken from the scene of the crime and from the defendant's apartment. Roy testified that she determined that the victim, Esther Drinkwalter, had type A blood and the defendant, Randy Drinkwalter, had type O blood. Roy analyzed a bloodstain taken from the rug taken from the defendant's apartment, which bloodstain was found to be type A and could have come from the murder victim. Roy also found type A blood in the sink trap taken from the defendant's apartment, which blood also could have come from the victim. After examining fingernail samples taken from the victim, Roy determined that six of the nails had blood type A under them, which was consistent with the victim's blood. Four of the fingernails had blood type O under them, which was consistent

with the defendant's blood type. The cigarette butts from the scene of the crime were also analyzed. Roy determined that approximately 35 percent of the Caucasian population, including the defendant, could have smoked the cigarettes.

Jeffrey Patterson, a criminalist with the Nebraska State Patrol, analyzed fragments of broken glass found at the scene of the murder. According to Patterson, measuring the refractive index is the best method for differentiating between the types of glass fragments. Patterson discovered four different refractive indices among five samples of broken glass. Five samples of glass fragments found in the rug taken from the defendant's apartment all had the same refractive index, which was similar to the refractive index of glass found at the scene of the crime. Patterson testified that he could not absolutely determine that the fragments in the rug were from glass found at the scene of the crime. He could only say that the refractive index was the same. The refractive index test establishes that two glass fragments may have common origins. The refractive index test is accepted by the scientific community as determining the distinguishing factors between small fragments of glass.

Randy Drinkwalter testified at the trial on his own behalf. The defendant testified that his apartment was furnished prior to his living there and that the rug taken during the search of his apartment was present in the apartment prior to the time he moved in. As to his whereabouts on the night of the murder, the defendant stated that he worked that evening until approximately 6 p.m. and then stayed at work after hours to work on his pickup. He testified that he did not go to Bruce Kneifl's that night. He left work at approximately 8:30 p.m. After going home to shower, he drove to the Dairy Sweet to eat, arriving between 9 and 9:20 p.m. He ordered a four-piece broasted chicken dinner that took 15 to 20 minutes to cook. The defendant testified that he got the dinner around 9:35 and ate all of it. The defendant left the Dairy Sweet between 9:45 and 10 p.m. and then drove back to his apartment, which was seven to eight blocks away. The last time the defendant had visited his grandmother, Esther Drinkwalter, was approximately 3 to 4 months prior to her death. The defendant stated that he never

visited his grandmother because he never found the time to go there.

Several patrons of the Dairy Sweet on November 1, 1989, testified as to the approximate time of the defendant's departure from the restaurant. The departure times ranged from 9:30 to 9:50 p.m.

The first two assignments of error pertain to two evidentiary rulings at trial which the defendant argues were prejudicial error and which therefore require that the judgment be reversed. The first alleged error pertains to testimony by the defendant's cousin and victim's grandson, Jim Drinkwalter, concerning a conversation he had with the victim on June 21, 1989. Jim Drinkwalter was asked at trial whether his grandmother had ever made a statement to him with regard to her feelings about the defendant, Randy Drinkwalter. Defense counsel objected to this question based on foundation, relevance, and hearsay. The trial court overruled the objection without comment and permitted the following testimony:

> A. I asked her if Randy ever come over and visited her.
>
> Q. And did she respond?
>
> A. Yes.
>
> Q. What did she say?
>
> A. She says "No, and I'm glad, because he scares me," and then I come back and says, "He scares you?" and she says, "Yes."

It is clear that this testimony is hearsay under Neb. Rev. Stat. § 27-801 (Reissue 1989). The next consideration is whether the testimony was admissible under any recognized exception to the hearsay rule. It is not evident from the record what the trial court's basis for the admission of the statement was. It appears that the testimony was offered to prove the victim's state of mind, that is, her stated fear of the defendant. The state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant if the state of mind of the declarant at the time the statement was made is an issue in the case. See, Neb. Rev. Stat. § 27-803(2) (Reissue 1989); *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985). Regardless of whether the statement in question would fit within Nebraska's state of mind exception to

the hearsay rule, it does not appear that the victim's alleged fear of the defendant at the time the statement was made is relevant to any issue in this case.

Under Neb. Rev. Stat. § 27-401 (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." Further, under Neb. Rev. Stat. § 27-403 (Reissue 1989), "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence."

In *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973), the court discussed the dangers of a court's receiving hearsay evidence involving the victim's fears of the defendant. In determining whether a victim's prior statement of fear of the defendant would be admissible, the *Brown* court stated:

> First, the victim's state of mind must be relevant to some material issue in the case as, for example, where an issue of self-defense, suicide, or accidental death is raised by defendant. Second, the extrajudicial statement itself must be probative on that question of the victim's state of mind once it is conceded that this is a valid and relevant inquiry.

490 F.2d at 774. The *Brown* court also noted:

> The rule then to be distilled from the better reasoned decisions is that a victim's extra-judicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule . . . only if there is a manifest need for such evidence, *i. e.,* if it is relevant to a material issue in the case. Where there is a substantial likelihood of prejudice to the defendant's case in the admission of such testimony, it is inadmissible if it bears only a remote or artificial relationship to the legal or factual issues raised in the case. Even where there is substantial relevance, the additional factual matters in the statement may simply be too explosive to be contained by the limiting instruction, in which case exclusion of the testimony is also necessitated.

490 F.2d at 773-74.

In the present case it is clear that the victim's fear of the defendant was not relevant. The possibilities of suicide, self-defense, or accidental death were not at issue in this case. Further, even if the statement of fear were relevant, the statement was highly prejudicial to the defendant. It is reasonable to assume that there was a danger that the jury would infer from the victim's statement of fear of her grandson that the defendant had threatened his grandmother in the past or that he was a person capable of committing murder. Therefore, based on the lack of relevance and the highly prejudicial nature of the statement, it was error to overrule defense counsel's objections to this testimony.

The second assignment of error pertains to a statement made by one of the State's expert witnesses, Patterson, with regard to his opinions based on his analysis and comparison of glass fragments. Patterson tested and compared glass fragments taken from the scene of the crime and glass fragments found in a rug taken from the defendant's apartment. Patterson testified with regard to the process by which the "refractive index" of glass fragments is determined. Patterson also testified that this process "is reported to be the best way to distinguish between fragments of glass." When Patterson was asked his opinion with regard to the comparison of glass fragments found at the scene of the crime and glass fragments found in the rug taken from the defendant's apartment, he testified that the refractive indices of the five fragments of glass taken from the rug were identical and matched the refractive index of one of the samples taken from the scene of the crime. Patterson testified that he could not determine absolutely that the fragments recovered from the rug were from glass found at the scene of the crime. He stated that he could testify only that the refractive indices of the fragments were the same and that the glass found in the rug was similar to glass found at the scene of the crime. The alleged error pertains to the following question and answer made at the end of Patterson's direct testimony: "Q. And the rug itself contained glass alone, which was from the scene of the crime? A. Yes."

Defense counsel objected after this statement was made, on the grounds of improper foundation or relevance. Defense

counsel then moved to strike the response. The trial court overruled this objection, stating that the motion was too late.

The defendant argues that the statement was prejudicial error, as it left the jury with the impression that the rug conclusively contained glass fragments which had originated at the scene of the crime. Based on Patterson's previous testimony that he could not determine absolutely that the fragments recovered from the rug were from glass found at the scene of the crime, the trial court should have sustained defense counsel's motion to strike the answer to the leading question that the rug contained glass "alone" from the scene of the crime.

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

We cannot determine how the jury in this case would have evaluated the remaining evidence if it had not been told that the victim was afraid of the defendant. Likewise, we cannot determine the effect on the jury of the expert's affirmative answer to the leading question that the rug in the defendant's apartment contained glass "alone" from the scene of the crime. This is true largely because the evidence presented to the jury, and upon which a conviction was based, was almost entirely circumstantial. Accordingly, we are unable to say that the error in the admission of the improper testimony was harmless beyond a reasonable doubt.

The defendant's next assignments of error pertain to a statement made by the trial court during its preliminary instruction to the jury at the commencement of the trial and to the trial court's definitions of "premeditation" and "reasonable doubt" given to the jury both at the commencement of the trial and during the trial court's final instructions to the jury.

During the trial judge's pretrial statement to the jury, the judge stated in relevant part:

> Ladies and gentlemen, at this time I want to give you a little bit of orientation about the trial. It might help you perform your function. You are here to decide disputed

> issues of fact. Now, your decision on any disputed fact is final. Perhaps it would be easier for you to understand your function as jurors if you understood my function as a judge. The judge has three functions: One is he is sort of a referee between the parties. In that function the judge rules on the evidence and objections that might be made, and in so doing he attempts to see that recognized practices and procedures are followed, and that the proceedings between the parties are fair. Secondly, a judge must decide what the law is that is applicable to that particular case, and lastly, he must instruct the jury as to what that law is.
>
> Now when somebody pleads innocent to a crime, all facts are in issue. All facts are disputed. The defendant is presumed innocent, and the statute — the State will introduce evidence, and the defendant will introduce such evidence as he chooses. I will instruct you as to the facts the State must prove beyond a reasonable doubt to find the defendant guilty of crimes charged. You will then decide whether the State has proved the material facts — the material elements of the crime beyond a reasonable doubt, and render your decision accordingly. Your decision is final.
>
> Now, in a criminal case the judge determines only whether or not there is enough evidence to support a verdict, and instructs the jury on the law. The determination of guilt or innocence is then upon the jury.

The defendant argues that the trial judge's statement that "in a criminal case the judge determines only whether or not there is enough evidence to support a verdict" was prejudicial error.

The defendant argues that this comment was improper in that the statement left the jury with the impression that if a verdict form of guilty of murder in the first degree is submitted to the jury, then, and in that event, the judge is of the opinion that there is enough evidence to support such a verdict.

Neb. Rev. Stat. § 29-2016 (Reissue 1989), which provides for the order of procedure for a criminal trial, does not require that a preliminary instruction be given to the jury. However, even though a preliminary jury instruction is not required, such

instructions have become commonplace, and the Proposed Nebraska Criminal Jury Instructions recommends that a preliminary jury instruction be given. The recommended preliminary jury instruction proposed in the Nebraska Criminal Jury Instructions does not contain a statement similar to the one which was used by the trial court in this case, that "in a criminal case the judge determines only whether or not there is enough evidence to support a verdict . . . ."

In *Hansen v. State*, 141 Neb. 278, 286, 3 N.W.2d 441, 446 (1942), this court stated:

> As a general rule, "It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury * * * but also on the examination of witnesses and otherwise during the course of the trial. The trial judge should not deny the existence of any fact bearing on the innocence of accused, or make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicates his opinion as to such facts."

Quoting 23 C.J.S. *Criminal Law* § 993 (1940).

With the exception of the erroneous admission or exclusion of evidence, a defendant claiming reversible error in a criminal case must demonstrate that the trial court's conduct during the proceeding against the defendant prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). It appears that the statement of the trial court in its preliminary instruction to the jury at the commencement of the trial may have had the effect of indicating to the jury that if a verdict form of guilty of murder in the first degree is submitted to the jury, the judge is of the opinion that there is enough evidence to support such a verdict. Accordingly, the statement by the trial court was prejudicial to the defendant and is reversible error.

The defendant also argues that the trial court erred in giving the jury instruction with regard to the definition of premeditation. However, no objection was made to this instruction prior to its being read to the jury. Failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal absent plain error

indicative of a probable miscarriage of justice. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991).

Regardless of whether this assignment of error was properly preserved for appellate review, the "premeditation" definition appears to be sound. The trial court in this case defined "premeditation" as follows: " 'Premeditation' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneous with the act." In *State v. Batiste*, 231 Neb. 481, 491, 437 N.W.2d 125, 132 (1989), this court stated:

> "Premeditated" means to have formed a design to commit an act before it is done. See Neb. Rev. Stat. § 28-302 (Reissue 1985). A person kills with "premeditated malice" if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.

The *Batiste* court further stated:

> "The question of premeditation was for the jury to determine. *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984). No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *Jones, supra*; *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901). The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *Nokes, supra*."

231 Neb. at 492, 437 N.W.2d at 132, quoting *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985). Accordingly, the premeditation instruction was sound, and this assignment of error is without merit.

The defendant also argues that the reasonable doubt instruction given in this case was improper in light of the U.S. Supreme Court's decision in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). This issue has previously been resolved by this court in *State v. Morley*, 239

Neb. 141, 474 N.W.2d 660 (1991). This court recently reaffirmed the *Morley* holding in *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). In *Morley*, this court determined that a reasonable doubt instruction nearly identical to the instruction given in this case complied with the *Cage* decision. Accordingly, this assignment of error is also without merit.

In view of the conclusions which we have reached in regard to the assignments of error which have been discussed, it is unnecessary to consider any of the other assignments of error made by the defendant, including those relating to the sentence.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

I dissent only from that part of the opinion that holds that the statement of the trial court to the jury at the commencement of the trial that in a criminal case the judge determines only whether or not there is enough evidence to support a verdict was erroneous and prejudicial.

It would seem to be quite obvious that if at the end of the trial the court submits verdict forms to the jury before they retire to deliberate, including both guilty and not guilty forms, the court has determined that the evidence of the State, if believed, is sufficient to support a verdict of guilty.

The instructions to the jury which were given in this case at the end of the trial were in the usual form and advised the jury that if it found from the evidence presented that the State had proved beyond a reasonable doubt all of the elements of the crimes charged, which were set out in the instructions, it should find the defendant guilty. It seems to me that is but another way in which the court tells the jury that the court has determined that the evidence of the State is sufficient, if believed, to support a verdict of guilty.

In my opinion, the statement made in the preliminary instruction was neither erroneous nor prejudicial.

IN RE APPEAL OF VERNON D. CROW.
VERNON D. CROW, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

493 N.W.2d 169

Filed December 18, 1992. No. S-89-1442.

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

Robert M. Spire, Attorney General, and Royce N. Harper for appellant.

John R. Brogan for appellee.

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

CAPORALE, J.

Claiming that the petitioner-appellee, Vernon D. Crow, was delinquent in the child support he was obligated to pay his former wife, the respondent-appellant, Department of Social Services, apparently at the request of the former wife and pursuant to the provisions of Public Welfare, 45 C.F.R. § 303.72 (1986), initiated steps to intercept Crow's 1986 federal income tax refund. Following an interdepartmental appeal, the department's director sustained the department's action, and Crow then appealed to the district court, which reversed the director's order. In its appeal to this court, the department asserts that the district court erred in determining that Crow was meeting his child support obligation. We reverse.

On March 31, 1978, the district court for York County, Nebraska, dissolved Crow's marriage to the former wife, granted custody of the minor child of the parties to the former wife, and ordered Crow to pay her $125 per month in child support. Although the former wife remained in Nebraska, Crow moved to Arizona and became delinquent in his child support obligation. The former wife thereupon, pursuant to the provisions of the Revised Uniform Reciprocal Enforcement of Support Act, found in Neb. Rev. Stat. §§ 42-762 through 42-7,104 (Reissue 1988), brought an action against Crow in the Superior Court of Maricopa County, Arizona, asking for an

order "for support . . . as shall be deemed fair and reasonable, and for such other and further relief as the law provides." On June 24, 1982, the Arizona court entered an order which directed Crow to pay the accumulated support arrearage of $5,395 and further ordered him to pay support in the sum of $40 per month. The Arizona order specifically provided that it applied "only to this reciprocal support action and does not constitute a modification of any divorce or dissolution decree, or other Court Order, in this State or any other jurisdiction."

Crow paid the arrearage as ordered by the Arizona court and made the monthly payments required by that court. However, there is no evidence that any separate action was taken to modify the Nebraska decree, under the terms of which Crow was, as of June 30, 1986, $4,302.41 in arrears.

The question is whether the Arizona order modified Crow's obligation such that from and after June 24, 1982, his liability was limited to $40 per month notwithstanding the Nebraska decree.

In *Chisholm v. Chisholm*, 197 Neb. 828, 251 N.W.2d 171 (1977), we held that under the terms of the act, the responding state could fix a different amount of support than that specified by the initiating state. We thus affirmed the Nebraska trial court's setting the amount of child support the obligee was required to pay at a sum less than that fixed by the initiating state, California. However, we did not consider whether the Nebraska order merely set the level of payment required for purposes of enforcing support under the act or whether it also modified the amount which accrued under the California order. Neither have we been directed to, nor have we found, any other case in which we have done so.

While it is true that a split of authorities exists as to whether a responding state's order under the act is an effective prospective modification of the child support order of the initiating state, see Annot., 31 A.L.R.4th 347 (1984), our version of the act provides in § 42-792:

> A support order made by a court of this state pursuant to sections 42-762 to 42-7,104 shall not nullify and shall not be nullified by a support order made by a court of this state pursuant to any other law or by a support order made

> by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. . . .

Although at an earlier time Arizona law permitted its courts to modify the effect of an initiating state's law, it did not do so when the Arizona order in question was entered.

Prior to its amendment in 1979, Ariz. Rev. Stat. Ann. § 12-1680 read:

> A support order made by a court of this state pursuant to this article does not nullify and is not nullified by a support order made *by a court of this state* pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, *unless otherwise specifically provided by the court*. . . .

(Emphasis supplied.) 1970 Ariz. Sess. Laws, ch. 90, § 3.

Under that language, the Arizona Supreme Court held in *Ibach v. Ibach*, 123 Ariz. 507, 600 P.2d 1370 (1979), that a court in the responding state (Colorado) could modify the spousal support provisions of the initiating state (Arizona).

However, in 1979, § 12-1680 was amended in that the language emphasized earlier was removed. 1979 Ariz. Sess. Laws, ch. 99, § 2. Under that version, the Arizona Court of Appeals held in *Westberry v. Reynolds*, 134 Ariz. 29, 653 P.2d 379 (Ariz. App. 1982), that a support order made under the act does not nullify the original order.

As a result, even if § 42-792 permits another jurisdiction to modify a support obligation accruing under a Nebraska decree or order, a matter we do not now decide, the situation remains that at the time in question, the law of Arizona did not empower its courts to do so, a fact the Arizona court apparently recognized by specifically declaring that its order did not modify any other decree.

For the foregoing reasons, the judgment of the district court is erroneous, and it is therefore reversed.

REVERSED.

DON L. THORELL AND KRISTI THORELL, APPELLEES AND CROSS-APPELLANTS, V. UNION INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

492 N.W.2d 879

Filed December 18, 1992. No. S-90-199.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law.
2. **Insurance: Breach of Contract: Claims: Proof.** When bringing an action for breach of an insurance contract, the plaintiff has the burden of bringing his claim within the terms of the policy.
3. **Insurance: Breach of Contract: Proof.** When the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. When a clause can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
5. **Insurance: Contracts.** While an ambiguous policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. **Waters: Words and Phrases.** "Surface water," sometimes referred to as "diffused surface water," has been defined in Nebraska law as water which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded with directions.

James A. Beltzer, of Luebs, Beltzer, Leininger, Smith & Busick, for appellant.

Richard A. Drews, of Brashear & Ginn, for appellees.

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

FAHRNBRUCH, J.

Union Insurance Co. (Union) appeals from a judgment based upon a jury verdict awarding Don L. and Kristi Thorell $55,217.50 under their homeowners policy for water damage to the contents of the Thorells' walkout basement.

The Thorells cross-appeal from a judgment based upon the jury's verdict that Union's policy did not cover damage to their dwelling.

We reverse the judgment in favor of the Thorells and remand the cause to the district court for Phelps County with directions to dismiss the petition.

Although Union has made numerous assignments of error, we need consider only one, that the trial court erred in failing to direct a verdict in Union's favor at the close of all the evidence.

DIRECTED VERDICT

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

FACTS

Resolving all controverted facts in favor of the Thorells, and giving them the benefit of every inference which can be drawn from the evidence, the facts of this case are as follows:

The Thorells are the owners of a ranch-style home located 1 1/2 miles southeast of Loomis, Nebraska. The house has a walkout basement which opens to the west. There is a 3-foot semicircular berm approximately 300 feet to the west of the house. It was constructed in 1984 to prevent water from coming into the house from a draw to the west of the berm.

On the evening of June 28, 1987, while the Thorells were

away from home, a severe rainstorm preceded by high winds struck the area. As much as 4 3/4 inches of rain fell in 30 minutes to an hour. After the storm, a neighbor who lived west of the Thorells saw water moving eastward toward the Thorells' property. The neighbor testified that the water which flowed toward the Thorells' house could only have come from an area directly west of the house, because there were no other bodies of water in the area other than a small dam. In the neighbor's opinion, the dam would have no effect on the amount of water which flowed toward the Thorells' home.

A second neighbor and then the Thorells' son, Mike, checked the Thorell home between 10:30 and 11 p.m. on June 28, and both noted approximately 4 feet of water in the basement. The neighbor also recalled seeing a 2 by 4 board floating in the water and hearing the sound of water running on the west side of the Thorells' home. Both the neighbor and Mike Thorell were able to see water west of the Thorells' house. Before the storm, some 2 by 4's and 2 by 6's had been stacked on an L-shaped deck built around the southwest corner of the house. The deck was approximately 10 feet off the ground.

The following morning, Mike Thorell returned to his parents' home. A picture window he described as 2 by 5 feet, which was one of four windows on the west side of the walkout basement, was broken, and the interior of the basement was extensively damaged by mud and water.

The Thorells' claim under their homeowners policy with Union was denied, and the Thorells then sued Union. Union claims that the damage to the Thorell home is not covered by their homeowners policy because the damage was caused by "surface water" or a "flood" and the policy specifically excludes damage from these occurrences. The Thorells argue that the initial damage to the dwelling was caused by wind propelling a 2 by 4 off the deck and through the basement window, which allowed the entry of "rain," and that these are covered perils under their policy with Union.

The trial court found that Union's insurance policy is ambiguous as to the coverage for the contents of the dwelling, and submitted the interpretation of the policy to the jury. The jury returned a verdict for the Thorells in the amount of

$55,217.50 for damage to the contents of the house. The trial court further found that the terms of the policy were not ambiguous as to coverage of the dwelling itself. The jury found that the damage to the dwelling was not covered by the policy.

Union appealed from the verdict in favor of the Thorells for damage to the contents. The Thorells cross-appealed from the verdict in favor of Union as to damage to the dwelling.

PROVISIONS OF THE POLICY

The homeowners policy issued by Union to the Thorells covering the period November 6, 1986, to November 6, 1987, insured all risks of direct loss to the dwelling except as specified under "Section I—Exclusions." The policy also provided for loss to personal property caused by windstorm or hail. A section entitled "Section I—Perils Insured Against" states in part:

> **COVERAGE A—DWELLING . . .**
>
> We insure against risks of direct loss to property described in [Coverage] A . . . *only* if that loss is a physical loss to property; *however, we do not insure loss*:
>
> . . . .
>
> 3. *excluded under Section I—Exclusions.*
>
> . . . .
>
> **COVERAGE C—PERSONAL PROPERTY**
>
> We insure for direct physical loss to the property described in Coverage C caused by a peril listed below *unless the loss is excluded in Section I—Exclusions.*
>
> . . . .
>
> **2. Windstorm or hail.**
>
> *This peril does not include loss to the property contained in a building caused by rain . . . unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain . . . enters through this opening.*

(Emphasis supplied.)

"**SECTION I—EXCLUSIONS**" provides in part:

> *We do not insure for loss caused directly or indirectly* by any of the following. *Such loss is excluded regardless of any other cause or event contributing concurrently or in*

any sequence to the loss.

. . . .

c. Water Damage, meaning:

(1) flood, *surface water*, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind.

(Emphasis supplied.)

To make a prima facie case for recovery of damage to their dwelling, the Thorells needed only to show that they suffered a "direct loss to property . . . if that loss is a physical loss to property" as required by the policy in "**COVERAGE A—DWELLING.**" When bringing an action for breach of an insurance contract, the plaintiff has the burden to bring his claim within the terms of the policy. *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991).

To make a prima facie case for recovery of loss of the contents of their walkout basement, the Thorells were required to show that their personal property loss was caused by a covered peril, that is, that the direct force of wind caused an opening in the wall through which rain entered. In this case, the Thorells allege that the direct force of the wind blew a 2 by 4 through a window, allowing rain to enter and damage the dwelling as well as the contents of the basement. Assuming that the Thorells met their burden of proof, it was then Union's burden to show that the ensuing loss to both the dwelling and the contents was caused by an excluded peril, namely, by surface water. When the insurer's defense is based upon an exclusionary clause in a policy, the burden is on the insurer to prove facts which bring it within the exclusion. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 188 Neb. 470, 197 N.W.2d 396 (1972).

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. When a clause can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987); *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.*, 238

Neb. 531, 471 N.W.2d 438 (1991); *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991).

While an ambiguous policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. See, *Central Waste Sys. v. Granite State Ins. Co.*, 231 Neb. 640, 437 N.W.2d 496 (1989); *Allstate Ins. Co. v. Farmers Mut. Ins. Co. of Nebraska*, 233 Neb. 248, 444 N.W.2d 676 (1989).

The language of the Thorells' insurance policy is not ambiguous. Its terms are clear, and they must be accorded their plain and ordinary meaning. The policy excludes coverage for loss due to "water damage," and more specifically excludes loss due to damage by "surface water." If the damage to the Thorells' home and personal property was caused by surface water, as Union contends, then the policy does not afford coverage for either loss. However, if the damage was caused by rain, as the Thorells insist, then the policy covers damage to the dwelling and may cover damage to the contents of the walkout basement.

"Surface water," sometimes referred to as "diffused surface water," has been defined in Nebraska law as " ' "[water] which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to and does flow with other waters . . . ." . . .' " *Jack v. Teegarden*, 151 Neb. 309, 314, 37 N.W.2d 387, 391 (1949). Accord, *Schomberg v. Kuther*, 153 Neb. 413, 45 N.W.2d 129 (1950); *Turnell v. Mahlin*, 171 Neb. 513, 106 N.W.2d 693 (1960). See, also, *Rolfsmeyer v. Seward County*, 182 Neb. 348, 154 N.W.2d 752 (1967); *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985); *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991).

The term "rain" apparently has not been defined either statutorily or by case law in Nebraska. This may be because the ordinary meaning of rain is so generally known that it has not been necessary to define it statutorily or by case law.

The Wyoming Supreme Court, in *State Farm Fire and Cas. Co. v. Paulson*, 756 P.2d 764 (Wyo. 1988), decided a

homeowners insurance policy case which is essentially identical to the one before us. The terms of the insurance policy in that case are the same as the terms of the Thorells' policy. In considering the meaning of "rain" as opposed to "surface water," the Wyoming court stated:

> "Rain" is ordinarily and commonly thought of as water falling from the sky. After it stops falling, one does not say that it is "raining" although there may still be wet sidewalks and streets, puddles of water resulting from the rain, or water running through gutters and elsewhere as a result of the rain. It is not common or usual to say in such instances that it is still raining.

Id. at 767.

The Wyoming Supreme Court concluded that the terms of the policy were not ambiguous. This is consistent with the decisions of other jurisdictions which have considered the meaning of "surface water" in the context of an insurance policy. See, e.g., *Heller v. Fire Ins. Exchange*, 800 P.2d 1006 (Colo. 1990); *Madison Block Pharmacy v. U. S. Fidelity*, 620 S.W.2d 343 (Mo. 1981); *Hirschfield v. Continental Casualty Company*, 199 Ga. App. 654, 405 S.E.2d 737 (1991); *Casey v. General Acc. Ins. Co.*, 178 A.D.2d 1001, 578 N.Y.S.2d 337 (1991).

We are persuaded by the Wyoming Supreme Court's reasoning that

> [i]f the water which accumulated on the ground and entered the basement window was still "rain," then there is either no such thing as "surface water," or "rain" and "surface water" are synonymous. Obviously, there is such a thing as "surface water"—at least in the minds of the parties to the contract in which they used the term. And if the two terms are synonymous, then the exclusion provision of the policy for "surface water" also applies to "rain," and there is no coverage.

State Farm Fire and Cas. Co. v. Paulson, 756 P.2d at 767-68.

Trial testimony indicated that approximately 4 3/4 inches of rain fell in the vicinity of the Thorell home on June 28, 1987. In contrast, there was approximately 4 feet of water in the Thorell basement after the storm, which is distinctly different from the

documented rainfall.

The evidence is uncontroverted that on the night in question, heavy rainfall caused a large volume of water to collect within an area circumscribed by an earthen berm west of the Thorell home. A broken window allowed this diffused water to flow into the basement to a depth of 4 feet. When the water receded, it left 4 inches of mud on the basement carpeting. From the evidence in this case, reasonable minds can draw but one conclusion as to the type of water that damaged the Thorells' home and personal possessions. It was surface water, not rain. Surface water damage to both the dwelling and the contents is a risk that is excluded from coverage by the express terms of the Thorells' insurance policy with Union. Therefore, Union was entitled to a directed verdict as a matter of law on both of the Thorells' causes of action at the close of all the evidence. Because the evidence established as a matter of law that the Thorells' damage to their dwelling was caused by surface water, it is unnecessary to reach the assignments of error on their cross-appeal.

The judgment in favor of the Thorells for damage to the contents of their walkout basement is reversed and the entire cause remanded to the district court for Phelps County with instructions to dismiss the Thorells' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

ALLIED MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLEE, V. GLEN MUSIL AND JAMES MUSIL, APPELLEES, AND CHRISTIE HABE, APPELLANT.

493 N.W.2d 171

Filed December 18, 1992. No. S-90-395.

1. **Insurance: Motor Vehicles: Proof.** Neb. Rev. Stat. § 60-535 (Reissue 1988) applies only to policies which have been filed with the Nebraska Department of Motor Vehicles and certified as proof of future financial responsibility pursuant to the requirements of the Motor Vehicle Safety Responsibility Act.
2. **Summary Judgment.** Summary judgment is appropriate only when the record

discloses no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law.

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

Walter E. Zink II and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellee Allied Mutual.

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

CAPORALE, J.

In this declaratory judgment action, the district court sustained the plaintiff-appellee Allied Mutual Insurance Company's motion for summary judgment upon a finding that the automobile liability insurance policy Allied had issued to the defendant-appellee Glen Musil did not provide liability protection for an accident involving a vehicle his son, the defendant-appellee James Musil, was driving and in which the defendant-appellant, Christie Habe, was riding as a passenger. Habe asserts the district court erred in so finding and ruling. We affirm.

The accident occurred at approximately 1:15 a.m. on August 14, 1988, when the driver ran the 1976 Chevrolet Blazer he was operating into a ditch. As a result, the Blazer rolled over and Habe sustained injuries.

Under the terms of the policy, Allied undertook to pay damages for bodily injury for which "any 'insured' " became legally responsible because of an automobile accident.

The policy defines the term "insured" as:

> 1. You or any "family member" for the ownership, maintenance or use, including loading and unloading, of any auto or "trailer."
> 2. Any person using, including loading and unloading, "your covered auto." This provision . . . does not apply to any person other than:
> a. you or any "family member . . . ."

To the extent relevant here, "your" is defined as "[t]he 'named insured' shown in the Declarations."

The term "family member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household."

The policy defines a "covered auto" as:

1. Any vehicle shown in the Declarations.
2. Any of the following types of vehicles on the date you . . . become the owner:
   a. a private passenger auto; or
   b. a pickup or van.

This provision [2] applies only if:

a. you . . . acquire the vehicle during the policy period . . . .

The declaration page of the Allied policy, which defines the policy period to be from August 9, 1988, to February 8, 1989, names the father as the insured, but does not list the Blazer as being among the vehicles covered. The policy excludes from the liability protection it affords damages arising from "the ownership, maintenance or use of . . . [a]ny vehicle, other than 'your covered auto,' which is . . . furnished or available for the regular use of any 'family member.' "

The Blazer was purchased from an automobile dealer in Ravenna in 1976 by the driver's brother, Thomas Musil, who was then 17 years old. The father's signature was needed to obtain financing for the vehicle, and at the suggestion of the dealer, both the brother's and father's names were placed on the certificate of title, which gives each the rights of survivorship. Although the title remained unchanged until after the subject accident, the father never considered the vehicle to be his, and the driver considered the brother to be the owner of the Blazer. The brother paid the taxes, licensing, repairs, and maintenance on the Blazer. The Blazer was covered under a policy of automobile liability insurance issued by Union Insurance, which the brother obtained.

Upon graduating from Ravenna High School in 1986, the driver enrolled at the University of Nebraska-Lincoln. During his first year at the university, he lived in an oncampus dormitory. During his second year, he lived in a rented house.

While the driver was away at the university, his parents maintained a room at their house in Ravenna for his use. Throughout his attendance at the university, the driver considered his parents' house to be his permanent residence. He maintained a checking account at a local bank and remained a member of the local Lutheran church. Moreover, the driver owned an automobile, a 1974 Chevrolet Impala, which was registered in Buffalo County, the county of his parents' residence.

Unless it was needed by the brother, the driver was permitted to take the Blazer with him to Lincoln throughout the spring semester of 1988. When the driver took the Blazer to Lincoln, he left his Impala in Ravenna for the brother's family's use. The driver commuted from Lincoln to Ravenna and back one or two times per month and used the Blazer for his personal transportation while in Lincoln. On the occasions the brother needed to use the Blazer, the driver would use his own Impala. The brother only needed the use of the Blazer "maybe once" during the spring semester of 1988.

The driver did not attend the university in the summer of 1988 and lived gratis with his parents, working as a farm laborer for the brother, who was a farmer renting most of his land from the father. During this period, the driver continued to use the Blazer except for those occasions when the brother wanted it.

While the parties have spent considerable effort considering whether the father was an owner of the Blazer, the matter is irrelevant, and we therefore do not concern ourselves with that issue. As the Blazer was neither listed in the policy declarations as one of the vehicles insured nor acquired by anyone during the policy period, it was clearly not a "covered" automobile as such is defined by the policy.

The question thus is whether the policy nonetheless provided the driver liability protection as a nonexempted unnamed insured. As noted earlier, under the pertinent policy language, a member of the named insured's family using any automobile is such an insured. A member of the family is one who is related to the named insured by blood and resides in the named insured's household. It is undisputed that the driver is the son of the named insured and is thus related to him by blood. Moreover, we have declared that as used in an omnibus clause extending

liability protection to members of the named insured's household, the word " ' "household" ' " means " ' "[t]hose who dwell under the same roof and compose a family." ' " See *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 344, 190 N.W.2d 789, 791 (1971), quoting *Andrews v. Commercial Casualty Ins. Co.*, 128 Neb. 496, 259 N.W. 653 (1935).

The evidence that the driver lived with his parents free of charge during the summer of 1988, that his parents maintained a room for him at their home while he attended the university, that he made frequent trips home during the school year, and that he maintained his local checking account and local church membership establishes as a matter of law that the driver was a member of the father's household at the time of the accident and thus a member of his family.

The controlling issue therefore becomes whether the driver falls within the exemptions to the liability protection otherwise provided him as an unnamed insured. Except for the named insured, the policy excludes from its protection the use of a noncovered automobile which is furnished or available for the regular use of a member of the named insured's family.

The evidence in this regard is that the driver could use the Blazer any time the brother did not himself need it and that the driver took the Blazer to Lincoln while he attended the university and used it as his own throughout the spring and summer of 1988. This evidence, combined with the evidence concerning the driver's living arrangements, establishes as a matter of law that the Blazer was furnished and was available for the driver's regular use while he was a member of the named insured's, that is, the father's, family.

Habe, however, argues that the "furnished or available for the regular use of any 'family member' " exclusion is preempted by Neb. Rev. Stat. § 60-535 (Reissue 1988), which reads, in pertinent part, that "[s]uch motor vehicle liability policy shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him . . . ." It is true that in *Rudder v. American Standard Ins. Co. of Wisconsin*, 187 Neb. 778, 194 N.W.2d 175 (1972), we ruled an exclusion from liability protection of any automobile owned by or hired, furnished, or available for the regular use of

the named insured, spouse, or any resident of the same household to be without legal effect as repugnant to the clear mandate of § 60-535. See, also, *Smith v. Canal Ins. Co.*, 184 Neb. 866, 173 N.W.2d 36 (1969) (applying § 60-535 to replacement automobile). It must be recognized, however, that these cases dealt with policies which had been certified as proof of future financial responsibility under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Cum. Supp. 1992).

Even if § 60-535 applies to other than named insureds, a matter we do not decide, its language pertains only to policies which have been filed with the Nebraska Department of Motor Vehicles and certified as proof of future financial responsibility pursuant to the requirements of the aforementioned act. See *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989) (act not applicable to policy not used as proof of future financial responsibility), citing *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967). The policy in question is not such a policy.

Being referred to no statute which prohibits the afore-described family-use exception in a policy of automobile liability insurance not certified as proof of future financial responsibility, and being aware of none, we discern no legal basis for not enforcing the clear and unambiguous language of the subject exception. See *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. at 251, 444 N.W.2d at 678 (ruling valid as against the named insured clause in noncertified policy exempting " 'insured or any member of the family of the insured residing in same household as the insured' " from protection where definition of "insured" encompassed "named insured").

The record disclosing no genuine issue concerning any material fact or as to the ultimate inferences deducible from such fact or facts and that Allied is entitled to judgment as a matter of law, *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992), we affirm.

AFFIRMED.

WHITE, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM G. MASSA, APPELLANT.

493 N.W.2d 175

Filed December 18, 1992. No. S-91-648.

1. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the State's case, proceeds with trial, and introduces evidence waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence.
3. _____: _____. An appellate court may set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt only where the evidence lacks sufficient probative force as a matter of law.
4. **Indictments and Informations: Lesser-Included Offenses: Juries: Convictions.** Under the cognate-evidence approach, a lesser-included offense determination is based on the elements of the crime as charged in the information, as well as the evidence averred to in the information, and the facts of the case which could reasonably support the charge. The lesser-included offense determination is neither solely controlled nor exclusively dictated by the specific statutory elements of the crimes themselves. The cognate-evidence approach necessarily requires the court to ask whether, considering the statutory elements of both the greater and the lesser offenses in light of the facts alleged and presented at trial, the jury could reasonably believe that the defendant was guilty of a lesser offense while concurrently finding the evidence insufficient to support a conviction on the greater offense.
5. **Jury Instructions: Lesser-Included Offenses.** When the defendant offers evidence to controvert one of the elevating elements of the greater offense or when the defense asserts an alibi or an insanity defense, but evidence nonetheless appears in the record to controvert one of the elevating elements, the court should submit the requested lesser-included instruction to the jury.
6. **Indictments and Informations: Jury Instructions: Lesser-Included Offenses: Appeal and Error.** Only when the evidence entirely fails to show the offense of the lesser degree than that charged in the information will the failure to give a lesser-included offense instruction not be prejudicial error.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for a new trial.

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

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

WHITE, J.

Following a jury trial in the district court for Lancaster County, William G. Massa was convicted of possession of marijuana with intent to deliver, a Class III felony, and possession of lysergic acid diethylamide (LSD), a Class IV felony. Massa was sentenced on count I, the marijuana conviction, to 5 years' probation with 6 months' incarceration conditioned on probation. Massa was sentenced on count II, the LSD conviction, to 2 years' probation with 90 days' incarceration conditioned on probation. The court ordered the probation periods to run concurrently and the conditional jail time to be served consecutively.

Massa's assignments of error summarily assert that his convictions should be reversed or remanded because there was insufficient evidence to support the verdicts, because the trial court refused to instruct the jury on the lesser-included offense of simple possession of marijuana, and because the trial court erred in overruling the defendant's objections to certain jury instructions.

The Nebraska State Patrol was investigating Romona Alvaro for selling marijuana and hoped to find Alvaro's drug source. On the morning of June 23, 1990, a confidential informant accompanied Alvaro while she purchased marijuana from the defendant's girl friend, Michelle Daffer. The informant was wearing a radio transmitter for the investigation. The purchase took place at a residence leased to Daffer, and arrangements were made for a second sale later that afternoon. Defendant Massa was not present during the morning sale.

Narcotics investigators obtained a search warrant based on the morning sale. The supporting affidavit for the warrant described Daffer's involvement in drug transactions, but did not name or refer to Massa. When law enforcement personnel executed the warrant that afternoon, Massa opened the door to

the residence. Daffer was found hiding in the basement.

A search of the living room uncovered what were later verified to be illegal controlled substances. Hidden under the couch was a cookie tin containing nine baggies of marijuana, a hand-held scale, and various drug paraphernalia. Two squares of LSD were found in plain view on a table in the living room. Various small amounts of loose marijuana were found in several areas in plain view in the living room. A search of the rest of the house uncovered a small baggie of marijuana in a leather jacket located among women's clothing in an adult's bedroom closet. A search of Massa disclosed $532.88 in cash, a pipe, and a baggie of marijuana in his jeans pocket.

The officers also found evidence relating to Massa's use of the house as a residence. Testimony and photographs were offered at trial to disclose his motorcycle parked outside the residence, a bedroom closet full of men's clothing, and a picture on a bedroom dresser of Massa, Daffer, and Daffer's son. A receipt bearing Massa's name, but a different address, and an envelope addressed to Massa at another address were found. A registration to a vehicle owned by Massa that listed a Denton, Nebraska, address was found in the cookie tin hidden under the couch. A roll of film found on the premises was later developed and revealed one photograph of Massa coming out of the shower at the residence, plus four other photographs depicting Massa outside of the residence.

At trial, an investigating officer testified that nine baggies containing approximately one-quarter ounce each of suspected marijuana were recovered from the cookie tin found hidden under a couch at the residence. Two narcotics investigators testified that in their experience, this packaging was consistent with distribution rather than personal use. The State Patrol's forensic drug chemist verified that the suspected LSD found in the residence and the suspected marijuana found in Massa's jeans pocket were in fact LSD and marijuana. The chemist also stated that he weighed each baggie of marijuana as part of his routine examination and that the weight of each separate exhibit of marijuana was marked on the outside of the plastic baggies or envelopes when they were resealed. These baggies and envelopes, along with their contents, were offered and

admitted at trial.

On Massa's behalf, his employer testified that he paid the defendant his weekly wages of $300 in cash on June 23, 1990. The employer further stated that he let Massa live in a backroom at his place of business. Daffer testified that Massa did not reside at her house, but only occasionally stayed there, and that some of the clothes in the closet belonged to her ex-husband. She also testified that except for the marijuana found on Massa's person, the LSD and the marijuana in the house belonged to her, and that she alone was involved in packaging and selling the marijuana.

The defendant asserts that the court erred in overruling his motion to dismiss at the close of the State's case and in overruling his motion for directed verdict at the close of the evidence. He also claims that his convictions were not supported by sufficient evidence and were contrary to law.

A defendant who moves for dismissal or a directed verdict at the close of the State's case, proceeds with trial, and introduces evidence waives any error in the ruling on that motion for dismissal or directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992).

The information filed against Massa contained two counts. Count I alleged that Massa unlawfully and knowingly possessed marijuana with the intent to deliver. Count II alleged that Massa unlawfully and knowingly possessed LSD. The defendant asserts that except for the marijuana found on his person, the evidence was insufficient to establish that he exercised control or dominion over either the marijuana or the LSD seized from the residence of Daffer.

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case if the verdict is supported by relevant evidence. *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992). On review, 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. *Id.* Furthermore, circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that

may be drawn therefrom establish guilt beyond a reasonable doubt. *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992).

The State introduced evidence, as noted above, to show that the defendant resided at the house on more than a casual basis, that the marijuana was packaged for distribution, that Massa's vehicle registration slip was found in the cookie tin along with the nine bags of marijuana, that the LSD was in plain view in the living room where the defendant was present, and that the defendant had an unusually large amount of cash on his person. From this evidence, the jury could reasonably infer that Massa was aware of the presence of the controlled substances, that Massa exercised dominion and control over the marijuana with the intent to distribute, and that Massa exercised dominion and control over the LSD with the intent to possess.

An appellate court may set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt only where the evidence lacks sufficient probative force as a matter of law. *State v. Back, supra*. We find that the evidence offered by the State, when taken as a whole, was sufficient to establish beyond a reasonable doubt that the defendant maintained dominion and control over the controlled substances as required to support the verdicts.

The defendant next asserts that the court erred in refusing to instruct the jury on the lesser-included offense of simple possession of marijuana. The State emphasizes that simple possession of marijuana requires the State to prove the weight of the marijuana as an element of the offense, while weight is legally an irrelevant element to the offense of possession with intent to deliver. The State argues that this inconsistency in the elements of the two crimes precludes a finding that simple possession of marijuana is a lesser-included offense of possession with intent to deliver. Conversely, the defendant argues that the weight of the marijuana for simple possession of marijuana is necessary only for determining the penalty and is not wholly dispositive of a lesser-included offense finding.

The pertinent language of Neb. Rev. Stat. § 28-416 (Reissue 1989), which was in effect at the time of the defendant's arrest and has since been renumbered, delineates the statutory violations for simple possession and possession with intent to

deliver:

> (1) . . . [I]t shall be unlawful for any person knowingly or intentionally: (a) To . . . possess with intent to . . . deliver . . . a controlled substance . . . .
>
> . . . .
>
> (6) Any person knowingly or intentionally possessing marijuana weighing more than one ounce but not more than one pound shall be guilty of a Class IIIA misdemeanor.
>
> (7) Any person knowingly or intentionally possessing marijuana weighing more than one pound shall be guilty of a Class IV felony.
>
> (8) Any person knowingly or intentionally possessing marijuana weighing one ounce or less shall:
>
> (a) For the first offense, be guilty of an infraction . . . .
>
> (b) For the second offense, be guilty of a Class IV misdemeanor . . . .
>
> (c) For the third and all subsequent offenses, be guilty of a Class IIIA misdemeanor . . . .

While both parties would prefer that this court definitively classify a lesser-included offense instruction in relation to simple possession and possession of a controlled substance with intent to deliver, this we decline to do. Under the cognate-evidence approach redefined by this court in *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), a lesser-included offense determination is based on the elements of the crime as charged in the information, as well as the evidence averred to in the information, and the facts of the case which could reasonably support the charge. The lesser-included offense determination is neither solely controlled nor exclusively dictated by the specific statutory elements of the crimes themselves. See *id.*

The cognate-evidence approach necessarily requires a case-by-case determination and compels the court to ask the following questions: First, considering the statutory elements of both the greater and the lesser offenses in light of the facts alleged and presented at trial, could the jury reasonably believe that the defendant was guilty of a lesser offense while concurrently finding the evidence insufficient to support a

conviction on the greater offense? If the answer is yes, a lesser-included offense instruction is indicated.

Once a lesser-included offense determination has been made, the second question is whether it is appropriate for the trial court to submit the lesser-included offense instruction to the jury. When the defendant offers evidence to controvert one of the elevating elements of the greater offense or when the defense asserts an alibi or an insanity defense, but evidence nonetheless appears in the record to controvert one of the elevating elements, the court should submit the requested lesser-included instruction to the jury. See *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988). The failure of a trial court to grant a requested instruction for a lesser-included offense may be reversible error. See, *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Hegwood*, 202 Neb. 379, 275 N.W.2d 605 (1979). Only when the evidence entirely fails to show the offense of the lesser degree than that charged in the information will the failure to give a lesser-included offense instruction not be prejudicial error. *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983).

As applied to this case, the relevant issue is whether the jury could reasonably believe that the facts support a finding that Massa was guilty of simple possession of marijuana and whether the jury could also find the evidence insufficient to support a guilty verdict on the charge of possession of marijuana with intent to deliver. Massa denies possessing the marijuana and contraband found in the search of the house, but does not deny possession of the marijuana found during the search of his person. A baggie of marijuana and a pipe were found in Massa's jeans pocket. From these facts, the jury could reasonably find that the amount of marijuana found on Massa, coupled with the pipe, was consistent with possession for personal use and contradictory to possession of an amount held for sale.

Additionally, Massa was not present during the morning sale of marijuana that occurred in the presence of the confidential informant. The residence under investigation was leased to Massa's girl friend, Daffer, and Daffer testified that she alone owned and sold the marijuana found hidden in the house.

Lastly, there were several documents belonging to Massa found in the residence that listed a different address. These facts, while not otherwise influencing a determination that Massa was guilty of simple possession, could further support a reasonable jury finding that Massa did not possess the nine baggies of marijuana with intent to deliver.

The marijuana found on Massa's person was offered into evidence as exhibit 27 and was tested by the Nebraska State Patrol's drug chemist. Only a photograph of this exhibit is available for inspection by this court; however, the actual exhibit itself stated the weight of the substance, consistent with the practice of the chemist's examination procedure. The evidence of the weight of the marijuana was therefore available to support a lesser-included offense instruction within one of the statutory requirements of § 28-416 (6),(7), or (8). The evidence of Massa's possession of marijuana on his person was clear and undisputed; therefore, the failure of the trial court to grant such a requested instruction was reversible error.

The final assigned errors relate to the trial court's decision to overrule the defendant's objections to jury instructions Nos. 4 and 21. Jury instruction No. 4 related to the statutory elements of possession with intent to deliver, while instruction No. 21 consisted of the verdict forms to be submitted to the jury. The defense objected at trial to these instructions, as they excluded a lesser-included offense charge. No other perceived error was argued in the defendant's brief. Consistent with the lesser-included offense analysis noted above, we find the court erred in overruling the defendant's objections to the two contested jury instructions.

The judgment of the district court is affirmed with respect to count II. The defendant's conviction on count I is reversed, and the cause is remanded for a new trial.

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

STATE OF NEBRASKA, APPELLEE, V. FRANK HERNANDEZ, APPELLANT.

493 N.W.2d 181

Filed December 18, 1992. No. S-91-675.

1. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)f and g (rev. 1992) requires that factual recitations be annotated to the record; the lack of such an annotation may result in an appellate court's overlooking a fact pertinent to the appeal.
2. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), is a rule of relevancy, and pursuant to Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989), evidence which is not relevant is not admissible.
3. _____: _____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), is an inclusionary rule permitting the use of uncharged misconduct evidence if the evidence is relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
4. _____: _____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), 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.
5. **Criminal Law: Trial: Evidence: Convictions: Appeal and Error.** In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.
6. _____: _____: _____: _____: _____. The erroneous admission of evidence in a criminal case is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted or admitted without objection, supports the finding by the trier of fact.
7. **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.
8. _____: _____. In determining whether evidence is sufficient to sustain a conviction, 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.
9. **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.

10. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.
11. _____: _____: _____. Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
12. **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) the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
13. _____: _____. In the consideration of a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
14. **Criminal Law: Jury Instructions: Proof: Words and Phrases.** It is not erroneous to instruct a jury: "A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the graver and more important transactions of life."
15. **Trial: Appeal and Error.** An objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and for that reason will not be reviewed on appeal.
16. **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 Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdict, the defendant-appellant, Frank Hernandez, was adjudged guilty of violating Neb. Rev. Stat. §§ 28-405(a)(4) [Schedule II] and 28-416(1)(a) (Reissue 1989) by

possessing with the intent to deliver a controlled substance, cocaine. He was thereafter sentenced to imprisonment for a period of not less than 3 nor more than 5 years. He asserts, in summary, that the district court erred by (1) failing to quash the jury panel, (2) receiving certain evidence, (3) finding the evidence sufficient to sustain the conviction, (4) improperly instructing the jury, (5) failing to find he was deprived of a fair trial through the misconduct of the plaintiff-appellee State at trial, and (6) imposing an excessive sentence. We affirm.

II. BACKGROUND

In their effort to identify and apprehend drug dealers, law enforcement officers worked with a paid informant. The officers would first search the informant and his vehicle to assure that he was not in possession of controlled substances or money they had not supplied to him, fit him with a body transmitter, and send him to purchase drugs from suspects he had earlier identified as drug dealers. The officers listened to the transactions as they occurred via the transmitter with which they had fitted the informant.

On August 29, 1990, the informant was sent to attempt to make a drug purchase from a third party. While officers listened, the informant met the third party at the latter's apartment and made arrangements to purchase some cocaine. The third party then left his apartment in the informant's vehicle and drove to Hernandez' house. The third party entered the house, remained for 5 or 6 minutes, and then returned to his own apartment, where he delivered to the informant one-half or one-fourth of a gram of cocaine. The cocaine was packaged in a small paper bindle (a piece of paper folded flat such that the cocaine powder would not fall out, a common delivery system for cocaine). Shortly thereafter, the informant turned the purchase over to the officers.

As a result, Hernandez was targeted for further investigation. A video camera and a time-lapse video cassette recorder surveillance of his residence was commenced on December 10, 1990, which permitted 24-hour-a-day monitoring. This surveillance revealed stop-and-go traffic to Hernandez' residence; that is, persons arrived by automobile

and departed after going inside for a very short period of time. Officers then personally watched the Hernandez residence during the evenings of December 19, 26, and 27, 1990. During this period, they saw at least two persons who had previously been arrested for narcotics violations enter and leave Hernandez' house as described earlier.

Armed with this information, the officers, on December 28, 1990, obtained a warrant which authorized the search of Hernandez' person and residence for "cocaine, cocaine related paraphernalia, cutting agents, records of transactions of cocaine sales, monies that are the result of cocaine sales, and an electronic scale." (A "cutting agent" is a substance having a lesser value than the controlled substance with which the agent is mixed both to increase the volume of the material to be sold and to dilute the purity of the controlled substance.)

At 7:55 p.m. on December 28, 1990, five officers arrived at the Hernandez residence to execute the warrant. When the officers knocked at the door, it was opened by an occupant, whereupon the officers rushed in with weapons drawn and told the two men in the living room to get down. Hernandez was found in a bedroom standing next to a bed. Although the officers repeatedly told him that they had a search warrant and to get down, Hernandez refused to comply and said he was going to take care of his dog.

The officers then forced Hernandez down on the bed, handcuffed him after a brief struggle, and searched him. In the left front pocket of his pants, they found a plastic bag tied shut with a knot, another smaller plastic bag, and $80 in cash. The tied plastic bag was later analyzed and found to contain 3.642 grams of cocaine and mannitol, a common cutting agent.

Five clear plastic bags of "white crosses," that is, white double-scored tablets, were also found in the bedroom. One bag of tablets was found in the top drawer of Hernandez' chest of drawers. A second bag was found in a woman's purse in the closet. Three separate bags of tablets were found in a drawer of Hernandez' wife's dresser. The tablets were analyzed and shown to contain ephedrine.

Hernandez's wife claimed that she had ordered the ephedrine tablets as a diet aid and as a pep pill and had taken them out of

the original bottle of 1,000 pills to count them to make sure she got the full amount and then put them in the clear plastic bags to carry in her purse.

A reloading scale designed for reloading ammunition and measuring weight in grains was found set up for use on top of the wife's dresser. Behind that on the dresser was a scale box, on the inside of which were notations converting grains to ounces and grams as follows: "quarter, 109.4," "G15.6," "7.8," and "3.9." According to one officer, in converting ounces to grams, then to grains, 109.4, on the bases of these notations, converts to one-fourth of an ounce, 15.6 to one-eighth of an ounce, 7.8 to a gram, and 3.9 to one-half of a gram. (There appears to be an error in either the calculations or the transcription of the testimony. If 15.6 converts to one-eighth of an ounce, 109.4 could not convert to one-fourth of an ounce. Furthermore, there is testimony that one-eighth of an ounce is approximately 3.5 grams. Thus, if one-eighth of an ounce reads 15.6 on the scale, a gram could not read 7.8 and meet the ratio.)

A second, smaller scale, sometimes referred to as a postage scale, was found on top of Hernandez' chest of drawers. The postage scale is designed to measure smaller amounts, and gram measurement notations had been added to it.

Also found was a spiral notebook containing a handwritten list of numerical codes used by law enforcement agencies in communicating via radio. Approximately 45 of the codes were defined. In the notebook was a loose sheet of paper with a handwritten list of police agencies and radio frequencies. In addition, a computer-printer-generated list of radio frequencies distributed compliments of an electronics chainstore was also found. These items were seized because drug dealers frequently possess scanners and lists of frequencies used by law enforcement agencies. However, no scanner was found.

The officers also took from the bedroom a magazine containing cutout squares of paper which had the "beginnings of a pharmacy fold." The magazine paper was very slick and of the type often used to package drugs, as they do not adhere to the paper.

Also seized was a small glass tray found on top of the wife's dresser containing a residue of white powder. While a positive

identification of the powdery substance was not possible, tests nonetheless suggested the presence of cocaine.

Hernandez explained that he had suffered an electrical shock in a work-related accident in October 1989 wherein he injured his back and neck and was prescribed numerous pain pills and muscle relaxants by his physician. As the pain continued, he resorted to cocaine in an effort to ease the pain.

Hernandez claims that he first purchased cocaine in February 1990, buying one-fourth of a gram approximately once a month. After receiving an insurance check for $530 to $540 a couple of weeks before Christmas for damages to his parked automobile, he purchased an "eight-ball," or approximately one-eighth of an ounce, for $200. He denied that he had ever before purchased that much cocaine at one time, claiming that he bought the eight-ball in a bar from someone he did not know and had never seen before.

Hernandez admitted that his cocaine use did "kind of get away from" him. On the evening of December 28, 1990, when he was arrested, he had gone into his bedroom to sneak the eight-ball of cocaine he had hidden in the wall of his bedroom while his brother-in-law and cousin were in the living room and his wife was in the shower. Hernandez said:

> I never even used it. I've never used it before, and I didn't even really know how. I just knew what I had bought, what they had told me I had bought, and I never cut it up before. I've never par — I mean split it up or done anything with it like that.

But he admitted he was "thinking about taking cocaine" at that time. Hernandez explained that he had removed the cocaine and the reloading scale from a hole in the wall between the bedroom closet and the bathroom when the police arrived. Although he admitted that he was going to try to use the scale to weigh the cocaine, he claimed that he had never actually used it for that purpose. He also admitted that he had used his wife's glass tray on the morning of his arrest to "snort" cocaine by making a pile of it and using a dollar bill as the device through which to inhale it.

Hernandez also claimed that he had bought the scale 2 or 3 weeks earlier for his brother-in-law to give to his father and that

he hid the scale in the meantime. His brother-in-law testified that Hernandez had previously discussed the possibility of purchasing a reloader and reloading scale to be used by his father. He also testified that he and Hernandez used the smaller postage scale to weigh carburetor float parts.

The officer in charge of the investigation, who had a total of 12 years' experience as a police officer and had investigated narcotics cases for 5 years, testified that the common quantities and purchase prices for end-user purchases are: one-fourth grams, $25 to $40; one-half grams, $50 to $60; grams, $100 to $120; eight-ball, which is approximately 3.5 grams, $225 to $350. According to him, most straight users purchase 1/4-gram and 1/2-gram amounts.

Hernandez' mother and sister testified to his good character and truthfulness and that to their knowledge he did not use or sell drugs.

III. ANALYSIS

With that background we turn our attention to an analysis of the summarized assignments of error.

1. Jury Panel

In connection with the first summarized assignment of error, Hernandez urges that the district court erred by failing to sustain his challenge to the jury panel "for the reason that persons of Spanish or Mexican heritage had been systematically and unconstitutionally excluded" from potential jury service.

Hernandez asserts that the composition of the jury violated both his Sixth Amendment right to be tried by a jury fairly representative of the community and his equal protection right to have members of his particular discernible minority group represented.

He bases his claim upon the showing that while approximately 14 percent of Scotts Bluff County's population of 36,025 has Hispanic surnames, only 2, or 2.7 percent, of the 74-person venire had Hispanic surnames, and that of the 30 names drawn for potential service in this case, none had such names.

The law controlling disposition of these claims was recently reviewed in *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32

(1992); no useful purpose would be served by reiterating that law here—we simply observe that there is nothing in this record which establishes that Hernandez is a member of any cognizable group of the population or that any under-representation of any group is due to its systematic exclusion in the jury selection process.

2. RECEIPT OF EVIDENCE

In connection with the second summarized assignment of error, Hernandez asserts that the evidence of the transaction between the informant and the third party and of the traffic patterns at Hernandez' home was improperly admitted, as it constituted hearsay and was otherwise not relevant.

We begin by noting that although Hernandez states hearsay evidence was received, he points to no place in the record which demonstrates such to have been the case. Neb. Ct. R. of Prac. 9D(1)f and g (rev. 1992) and its predecessors have long required that factual recitations be annotated to the record. The lack of such an annotation may result in an appellate court's overlooking a fact pertinent to the appeal. See *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). Since the claimed hearsay evidence, if any such exists, is not annotated to the record, nor was any such evidence noted in our detailed study of the record, we review this matter as if none exists. This treatment obviates Hernandez' claim that his right to confrontation under U.S. Const. amend. VI and Neb. Const. art. I, § 11, was somehow violated.

Hernandez also argues, however, that the testimony concerning what the officers saw transpire between the informant and the third party and concerning the traffic at Hernandez' house was not relevant and that even if it was relevant, its probative value was substantially outweighed by the potential of its unfair prejudice.

When the district court overruled Hernandez' objection to this evidence, it instructed the jury:

> [E]vidence that [Hernandez] may have had connection with [the third party] or any other incidents before the night of the search itself are being — any of these incidents are being received only for the limited purpose of helping

> you decide whether the defendant had the intent and knowledge required by the charge on the night charged in this case . . . the night of December 28, 1990. It's being received for that limited purpose only, and you can consider evidence of any of these other incidents for that limited purpose and for no other purpose.

Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), reads:

> 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.

Rule 404(2) is a rule of relevancy, and pursuant to Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989), evidence which is not relevant is not admissible. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

Rule 404(2) is an inclusionary rule permitting 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. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Timmerman, supra*; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). However,

> [r]ule 404(2) is subject to the overriding protection of Neb. Evid. R. 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." Neb. Rev. Stat. § 27-403 (Reissue 1989).

State v. Messersmith, 238 Neb. at 930, 473 N.W.2d at 89.

As to the unfair prejudice concern, the *Timmerman* decision quoted from *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), as follows:

> "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 in original.) *State v. Timmerman*, 240 Neb. at 85-86, 480 N.W.2d at 419.

While there can be no question that the evidence in question was admitted for a proper purpose, i.e., to show that Hernandez possessed the cocaine with the intent to deliver required by § 28-416(1)(a), that the evidence may have been at least marginally relevant to show Hernandez' intent, and that the district court gave an appropriate instruction limiting the use of the evidence, the crucial question is whether its potential for unfair prejudice outweighed its probative value.

We conclude that it did; unlike the situation in *Messersmith*, where the similar acts evidence was obtained through the testimony of two witnesses who claimed to have exchanged stolen property for drugs obtained from the defendant therein, in the case before us we have only observations that after the third party returned from Hernandez' house, he delivered some cocaine to the informant, and that persons previously arrested for narcotics violations were seen going to Hernandez' house. No one testified he saw Hernandez deliver any drugs to anyone.

However, that does not end our inquiry in this regard, for we must determine whether the erroneous receipt of this potentially prejudicial evidence worked to actually prejudice Hernandez.

We begin with the proposition that in a jury trial of a criminal

case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Messersmith, supra.*

> In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection. . . . In contrast with the preceding, we have expressed the "harmless error" standard pertaining to erroneous admission of cumulative evidence: "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact."

State v. Coleman, 239 Neb. at 814-15, 478 N.W.2d at 358.

Here, the evidence erroneously admitted was for the purpose of showing intent to deliver in accord with the circumstantial evidence of past delivery. The items found in Hernandez' possession, upon the search of his house, including the quantity of cocaine, the reloading scale, the postage scale, the slick magazine paper cut in squares with the beginnings of a pharmacy fold, the handwritten list of codes used in law enforcement communications, the scanner frequency list, and the cutting agent, are more than adequate to support the finding of intent by the jury. Thus, the erroneously admitted evidence is cumulative and harmless beyond a reasonable doubt.

3. Sufficiency of Evidence

The foregoing analysis foreshadows the resolution of the third summarized assignment of error, the claim that the evidence is not sufficient to support the conviction, in which connection Hernandez also asserts that the district court's denial of his motions for directed verdict was reversible error as well.

As we have frequently declared, 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. Moreover, on such a claim, 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. Vance*, 240 Neb. 794, 484 N.W.2d 453 (1992); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

We have also written:

> " '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.' " . . . [C]ircumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. . . .
>
> " 'Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field.' "

State v. Zitterkopf, 236 Neb. at 748, 463 N.W.2d at 620.

As demonstrated by our analysis of the second summarized assignment of error, the evidence seized at Hernandez' house, in and of itself, is sufficient to support the conviction. Since that evidence was adduced in the State's case in chief, there can be no merit to Hernandez' claim that the district court erred in overruling his motions for directed verdict made at the close of the State's evidence and at the close of all the evidence.

Indeed, by adducing evidence after the State rested, Hernandez waived any error which might have existed in the

overruling of his motion at the close of the State's evidence. See *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). In such a circumstance, our review is confined to the status of the record at the close of all the evidence, in connection with which we have proclaimed:

> 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) the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. . . . In the consideration of a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.

Id. at 6-7, 468 N.W.2d at 609.

Obviously, then, a criminal defendant has no less a task in undertaking to show that he or she was entitled to a directed verdict than such a defendant has in undertaking to show that the evidence is insufficient to support a conviction.

4. Jury Instruction

In connection with the fourth summarized assignment of error, Hernandez asserts the district court should have defined "reasonable doubt" in the terms he requested rather than as it did.

The district court instructed the jury that "[a] reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the graver and more important transactions of life." This instruction differs from that recently approved in *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992), only in that the *Garza* instruction used the phrase " 'in the more serious and important transactions of life' " in place of the phrase "in the graver and more important transactions of life" and added a third sentence reading: " 'However, proof beyond a reasonable doubt does not mean

proof beyond all possible [sic] doubt.' " *Id.* at 958, 492 N.W.2d at 49.

Nonetheless, as did the instruction in *Garza*, the instruction questioned here required the jury to carefully and impartially consider all the evidence and convict Hernandez only in the event the jury concluded the evidence was so convincing that it would rely and act upon it in life's graver and more important matters. The questioned instruction thus accurately defines the requisite standard of proof without minimizing Hernandez' due process rights.

Since it is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given, *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980), we need not concern ourselves with the instruction Hernandez tendered.

5. Trial Conduct of State

In the fifth summarized assignment of error, Hernandez argues that he was deprived of a fair trial by certain of the prosecutor's statements during closing argument. He also argues in this connection that as the prosecutor had participated in the arrest, he was a potential witness and thus should not have acted as the State's attorney, for in arguing the case he confused in his own mind what the witness said at trial with what the prosecutor knew from his own observations.

However, we are directed to no objection in the bill of exceptions to any allegedly improper argument. So far as we can determine, complaint was first made in this regard in Hernandez' motion for new trial. As we have recently reaffirmed, an objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and for that reason will not be reviewed on appeal. *State v. Garza, supra.*

6. Sentence

In the sixth and last summarized assignment of error, Hernandez, without attempting to suggest what an appropriate sentence would be, seeks to convince us that the sentence imposed upon him is excessive. It is not.

The offense of which he was convicted is a Class II felony,

§ 28-416(2), punishable by imprisonment for a period of from 1 to 50 years, Neb. Rev. Stat. § 28-105(1) (Reissue 1989).

In reviewing sentences, this court has repeatedly stated that 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. Hall, post* p. 92, 492 N.W.2d 884 (1992); *State v. Muratella*, 240 Neb. 567, 483 N.W.2d 128 (1992); *State v. Brandon*, 240 Neb. 232, 481 N.W.2d 207 (1992).

We find nothing in this record which suggests that the district court abused its discretion. What we do find is that, albeit for non-drug-related matters, Hernandez has been placed on probation three times in the past and that on one of those occasions he was unable to adhere to the terms imposed upon him.

IV. JUDGMENT

The record failing to sustain any of the summarized assignments of error, we, as first said in part I, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES T. HALL, ALSO KNOWN AS THOMAS DUANE STRAWDER, APPELLANT.

492 N.W.2d 884

Filed December 18, 1992. No. S-91-919.

1. **Sentences: Appeal and Error.** Except under certain circumstances when the Supreme Court is reviewing a sentence of death, it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.
2. _____: _____. To the district court and not to an appellate court is entrusted the power to impose sentences for the commission of crimes against the State; and the judgments of that court cannot be controlled or interfered with in the absence of an abuse of discretion.
3. _____: _____. 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.
4. _____: _____. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a

sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Jerry J. Fogarty, Deputy Hall County Public Defender, 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.

Complaining that his sentences are excessive, James T. Hall, also known as Thomas Duane Strawder, appeals his sentence of life imprisonment for second degree murder and his consecutive sentence of 20 years' imprisonment for use of a weapon to commit a felony.

George D. "Joe" Allan died January 2, 1991, as a result of Hall's firing five .357-Magnum revolver shots into Allan's body. Three of the shots were inflicted upon Allan after he was knocked to the ground by two earlier shots. A sixth shot missed him.

We affirm the sentences imposed by the district court for Hall County following Hall's guilty pleas, which were entered pursuant to a plea agreement with the prosecutor.

Allan was killed while he was inspecting animal traps he and his 5-year-old son had placed on his property near the Platte River in Hall County the previous day. His 5-year-old son had accompanied Allan in his pickup truck as he inspected the traps on the day he was killed. When Allan arrived at the site of the killing, Hall, armed with a gun and ammunition he had stolen during the burglary of the 3-D "ammunition factory" in Doniphan, was attempting to conceal a car he had stolen in Grand Island. Hall found the gun partially disassembled in a vise when he burglarized the 3-D building. He reassembled the gun and took it and more than 200 rounds of ammunition for it. The record reflects that Hall planned to commit an armed robbery on the evening of January 2 and use the car he had

stolen as a getaway vehicle. Hall told the district court judge that he burglarized the ammunition factory to obtain money "to take care of my needs and my insecurities." He told the probation officer that upon finding the .357-Magnum revolver, his plans changed. After Hall found the gun and ammunition for it, "I was going to go and kill my father and kill my stepfather and I didn't care what happened to me," he told the judge. Before confronting Allan, Hall had also burglarized a four-bedroom cabin trailer on Allan's property and taken clothing and other items.

Hall told the court that as he was covering the stolen car with tree branches, Allan happened on the scene. Hall said he hid among some trees and watched Allan inspecting the stolen car and its license plate. Hall said he was afraid that Allan would remove the keys from the stolen vehicle and that Hall "could not outrun pursuit." When Hall stepped from his hiding place, Allan asked him if the car was his. Hall said he told Allan that the car was his. Hall claimed that when Allan made a move with his right hand, Hall "came around with the gun [he had stolen], pointed it at [Allan] and pulled the trigger." Hall shot Allan five times. Allan's young son, who had remained in the pickup truck, was an eyewitness to his father's killing. He said his dad fell to the ground after Hall had shot him twice, leaving the inference that Hall had shot Allan three times while he was lying on the ground. A sixth shot by Hall missed Allan. Hall maintains that he kept shooting because Allan kept trying to draw his own handgun from its holster.

Hall attempted to reload his stolen weapon, but it would not open for the reload. Hall claimed he was unaware of the boy's presence in Allan's pickup until he approached the truck to make his escape from the scene. Hall pointed his empty gun at the boy, ordered him out of the truck, and then fled the scene in Allan's truck. The child was left alone with the body of his father, 2 miles from the nearest house. The boy went to a farmhouse. Authorities were notified that Allan had been shot.

Hall was taken into custody in Cimarron, Kansas, by the Gray County sheriff the day after Allan was killed. Hall abandoned Allan's pickup truck in Kansas. He stole another pickup in Gray County. While in custody for auto theft in Gray

County, Hall confessed to killing Allan and taking his truck. Hall also told law enforcement officials that he planned to go to Texas and "maybe across into Mexico and living [sic] off the land."

Hall was initially charged with first degree murder, use of a weapon to commit a felony, child abuse, being a felon in possession of a firearm, and two counts each of theft by unlawful taking and burglary. At his arraignment on the eight-count information, Hall stood mute. The district judge entered pleas of not guilty to each count for Hall.

A plea agreement was reached between Hall and the prosecutor. At a July 16, 1991, hearing, Hall pled guilty to second degree murder and use of a weapon to commit a felony. The remaining charges were dismissed in accordance with the plea agreement. On September 5, Hall was sentenced to life imprisonment on the second degree murder charge and 20 years' imprisonment on the weapons charge, the sentences to run consecutively. Second degree murder is a Class IB felony under Neb. Rev. Stat. § 28-304(2) (Reissue 1989), for which the maximum penalty is life imprisonment, see Neb. Rev. Stat. § 28-105(1) (Reissue 1989). The maximum sentence on the use of a weapon to commit a felony is 20 years' imprisonment, a $25,000 fine, or both, and must be imposed consecutively to the felony sentence. See, Neb. Rev. Stat. § 28-1205 (Reissue 1989); § 28-105.

Except under certain circumstances when the Supreme Court is reviewing a sentence of death, *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. We have long adhered to the doctrine that to the district court and not to an appellate court is entrusted the power to impose sentences for the commission of crimes against the State; and the judgments of that court cannot be controlled or interfered with in the absence of an abuse of discretion. See *Wright v. State*, 45 Neb. 44, 63 N.W. 147 (1895). We have also declared 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. Coleman*, 241 Neb. 731, 733, 490 N.W.2d 222, 226 (1992). This standard has

been in effect since at least 1950, when we held in *Carr v. State*, 152 Neb. 248, 254, 40 N.W.2d 677, 681 (1950), that " '[w]here the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.' " See, also, *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991); *Kirkendall v. State*, 152 Neb. 691, 42 N.W.2d 374 (1950). All Nebraska courts acting in an appellate capacity are bound by the standard enunciated in *State v. Coleman, supra*.

Hall, 33 years of age at the time of Allan's murder, has a criminal record which includes auto theft as a juvenile, and convictions of grand theft and third degree sexual assault. The latter conviction stemmed from an incident involving Hall and a close relative. After considering Hall's age, mentality, education, experience, social background, past criminal record, and the amount of violence involved in the commission of his crimes, the district court found that "any prison sentence less than the maximum would depreciate the seriousness of the crimes."

Hall admitted to the court that he intentionally shot and killed Allan. The killing of Allan without just cause was a senseless and unnecessary act of violence. From the facts and circumstances of this case, a sentencing court could reasonably conclude that Hall killed Allan to avoid being apprehended for the several crimes he had committed. A sentencing court could also reasonably and properly conclude that any physical or mental health problem that Hall claimed he had was no justification to take Allan's life, nor that any such claimed problem should serve to mitigate the sentences Hall received.

Hall related that after he obtained the gun in the 3-D burglary, he wanted to kill his father and stepfather if he could find them. He said he wanted them dead. It was indeed fortunate that the gun Hall had stolen in the 3-D burglary would not open for a reload after he had fired all of its shots at Allan. Hall's state of mind to avoid being apprehended may be drawn from the fact that he pointed the gun he had stolen at the victim's 5-year-old son, ordered him out of the truck, and left

the boy alone with his dead father in a remote area 2 miles from the nearest house. Hall then began his trek to Kansas and anticipated traveling to Texas and perhaps to Mexico.

Had Hall been convicted of all eight of the charges originally brought against him, and had he been given the maximum sentence on each count, Hall faced, in addition to the death penalty, 110 years' imprisonment for five Class III felonies and two Class IV felonies.

Hall's sentence was within the statutory limits of crimes to which he pled guilty. The trial court's reasons and rulings in sentencing Hall were not clearly untenable, nor did they unfairly deprive Hall of a substantial right and a just result. See *State v. Coleman, supra*. For these reasons, it cannot be said that the trial court abused its discretion in sentencing Hall. The sentences imposed by the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A UTAH CORPORATION, APPELLANT.

490 N.W.2d 461

Filed December 24, 1992. Nos. S-89-1144, S-89-1345, S-89-1347.

Appeal from the District Courts for Custer, Dawson, and Buffalo Counties: RONALD D. OLBERDING, JOHN P. MURPHY, and DEWAYNE WOLF, Judges. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Brenda J. Council for appellant.

Robert M. Spire, Attorney General, and Jeffery T. Schroeder for appellee.

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

BOSLAUGH, J.

These cases are now before this court on the motion of the

appellee for rehearing. The original opinion is reported at *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992).

The appellee has called our attention to the fact that Neb. Rev. Stat. § 76-107 (Reissue 1990) is not applicable. See Neb. Rev. Stat. § 76-2,104(5) (Reissue 1990).

Upon consideration of the motion, we have concluded that the possibilities of reverter contained in the right-of-way deeds to the defendant were void as restraints on alienation and that the last paragraph on page 686 of the opinion which appears in volume 241 of the Nebraska Reports and the first paragraph on page 687 of the opinion, which was filed on October 9, 1992, should be withdrawn and the following substituted for the deleted material:

However, we hold that the possibility of reverter contained in the original deeds to the Railroad herein are restraints against alienation and are therefore void and unenforceable.

In *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 391, 183 N.W.2d 485, 489-90 (1971), this court held that a condition attached to a fee simple estate is an indirect restraint on alienation "[i]f it materially affects marketability adversely." The *Cast* decision also stated:

> A majority of this court, including the writer, has come to the conclusion that the law is the same on direct and indirect restraints on alienation. The authorities are not in accord on the question. While much has been written on the subject, we adopt the following as a proper statement of the law: "As used in this treatise, the expression 'restraint on alienation' refers not merely to the restriction of the legal power of alienation, but also to the restriction of alienability as a practical matter. Any provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation." . . . "In brief, the law is concerned primarily with practical alienability [sic], not with a theoretical power of alienation."

Id. at 391, 183 N.W.2d at 490, quoting Lewis M. Simes & Allan F. Smith, The Law of Future Interests §§ 1111 and 1115 (2d ed. 1956).

In *Falls City v. Missouri Pacific Railroad Company*, 453 F.2d 771 (8th Cir. 1971), the U.S. Court of Appeals for the Eighth Circuit relied on the *Cast* decision and held that the reversionary interest in the railroad deed at issue in that case was void. In that case a clause in a deed to the railroad provided that the property was to revert to the city as grantor on failure of the grantee railroad to make use of the property as its divisional headquarters. The court held that this use limitation, in practical effect, completely restricted alienation of the land to other grantees. The court concluded that the reversionary interest in the railroad deed was unenforceable as an indirect restraint on alienation and concluded that the railroad held an indefeasible estate in fee simple.

In the present cases, the possibility of reverter set out in the deeds to the Railroad obviously affects the marketability of the title the Railroad received and completely limits alienability. Therefore, the possibility of reverter in the deeds is void, and the Railroad owns the property in fee simple absolute. The trial courts' judgments that the State acquired title to the property because of the appellant's abandonment of the right-of-way were incorrect.

The motion for rehearing is otherwise overruled, and the former opinion is modified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. WALKER, APPELLANT.

493 N.W.2d 329

Filed December 24, 1992. No. S-91-620.

1. **Police Officers and Sheriffs: Confessions.** A police officer's characterization of the legality of an act, although technically accurate, may affect the voluntariness of the actor's confession if the characterization is misleading to a layperson.
2. _____: _____. The use of deceptive statements by police, standing alone, will not render a defendant's confession involuntary, unless the deception produced a false or untrustworthy confession.

3. _____: _____. A confession is not rendered involuntary by police statements which attempt to "befriend" the defendant or by police statements which, although deceptive, do not offer the defendant a benefit in exchange for the confession.
4. **Polygraph Tests: Appeal and Error.** Although the results of polygraph examinations are inadmissible, the mere mention of the word "polygraph" does not constitute prejudicial error.
5. _____: _____. Reference to a defendant's statements made during a "polygraph pretest interview," when the defendant did not actually take a polygraph test, are not so misleading or confusing as to require suppression of the statements.
6. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

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 David T. Bydalek for appellee.

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

WHITE, J.

Appellant, Terry L. Walker, brings this action to reverse his district court conviction for first degree sexual assault on a child, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989). After being found guilty by a jury, Walker was sentenced to 4 to 6 years' incarceration. We affirm.

On June 28, 1990, the victim told her stepmother that she had submitted to sexual contact with Walker. The stepmother then called her husband, the victim's father, and they drove the victim to Saint Joseph Hospital, where test samples were taken to obtain evidence of sexual assault. The victim repeated her allegations to the interviewing nurse and later to the police.

The victim alleged that Walker had phoned her, picked her up in his car, and asked her to perform oral sex—which she did. She further stated that Walker then drove to a wooded area and parked the car. Walker allegedly began kissing and fondling the victim and began to undress her. While removing her clothing,

Walker allegedly tore her skirt and underwear. The victim stated that she then engaged in sexual intercourse with Walker. Afterward, Walker allegedly dropped her off near her father's house.

At the time of the incident, the victim was 15 years old and Walker was 32 years old. Section 28-319(1)(c) provides that "[a]ny person who subjects another person to sexual penetration and . . . the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree."

On August 9, 1990, Walker went to the Omaha central police station to take a polygraph test concerning the allegations. Walker was given his *Miranda* rights, signed a "Polygraph Rights Advisory Form," and took part in a "pretest interview" with a polygraph examiner, Officer Richard Circo. The interview was videotaped and later was shown to the jury at trial, over Walker's objection.

During the interview, Circo told Walker that he was free to leave at any time. Walker initially denied any sexual contact with the victim. While interviewing Walker, Circo stated that if the sex was mutually agreed upon, it did not constitute sexual assault. Circo made further comments that it is not uncommon for children to lead adults on about sex and for the sexual contact to be agreed upon. In a tape-recorded statement Circo said to Walker, "I've seen someone who's in pain and who is under stress, and you're in a lot of emotional stress." After further denials and more questioning, Walker admitted having intercourse with the victim. No polygraph test was given. Later that day Walker was interviewed by Officer Steve Henthorn and, after being informed of and waiving his rights, again admitted having intercourse with the victim. The Henthorn-Walker interview was not taped; Henthorn testified to its substance at trial.

At trial, Walker moved to suppress and later objected to the admission of all statements he had made to the officers, arguing that the statements were involuntarily given and coerced. The trial judge overruled both the motion and the objections. The victim, her father, and her stepmother, as well as the examining doctors, also testified at trial. The doctor who analyzed the test

samples stated that the samples indicated the presence of seminal fluid.

Circo testified over objection regarding Walker's admission during the pretest interview. During his testimony, in response to the prosecutor's question about his job, Circo stated that he worked for the police as a polygraph examiner. Walker then moved for mistrial based on "testimony regarding polygraph." The court overruled the motion, but did sustain Walker's continuing objection as to Circo's duties as a polygraph operator. The court later had the prosecution lay foundation that Circo was a polygraph examiner, that no polygraph was given to Walker, and that Walker was only subjected to a pretest interview.

Walker also objected to the introduction of the "Polygraph Rights Advisory Form" and the "Polygraph Interview" sheet, exhibits 2 and 3, respectively. The court overruled each objection and received the exhibits into evidence. After the jury found Walker guilty, he was sentenced to 4 to 6 years' incarceration.

On appeal, Walker alleges that the district court erred in (1) failing to suppress his statements to Circo because they were elicited by improper inducements; (2) admitting exhibits 2 and 3 and allowing Circo to refer to the polygraph examination, because the evidence violated the "polygraph relevancy rule" and was more prejudicial than probative; and (3) denying Walker's motion for mistrial.

Walker first argues that Circo, by his comments during the pretest interview, improperly induced Walker's confession —thereby rendering the confession involuntary and inadmissible. Walker objects to three categories of statements made by Circo: (1) that Walker was "in a lot of emotional stress"; (2) that if the contact between Walker and the victim was mutually agreed upon, it did not constitute sexual assault; and (3) that sexual contact between children and adults is not uncommon and that the children often initiate the contact. The district court denied Walker's suppression motion and objections.

The especially damning nature of a confession requires the State to prove that the statement was voluntary before it is

admissible. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). See, also, *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (holding that a conviction based on an involuntary confession violates due process). We have frequently stated the test for the voluntariness of a statement:

> To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made. . . .

State v. Melton, 239 Neb. 790, 796, 478 N.W.2d 341, 347 (1992). See, also, *Haynie, supra*. We also note that the necessity of proving that Walker's statement was voluntary is not obviated by the fact that Walker went to the police station voluntarily, was not under arrest during interrogation, and knowingly and intelligently waived his *Miranda* rights prior to the pretest interview. See *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990).

We first address Circo's statement that Walker was under "a lot of emotional stress." Whether this was true or not, the statement clearly is neither a promise nor an inducement sufficient to render Walker's confession involuntary. In *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986), we were faced with a similar argument by the defendant. Norfolk had argued that his confession was involuntary because an officer suggested that Norfolk would "feel better" if he confessed. We held that this statement did not constitute an inducement sufficient to overturn the trial court's finding of voluntariness. In doing so, we noted that " '[a]n interrogation tactic in which the police appear to befriend the defendant' does not, by itself, render the confession involuntary." *Id.* at 820, 381 N.W.2d at 128 (quoting *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983)). Circo's statement regarding Walker's emotional condition was no more an improper inducement than the

statement in *Norfolk*. We therefore hold that this statement did not render Walker's confession involuntary.

The other two statements that Walker asserts were improper differ from the "emotional stress" statement in that they are arguably deceptive. While it is true that police cannot coerce a statement from a defendant or promise leniency in exchange for a statement, *Porter, supra*, mere deception will not render a statement involuntary or unreliable, *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979). We must therefore determine whether, if Circo's statements were deceptive, the deception "produce[d] a false or unworthy confession." *Erks*, 214 Neb. at 305, 333 N.W.2d at 779.

The more problematic statement concerns the officer's explanation of "rape" to Walker. During the interview, Walker told Circo that the victim had accused him of sexually assaulting her. Circo then replied that "to rape someone is to forcibly take something from someone without their permission. . . . *To have sex with someone is not rape*. . . . Rape is a forced type thing." (Emphasis supplied.)

Although Circo's statement is an accurate, albeit simplistic, statement of the law, it is deceptive to persons lacking a legal education. The State points out that while Circo implied that having mutually-agreed-upon sex with the victim would not be sexual assault, Circo never stated that it would not be a crime. This argument draws too fine a distinction. To the lay individual unfamiliar with the niceties of the law, Circo's statement indicates that if the sexual contact between Walker and the victim was consensual, then Walker had committed no crime. Under § 28-319(1)(c), however, sexual intercourse between Walker and the victim constituted first degree sexual assault. The statement, as such, is deceptive. However, deception alone will not render the confession involuntary.

In *Norfolk, supra*, we stated, "[T]he test for determining admissibility of a statement obtained by police deception is whether that deception *produced* a false or untrustworthy confession or statement." (Emphasis in original.) *Id.* at 820, 381 N.W.2d at 128. The statement will be involuntary if, considering all the circumstances, the officer's statements overbore the will of the defendant and caused him to confess.

State v. Ray, 241 Neb. 551, 489 N.W.2d 558 (1992).

In *Ray*, we stated:

> A defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a *benefit in exchange* for the statement. . . .
>
> . . . .
>
> If the *benefit is offered in exchange* for testimony, and the offer is definite, then the confession is involuntary and must be suppressed.

(Emphasis supplied.) *Id.* at 562-64, 489 N.W.2d at 565-66.

From this language it is clear that Walker's statement was not rendered involuntary by Circo's deceptive statement. Unlike the situation in *Ray*, where the officer told the defendant that " 'if he cooperated it would be better for him,' " *id.* at 556, 489 N.W.2d at 564, Circo offered no beneficial exchange for Walker's confession. Granted, Walker would have benefited if Circo's statement had been true, but the existence of that benefit was completely independent of whether Walker confessed; Circo's statement sought nothing in return for the benefit.

Walker's decision to confess "got" him nothing. Even if Circo's statement had been true, Walker need not have made a statement to receive the "benefit" of nonillegality. Walker's statement is analogous to a statement blurted out by an accused before being *Mirandized*—the statement is "volunteered" and therefore admissible. Likewise, Walker's confession was not "produced" by Circo's deceptive characterization of the law and is also admissible. Cf. *Norfolk, supra*.

An additional consideration is a statement Circo made before Walker confessed that substantially reduced the deceptive impact of Circo's "rape" statement. Walker asked Circo how the prosecutor would handle the case, to which Circo responded, "I can't respond to any of that. I'm a polygraph examiner; this is the part I'm involved in." The State correctly points out that if Circo had wanted to deceive Walker with a promise of leniency, he could have told Walker that mutually-agreed-upon sex was not a crime. Circo did not do this and thus mitigated the effects of his deceptive "rape" statement.

Walker's final voluntariness argument concerns Circo's statements about the commonness of child-initiated sexual contact. Walker argues that these statements improperly induced a confession by implying that he had done nothing wrong. We do not agree.

It is debatable whether Circo's statements about child-initiated sex were, in fact, deceptive. Rather, they appear to be another attempt to "befriend" the defendant. Regardless of whether Circo's statements regarding the commonness of this problem were true, the statements certainly had not overborne Walker's will and "produced a false or untrustworthy confession." *Norfolk*, 221 Neb. at 820, 381 N.W.2d at 128.

Like Circo's statements about the nature of sexual assault, the "child-initiated sex" statements simply do not offer any exchange of benefits for Walker's confession. Even if Walker actually believed that his contact with the victim was neither illegal nor out of the ordinary, this belief provides no incentive or pressure to make a statement. In *Norfolk, supra*, we noted that the greatest concern about involuntary confessions is that they are unreliable or untrustworthy. That concern does not present itself in Walker's case. Having no incentive to fabricate a story, having been informed of his rights, and being free to stop the interview at any time, Walker *chose* to make a statement. The district court found this statement to have been made voluntarily.

We will only disturb the trial court's ruling on a motion to suppress if that court's findings of fact are clearly erroneous. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but do recognize the trial court as the finder of fact and that the trial court has observed the witnesses. *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (citing *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991)). "Thus, 'a determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.' " *Ray*, 241 Neb. at 557, 489 N.W.2d at 562.

The trial court, after considering Circo's statements and the other evidence, found that Walker's confession was voluntary. The record supports that this finding was not clearly erroneous.

Although we hold that Walker's confession was not rendered involuntary by Circo's deceptive statements, we do not intimate any approval or condonation of these tactics. We simply hold that the conduct did not overbear Walker's will.

Walker's final assignment of error concerns the references at trial to polygraph. Walker argues that polygraph evidence is not relevant and is therefore inadmissible. Walker further argues that the polygraph references are also inadmissible under Neb. Rev. Stat. § 27-403 (Reissue 1989), because references to polygraph when no polygraph examination was actually given, confuse the issues and mislead the jury. Walker concludes that the admission of the evidence required a mistrial.

Walker is correct that the results of polygraph examinations are not admissible. *State v. Houser*, 234 Neb. 310, 450 N.W.2d 697 (1990) (citing *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983)). However, simply mentioning the word "polygraph" does not constitute prejudicial error. *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

In *Anderson and Hochstein, supra*, we dealt with a similar situation to the case at bar. In that case, one of the State's witnesses mentioned the word "polygraph" while testifying. The defense then moved for mistrial. The trial court overruled the motion and instructed the jury that the case contained no factual matter concerning polygraph testing. On appeal, we affirmed the overruling of the motion for mistrial:

> [I]n the instant case, there was no testimony concerning the results of a polygraph test. The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word "polygraph" was prejudicial under the circumstances . . . . The assigned error [for refusing to grant a mistrial] must be overruled.

Id. at 67, 296 N.W.2d at 450-51.

The same result applies to Walker's case. The only references to polygraph were Circo's statement about his job and the captions of the "Polygraph Rights Advisory Form" and the "Polygraph Interview" sheet. No polygraph test was given, and thus the *results* of a polygraph test were never mentioned. The

trial court determined that the evidence was relevant, and this finding will not be disturbed on appeal absent an abuse of discretion. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). Walker has shown no such abuse.

The only prejudice that Walker claims is that the jury may have been misled by references to a polygraph test, when no such test was administered. Section 27-403 permits the exclusion of relevant evidence if, among other things, the probative value of the evidence is substantially outweighed by the danger of misleading the jury or confusing the issues. We believe that the jury was fully capable of understanding the difference between a pretest interview and an actual polygraph test. The judge amply guarded against such confusion by having the State inform the jury that no polygraph test was given to Walker. Finally, Walker's contention that the court erred by allowing Circo to discuss his duties as a polygraph examiner is directly contradicted by the record. The State did ask Circo to describe his duties, but the court sustained Walker's objection to the question.

"The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion." *State v. Palser*, 238 Neb. 193, 202, 469 N.W.2d 753, 759 (1991). The district court correctly ruled that Walker had not suffered such prejudice that a fair trial was prevented. We affirm the court's denial of the motion.

The district court was not clearly wrong in finding that Walker's confession was voluntary. Neither did the court abuse its discretion by holding that the references to polygraph did not render the evidence irrelevant, confuse the issues, or mislead the jury. We therefore affirm.

AFFIRMED.

IN RE INTEREST OF WESLEY DEAN VANCE, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. WESLEY DEAN VANCE, APPELLANT.

493 N.W.2d 620

Filed December 24, 1992. No. S-91-769.

1. **Mental Health.** Before a person may be committed for treatment by a mental health board, it is necessary that the person be found to be mentally ill and that the person presents a substantial risk of serious harm to others or to himself or herself.
2. **Mental Health: Final Orders: Evidence: Appeal and Error.** A district court's review of an appeal from a mental health board is de novo on the record, and on further appeal, an appellate court will not interfere with a final order made by the district court unless the appellate court finds, as a matter of law, that the order is not supported by clear and convincing evidence.
3. **Mental Health: Evidence.** Neb. Rev. Stat. § 83-1037 (Reissue 1987) requires that a mental health board's conclusion that a person before it is a mentally ill dangerous person and that a less restrictive alternative is not available or would not suffice to prevent the harm described in Neb. Rev. Stat. § 83-1009 (Reissue 1987) must be supported by clear and convincing evidence.
4. **Mental Health: Other Acts: Proof: Evidence.** Any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness.
5. **Mental Health: Other Acts: Proof.** In determining whether an act is sufficiently recent to be probative on the issue of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances.
6. **Mental Health.** The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others.

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

Leo J. Eskey for appellant.

Dean Skokan, Dodge County Attorney, and Eric Miller for appellee.

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

GRANT, J.

On February 29, 1988, in the district court for Dodge County, Nebraska, appellant, Wesley Dean Vance, pled guilty

to sexual assault of a child. He was sentenced to 20 months' to 5 years' imprisonment. He was scheduled to be released on January 14, 1991.

Pursuant to Neb. Rev. Stat. § 29-2920 (Reissue 1989), a statute repealed on July 15, 1992, the county attorney of Dodge County was notified of Vance's pending release. Although § 29-2920 is now repealed, we will review the case before us in accordance with the procedural steps for appeals provided in the statutes in effect at the time of Vance's appeal. See *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 901, 492 N.W.2d 7, 10 (1992), where we stated: "While as a general matter changes in procedural statutes apply to pending litigation, they have no retroactive effect upon steps taken in an action before such changes became effective. See *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975)."

After being so notified, the Dodge County Attorney then filed a petition before the Dodge County Mental Health Board and alleged that Vance was a mentally ill dangerous person within the meaning of Neb. Rev. Stat. § 83-1009 (Reissue 1987). The board found that Vance was such a mentally ill dangerous person and committed him to the Lincoln Regional Center for inpatient treatment. Vance appealed to the Dodge County District Court, which affirmed the board's actions. Vance timely appealed to this court.

In his appeal to this court, Vance contends that the board erred (1) in finding that he was mentally ill; (2) in finding that he was "a dangerous person, as defined by Section 83-1009"; and (3) in committing him "to full time inpatient hospitalization as opposed to outpatient or another less restrictive program." We affirm.

Before a person may be committed for treatment by a mental health board, it is necessary that the person be found to be mentally ill and that the person presents a substantial risk of serious harm to others or to himself or herself. § 83-1009; *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987).

A district court's review of an appeal from a mental health board is de novo on the record, and on further appeal, an appellate court will not interfere with a final order made by the district court unless the appellate court finds, as a matter of

law, that the order is not supported by clear and convincing evidence. *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990).

The record before us shows that at the hearing before the board on February 28, 1991, the only evidence adduced was that of two clinical psychologists: Dr. James Cole, who examined Vance at Vance's request; and Dr. Suzanne Bohn, who is employed by the Nebraska Department of Correctional Services. After hearing testimony from the two psychologists, the board found there was clear and convincing evidence that appellant was a mentally ill dangerous person and ordered full-time inpatient hospitalization for a period of observation not to exceed 60 days, with provisions for future reports and continued inpatient treatment.

With regard to Vance's first assignment of error, Neb. Rev. Stat. § 83-1037 (Reissue 1987) requires that a mental health board's conclusion that a person before it is a mentally ill dangerous person and that a less restrictive alternative is not available or would not suffice to prevent the harm described in § 83-1009 must be supported by clear and convincing evidence. See *In re Interest of Dickson*, 238 Neb. 148, 469 N.W.2d 357 (1991). Section 83-1009 provides, in part, that a mentally ill dangerous person is a person who is mentally ill and who presents "[a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts."

Vance contends there was not clear and convincing evidence that he was a mentally ill dangerous person. The record shows to the contrary. The psychologists testifying at the hearing provided a similar account of Vance's background. Vance was born on December 5, 1956. After his mother's death when he was 13 years old, his older brothers began to sexually abuse him. At some point, appellant began to enjoy the sexual activity, and the brothers began bringing young "customers," both adolescents and age-related peers, from the neighborhood to engage in sexual activity with appellant in exchange for money. This activity continued until 1980, when Vance was 23 years old. At that time, Vance was convicted of sexual assault on a 14-year-old boy and a 14-year-old girl. The 14-year-old boy

had engaged in a 6-month-long sexual relationship with the appellant. Vance was imprisoned from 1980 to 1985, and after his release, he left Nebraska from 1986 to 1987.

Then, as set out above, in 1988 Vance pled guilty to the crime of sexual assault on a 9-year-old child and was sentenced to 20 months' to 5 years' imprisonment.

Dr. Bohn based her diagnosis of Vance on a review of his history and on two interviews with him, one in 1988, when he entered the correctional facility, and again in 1991, in preparation for the hearing before the board in this case. Dr. Bohn diagnosed Vance as having a mental illness known as pedophilia and an unspecified personality disorder. She testified that Vance met the three criteria for determining whether or not a person is a pedophile: (1) Vance had recurrent urges to engage in sexual behavior with prepubescent or postpubescent children over a period of time exceeding 6 months; (2) he "acted out on those urges, which obviously he has some since he's been convicted and he also admits to engaging in this behavior," and (3) he was over 16 years of age and was at least 5 years older than his victims. Bohn further testified that in her opinion, there was a substantial probability that Vance would reoffend.

Dr. Cole reached a different conclusion. He based his diagnosis on a review of prior assessments that had been done in 1980 and 1988 and on one interview with Vance prior to the hearing. In Cole's opinion, Vance was not a "true" pedophile because his sexual orientation was not limited to prepubescent children. Cole defined a pedophile as an individual with a specific erotic sexual attraction to prepubescent children and as one "whose arrested psycho-sexual development means that [the individual is] unresponsive sexually to peers or to people older than prepubescent children." Dr. Cole had been informed that Vance had been divorced twice, and he focused on Vance's past sexual relationships with adults to determine that Vance was not a "true" pedophile. Cole found that Vance's early sexual experiences had prevented him from developing the moral and social restraint that most people develop to restrict their behavior. He diagnosed Vance as having an antisocial personality disorder, not within the definition of mental illness

as he understood it, and recommended that Vance should not be classified as a dangerous person under the definition set forth in the civil commitment statutes. Dr. Cole testified that he did not recommend any course of treatment for Vance at this time. While he testified that he did not consider Vance to be a "true" pedophile, he did agree that Vance posed a higher risk of assaulting children than others in the general population.

Cole's description of a pedophile as one whose sexual arousal could only be accomplished with prepubescent children was contradicted by the "Diagnostic and Statistical Manual." On cross-examination, Dr. Cole agreed that the manual was an accepted authority on diagnostic mental disorders. The manual states that the essential feature of pedophilia is the act or fantasy of engaging in sexual activity with prepubescent children as a repeated, *preferred*, or exclusive method of achieving sexual excitement. In Vance's case, he had sexual relationships with adults, but he indicated to Bohn that he had a preference for young boys, and he indicated that given the opportunity, he would again engage in sexual activity with young children.

In addition to Dr. Bohn's and Dr. Cole's testimony, evidence before the board showed that Dr. Cole considered a report of Dr. Robert E. Mitchell, a psychologist, who evaluated Vance in March 1988 and determined that Vance was a mentally disordered sex offender and that he was a pedophile with an antisocial personality.

The trier of fact in this case, the board, had sufficient evidence before it to support the order the board entered. That evidence included the testimony of Dr. Bohn, the prior evaluation of Vance by Dr. Mitchell, and the description of pedophilia set forth in the diagnostic manual. The board's decision that appellant was mentally ill was supported by clear and convincing evidence.

In his second assignment of error, Vance contends that the board erred in finding that he was a dangerous person, as defined in § 83-1009, at the time of the hearing. We have stated, "[A]ny act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness." *In re Interest of*

Blythman, 208 Neb. 51, 59, 302 N.W.2d 666, 672 (1981). The question in this case is whether, considering that there is no evidence of any inappropriate conduct by Vance with a child from 1985 up to the time of Vance's involvement with a 9-year-old child in 1988, Vance's acts in 1980 and 1988 are probative evidence of appellant's present state of dangerousness. This court has stated that in determining whether an act is sufficiently recent to be probative on the issue of dangerousness, " '[e]ach case must be decided on the basis of the surrounding facts and circumstances.' " *State v. Hayden*, 233 Neb. 211, 221, 444 N.W.2d 317, 324 (1989). Accord *Hill v. County Board of Mental Health*, 203 Neb. 610, 279 N.W.2d 838 (1979).

Vance told mental health professionals that he did not engage in any sexual activity with children from 1980 until 1988. In the years between 1980 and 1985, he was imprisoned and, therefore, unable to engage in such activity. Vance testified he was not in Nebraska from 1986 to 1987, but he told Dr. Cole that he was involved in a homosexual relationship during that time and had not been involved with children. The record shows that Vance returned to Nebraska in 1987, and in 1988, he pled guilty to the sexual assault of the 9-year-old boy. In *Blythman, supra*, we held that an act which occurred 5 years prior to commitment was not too remote to be probative of Blythman's state of dangerousness in light of his incarceration, which had prevented him from committing a more recent act in the intervening years. In this case, Vance did not have the opportunity to reoffend while incarcerated, and any inappropriate conduct committed in another state would be difficult to discover. There was sufficient evidence for the board to find that Vance's past acts were probative of his present state of dangerousness.

Vance has demonstrated his potential to harm others through his past assaults on children. His decision not to participate in treatment programs available in prison and his lack of intent to seek treatment once released demonstrate his lack of understanding of his problem. Both incidents of sexual assaults on minors resulting in Vance's imprisonment occurred when Vance was involved in relationships with adult women. In one

instance, he was living with his girl friend while engaged in a 6-month affair with a 14-year-old boy. Vance's lack of control was displayed during his most recent assault, for which he was convicted in 1988. On that occasion, Vance was playing with the victim, who was his then girl friend's nephew, when the 9-year-old accidentally kicked Vance in the groin. Vance stated he was unable to control himself at that time and began to kiss the child.

In light of Vance's history of sexual assault on children, his propensity to engage in sexual activity with children as a preferred method of sexual gratification, and his lack of awareness of this preference as a problem, it cannot be said, as a matter of law, that the order of the board was unsupported by clear and convincing evidence.

Vance also assigns as error the board's action in committing him to inpatient hospitalization. Before a board can commit a person for inpatient treatment, the board must conclude that no less restrictive alternative than a board-ordered commitment for treatment is available or would suffice to prevent the harm described in § 83-1009.

" 'The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others.' " *In re Interest of McDonell*, 229 Neb. 496, 498, 427 N.W.2d 779, 781 (1988). As set forth in Neb. Rev. Stat. § 83-1038 (Reissue 1987): "The board shall consider all treatment alternatives, including any treatment program or conditions suggested by the subject . . . . Full-time inpatient hospitalization or custody shall be considered a treatment alternative of last resort." Dr. Bohn testified that Vance would engage in sexual activity with minors, given the opportunity. She testified that absent the involuntary commitment, Vance would not seek treatment because he did not believe he had a problem. She recommended the inpatient treatment for Vance because she felt that only through direct confrontation of the problem would Vance realize he had a problem.

There was sufficient evidence to find that Vance would not benefit from an outpatient treatment program and that if

released, he would present the type of harm § 83-1009 was designed to prevent. The board did not err in ordering inpatient hospitalization for Vance. The district court did not err in affirming the order of the board.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FLOYD MARTIN, APPELLANT.

493 N.W.2d 191

Filed December 24, 1992. No. S-91-793.

1. **Rules of Evidence: Other Acts: Proof.** 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. Neb. Rev. Stat. § 27-404(2) (Reissue 1989).
2. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is a rule of inclusion rather than exclusion; the list of acceptable uses recited in the statute is illustrative and not intended to be exclusive.
3. **Rules of Evidence: Other Acts: Appeal and Error.** In reviewing the admission of evidence of other acts under Neb. Rev. Stat. § 27-402(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.
4. **Sexual Assault: Evidence: Other Acts.** Sexual crimes are offenses in which evidence of other similar sexual conduct is recognized as having independent relevancy, and such evidence may be admissible whether that conduct involved the complaining witness or third parties.
5. **Sexual Assault: Evidence: Other Acts: Proof.** Evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished.
6. **Rules of Evidence: Other Acts: Proof.** Evidence of other crimes, wrongs, or acts should not be considered as proof that the defendant acted accordingly. It may be proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

7. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of a jury must be sustained if, taking the view must favorable to the State, there is sufficient evidence to support it.
8. **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 Franklin County: BERNARD SPRAGUE, Judge. Affirmed.

Thomas G. Lieske, of Lieske and Kristensen, for appellant.

Don Stenberg, Attorney General, and Kenneth W. Payne for appellee.

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

HASTINGS, C.J.

The defendant, Floyd Martin, was charged in an amended information with the crime of engaging in sexual intercourse with his minor daughter on December 5, 1989, a violation of Neb. Rev. Stat. § 28-703 (Reissue 1989), and a Class III felony. Following a trial by jury, he was convicted as charged. He has appealed to this court, alleging that the reception into evidence of previous sexual conduct by the defendant with his daughter was error and, further, that the judgment is not sustained by the evidence. We affirm.

On December 9, 1989, the defendant reported to the police that his daughter, the victim, had run away. She was subsequently taken into custody by a Minden police officer. When asked by the officer why she had run away, she replied that her father, the defendant, had sexually assaulted her and that since she had been in the fifth grade, her father had continually offered her $10 in exchange for allowing him to make love to her, which the defendant referred to as "helping him out." The officer also talked to the victim's mother, who responded that she had no knowledge of any of these acts and

had not suspected anything. The officer further testified on cross-examination that the victim did not state that she had had sexual intercourse with her father on December 5.

The victim's brother testified that in the spring of 1989, he had observed his father in the victim's bedroom, touching and rubbing her, and putting his hands underneath her blouse. He also testified that some evening between Thanksgiving and December 5, he had observed his father making love to his sister on her bed. This testimony was objected to by the defense as improper evidence of prior bad acts, but the objection was overruled, as was the motion for a mistrial.

The victim testified that in December 1989 she resided with her family, that she was enrolled as a ninth grade student in the local high school, and that her date of birth was December 27, 1974. On Tuesday, December 5, she did not attend school because she and her family attended a funeral out of town. The victim stated that on the morning of December 5, she awoke to knocking at her bedroom door and her father calling to her in a whisper. She testified that he would not leave and that she finally let him in. After touching and fondling, they had sexual intercourse.

The victim further testified that the first time she recalled having intercourse with her father was at the age of 5, before she was enrolled in school. She estimated that when she was 14 years old, she had intercourse with her father two to three times a week. Furthermore, according to the victim's testimony, her brother had once walked in on her and the defendant, after which she told her mother about this sexual activity. The victim then went to live with her grandmother.

The family was reunited in 1985 and, according to the victim's testimony, about 2 weeks later, her father asked for sex, and they engaged in sexual intercourse. She stated that her father requested sexual intercourse by asking her "to help him," in return for which the victim was paid $10. Her father also did favors for her, such as washing the dishes or taking her to see her boyfriend. She testified that her father was always prepared with the money and a condom.

When the victim was asked why she had not told various counselors and police officers about this sexual activity, she

replied that she was scared because her father had said that if she ever told anyone "it would be us kids taken this time." In testifying to her attempts to talk to her mother about the activity, the victim said that on the day she ran away she told her mother that her father was still bothering her and offering her money and that her mother told her "she couldn't do anything about [it] because it would always be that way."

A pediatrician testified that he had examined the victim in February 1991 for evaluation of possible sexual abuse. He stated that when he took the victim's medical history, she told him that she had been sexually abused by her father since she was approximately 5 to 7 years of age. Her physical examination was also consistent with the sexual activity indicated by her history. The witness expressed the opinion that the victim was a sexually active female with significant sexual trauma.

A deputy sheriff testified for the defense as to his conversation with the victim on December 10, 1989, in which she indicated that her father had fondled her, but that she had not had intercourse with her father since after she was about 5 years old.

The victim's mother testified about the events of December 5, 1989, and said that to the best of her knowledge the victim had not been alone with her father any time that day. The mother also testified that on the day the victim ran away, she was angry at her parents for breaking a promise to take her to her boyfriend's house and threatened that she would get even with them. The mother stated that she did take the victim to her boyfriend's house that evening, and the victim and her boyfriend ran away.

The defendant testified that he was unemployed due to surgery on his leg and that his source of income in 1989 was Social Security disability. He stated that he had asked his children to help on the farm, but that when he asked the victim to help him out it had never meant to have sex. He further testified that he had never offered her money for sex. The defendant also testified that he never was alone with his daughter on December 5, 1989, and that he did not have sexual intercourse with her on that date.

We turn first to the claim of error in the admission of evidence of other sexual activity between the victim and the defendant. The defendant alleges that the effect of the testimony of the victim and her brother was to suggest that the defendant had the character of a pedophile and that he acted in conformity with that character. Neb. Rev. Stat. § 27-404(2) (Reissue 1989), provides:

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

This court has frequently noted that § 27-404(2) is a rule of inclusion rather than exclusion; the list of acceptable uses recited in the statute is illustrative and not intended to be exclusive. See, e.g., *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991).

In reviewing the admission of evidence of other acts under § 27-404(2), 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. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992); *State v. Stephens, supra*.

The two segments of the testimony given by the victim's brother which the defendant claims are erroneously prejudicial relate to the brother's recitation that he observed the victim and the defendant in the victim's bedroom in the spring of 1989, at which time the defendant was fondling the victim, and to the incident during the period between Thanksgiving and December 5, 1989, when he observed the two in the victim's bedroom with the defendant on top of the victim and engaging in sexual intercourse.

In a similar manner, a claim of error is made by the defendant as to portions of the victim's testimony. After testifying to the facts surrounding the event which is the basis for the complaint,

the victim testified that this was not the first time in her life that she had engaged in sexual intercourse; that it had occurred when she was 5 years of age; that sexual intercourse with the defendant was had more than two times; and that during the period of November 1989 back to her 14th birthday, she had sexual relations with her father two to three times per week.

The victim also described the manner in which her father would request sexual intercourse; i.e., he would ask her to "help him." She also stated that the defendant would offer her $10 for sex; that she took the money; and that the defendant would have sex with her not only in her bedroom, but in the defendant's bedroom, the bathroom, outside in a field, and in a car. The victim described the preparations her father would make if intercourse was to be out in the fields; she said that the weeds would be trampled down and a tentlike cloth would be laid on the ground. She also insisted that the defendant would always have in his possession a condom and the $10 to pay.

The police officer who took the victim into custody on December 9, 1989, testified without objection that in response to a question from him, the victim stated that her father "had raped her when she was 5, and since she had been in the fifth grade he continually offered her $10.00 in exchange for her allowing him to make love to her. She advised that he referred to it as helping him out." Also, a deputy sheriff who later interviewed the victim testified as a defense witness that she said her father had fondled her, but that she had not had intercourse with him since after she was about 5 years old. Finally, the pediatrician who examined the victim, albeit it some months after the offense charged, testified that the victim had told him during his obtaining a medical history that she had been sexually abused by her father since she was approximately 5 to 7 years of age.

Therefore, at the outset it may be stated that the testimony of the victim and her brother, although more detailed than that of the witnesses set forth above, was merely cumulative. Additionally, the testimony of both the victim and her brother was relevant and material to prove opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake, all legitimate purposes for admitting testimony of

prior bad acts under the provisions of § 27-404(2). See, e.g., *State v. Stephens, supra*; *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1989).

Finally, the defendant was charged with the offense of incest, in violation of § 28-703, for knowingly engaging in sexual intercourse with his minor daughter. This court noted in *State v. Stephens, supra*, that

> sexual crimes have consistently been classified as offenses in which evidence of other similar sexual conduct has been recognized as having independent relevancy and that such evidence may be admissible whether that conduct involved the complaining witness or third parties. [Citations omitted.] As we said in *State v. Craig*, [219 Neb. 70,] 76, 361 N.W.2d [206,] 212 [(1985)]: "[E]vidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished."

237 Neb. at 556, 466 N.W.2d at 785-86.

Also, the trial court properly instructed the jury to consider the evidence only for the purpose for which it was admitted. The jury was informed by instruction No. 8:

> Evidence of other crimes, wrongs, or acts should not be considered as proof that the Defendant acted accordingly.
>
> It may be proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> The State of Nebraska is still required to prove beyond a reasonable doubt that the defendant committed the offense with which he is charged on the date alleged in the information filed by the State.

The admission by the court of the testimony of the victim and her brother was not erroneous, and that assignment of error is without merit.

Defendant then claims that the evidence is insufficient to support his conviction.

In determining the sufficiency of the evidence to sustain a

conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991).

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*, 240 Neb. 400, 481 N.W.2d 921 (1992).

Defendant argues that because the victim's testimony as to the events of December 5, 1989, consists of "a scant 20 lines in the entire Bill of Exceptions," brief for appellant at 12, the evidence is so lacking in probative value as to render it insufficient to support the defendant's conviction. The defense contends that testimony from the victim's mother, the defendant, the deputy sheriff, and the victim herself directly refute the victim's incriminating testimony.

It is true that the deputy sheriff testified that during his interview of the victim on December 10, 1989, she told him that she had not had intercourse with her father since she was about 5 years old. A Child Protective Services worker testified that in the spring of 1987, she interviewed the victim and the victim indicated at that time that there had not been any actual physical contact between her and her father.

The victim testified that she did not tell the deputy sheriff about the sexual intercourse with her father because he was a man, and she felt uncomfortable around men. She explained that in 1987 she did not tell the Child Protective Services worker or her guidance counselor about the sexual intercourse because "she didn't want to get taken away from my family."

The defense attempted to establish through the testimony of the mother that the victim was never alone with her father. The mother testified that she had surgery in November 1989 which prevented her from driving, so she would have been home in the mornings, afternoons, and evenings. She stated that if she

wanted to go anywhere, her husband, the defendant, had to take her. However, on cross-examination she testified that on December 9, 1989, she drove the victim to town and later "drove around town for a while and looked for her." In rebuttal, the victim testified that after her mother's surgery, her mother still drove to get groceries, to visit the victim's grandmother, and to take the victim's brother to work in an adjoining town.

As previously stated, credibility of the witnesses and the plausibility of their explanations are matters for the finder of fact. Here, the victim testified that her father came into her room on December 5, 1989, fondled her, kissed her, and engaged in sexual intercourse with her. The victim's brother, who was 18 years old at the time of trial, testified that he had observed his father engaging in sexual intercourse with the victim between Thanksgiving and December 5. Although the testimony of these two witnesses was at times contradictory, we cannot say as a matter of law that it was unbelievable.

The pediatrician testified that the victim's history and physical examination indicated sexual activity and significant sexual trauma.

The evidence, considered as a whole, was sufficient to support the jury's finding of guilt beyond a reasonable doubt. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DORETHA R. CHAMBERS, APPELLEE.

493 N.W.2d 328

Filed December 24, 1992. No. S-92-505.

1. **Courts: Jurisdiction.** Neb. Rev. Stat. § 24-1104 (Cum. Supp. 1992) does not confer upon the Nebraska Supreme Court the jurisdiction to order the publication of an opinion of a single judge of the Nebraska Court of Appeals, nor does authority exist for publication in the absence of such an order.

2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Courts: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992) does not confer upon the Nebraska Supreme Court the jurisdiction to review an opinion of a single judge of the Nebraska Court of Appeals.

Publication recommendation for a single-judge opinion of the Nebraska Court of Appeals. Publication recommendation dismissed.

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

PER CURIAM.

This matter is before us on the recommendation for publication of an opinion of a single judge of the Nebraska Court of Appeals reversing the suppression order of the district court.

Neb. Rev. Stat. § 29-824 (Cum. Supp. 1992) provides, in pertinent part, that the State "shall have the right to appeal from an order granting a motion . . . to suppress evidence . . . . The review shall be made by *a judge* of the Court of Appeals at chambers . . . ." (Emphasis supplied.) The relevant portion of Neb. Rev. Stat. § 24-1104(1) (Cum. Supp. 1992) reads: "Decisions of the *Court of Appeals* . . . shall not be published unless . . . ordered by the Supreme Court." (Emphasis supplied.)

The controlling rule is that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Brohimer*, 238 Neb. 45, 468 N.W.2d 623 (1991). See, also, *In re Interest of Powers, ante* p. 19, 493 N.W.2d 166 (1992).

An opinion of a single judge of the Court of Appeals is obviously not an opinion of the Court of Appeals, and thus, just as obviously, § 24-1104 does not provide this court with jurisdiction to order its publication. Neither does authority exist for publication in the absence of such an order.

This is as it should be, for while a single-judge opinion provides a review of a suppression order in a particular case, the opinion does nothing more than memorialize the single judge's analysis and order. See *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985) (opinion of single judge of Nebraska Supreme Court neither binding upon Supreme Court nor available to be cited as precedent).

Since, in like fashion, Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992) provides that "after the *Court of Appeals* has issued *its* decision in a case, any party to the case may petition the Supreme Court for further review" (emphasis supplied), neither does this court have jurisdiction to review an opinion of a single judge of the Court of Appeals.

Accordingly, we dismiss the recommendation.

PUBLICATION RECOMMENDATION DISMISSED.

MID CENTURY INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, V. CITY OF OMAHA, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

494 N.W.2d 320

Filed December 31, 1992. No. S-90-007.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
2. _____: _____. In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Liability: Proximate Cause.** In order for a city to be liable for injuries under Neb. Rev. Stat. § 13-911 (Reissue 1991), the first requirement is that the act of the police in pursuing a fleeing motorist must be such that without it the injury would not have occurred, commonly known as the "but for" rule, and the second requirement is that the injury must be the natural and probable result of that act and without an efficient intervening cause.
4. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Daniel P. Chesire and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, Thomas O. Mumgaard, and Jo A. Cavel for appellee.

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

HASTINGS, C.J.

The plaintiff, Mid Century Insurance Co. (MCIC), brought this action against the City of Omaha under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991). The action arose out of the deaths of two teenage youths who were involved in an accident on May 20, 1986, at 72d and Maple Streets in Omaha. The car in which they were riding was struck by an automobile being driven at an excessive speed by Lee Williams, whose 1974 Buick Century was not covered by liability insurance. The plaintiff afforded uninsured motorist coverage to the automobile being driven by the youths, and as a consequence, it paid $100,000 to the estates of each of the two youths. As a basis for its claim, MCIC alleged that the proximate cause of the accident that resulted in the deaths was the negligence of the City of Omaha as imputed to it by the actions of its police officers in negligently pursuing Williams, in failing to warn the motoring public with the use of flashing lights and sirens, and in attempting to apprehend Williams, who was attempting to elude the police by driving at excessive rates of speed and violating a red traffic signal at the location of the accident.

The theory upon which the case was tried to the court was that the accident was proximately caused by law enforcement officers during vehicular pursuit as set forth in § 13-911. Section 13-911 provides as follows:

> In case of death, injury, or property damage to any innocent third party *proximately caused* by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be

> paid to such third party by the political subdivision employing the officer. This section shall be considered part of the Political Subdivisions Tort Claims Act and the provisions of sections 13-901 to 13-926 shall apply.
>
> For purposes of this section, vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

(Emphasis supplied.)

The trial court in its order and judgment of dismissal of the claim found that Officer Joseph Vaccaro was not in vehicular pursuit, that Officer Michael McGowen was in vehicular pursuit, that the deaths of the youths were not proximately caused by the actions of McGowen, and that any negligence on the part of McGowen in failing to activate his siren was not the proximate cause of the accident, but that the sole proximate cause was the conduct of Williams.

MCIC assigns as error the findings of the trial court as to the absence of proximate cause attributed to pursuit by McGowen and the related finding that Williams' reckless driving was not occasioned by any conduct of McGowen relating to the pursuit. In effect, the claim of error may be distilled to one: the finding that the pursuit by McGowen was not a proximate cause of the accident. We affirm.

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989).

In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that

party the benefit of all reasonable inferences that can be deduced from the evidence. *Gatewood v. City of Bellevue*, 232 Neb. 525, 441 N.W.2d 585 (1989).

The evidence, viewed most favorably to the city, shows that on the evening of May 20, 1986, Williams drove his 1974 Buick Century to the Office West lounge at 108th and Cottonwood in Omaha to see his girl friend. He said that he was there for 1 1/2 to 2 hours and was drinking. He got into an argument with his girl friend and the manager of the lounge, and apparently he got into a fight with the lounge's owner.

Eventually, a disturbance occurred which resulted in the police being called. Vaccaro testified that he was called to the lounge, but when he arrived he failed to see any sort of disturbance. He was told by the owner of the lounge, a Mr. Kolzewski, that everything was under control and that the officer could leave. He did leave and went to the 108th and Maple intersection where the Albertson's parking lot was located. He was joined there by Officer David Marion.

A few minutes later, the officers received a call about a disturbance at the Office West lounge. When they arrived in response to that call, Kolzewski, who had blood on his face and chest, told Vaccaro to stop the Buick which had just left the parking lot. Vaccaro testified that the Buick pulled out in a normal fashion and that he did not think Williams was exceeding the speed limit at that time. Vaccaro followed Williams and saw him pull into an Amoco station at 102d and Maple. Vaccaro stated that he did not flash the cruiser's lights to indicate that he was trying to catch up with the Buick. However, Williams stated that when the cruiser behind him turned on its lights, he thought that it meant for him to pull over, so he pulled into the Amoco station. Obviously, a disputed factual issue exists.

Vaccaro went up to Williams and obtained his driver's license. Vaccaro told Williams to have a seat in the cruiser. Williams was cooperative. Vaccaro then checked the identity of Williams with the radio dispatcher and found that Williams had no outstanding warrants, but he did have a criminal record and was to be considered dangerous. At this time, Vaccaro noted that a cruiser driven by McGowen was in the vicinity of the

station.

Vaccaro was then advised by the dispatcher that there had been an assault and a hit and run accident at 108th and Cottonwood and that he should bring Williams back there. Williams heard this broadcast and said, "Fuck it, I'm leaving." Williams got into his car; Vaccaro tried to reach in and take the keys away from Williams, but was unsuccessful. Williams got the car started moving forward, held onto Vaccaro's hand, and dragged him along for three or four steps, until Williams released him and Vaccaro fell to the ground. Vaccaro watched to see which way Williams was going, then went back to his cruiser and advised over his radio that the party had gotten away and was eastbound on Maple Street from 102d with no lights on. Vaccaro still had Williams' driver's license, but thought if they could locate Williams, they could clear up the incident that evening rather than have to go through the steps to get an arrest warrant the next day.

Vaccaro testified that his intent was to locate Williams, but he saw no point in actual pursuit because he had no idea as to Williams' location. Vaccaro stated that Williams was accelerating as he left the lot, and when the officer last saw Williams, he was going 40 or 45 miles per hour.

McGowen testified that he was working the midnight shift on May 20, 1986. He stated that he knew about the alleged assault at 108th and Cottonwood and that when the second call came out, he started in that direction to back up the officers there. While he was at 102d Street, he received another call which dispatched him to 78th and Dodge, and he left the area. As McGowen reached the area of 78th and Lake Streets, having heard Vaccaro's broadcast and thinking it referred to the 1974 Buick Century he had seen at the Amoco station, he thought Vaccaro needed help. Therefore, he asked the dispatcher to send someone else to 78th and Dodge, and he made a U-turn to go back to Maple Street. He then drove westbound on Maple, thinking he would be able to intercept Williams at 78th, 80th, or 84th.

While driving west on Maple, McGowen looked to the west and saw the headlights of two cars approaching. He observed that one automobile rapidly passed the other. At about 79th or

80th Street, he knew that the car in the inside lane was Williams' car because he could see Williams looking out the windshield with his face close to the windshield and dashboard. As soon as he saw Williams' face, he accelerated. He was then at a median break and made a turn at that point to try to clip the rear end of Williams' car, attempting to use the left front of his cruiser to strike the left rear of Williams' car so as to cause it to spin around. McGowen came within a couple of yards of Williams, but missed. He had completed the maneuver and turned his car around when he broadcast that Williams was eastbound, "[G]oing about 90 miles an hour just passed 78th Street . . . ." McGowen got his cruiser turned around, headed east, accelerated, and apparently did not have the Williams car in view until he crested the hill at 78th Street. From that location, he saw beams from headlights coming from the south going north on 78th and saw that the traffic light for eastbound traffic at Maple and 72d was red. McGowen stated that he had accelerated to about 65 miles per hour when he crested this hill, so that he could determine which direction Williams was going to travel. McGowen testified that when he reached the top of the hill, he determined that he could not get close enough for a pursuit. He stated that he took his foot off the accelerator, because at that point there was not any need for speed. He then witnessed a collision at the intersection of 72d and Maple between Williams' car and a Dodge Coronet in which the youths were riding. McGowen then broadcast the fact of the traffic accident and stopped and assisted at the scene.

Williams knew that Vaccaro had been ordered to bring him back to the scene of the alleged assault at 108th and Cottonwood. As to the ensuing "chase," in spite of his lack of memory as to many of the details, Williams testified that prior to the accident, "The last thing I recall is when the police was coming behind me" and the police "had his red lights on." Both Vaccaro and McGowen deny that they ever turned on their red lights, which issue presented a question of fact for the court.

We can find no legitimate disagreement with the finding of the trial court that Vaccaro was not engaged in a pursuit within the meaning of § 13-911. Vaccaro did not see Williams after the latter left the Amoco station. He knew that Williams had

headed east, but had no notion of whether Williams continued in that direction or turned off. Vaccaro never again had the "fleeing" auto in his view. Williams did not testify that he saw or was aware of being chased by Vaccaro. Williams knew that the officer had been ordered to return him to the scene of the assault and that he, Williams, had left his present location. However, there is nothing in those facts which would establish the fact of a pursuit contrary to the finding of the trial court.

The evidence of the involvement of McGowen in this matter, whom the trial court found to be in pursuit of Williams, was his knowledge gained from the radio broadcasts and his observation of Williams' car for the first time, proceeding toward him several blocks away at a speed of well over 75 or 80 miles per hour, estimated at 90 miles per hour as they crossed paths. There is nothing in the record to establish that McGowen's presence in the vicinity had anything at all to do with Williams' fantastic trip.

True, McGowen attempted to stop Williams by ramming him. However, there is no evidence that such action altered in the slightest the speed or direction of travel of Williams. Williams was out of sight of McGowen in a matter of seconds, and the accident occurred a matter of seconds after McGowen next spotted Williams and had given up any chase he might have intended to undertake.

Other than the fact that Williams knew he was in trouble for leaving the scene when he was wanted back at 108th and Cottonwood, he cannot be heard to say that he knew he would be pursued.

By the same token, by the time Williams could have been aware of McGowen's involvement in this episode, if in fact Williams was aware, he was already following a course of undiminished breakneck speed which would inevitably lead to the accident seconds later.

Paraphrasing the language of this court, speaking of negligence in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 174, 425 N.W.2d 872, 881 (1988), in order for a city to be liable for injuries under § 13-911, the first requirement is that the act of the police in pursuing a fleeing motorist be such that without it the injury would not have

occurred, " ' " 'commonly known as the "but for" rule,' " ' " and the second requirement is that the injury be the natural and probable result of that act and without an efficient intervening cause.

The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact. *Corbet, Inc. v. County of Pawnee*, 219 Neb. 622, 365 N.W.2d 437 (1985). A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly wrong. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989).

Viewed by these standards, it cannot be said that the record discloses that the findings in this respect were clearly wrong.

The same rules apply and the same conclusion is appropriate as to plaintiff's claim that a proximate cause of the accident was the failure of McGowen to activate his red lights and his siren. An expert was called to testify as to how far, in his opinion, a siren could be heard under certain circumstances. However, in the time that was available and with the apparent justification for using the lights and siren, again it was a question of fact for the court as to whether such lack of action was a proximate cause of the accident.

The judgment of the district court is affirmed. We see no need to take up the cross-appeal of the City of Omaha denying that McGowen was in pursuit at the time of the collision within the meaning of § 13-911.

AFFIRMED.

SPEIDELL MONUMENTS, INC., AND W.J. TRUMP MEMORIALS, APPELLANTS, V. WYUKA CEMETERY ET AL., APPELLEES.

493 N.W.2d 336

Filed December 31, 1992. No. S-90-171.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Equity: Stipulations: Appeal and Error.** In an appeal of an equity action where the facts are stipulated, there is no conflict in the evidence and an appellate court renders its independent conclusion on the same facts on which the trial court based its decision.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dick H. Hartsock for appellants.

Mark M. Schorr, of Erickson & Sederstrom, P.C., for appellees.

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

GRANT, J.

In their fourth amended petition, plaintiffs Speidell Monuments, Inc., and W.J. Trump Memorials, both Nebraska corporations, sought a permanent injunction against defendants Wyuka Cemetery, the trustees of Wyuka Cemetery, Wyuka Memorials, and Giebelhaus Memorials (hereafter collectively referred to as Wyuka). The injunction sought would have enjoined defendants "from continuing the practice of or engaging in the business of the advertising, distributing and

selling of [grave] markers and monuments." Defendants admitted the allegations of plaintiffs' petition as to the various parties; specifically denied the other allegations of the petition; and pled certain affirmative defenses, including the allegations that Wyuka's activities, complained of by plaintiffs, were specifically authorized by Neb. Rev. Stat. §§ 12-101 to 12-105 (Reissue 1991).

The case was tried on an agreed stipulation of facts. The trial court entered its written order and dismissed plaintiffs' petition. Plaintiffs timely appealed. In this court, plaintiffs assign four errors, which may be consolidated into one, contending that the trial court erred in holding that Wyuka, a public corporation, has the implied power to sell grave monuments and markers. We affirm.

According to the stipulations and pleadings, Wyuka is a public charitable corporation governed by a board of trustees. Wyuka was created in 1869 by the Nebraska Legislature and has operated as a cemetery in Lincoln, Nebraska, since that time. In April 1987, Wyuka began selling burial markers and monuments. Plaintiffs are private corporations engaged in the business of selling such monuments and markers, including sales in the Wyuka Cemetery. Plaintiffs made such sales both before and after Wyuka sold such items.

The controlling statutes in this case are §§ 12-101 to 12-105. Section 12-101 states in part:

> (1) The cemetery in Lincoln, Nebraska, known as Wyuka Cemetery, is hereby declared to be a public charitable corporation. The general control and management of the affairs of such cemetery shall be vested in a board of three trustees who shall serve without compensation and who shall be a body corporate to be known as Wyuka Cemetery, with power to sue and be sued, to contract and to be contracted with, acquire, hold, and convey both real and personal property for all purposes consistent with the provisions of sections 12-101 to 12-105, and to have the power of eminent domain to be exercised in the manner provided in section 12-201.

In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a

conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991); *Citizens State Bank v. Jennings State Bank*, 236 Neb. 307, 461 N.W.2d 78 (1990). In this case, there are no issues of fact in question because the parties stipulated to the facts on which the case was tried. In an appeal of an equity action where the facts are stipulated, there is no conflict in the evidence and an appellate court renders its independent conclusion on the same facts on which the trial court based its decision. The only question on review in this case is whether the trial court was correct, as a matter of law, in ruling that §§ 12-101 to 12-105 authorize the sale of grave monuments and markers by Wyuka.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). See *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988).

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Brohimer*, 238 Neb. 45, 468 N.W.2d 623 (1991).

The powers expressly granted to Wyuka include the right of the management and general control of the cemetery. Section 12-101 empowers Wyuka to "acquire, hold, and convey both real and personal property for all purposes consistent with the provisions of sections 12-101 to 12-105." Wyuka contends that § 12-101 specifically grants to Wyuka the "express authority to sell [burial] markers and monuments." Brief for appellees at 2. We do not agree with that assertion, but that does not conclude the case.

We hold that while § 12-101 does not expressly grant to Wyuka the power to sell markers and monuments, Wyuka does

have the implied and incidental powers and authority to sell such grave markers and monuments.

Section 12-101 provides that Wyuka may "contract and . . . be contracted with, acquire, hold, and convey both real and personal property for all purposes consistent with the provisions of sections 12-101 to 12-105." Section 12-103 provides in part: "The trustees shall set aside a part of the purchase price of each burial lot sold, for the permanent maintenance of said cemetery, to be invested in any of the investments authorized by the provisions of section 30-3201." It is clear the Legislature intended for Wyuka, as a corporation, to generate revenues from the operation of the cemetery and to invest those revenues as authorized by the State.

In *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940), we held that the power granted to Metropolitan Utilities District (MUD) to supply gas and water to the city of Omaha and surrounding areas included the right of MUD to sell gas appliances to the community. Nelson-Johnston & Doudna had challenged MUD's sales of appliances, contending that such sales were outside the powers of MUD. We stated in *Nelson-Johnston & Doudna*:

> When a municipal corporation engages in a business enterprise which is reasonably necessary to the performance of its public duty, or which materially advances it, or even where the enterprise merely affords the public greater convenience in the use of the municipality's facilities, the participation in such an enterprise is, by the weight of authority, held to be a power implied from or incidental to its expressly granted powers.
>
> . . .
>
> . . . If a municipal corporation legally acquires a public utility plant, with the right to operate it for the benefit of its inhabitants, it would likewise acquire by implication the right to do all the things that a private owner might do in order to economically and efficiently furnish to the citizen the product in which he deals.

Id. at 876-77, 291 N.W. at 561.

We hold that Wyuka, a public charitable corporation created

by statute, should be treated in the same manner as MUD in the *Nelson-Johnston & Doudna* case. Applying the *Nelson-Johnston & Doudna* rule to the facts in this case, we hold that where a public charitable corporation acquires property with the right to operate that property for the benefit of the public, the corporation will acquire by implication the right to do all the things a private owner might do in order to economically and efficiently furnish to the public the services in which the corporation deals.

We hold that the specific authority granted to Wyuka to sell personal property includes the right to sell grave markers and monuments. Such sales by Wyuka materially advance Wyuka's ability to perform its statutory duties in that the sales contribute to Wyuka's continued operations and afford to the public convenience in the use of Wyuka facilities. While Wyuka could not sell automobiles for profit in its business, Wyuka has the right to sell personal property so closely connected to its cemetery operation as grave markers and monuments. The judgment of the trial court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. BELL, APPELLANT.

493 N.W.2d 339

Filed December 31, 1992. No. S-91-681.

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: Verdicts: Appeal and Error.** Normally, an appellate court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence unless such evidence lacks sufficient probative force as a matter of law to sustain a guilty verdict beyond a reasonable doubt.
3. **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.** 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.
5. **Constitutional Law: Appeal and Error.** Constitutional questions not properly raised in the trial court will not be considered on appeal.
6. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
7. **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.
8. _____. 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.
9. **Records: Appeal and Error.** The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review.
10. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court. Evidence which is not made a part of the bill of exceptions may not be considered.
11. _____: _____: _____. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence. A bill of exceptions is the only vehicle for bringing evidence to an appellate court; this remains so even though certain evidence has been physically filed in the office of the clerk of the trial court.
12. **Trial: Appeal and Error.** Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded, inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
13. **Appeal and Error.** Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Mary Lee Skaff for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

HASTINGS, C.J.

Defendant, Larry E. Bell, was convicted by a jury of shoplifting an item worth less than $100, in violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1989). Following an enhancement hearing, this conviction was found to be a third offense and as such, under the provisions of Neb. Rev. Stat. § 28-518(6) (Reissue 1989), became a Class IV felony. Defendant was sentenced to a term of imprisonment of 20 months to 5 years.

Defendant assigns as error that the court erred (1) in excluding evidence of defendant's poor memory; (2) in enhancing defendant's sentence under the provisions of § 28-518(6), despite the fact that such statute is unconstitutional as being cruel and unusual punishment; (3) in committing an abuse of discretion by imposing a 5-year sentence for shoplifting an item valued at only $12.99; and (4) in permitting a juror to sleep through closing arguments and jury instructions, which constituted juror misconduct prejudicial to the defendant. We affirm.

On February 14, 1991, defendant set off the alarm system at an Omaha drugstore with a wallet which contained a label which had not been desensitized by a checkout clerk. Defendant reentered the store, pulled the wallet out of a pocket, and asked to purchase it. The retail value of the wallet was $12.99. When the drugstore's manager requested that defendant accompany him to the backroom in order to complete some forms, defendant attempted to flee the premises, but was apprehended by the manager.

Defendant contends that he remembered picking up the wallet, but did not remember that he still had it on his person when he attempted to leave the store.

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. *State v.*

Sexton, 240 Neb. 466, 482 N.W.2d 567 (1992).

Normally, an appellate court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence unless such evidence lacks sufficient probative force as a matter of law to sustain a guilty verdict beyond a reasonable doubt. *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991).

Defendant sought to admit evidence that he phoned his place of employment every day, allegedly because he could not remember when he was scheduled to work. The court sustained the prosecutor's relevancy objection, which is the subject of defendant's first assignment of error.

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:

> "[M]ateriality 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. . . ."

State v. Baltimore, 236 Neb. 736, 740, 463 N.W.2d 808, 812 (1990) (quoting McCormick on Evidence § 185 (Edward Cleary 3d ed. 1984)). We have consistently held that 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, 478 N.W.2d 349 (1992).

The ability to remember one's varying work schedule for the week is certainly distinguishable from remembering within a span of a few minutes whether one is carrying merchandise

from a store without paying for it. Defendant was permitted to testify that he had not remembered that he was still carrying the wallet when he began to exit the drugstore. The prohibited testimony added nothing to that point.

Defendant complains of, but did not argue to the trial court the unconstitutionality of § 28-518(6) or of the enhancement of his crime to a Class IV felony. Constitutional questions not properly raised in the trial court will not be considered on appeal. See *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). Thus, the argument is considered to have been waived, and our consideration of the assignment is not appropriate.

As to the alleged excessiveness of the sentence, we have continually held that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992); *State v. Wounded Arrow*, 240 Neb. 44, 480 N.W.2d 205 (1992); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992). 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. *State v. Wounded Arrow, 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. Smith, supra*.

Bell's criminal record itself speaks to the legitimacy of his sentence. He has been convicted and sentenced to probation or incarceration for extended periods of time in the past. Neither probation nor varying sentences of incarceration have taught him the value of avoiding criminal encounters with the legal system. In light of his record, the imposed sentence does not display an abuse of discretion on the part of the sentencing court and is not excessive.

Finally, defendant assigns as error that a juror allegedly slept

during the trial's closing arguments and the giving of jury instructions. Defendant concedes that trial counsel did not timely object at trial, and no evidence of such misconduct appears in the bill of exceptions.

The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. Neb. Rev. Stat. § 25-1140 (Reissue 1989); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991). A bill of exceptions is the only vehicle for bringing evidence before an appellate court. Evidence which is not made a part of the bill of exceptions may not be considered. *State v. Biernacki, supra.*

Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence. A bill of exceptions is the only vehicle for bringing evidence to an appellate court; this remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986).

Absent plain error, when an issue is raised for the first time in an appellate court, it will be disregarded, inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992). No such error is evident from the record.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT BOYD, APPELLANT.

493 N.W.2d 344

Filed December 31, 1992. No. S-91-801.

Drunk Driving: Administrative Law: Criminal Law: Blood, Breath, and Urine Tests: Police Officers and Sheriffs: Probable Cause. While in the context of an administrative operator's license revocation proceeding the inquiry centers on the reasonableness of an operator's refusal to submit to a chemical test, in the criminal context the inquiry centers on the existence of reasonable grounds for the arresting officer to believe that an operator was driving while under the influence of alcohol. Neb. Rev. Stat. §§ 39-669.08(2) (Cum. Supp. 1990) and 39-669.16 (Reissue 1988).

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. Sentence vacated, and cause remanded for resentencing.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom & Stehlik, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

CAPORALE, J.

The defendant-appellant, Robert Boyd, was convicted in the county court of violating Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1990) by refusing to consent to the chemical testing of his breath for the purpose of determining the presence of alcohol. He was thereafter sentenced to pay a fine of $200, not drive a motor vehicle for a period of 6 months, and spend 30 days in the county jail. The district court affirmed. In this appeal Boyd asserts, in summary, that the district court erred in failing to find that the county court erred on the record by failing to find that his refusal was reasonable. We vacate the sentence and remand the cause for resentencing.

On the day in question, April 19, 1990, Boyd was employed at a repair shop. His son arrived at the shop after school, and between 6 and 6:30 p.m., the two of them left the shop and went to the home of a female acquaintance of Boyd's for dinner.

They arrived at the acquaintance's house between 7 and 7:30 p.m. and, after dining with her, left at 8:30 or 9 p.m. According to the acquaintance, Boyd did not appear to be under the influence of alcohol when he arrived and did not consume any alcoholic beverage while at the woman's house.

When he left the acquaintance's house, Boyd took his son, who was at that time living with him, home to do his homework. Boyd then returned to the repair shop and spent at least an hour working on his motorcycle. Boyd's employer was also at the shop, and according to their testimony, neither consumed any alcohol while at the shop.

Boyd and the employer left the shop at approximately 10:30 p.m. and traveled separately to a bar, arriving between 11 and 11:30 p.m. Boyd did not sit with the employer. He drank two or three beers and was getting ready to leave when a woman asked for a ride on his motorcycle. The woman remembered arriving at the bar around 10 p.m. or a little after; contrary to the other testimony, Boyd, according to her, was then at the bar talking with some people. She later joined Boyd and thought she left between 11 and 11:30 p.m. for a ride with him.

Boyd told the woman that he would just take her around the block and then go home. He and the woman next got on the motorcycle and pulled away from a parking stall in front of the bar and proceeded westbound. Neither Boyd nor the woman was wearing a protective helmet.

Officer Tim Meguire of the Grand Island Police Department, who was stopped in his police cruiser at a red light, saw the Boyd motorcycle as it pulled away from the parking place shortly after midnight. Noticing that neither Boyd nor the woman was wearing a helmet, Meguire followed the motorcycle and activated his red lights to stop it. He followed the motorcycle as it made a wide right-hand turn and proceeded northbound at the next street. The motorcycle continued, making a second right-hand turn going eastbound into an alley. During this maneuver, the motorcycle cut the corner a little short and made a sharp swerve to avoid hitting the curb before entering the alley. The motorcycle also swayed from side to side in the alley before it stopped about two-thirds of the way through the alley just behind the bar.

Meguire then approached the driver and the woman and stated his intention to cite them for not wearing helmets. During this encounter, the officer observed that the driver, who had not realized there was a police cruiser in the vicinity with its red lights activated until after he was in the alley, had very bloodshot eyes and that there was a strong odor of alcohol coming from both him and the woman as they spoke. However, Meguire did not tell Boyd at this time that he was being detained for any alcohol-related offense.

Meguire then asked the woman to come back to his police cruiser to receive a citation for riding without a helmet. However, the woman claimed that after the initial stop and being told that they would be cited for not wearing helmets, she went back into the bar and began drinking beer and talking with her friends. A while later, Meguire or another officer went into the bar through the back door and ordered her to come outside to Meguire's police cruiser.

While Meguire was in the police cruiser issuing the woman a citation, Boyd began talking to another person while remaining seated on his motorcycle. At some point, Boyd left his motorcycle and went into the bar via the back door.

As soon as Meguire saw Boyd leave the motorcycle and move toward the back of the bar, he got out of his police cruiser and yelled at Boyd to stop and return to the motorcycle. Boyd, however, continued on into the bar; Meguire attempted to follow him in order to bring him back outside. As Meguire attempted to enter the bar, he was momentarily blocked by a patron who threatened him. Within a few seconds, Meguire made it past the patron and met with Boyd.

Boyd was standing at a counter talking to another person, refused to go back outside with Meguire, and physically resisted when Meguire attempted to forcibly remove him. Meguire then radioed for assistance and remained with Boyd, assuring that Boyd consumed no more alcohol. When assistance arrived, Boyd agreed to return to the alley.

Boyd and another of the defense witnesses testified that Boyd returned to the bar while Meguire wrote the woman a citation, during which time Boyd drank one beer and a portion of a second beer before Meguire and backup officers

summoned Boyd to return to the alley some 10 to 15 minutes later. The county court judge, in evaluating the conflicting testimony, stated:

> [W]ith all due respect to your witnesses, sometimes cases turn on who you believe. I believe the officer. I don't think that . . . Boyd had anything to drink after the officer made contact with him. It's inconceivable to me that the officer would let him go in — would cite — stop him to issue him a citation, or for whatever reason, and then let him go back into the bar for 15 minutes and just drink. I don't think that that occurred.

After Boyd was returned to the alley, Meguire had Boyd undergo several sobriety tests. Meguire then concluded that Boyd had operated a motor vehicle under the influence of alcohol and arrested him on that charge. Meguire based his conclusion upon "the attitude of the subject, the ability of the subject to perform the sobriety tests, his balance, coordination, ability to follow direction. Also on his physical appearance and the odor of alcohol on his breath."

Meguire next transported Boyd to the county jail for a breath test. After arriving at the testing room in the county jail, Boyd was asked to repeat before a video camera the sobriety tests performed earlier, which he refused to do.

Meguire continued the testing procedure, reading Boyd the implied consent form and instructing Boyd that he would be given 15 minutes to consent to the test. Boyd stated that he would not consent to the test unless it was performed by a certain officer of the sheriff's department whom he trusted. However, that officer was employed by the Hall County Sheriff's Department and not the Grand Island Police Department. Boyd was told that he did not have the choice of another officer, and he never submitted to the testing of his breath.

Citing Neb. Rev. Stat. § 39-669.16 (Reissue 1988), Boyd argues that "under the Nebraska implied consent law, there can be no revocation of one's driver's license and operating privileges if the refusal to submit to a chemical test is reasonable under the circumstances." Brief for appellant at 7. It is true that this statute empowers the Director of Motor Vehicles to revoke

a motor vehicle operator's license "if it is not shown to the director that such refusal to submit to such chemical test was reasonable . . . ." However, by its terms this statute relates only to administrative license revocation actions by the Director of Motor Vehicles.

While there is a plethora of reported cases which have analyzed reasonable refusal to submit to chemical test proceedings under the administrative revocation procedures of the implied consent statute, we have neither found nor been directed to any which establish a reasonable right to refuse a test in the context of a criminal proceeding.

Indeed, this court has written:

> The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other.

Neil v. Peterson, 210 Neb. 378, 379, 314 N.W.2d 275, 276 (1982). See, also, *Bapat v. Jensen*, 220 Neb. 763, 371 N.W.2d 742 (1985); *Raymond v. Department of Motor Vehicles*, 219 Neb. 821, 366 N.W.2d 758 (1985).

Section 39-669.08(2) reads, so far as is relevant:

> Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving . . . while under the influence of alcoholic liquor or drugs to submit to a chemical test or tests of his or her . . . breath . . . for the purpose of determining the alcoholic content . . . in such . . . breath . . . when the officer has *reasonable grounds* to believe that such person was driving . . . a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor . . . .

(Emphasis supplied.)

Thus, while in the context of an administrative operator's license revocation proceeding the inquiry centers on the reasonableness of an operator's refusal to submit to a chemical test, in the criminal context the inquiry centers on the existence of reasonable grounds for the arresting officer to believe that an operator was driving while under the influence of alcohol.

Even if we ignore Boyd's return into the bar after he was stopped, his erratic operation of the motorcycle, his bloodshot eyes, his production of an alcoholic odor, and his failure of other sobriety tests provided Meguire with reasonable grounds to believe that Boyd was driving while under the influence of alcoholic liquor. E.g. *State v. Medina*, 227 Neb. 736, 419 N.W.2d 864 (1988) (rear-end collision, combative behavior, odor of alcohol, and offer to take test next day sufficient to sustain conviction for failure to submit to chemical test). See, also, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991) (driving at excessive speed, squealing of tires, odor of alcohol, swaying walk, flushed face, belligerent conduct, and failure of two field sobriety tests sufficient to support conviction for driving under influence of alcohol); *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989) (erratic driving, strong odor of alcohol, and slow off-balanced actions sufficient to sustain conviction for driving under influence of alcohol).

Although the appellee State did not file a cross-appeal, it calls to our attention that the sentence is erroneous, a matter which we note as plain error. We find nothing in the record which establishes that Boyd had a relevant conviction within 10 years of the present conviction. Under such a circumstance, the present conviction is not only punishable as a Class W misdemeanor, which permits imprisonment of from 7 to 30 days and calls for a fine of from $200 to $500, Neb. Rev. Stat. § 28-106 (Reissue 1989), but § 39-669.08(4)(a) requires the sentencing court to,

> as part of the judgment of conviction, order [the convicted] person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date ordered by the court *and shall order that the operator's license of such person be revoked for a like period*. Such revocation shall be administered upon

> sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. Such revocation shall not run concurrently with any jail term imposed.

(Emphasis supplied.) Thus, the county court erred in not ordering revocation of Boyd's operator's license, and the district court erred in not requiring the county court to impose a sentence which conformed to the requirements of § 39-669.08. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990).

Accordingly, as first written in the opening paragraph of this opinion, we vacate the sentence and remand the matter to the district court with the direction that it remand the cause to the county court for resentencing in accordance with law.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

LLOYD HOWARD AND JOY HOWARD, AS MOTHER AND NEXT FRIEND OF KATHRYN HOWARD, APPELLANTS, V. BLUE CROSS BLUE SHIELD OF NEBRASKA, APPELLEE.

494 N.W.2d 99

Filed January 8, 1993. No. S-89-1452.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish 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.

4. **Insurance: Contracts.** An insurance policy must be read in its entirety, and the words must be given their plain and proper meaning. It should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
5. _____: _____. An insurance policy provision is ambiguous only if reasonably intelligent persons considering it in the light of the entire policy could honestly differ as to its meaning.
6. _____: _____. A court may not create ambiguity merely to afford coverage where a clear reading of an insurance policy would otherwise deny coverage.
7. _____: _____. If the stated exceptions and limitations are plainly expressed, insurers are entitled to have them construed and enforced as expressed.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Robert W. Mullin, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellants.

John F. Thomas and Geoffrey V. Pohl, of McGrath, North, Mullin & Kratz, P.C., and James W. Ellison, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

Donald F. Evans and Lyman L. Larsen, of Kennedy, Holland, DeLacy & Svoboda, for amicus curiae Health Insurance Association of America.

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

HASTINGS, C.J.

Appellants, Lloyd Howard, an employee of the city of Kimball since 1973, and his wife, Joy, as mother and next friend of their daughter, Kathryn Howard, brought this action on September 18, 1989, against Blue Cross Blue Shield of Nebraska (BCBS). The amended petition for declaratory judgment alleges Lloyd Howard's employment, the issuance by defendant of its group sickness and health policy to the city of Kimball, and the birth on May 24, 1984, of Kathryn, who was afflicted with the congenital defect known as spina bifida. It is further alleged that the policy contained major medical benefits of a lifetime maximum limit of $1,000,000 and that BCBS paid benefits for medical and hospital treatment (in excess of

$60,000 according to the testimony of Joy Howard) until June 30, 1985, at which time the policy was terminated by BCBS and the city of Kimball without the consent of the plaintiffs. Plaintiffs then allege that BCBS contends the policy excludes coverage for services rendered after the effective date of the termination of the policy, that no conversion privilege exists, and that although demand was made on BCBS by the plaintiffs to extend coverage, the demand was refused. The amended petition concludes with a prayer for the declarations of the rights of the parties. Both parties moved for summary judgment. The trial court sustained the motion of BCBS, which action precipitated this appeal by the plaintiffs.

The minutes of the meeting of the city council of the city of Kimball show that on May 14, 1979, the Howards were included on the existing BCBS policy of the city of Kimball in lieu of a salary increase. According to the February 5, 1985, minutes of the city council meeting, BCBS gave notice that as of March 1, 1985, there would be an increase of 31.9 percent in the city's premiums for the health care policy for the ensuing year. The answers to interrogatories filed by BCBS reflect that the expenses paid relating to Kathryn Howard accounted for 38 percent of the total claims paid for the city of Kimball under the group policy then in force. The city council discussed "self-funding" of health insurance at the March 5, 1985, meeting. On March 19, 1985, the city received bids from other insurers for group insurance. The Howards, particularly Joy Howard, were in touch with both the mayor and city council regarding the loss of BCBS coverage. The minutes of the April 16, 1985, meeting of the city council reveal that the city council voted to pay the premium on the BCBS policy for another month. The proposal of New York Life Insurance Company to furnish group health insurance to the city was accepted at the council meeting of June 4, 1985.

The city terminated its group health policy with BCBS on June 30, 1985, and switched its insurance company to New York Life in an effort to reduce premium expenses. New York Life carried a cap of $100,000 on lifetime benefits for claims as a result of a preexisting condition. BCBS' cap (Kathryn Howard's condition was not considered by BCBS to be

preexisting) was $1,000,000. While Lloyd Howard could have converted his original policy, he would have been required to quit his job, and the coverage would have been reduced to $25,000 of lifetime benefits. BCBS stopped paying benefits to the Howard family effective with the termination of the policy.

Appellants, in summary, claim that the district court erred in granting appellee's motion for summary judgment and not appellants' motion and in determining that the insurance policy in question was not ambiguous on the issues of (1) whether it was a contract of indemnity for services rendered during the life of the policy or a sickness and accident policy extending coverage for medical expenses or charges which result from sickness and accident; (2) its definition of services, covered services, and covered condition and the language of the termination provisions; (3) the specific extension of coverage for the care and treatment of birth defects and the insuring language which states that appellee agreed to pay for "services" as described in the policy; and (4) whether the policy extended lifetime coverage of $1,000,000 for medical catastrophes and permitted cancellation, termination, or modification after the catastrophe had occurred.

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. *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hanson v. General Motors Corp.*, 241 Neb. 81, 486 N.W.2d 223 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must

furnish 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. *Spittler v. Nicola, supra*; *Flamme v. Wolf Ins. Agency, supra*.

Before addressing the merits of this appeal, we acknowledge that the insurance policy must be read in its entirety and that the words must be given their plain and proper meaning. It should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Jefferson v. State Farm Ins.*, 380 Pa. Super. 167, 551 A.2d 283 (1988); *Monti v. Rockwood Ins. Co.*, 303 Pa. Super. 473, 450 A.2d 24 (1982). See, also, *Bartulis v. Metropolitan Life Ins. Co.*, 72 Ill. App. 2d 267, 218 N.E.2d 225 (1966). A provision is ambiguous only if reasonably intelligent persons considering it in the light of the entire policy could honestly differ as to its meaning. *Jefferson v. State Farm Ins., supra*; *Adelman v. State Farm Mut. Auto. Ins. Co.*, 255 Pa. Super. 116, 386 A.2d 535 (1978). A court may not create ambiguity merely to afford coverage where a clear reading of the policy would otherwise deny coverage. *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

In determining whether the insurance policy in question was indeed ambiguous on the issues of whether it was a contract of indemnity for services rendered during the life of the policy or a sickness and accident policy extending coverage for medical expenses or charges which result from sickness and accidents occurring during the life of the policy, we refer to the very letter of the policy, and we find that the BCBS policy is one covering services rendered.

The cover page of the master contract provides as follows:

> Starting at 12:01 A.M. at the Applicant's office on the date stated in the Application, and in consideration of the attached Application and payment of the charges as provided, THE COMPANY AGREES TO MAKE PAYMENT for the services as described, defined and

limited herein, *during the term of this Contract.* (Emphasis supplied.)

Part XII of the policy, relating to hospital services except pregnancy, provides as follows:

> **A. INPATIENT SERVICES:**
>
> **1. Member Hospitals:** If, because of Illness or Injury a Covered Person is an Inpatient in a Member Hospital, payment will be made for services which are billed by the Hospital as a regular Hospital service:
>
> . . . .
>
> **B. OUTPATIENT HOSPITAL SERVICES AND FREE STANDING AMBULATORY SERVICES:**
>
> 1. Payment will be made for services of a Hospital for Outpatient Services . . . .

Part XIII covers payment for a doctor's services:

> **A. DETERMINATION OF PAYMENT:**
>
> 1. Payments made under this Part for services in Nebraska will be based on the Usual, Customary and Reasonable charge.
>
> 2. Payments made under this Part for services not in Nebraska will be based on the Usual, Customary and Reasonable charge for the area where done if such data is available to the Company. . . .

The policy goes on to refer consistently to payment for "Covered Services," for a "Covered Person," and for a "Covered Condition."

In discussing exclusions, the policy remains consistent with the theory of payment for services rather than for expenses arising out of a particular occurrence. Part II of the contract states: "**PART II. EXCLUSIONS AND LIMITATIONS A. EXCLUSIONS:** No payments shall be made under this Contract, except as expressly stated herein, for: . . . . 5. Services provided: . . . . c. Any Covered Person before their effective date of coverage, or after their termination."

Part IV of the policy provides that premium charges are due and payable monthly in advance, that a 31-day grace period is provided for, but that if payment is not received during that period, "this Contract shall end as of Midnight of the last day for which charges have been paid."

Finally, at part V, the policy provides in part as follows:

> C. The Company may cancel this Contract at any time by written notice to the Applicant under Part III, Paragraph H., stating when, not less than 5 days later, the cancellation shall be effective. After this Contract has been in effect one year, the Applicant [City of Kimball] may cancel this Contract at any time by written notice to the Company, effective upon receipt or on such later date as may be stated in the notice. Thereupon, the Company will return the unearned portion of any dues paid, computed pro rata. Cancellation shall not affect any claim for *services provided* before the effective date of cancellation.
>
> D. If this Contract is cancelled or terminates or if Applicant executes a contract with another health care carrier or becomes self-insured, no conversion privileges shall apply.

(Emphasis supplied.)

The above-quoted language from the policy itself would seem to leave little doubt that this policy covers services rendered and not occurrences, and once the contract is terminated, in this case canceled by the city of Kimball, the only claim available to a subscriber such as Howard is "*for services provided* before the effective date of cancellation." This language is clear and unambiguous.

As to the Howard's complaint that BCBS afforded no conversion privileges, the contract explicitly provides for the situations in which conversion privileges apply. BCBS was not required to advise the Howards that they had a right to convert their policy, because the policy had been voluntarily terminated, and thus, they had no right of conversion. "If this Contract is cancelled or terminates or if Applicant executes a contract with another health care carrier or becomes self-insured, no conversion privileges shall apply." The assignment of error is without merit, and we consider it no further.

We next address whether the BCBS policy's definitions of services, covered services, and covered condition and the language of the termination provisions were ambiguous: "**5.**

Covered Condition: Illness, Injury or Pregnancy for which this Contract provides payment. **6. Covered Services:** Medical care, treatment, and facilities for a Covered Condition for which this Contract provides payment."

While the word "services" is not identified in the definitional portion of the contract, the context in which the word was used was an elaboration of the policy's coverage. For the Howards to find an ambiguity and to subsequently misinterpret the use of "services" over "covered services" to the end that they believed that BCBS would continue to pay their daughter's medical expenses after termination of the policy is without any reasonable foundation. The assignment of error is without merit.

Equally unambiguous were the provisions promulgating the specific extension of coverage for the care and treatment of congenital defects, as well as the insuring language which stated that appellee agreed to pay for services as described in the policy. Again, the policy clearly states that it provides $1,000,000 of lifetime maximum coverage for the care and treatment of conditions, which definitionally would include Kathryn Howard's congenital defects. Upon the employer's voluntary termination of the policy, however, the coverage ceased.

Like most group hospitalization policies, this policy did not cover hospital and surgery expenses of the insured incurred after the policy had expired for injury sustained by the insured while the policy was still in force. See *Bartulis v. Metropolitan Life Ins. Co.*, 72 Ill. App. 2d 267, 218 N.E.2d 225 (1966). In *Bartulis*, the Illinois Appellate Court held:

> We cannot agree with the plaintiff that liability arose when the injuries were sustained. The coverage was not for expense caused by injuries sustained during the life of the policy, but for the cost of hospitalization and surgery obtained during the life of the policy. We recognize the rule that insurance contracts are construed in favor of the insured, but construction does not degenerate into a perversion of plain language to create an ambiguity where none exists or to father a contract obligation where none is stated or reasonably implied. Miller v. Madison County

> Mut. Automobile Ins. Co., 46 Ill App2d 413, 197 NE2d 153; Thompson v. Fidelity & Casualty Co. of New York, 16 Ill App2d 159, 148 NE2d 9. Nor does either justice or public policy compel a different result. Such argument is effectively answered in Shelton v. Equitable Life Assur. Society of the United States, 28 Ill App2d 461, 468, 171 NE2d 787, 790, with these words: "Plaintiff argues in effect that the ninety-day provision should be ignored so that justice can be served. We know of no public policy justification for ignoring the language of a contract in order to impose liability of a defendant insurer for a loss not contemplated by the contract. The ninety-day period provision allows a reasonable time for the manifestation of losses caused by accidental injury. Moreover, defendant contracted to pay only for losses occurring within ninety days after injury."

Bartulis, 72 Ill. App. 2d at 271, 218 N.E.2d at 226-27.

Finally, we address whether the policy extended lifetime coverage of $1,000,000 for medical catastrophes and permitted cancellation, termination, or modification after the catastrophe had occurred.

While the policy does provide for $1,000,000 of lifetime coverage for medical catastrophes, nowhere in the policy exists a colorable claim that termination, cancellation, or modification was permissible so as to still retain that coverage. Insurance companies clearly base their premium rate on a calculation of their risk. To leave themselves open to risk after termination of policy is not factored into the premium rates; to require them to do so would certainly create an undue burden, not only upon the insurance industry, but ultimately upon all policyholders, the very ones who pay the premiums, be it directly or indirectly. The BCBS contract clearly provides that provided services would not be covered after the date of termination of coverage, the end of the period for which premiums had been paid. Appellants essentially contend that since the policy states that it would not pay for services after termination and did not specify covered services, an ambiguity was created. This contention is totally without merit.

The trial court's findings consisted of the following:

> It's . . . my opinion there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. One major consideration is the fact in this case that it was the policyholder, after full, deliberate and considered study, that made the determination to end coverage and to stop the provision of insurance by the defendant, and it seems to me that that is the cause. They knew what the coverage was from that company because of, well, I think four years experience or whatever it was with them, and it was — that was the cause of the loss of coverage. I don't agree that the policy behind the legislative change for policy language on congenital birth defects and coverage for newborns is as broad as is being urged by the plaintiff. I think it was more limited. I think the effect of the public policy expressed in that statute was to require that coverage begin at the moment of birth which occurred in this case, and that policies not wiggle out of that on the claim of preexisting condition, because a congenital defect is a preexisting condition, no matter when the person becomes a covered individual, but it does more than that, and that those policies were furthered by the facts of this case, and the reason they were furthered was that coverage existed at the moment of birth, continued throughout the time without any delays for preexisting condition, and stopped only because of the voluntary action of the policyholder, not on the part of anything that was the fault of the defendant. That's what I think decides this case. So that's my decision, and those are the reasons.

As this court has held before, parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please on their obligations, not inconsistent with public policy. If such exceptions and limitations are plainly expressed, insurers are entitled to have them construed and enforced as expressed. *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

It is clear that the city of Kimball elected to terminate its group BCBS policy to save money, despite the obvious and devastating repercussions the Howards would suffer. BCBS had no alternative but to accept the action of the city. An insurance company cannot be expected to continue to pay out claims to the Howards or to any former subscriber, especially when it was indeed the city, the employer, that made the affirmative decision to terminate the policy. This lawsuit is not against the city of Kimball for breach of contract.

This policy is clearly one covering expenses for services and is not an accident policy, and thus recovery must be denied, for "[i]nsurance is a matter of contract, not sympathy." *St. Paul Fire & Marine Insurance Company v. Purdy*, 129 Ga. App. 356, 357, 199 S.E.2d 567, 569 (1973). See, also, *Wulffenstein v. Deseret Mut. Ben. Ass'n*, 611 P.2d 360 (Utah 1980).

The Howards argue that Neb. Rev. Stat. § 44-709 (Reissue 1988) becomes a part of the insurance contract under consideration and binds BCBS. That section states as follows: "The term sickness and accident insurance, or accident and sickness insurance as used in sections . . . is defined as insurance against loss or expense resulting from the sickness of the insured, or from the bodily injury or death of the insured by accident, or both."

However, immediately following that citation in their brief, the Howards refer to Neb. Rev. Stat. § 44-710.19 (Reissue 1988), which on its face contradicts their reliance on § 44-709. Section 44-710.19 provides in part as follows:

> (1) All individual and group health insurance policies *providing coverage on an expense incurred basis* and individual and group service or indemnity type contracts, which provide coverage for a family member of the insured or subscriber shall, as to such family members' coverage, also provide that the health insurance benefits applicable for children shall be payable, with respect to a newly born child of the insured or subscriber, from the moment of birth.
>
> (2) The coverage for newly born children shall consist of coverage of injury or sickness including the necessary care and treatment of medically diagnosed congenital

defects and birth abnormalities.

(Emphasis supplied.)

This latter section merely requires that any policy in force as to a covered newborn child shall provide coverage in the same manner that it does for the other family members. There is nothing about that section nor the previously cited section that changes a services-incurred policy into an occurrence policy.

Based upon the foregoing, no genuine issue of material fact is in dispute and BCBS was entitled to judgment as a matter of law. The judgment of the district court was correct and is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The majority states that when "read in its entirety," the insurance policy at issue, including the provisions that strip Kathryn Howard of care benefits, is "unambiguous." However, the majority does not acknowledge that based on its reading, the policy is utterly misleading—intimating "lifetime" coverage while binding BCBS to an illusory coverage obligation. I believe that a genuine issue of material fact exists regarding the reasonableness and effect of BCBS' premium increase and that summary judgment was inappropriate. I therefore dissent.

I agree with the majority that the policy language makes clear that only "services" are covered by the contract. The contract is ambiguous, however, as to when those services are covered. Throughout the policy there are frequent references to "termination" and "cancellation." The policy gives both parties the power to cancel the contract and refers to the instances giving rise to termination. In its brief, BCBS even cites authority distinguishing the two terms.

However, when the policy refers to exclusions, cancellation is not mentioned: "**A. EXCLUSIONS:** No payments shall be made under this Contract, except as expressly stated herein, for . . . Services provided [to a]ny Covered Person before their effective date of coverage, or after their *termination*." (Emphasis supplied.)

If the policy is given a literal reading, as is demanded by the majority, only a termination would absolve BCBS from

fulfilling its policy obligations to Kathryn Howard. The question then becomes: Did the Howards' coverage cease because of a termination or because of a cancellation? Based on the authority cited by BCBS, cancellation relates to the insurer's taking action to end coverage before coverage would otherwise end under the terms of the contract. Termination, on the other hand, refers to coverage ceasing pursuant to the terms of the contract. See *Mezzacappo v. Travelers Ins. Co.*, 523 So. 2d 291 (La. App. 1988). The policy itself does not draw such a fine distinction; part V(C) gives the insured, as well as BCBS, the power to "cancel" the policy.

Although coverage ceased when the city of Kimball failed to renew the yearly contract, I do not believe this is dispositive on the question of whether the contract ended by termination or by cancellation. I believe there is a genuine issue of material fact as to whether the 32-percent premium increase by BCBS constituted a constructive cancellation of the contract and effectively forced the city of Kimball to find another carrier.

Neither am I convinced that the 1-year renewable nature of the contract freed BCBS to raise premium rates to any level it chose, regardless of the effect on the city of Kimball and its employees. Faced with a similar policy, the court in *Danzig v Dikman*, 78 A.D.2d 303, 309, 434 N.Y.S.2d 217, 220-21 (1980), noted:

> [T]he existence of a lifetime maximum [benefit provision] (whether limited or unlimited) discloses an awareness on the part of the insurer and all interested parties that an illness or condition might well continue indefinitely beyond any one contract term and, indeed, persist for the lifetime of an individual subscriber or his or her beneficiary.

See, also, *Myers v. Kitsap Physicians Serv.*, 78 Wash. 2d 286, 474 P.2d 109 (1970) (holding that the phrase "life of the contract" could mislead the average purchaser of insurance as to the extent of coverage under a 1-year renewable policy).

I agree with the *Danzig* court and find that the $1,000,000 "Total Lifetime Maximum" provision in the BCBS policy indicates an expectation by the parties that the contract would extend more than one policy term. As such, I believe that BCBS

should not be able to constructively cancel the contract through exorbitant premium increases. See *Cataldie v. Louisiana Health Service & Indem.*, 456 So. 2d 1373 (La. 1984) (holding that an insurer could not limit incurred liability by constructively canceling the policy).

BCBS may argue that under the contract it had a right to raise rates at the end of each year. While it would be ludicrous to suggest that an insurance company can never raise premiums, when the language of the contract indicates that the parties expect extended coverage, the insurer should not be able to grossly inflate its rates to escape an unfavorable contract. In *Lutsky v. Blue Cross Hosp. Service, Inc.*, 695 S.W.2d 870 (Mo. 1985), the Supreme Court of Missouri examined the implications of policy provisions similar to those now relied on by BCBS. The court stated:

> The defendants [insurers] point out . . . that the contractual documents state very clearly that the benefits payable are only such as are provided by the contracts in effect at the time the expenses are incurred. . . .
>
> If the defendants are correct, then the provision for $1,000,000 lifetime benefits per person is illusory to the point of being positively deceptive. This provision might lead members to believe that they would be protected against catastrophic and prolonged illness which strikes all too often without warning, whereas, by the defendants['] contentions, the protection would continue only so long as the insurer and the sponsor did not change the coverage. By the defendants' argument, indeed, modifications could be made in order to forestall further payments on account of an existing disability. Such a state of affairs, at the very least, is occasion for a raising of the judicial eyebrow.

Id. at 874-75.

An additional factor indicates that BCBS should not be free to constructively cancel the contract—the Howards' detrimental reliance on the policy. Several courts, usually dealing with pregnancy expenses, have cited a public policy against revoking the insurance coverage of an individual who, after incurring expenses in reliance on the coverage, has become

effectively "uninsurable." See, e.g., *Providence Hosp v Morrell*, 431 Mich. 194, 427 N.W.2d 531 (1988); *Brown v. Blue Cross & Blue Shield of Miss.*, 427 So. 2d 139 (Miss. 1983).

To a greater extent than in most sickness or injury cases, the Howards relied on this policy. While no one drives recklessly *because* they have accident insurance, the Howards actually planned the conception of their child based on the BCBS policy. They waited the requisite 270-day period before conceiving, obviously intending to have maternity expenses covered.

Although pregnancy expenses were probably foremost in the Howards' plans, it is not unreasonable to presume that they also relied on the policy for the unfortunate possibility that something could be wrong with their child. They took the steps necessary to qualify for the plan, and the record does not indicate that they purchased any supplemental insurance to cover this contingency. Why would they, when they were supposedly covered by a million-dollar policy?

This reliance, no doubt engendered by the misleading "lifetime maximum" provision, should estop BCBS from constructive cancellation through unreasonable premium increases. As noted before, BCBS increased premiums 32 percent in one policy period. A fact question exists as to the propriety of this increase, and summary judgment was therefore improper. A letter from BCBS explaining the increase is part of our record. However, the reasonableness of the increase was never resolved because the trial court erroneously granted summary judgment.

In spite of the many cases that have extended coverage to posttermination expenses, there are at least an equal number that have not. Most of these cases note that the parties to the contract are free to set the terms as they wish, and if those provisions allow the coverage to be cut off, even on the mere whim of the employer and insurer, then those parties should be free to do so. I posit that these cases refuse to acknowledge the parties who matter—the insured workers and their families. Contrary to the position of the majority, "fairness" is not a four-letter word. It is said that hard facts make bad law, but if unconscionable facts find no remedy in the law as it stands, then the law must change.

It is ironic that as courts stretch the limits of policy language to determine whether the insured's rights are vested, the insurers make certain that the policy language becomes tighter, more complex, and ultimately, more difficult for the nonlawyer to understand. The process forgets just who it is that relies on these policies: not the insurer, not the city, not the lawyers or the judges. The ones who rely are people like Lloyd and Joy Howard.

Insurance is based on the spread of risk. BCBS simply spreads the risk of premium payment over the insured group, here, over the employees of the city of Kimball. As payments go out, rates go up; the smaller the group, the higher the individual premium. Lloyd Howard's only fault was working for a governmental subdivision too small to absorb the increased premiums, and the only risk that the BCBS policy effectively guarded against was that the company would lose money on the contract.

The irony is that the risk will be spread anyway—to the general populace. When the new insurance policy's limit is reached, the Howards will inevitably be forced to deplete their income and savings until they qualify for Medicaid, whereupon the taxpayers will have to cover the cost.

While I believe that the language of the policy should prevent BCBS from exorbitantly raising its premiums, I also feel that the city of Kimball is the true villain in this tragedy. BCBS points out that when shopping for substitute coverage, the city of Kimball received a proposal from another insurance company that would have covered Kathryn Howard's disabilities up to $1,000,000, an amount equal to the BCBS coverage. The city of Kimball rejected that proposal and instead purchased a policy reducing Kathryn Howard's coverage by $900,000. In my view, however, this fact does not automatically legitimize BCBS' actions. I still believe that summary judgment was improper.

A majority of this court holds that coverage will not be extended to Kathryn Howard's future medical needs. For the reasons I have set out above, I dissent. I note, however, that if this court cannot provide relief for those in the unfortunate situation encountered by the Howards, perhaps the Legislature

will. Faced with a similar dilemma, the Supreme Court of Louisiana stated:

> If relief is to be made available to persons like [the insured] who suffer unfortunate and debilitating injury or illness which leads to . . . termination of their insurance, it must come from the legislature. As a matter of public policy, the legislature might require continued coverage of all risks which materialize prior to the cessation of an insured's membership in a group.

Massachusetts Mut. Life Ins. v. Nails, 549 So. 2d 826, 832 (La. 1989).

Another possibility would be to place stricter limits on the ability of state subdivisions to modify, without consent, employee insurance coverage. Even rules requiring better disclosure would help, for I am sure that if Lloyd and Joy Howard had been made aware that the city of Kimball and BCBS could unilaterally strip them of their "insurance," the Howards would have considered supplemental coverage. I do not pretend to have the solution to this problem. I do know, however, that it needs to be addressed, or others will face the same misfortune.

SHANAHAN, J., joins in this dissent.

C.R. FOREE, APPELLANT, V. SCHOOL DISTRICT NO. 7 OF HOLT COUNTY, NEBRASKA, APPELLEE.

493 N.W.2d 625

Filed January 8, 1993. No. S-90-670.

Legislature: Schools and School Districts: Property: Leases: Sales. The Legislature has authorized school districts to acquire buildings or equipment through lease-purchase agreements.

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

John W. DeCamp and Stanford L. Sipple, of DeCamp Legal Services, P.C., for appellant.

John P. Heitz, of Cronin, Symonds & Heitz, for appellee.

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

BOSLAUGH, J.

The defendant, School District No. 7 of Holt County, Nebraska, is a Class III school district. The plaintiff, C.R. Foree, is an elector, resident, and taxpayer within the school district. On August 16, 1989, the defendant entered into an "Equipment Lease/Purchase Agreement" with the Maryland National lease corporation for the lease/purchase of eight modular homes for use as classrooms by the defendant. This action, which was commenced on August 21, 1989, was brought to enjoin the defendant from performing the lease-purchase agreement.

The trial court found that the agreement was valid and dismissed the petition. From that judgment the plaintiff has appealed. The plaintiff's assignments of error allege generally that the trial court erred in finding that the lease-purchase agreement is valid under Neb. Rev. Stat. § 79-4,154 (Cum. Supp. 1992).

The lease-purchase agreement involves a 4-year lease and the payment of principal and interest amounting to $303,599. If funds are not available for the rental payments during any school year of the defendant, the defendant may terminate the lease.

The schedule of payments under the lease-purchase agreement requires the first monthly lease payment to be paid on or before September 15, 1989, with the total of payments for the period from September 1, 1989, through August 31, 1990, being $84,800.

Section 79-4,154 was first adopted in 1971. In 1985, it was amended to increase the permissible period of the lease from 5 years to 7 years and to remove the words applying the statute to vocational schools and junior colleges. Except for those changes, the first three sentences of the statute have remained essentially the same since 1971. They are:

> The governing board of any public school may enter into a lease or lease-purchase agreement for the exclusive

> use of its individual jurisdiction for such buildings or equipment as the governing board determines necessary. Such lease or lease-purchase agreements may not exceed a period of seven years. All payments pursuant to such leases shall be made from current building funds or general funds.

§ 79-4,154 (Cum. Supp. 1992).

In 1985, L.B. 633 added to § 79-4,154 a sentence which provides: "No school district shall directly or indirectly issue bonds to fund any such lease-purchase plan for a capital construction project exceeding twenty-five thousand dollars in costs unless it first obtains a favorable vote of the electorate pursuant to Chapter 10, article 7."

In 1988, L.B. 435 further amended the statute by adding the following sentence: "Nothing in this section shall prevent the governing board of any public school district from refinancing a lease or lease-purchase agreement without a vote of the electorate for the purpose of lowering finance costs regardless of whether such agreement was entered into prior to July 9, 1988."

In *George v. Board of Education*, 210 Neb. 127, 313 N.W.2d 259 (1981), the Ord School District had entered into a lease-purchase agreement with the Ord School District Building Corporation to lease an addition to its building for a term of 5 years, with the building being donated to the school district at the end of the lease term. The building corporation had issued bonds to provide the necessary financing for the building addition. The district court refused to enjoin the school district from proceeding with its lease-purchase agreement, and this court affirmed that judgment.

In *George*, the plaintiff contended that the school district could not issue bonds without a vote of the electorate or cause a corporation to be formed to issue bonds. We noted that the school district had not issued any bonds and that it was not inappropriate for a corporation formed by the school district to issue bonds. We also noted that the Legislature had specifically authorized the defendant to acquire facilities by this method.

The plaintiff's principal contention seems to be that the provision requiring a favorable vote of the electorate for a

direct or indirect issue of bonds to fund a lease-purchase agreement for a capital construction project exceeding $25,000 prohibits the defendant from entering into its lease-purchase agreement for the modular units. The plaintiff contends that the 1985 amendment to § 79-4,154 which added the requirement of a vote was the Legislature's response to this court's opinion in *George v. Board of Education, supra.*

While the Legislature's amendment to § 79-4,154 in 1985 may have been in response to the *George* decision, it is clear that § 79-4,154 still authorizes school districts to acquire buildings or equipment through lease-purchase agreements. See *George v. Board of Education, supra.*

In the present case, no bonds were issued directly or indirectly by any party in order to fund the modular units. Furthermore, the defendants are not required to finance the lease/purchase of the modular units by bonds. See *id.*

The plaintiff's other contentions in regard to budgeting and the construction of supporting structures are also without merit. The record shows that the necessary funds for the lease payments were properly budgeted and that there is no evidence relating to future expenditures for construction of supporting structures.

The judgment of the district court is affirmed.

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. BURTON I. BEATY, APPELLEE, AND DONA FAE GREENOUGH, APPELLANT.

493 N.W.2d 627

Filed January 8, 1993. No. S-90-911.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the

pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

3. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
4. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
5. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
7. **Contracts: Intent.** If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the document.
8. **Contracts.** A trial court is not free to rewrite a contract for parties or speculate as to the terms of a contract which the parties have not seen fit to set out.
9. **Divorce.** What a decree of dissolution means, as a matter of law, is determined from the four corners of the decree.
10. **Judgments.** In the absence of ambiguity, the effect of a decree must be declared in light of the literal meaning of the language used.

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

Thomas K. Harmon, of Respeliers and Harmon, P.C., for appellant.

Steven M. Watson, P.C., of Marks & Clare, for appellee Beaty.

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

HASTINGS, C.J.

Defendant Dona Fae Greenough appeals from the judgment of the district court which awarded to defendant Burton I. Beaty the proceeds of a Metropolitan Life Insurance Company policy on the life of Roy Beaty, deceased. This action was originally brought as the result of an interpleader petition filed by the plaintiff, Metropolitan. The two defendants filed

separate motions for summary judgment. The district court sustained the motion of Burton Beaty and overruled the motion of Greenough.

The facts are not in dispute and are found in a joint stipulation submitted by the parties. Roy Beaty and Greenough were married on June 3, 1962. Two children were born of the marriage, Burton, born August 20, 1963, and Beverly, born August 17, 1966. The marriage was dissolved by decree on July 16, 1982. The decree incorporated various provisions regarding custody, child support, property division, and alimony. The settlement agreement also provided, in relevant part: "7. Husband shall maintain hospitalization and medical insurance coverage for the benefit of his minor child, and shall continue in effect existing life insurance coverage on his own life, naming wife as beneficiary on the policies."

Roy Beaty had been employed by Vickers, Incorporated, since February 24, 1964. The employer had furnished a group policy of insurance with Metropolitan, which afforded life insurance benefits for eligible participating employees. This policy, No. 26550-G, provided death benefits on the life of Roy Beaty and was in existence on the date of the dissolution of the marriage, July 16, 1982, and on the date of Roy Beaty's death on July 11, 1989. As a result of the death of Roy Beaty, Metropolitan became obligated to pay $13,500 plus 6-percent interest on that policy.

On December 10, 1986, Roy Beaty signed a Vickers "Medical/Dental/Life Insurance" form on which he designated "Burton I. Beaty, son, if living; otherwise, Beverly Y. Beaty, daughter," as beneficiary of his group life insurance benefits. On November 21, 1988, Roy Beaty signed a second Vickers "Medical/Dental/Life Insurance" form in which he designated "Burton I. Beaty, son, if living[;] otherwise, Jimmie D. Beaty[,] brother," as beneficiary of his group life insurance benefits.

A dispute arose between the parties to this appeal with regard to the benefits available under the Metropolitan policy at issue. Pursuant to an order of the district court, Metropolitan deposited its admitted full and total liability amount of $14,014.89 with the clerk of that court and was dismissed from

this cause of action. As previously stated, the court sustained the motion for summary judgment filed by Burton Beaty.

Greenough asserts as error the court's (1) sustaining of Burton Beaty's motion for summary judgment; (2) overruling of Greenough's motion for summary judgment; (3) interpreting the language of the decree and the property settlement agreement to deny benefits of coverage to Greenough, because the same was clear and unambiguous; and (4) denying Greenough benefits available per terms of the life insurance policy. We reverse and remand with directions.

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. *Howard v. Blue Cross Blue Shield, ante* p. 150, 494 N.W.2d 99 (1993); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Howard v. Blue Cross Blue Shield, supra*; *Hanson v. General Motors Corp.*, 241 Neb. 81, 486 N.W.2d 223 (1992).

Burton Beaty urged the trial court to find the language of the property settlement agreement to be ambiguous.

Whether a document is ambiguous is a question of law initially determined by a trial court. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989).

Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991); *Knox v. Cook, supra*.

The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by

itself, compel the conclusion that the document is ambiguous. *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Knox v. Cook, supra.*

If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the document. *Knox v. Cook, supra*; *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

In the context of interpretation of a decree, this court has held:

> [T]he fact is that neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

Neujahr v. Neujahr, 223 Neb. 722, 728, 393 N.W.2d 47, 50-51 (1986).

In the instant case, the trial court found that no ambiguity existed in the provision at issue, paragraph 7 of the property settlement agreement. However, in reaching this conclusion, the court reasoned:

> The fact that contract language may not be given its literal meaning does not necessarily mean that the contract is ambiguous. Words are often not explicitly stated in a second clause of a sentence if the words are implied. Even defendant, Greenough, cannot prevail if the literal meaning would suggest no addition of words to the clause in question. The reason, of course, is that the subject of the clause beginning "and shall continue" is implied from the first clause of paragraph 7. The implication is that the word "he" should be inserted between the words "and" and "shall". But one could argue ambiguousness since possibly the term "minor child" could be the person of reference.
>
> Sensibly, neither counsel suggest that leaving the word "he" out of that clause leads to an ambiguity. Its meaning is evident from the agreement as a whole. Likewise the words "for the benefit of his minor child" are words

> implied by the meaning of paragraph 7 but left out of the second clause. If the implied words and phrases were inserted, paragraph 7 would read "Husband shall maintain hospitalization and medical insurance coverage for the benefit of his minor child, and [he] shall continue in effect existing life insurance coverage on his own life [for the benefit of his minor child], naming wife as beneficiary on the policies." . . .

Thus, the trial court suggests that the word "he" and the phrase "for the benefit of the minor child" are both *necessarily* implied in the context of the paragraph. This conclusion is founded upon a faulty premise. It is unnecessary to insert the word "he" in order to avoid ambiguity. The phrase "and shall continue in effect existing life insurance coverage on his own life" could refer to no one other than "[h]usband," since (1) the document is a property settlement agreement directing the disposition of property of husband and wife, and not the minor child; (2) grammatically, "[h]usband" is the subject of the phrase; and (3) the minor child, a daughter (the son attained the age of majority 35 days after the date of the decree), would not, in any event, be directed to continue insurance on "*his* own life."

It is equally unnecessary to insert the phrase "for the benefit of his minor child" because the paragraph is complete and has meaning without the insertion of any additional words. A trial court is not free to rewrite a contract for parties or speculate as to the terms of a contract which the parties have not seen fit to set out. *Rees v. Huffman*, 222 Neb. 493, 384 N.W.2d 631 (1986). The property settlement agreement clearly required "[h]usband" to continue in effect any existing life insurance coverage on his life, naming "wife" as beneficiary. There is no inherent ambiguity in this provision. Where no ambiguity exists a document is not subject to interpretation and construction. There is no language in the provision which states that the policy was intended to insure the support and maintenance of the minor child; neither is there any phrase which would have compelled "wife" to use any benefits she might have received for her child's benefit prior to the child's majority. Nor is there any indication that "wife['s]" interest in the policy was dependent on her child's minority. While Burton Beaty argues

that had the parties' intent been otherwise than to benefit the minor child, the provision regarding the life insurance policy would have been included with the provisions for alimony and other division of marital property rights. It would be equally logical, however, to find that if the parties had intended the policy to provide for the support and maintenance of the minor child, the provision would have been included with the provision for child support.

Here, the trial court apparently concluded that Roy Beaty was free to designate someone other than his former wife as beneficiary only by reading into the provision at issue that the parties' intent was to maintain the insurance for the benefit of the minor child. What a decree of dissolution means, as a matter of law, is determined from the four corners of the decree. *Buhrmann v. Buhrmann*, 231 Neb. 831, 438 N.W.2d 481 (1989); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

In the absence of ambiguity, the effect of a decree must be declared in light of the literal meaning of the language used. See *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

Where, as here, a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective. There has been no allegation of any unconscionable advantage taken, and the property settlement agreement was presumably fair. In light of the "four corners of the decree," we find there was no manifest intent to benefit the minor child which would have allowed the decedent to execute a change in the policy permitting the subsequently named beneficiary to receive the proceeds of the life insurance policy at issue.

The judgment of the district court is reversed, and the cause is remanded with directions to enter summary judgment in favor of Dona Fae Greenough.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN JACOB, APPELLANT.

494 N.W.2d 109

Filed January 8, 1993. No. S-91-109.

1. **Rules of Evidence: Hearsay.** The excited utterance exception excludes from the operation of the hearsay rule statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
2. _____: _____. The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
3. _____: _____. For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
4. **Rules of Evidence: Hearsay: Proof.** The key requirement to the excited utterance exception is spontaneity, which requires a showing the statements were made without time for conscious reflection.
5. **Trial: Rules of Evidence.** 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.
6. **Rules of Evidence: Hearsay: Case Overruled.** Language in cases such as *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), and *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983), which suggests that the admission of an excited utterance is left to the discretion of the trial court rather than being controlled by Neb. Rev. Stat. § 27-803(1) (Reissue 1989) is overruled.
7. **Rules of Evidence: Hearsay.** A declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event.
8. _____: _____. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
9. **Constitutional Law.** The analysis of the right to confrontation under Neb. Const. art. I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution.
10. **Constitutional Law: Criminal Law: Trial.** The mission of the Confrontation Clauses is to advance practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.
11. **Constitutional Law: Criminal Law: Trial: Hearsay.** While the Confrontation Clauses limit the use of hearsay testimony, they do permit its use under certain circumstances, despite a defendant's inability to confront the declarant.
12. **Constitutional Law: Rules of Evidence: Hearsay: Proof.** Where it is established that the declarant is unavailable, the question under the Confrontation Clauses

becomes whether the State, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clauses, has carried its burden of proving that the declarant's statements bear sufficient indicia of reliability to withstand scrutiny under the clauses.

13. _____: _____: _____: _____. The use of hearsay testimony does not violate the Confrontation Clauses if the State can demonstrate (1) the unavailability of the declarant and (2) that the declarant's statement bears adequate indicia of reliability.
14. **Rules of Evidence: Hearsay.** Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.
15. **Constitutional Law: Rules of Evidence: Hearsay.** Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.
16. **Rules of Evidence: Hearsay: Death.** The essential element to the admission of a statement as a dying declaration is that the declarant be conscious of approaching death at the time of the making of the statement.
17. _____: _____: _____. A declarant's belief of impending death is best shown by express communication to that effect; however, it is not necessary that a declarant state in specific terms at the time of the making of the statement her or his consciousness of impending death.
18. **Rules of Evidence: Hearsay: Death: Circumstantial Evidence: Proof.** A declarant's consciousness of impending death may be established by evidence other than the declarant's own statement; circumstances surrounding the death may be enough to show consciousness of impending death.
19. **Rules of Evidence: Hearsay.** While the residual hearsay exception is to be used rarely and only in exceptional circumstances, where the declarant is dead, the specific exceptions of both Neb. Rev. Stat. §§ 27-803(22) and 27-804(2)(e) (Reissue 1989) are applicable in determining the existence of equivalent circumstantial guarantees of trustworthiness.
20. **Constitutional Law: Rules of Evidence: Hearsay.** To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.
21. **Rules of Evidence: Hearsay: Witnesses.** Testimonial accuracy and a witness' perception, memory, and narrative ability are practical concerns regarding any hearsay used for conviction of a defendant.
22. **Trial: Witnesses.** The burden of laying a foundation by showing that the witness had an adequate opportunity to observe is upon the party offering the testimony.
23. **Rules of Evidence: Witnesses.** Whether a witness had the opportunity to observe and did actually observe the subject matter of the witness' testimony is a preliminary question of admissibility determined by a trial court pursuant to Neb. Rev. Stat. § 27-104 (Reissue 1989).
24. _____: _____. Neb. Rev. Stat. §§ 27-602 and 27-701 (Reissue 1989) require that a witness testifying to objective facts must have had means of knowing the facts from the witness' personal observation.

25. **Rules of Evidence: Hearsay.** There is a general requirement imposed on declarations admitted under all the exceptions to the hearsay rule that the declarant, like witnesses, must have had an opportunity to observe or personal knowledge of the fact declared.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for a new trial.

John C. Vanderslice for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Steven Jacob, was adjudged guilty of two counts of murder in the first degree, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), and of two counts of using a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was thereafter sentenced to life imprisonment on each of the murder convictions and to imprisonment for a period of not less than $6^2/_3$ nor more than 20 years on each of the firearm convictions, all sentences to run consecutively. He assigns a number of errors, including the district court's receipt into evidence of certain statements made by one of the victims. Inasmuch as that assignment is in part meritorious, we reverse and remand the cause for retrial without considering the remaining claimed errors.

II. FACTS

In February 1988, the now 37-year-old Jacob began dating the victim Melody Hopper. Hopper took Jacob to family events and often participated in activities with his mother. Jacob soon began making plans to buy a house and eventually marry Hopper. However, the relationship between the two began to deteriorate sometime in late June or early July 1989, presumably because Hopper had met the other victim, Jim Etherton.

Hopper first encountered Etherton on Mother's Day 1989 when she, her sister, and her sister's husband visited Etherton's brother, a family friend. The two began dating soon thereafter and developed a relationship described as one in which they "cared for each other quite a bit." However, Hopper had not severed all ties with Jacob. Around June 4, 1989, he and his parents were invited to attend the high school graduation of Hopper's son. At the reception which followed, Hopper introduced Jacob as her "fellow."

Later, Jacob discovered that Hopper was seeing another and had gone out of town with him. Jacob began searching for Hopper. Between June 29 and July 4, 1989, he called Hopper's son's fiance, inquiring if she knew where Hopper was. Jacob talked in a much louder and faster voice than the son's fiance had ever heard previously. Also, Jacob called Hopper's sister, inquiring as to Hopper's whereabouts.

Hopper had left with Etherton on a trip to Wyoming and, in the middle of July, moved into Etherton's residence. While watching Etherton and Hopper unload a pickup truck on July 28, 1989, one of Etherton's neighbors noticed Jacob standing by the rear corner of Etherton's house.

Immediately after arriving at her place of work at approximately 1 p.m. on August 1, 1989, Hopper stood impatiently outside her supervisor's office waiting to speak with him. As soon as the supervisor finished visiting with another person in his office, Hopper went in and sat down. She appeared "flushed," "very fidgety," and "visibly upset." The supervisor had never seen Hopper as agitated and angry as she was on that occasion.

Hopper told the supervisor that she had to talk with him and get something off her chest. She then reported that on that morning, August 1, after Etherton had come home from work, the two of them sat down and had coffee and a roll. When they finished, Etherton left again. Shortly thereafter, Hopper heard the door handle rattle and the doorbell ring. Believing it to be Etherton returning, she opened the door, only to find Jacob standing there. Jacob entered the house uninvited and stated that he had come to talk to her about getting back together. He

was very upset and his hands were shaking. Hopper told Jacob that it was too late and that she intended to marry Etherton. Jacob told her that he at least wanted to talk to her and that if she would not do that, he might do something drastic. Hopper had difficulty getting Jacob to leave, having to physically shove him out of the house. After Jacob's departure, Hopper locked all the doors and windows in the house and called Etherton at his place of work to tell him what had happened.

Hopper also reported to Jacob's mother that Jacob had been over to see her that morning, and Jacob admitted such to his mother. During the conversation, Jacob told his mother that he was going on vacation. He also so informed his father shortly after noon on August 1. Jacob appeared to his father to be upset. However, Jacob, who operated his own business, had a reputation as a "workaholic," was overworked, and had been planning to take a vacation for some time. Jacob had first told his mother in late spring of 1989 that he planned on taking a vacation and had so informed his landlord in early July 1989.

Jacob did not disclose his intended destination, mentioning only that he might visit his sister in Chicago. Prior to leaving, Jacob left a note on his parents' kitchen table, making his mother a director of his company. Jacob left on vacation from his business sometime between 2 and 3 p.m.

At approximately 3:45 a.m. on August 2, a coworker of Etherton's, who rented and lived in the basement of Etherton's house, awoke in his bedroom to use the restroom. Upon opening the door on his way there, he noticed glass on the floor and soon realized that the back door was open. Initially, the coworker believed that a cat had broken the glass; however, he then realized that the glass was broken from the outside. At this point, the coworker heard the upstairs floor "squeak." Becoming frightened, he retrieved his .22-caliber pistol from his nightstand and then went to the base of the stairs, where he heard three rapid gunshots. After hearing two to three more shots, two "high pitched" female screams, and a couple more shots, the coworker backed up and stood in the doorway to the restroom. He thereupon heard "another shot or so and then a thump," as if someone or something fell.

Dressed in only his underwear and a T-shirt, the coworker

then ran out the open back door with gun in hand, jumped a chain link fence, and, proceeding on foot, searched for the home of a man he believed to be a fire marshal. The coworker mistakenly went to the house of the presumed fire marshal's next door neighbor.

The coworker began "frantically" ringing the doorbell and beating on the door of the neighbor's home. The neighbor answered the door at approximately 3:50 a.m.; the coworker told him that someone had been shot and to call the police. The neighbor called the emergency number while the coworker remained outside.

Officer Larry Barksdale joined Officer Larry Nelson at the Etherton house at approximately 4 a.m. on August 2. After attempting to make entry through the front door, Barksdale discovered an open door and a window screen lying on the ground. The glass on the inner door was broken out, and the outer door was propped open with a rock. The house was completely dark, and the officers were forced to use their flashlights. Upon entering the house, Barksdale smelled the scent of blood. Both officers smelled the scent of gunpowder.

Nelson and Barksdale began making their trek through the house, soon discovering Etherton's body lying nude in the hallway. After radioing for help, the officers continued their search through the house. A faint voice crying for help was heard, and the officers proceeded into the northeast bedroom, where they found a nude and bleeding Hopper lying under a bed.

An ambulance arrived at the Etherton residence at approximately 4:16 a.m. The emergency medical technicians found Hopper to be alert but confused, combative, and screaming. She had lost blood and was suffering from shock; the ambulance personnel took her to a Lincoln hospital.

The ambulance arrived at the hospital at 4:41 a.m., and Hopper was admitted at 4:44 a.m. in critical condition. At 4:50 a.m., Hopper was intubated by a nurse anesthetist. The tube, which went from a respirator down into Hopper's lungs, blocked the vocal cords and prevented her from speaking. Thus, Hopper was forced to communicate by moving her head. At the time of her admission, Hopper was still anxious and

slightly combative.

The attending physician, Dr. John Cherry, evaluated Hopper's breathing, blood pressure, and circulation and found that Hopper was awake, alert, "intellectually intact," and able to communicate nonverbally. An initial observation by Cherry discovered an entrance wound in Hopper's right flank, an exit wound at the base of her neck, an entrance wound at the right face bone, and an apparent exit wound below the right ear. Damage to Hopper's liver and diaphragm was repaired. Complications arose and it became necessary to remove Hopper's right lung. No brain damage appeared to be present, as Hopper was given 100-percent oxygen as needed.

After surgery, at approximately 9:10 a.m. on August 2, Hopper was placed in the intensive care unit. Although Hopper was nonresponsive immediately after leaving surgery and being placed in intensive care, she soon started to respond to pain and appeared to be intellectually intact. A noon assessment found Hopper to be alert, oriented, calm, and awake.

At 12:10 p.m. on August 2, Hopper was given a small dosage of morphine to relieve pain. The anesthesiologist opined that Hopper was able to receive communications and respond appropriately at 12:15 p.m.

Hopper was visited at approximately 12:30 p.m. by her sister. When the sister first saw Hopper on August 2, Hopper was awake and acknowledged the sister's presence by squeezing the latter's hand. Hopper also shook her head in an affirmative fashion, nodding up and down. The sister inquired whether Hopper knew who "did this to her," to which Hopper shook her head affirmatively. The sister then asked Hopper, "Was it Steve," and, "Steve Jacob," to which Hopper shook her head up and down. This questioning was witnessed by an intensive care nurse. No further questions were asked at this time.

Hopper's sister left to bring others in to witness Hopper's responses. The intensive care nurse informed the sister that trauma patients often answer affirmatively to any question asked of them. In an attempt to ensure reliable responses from Hopper, the intensive care nurse asked Hopper whether there was snow on the ground and whether it was Christmastime. Hopper made eye contact and shook her head negatively to

both questions. The intensive care nurse testified that Hopper appeared oriented, made good eye contact, and was focused.

Hopper's sister, after leaving the intensive care unit, visited with Det. Doug Hansen regarding Hopper's responses. Hansen suggested that additional questioning of Hopper would be necessary. Hansen, as well as a hospital chaplain and Hopper's mother, then went into the unit at approximately 12:30 to 12:40 p.m., while Hopper's sister remained outside. The mother and the chaplain described Hopper as being very alert. The intensive care nurse described Hopper as appearing oriented. Hopper nodded and squeezed her mother's hand when the mother asked if Hopper knew who she was. Hopper was asked if she knew who had done this to her, to which Hopper nodded affirmatively. Hopper's mother then asked if it was Steve and whether it was Steve Jacob. In response to each question, Hopper nodded her head up and down. The chaplain, who had not previously met Hopper, asked Hopper if she knew who he was and whether it was wintertime; Hopper shook her head back and forth in a negative fashion. Hopper also responded to her mother's requests to wiggle specific fingers and toes. According to the anesthesiologist, Hopper was cognizant at 12:40 p.m. on August 2, 1989.

Hopper's sister visited Hopper seven to eight more times on August 2. The sister asked Hopper if she was in any pain, to which Hopper shook her head negatively, as well as whether she wanted her to place a wet washcloth on Hopper's head, to which she replied in the affirmative.

Officer Barksdale questioned Hopper at approximately 4:30 a.m. on August 3, 1989. Barksdale asked if Hopper knew what had happened to her, if she knew she had been shot, and if she knew who shot her. Hopper responded by nodding her head affirmatively. Barksdale then proceeded to ask Hopper if it was Jacob who shot her, to which she nodded her head yes. Hopper was asked if there was anyone else with Jacob, to which she moved her head back and forth indicating no. Hopper responded affirmatively when asked whether she was shot with a gun, whether she crawled under the bed after Jacob shot her, and whether there were a lot of shots fired. Barksdale asked Hopper if she called on the telephone; Hopper paused for a

moment and shrugged her shoulders. Barksdale then asked Hopper if she was going to be okay and if she was feeling better and knew she was safe, to each of which she nodded yes. Barksdale testified that Hopper appeared alert and conscious during his questioning. In the view of the anesthesiologist, Hopper was cognizant at 4:35 a.m. on August 3, the medications given to Hopper do not affect cognition, and the anesthetic administered to her does not affect memory. The anesthesiologist also opined that he has found that patients given morphine are often more cooperative and better able to understand questioning once the pain is relieved.

Cherry testified that Hopper's injury was not survivable. The intensive care nurse was of the opinion that Hopper suffered traumatic internal injuries to such a degree that survival was questionable.

Dr. Bob Bleicher, a pulmonary specialist who was called in to assist Cherry, first examined Hopper at 1:30 p.m. on August 2 and found her to be neurologically intact. In Bleicher's opinion Hopper was mentally alert and able, at around 12:15 p.m. and 12:40 p.m. on August 2 and at 4:35 a.m. on August 3, to give proper and appropriate responses to questioning. Bleicher was also of the view that Hopper realized she "had the ability to die from her injuries at the time that she gave [her statement]." A hospital nurse testified that he did not expect Hopper to survive her injuries.

Sometime between August 2 and August 7, Hopper wrote on a "magic slate" the letters "g" and "l" and possibly "a" and "s" before her sister and the others present realized that Hopper was requesting her eyeglasses.

On the morning of August 7, 1989, Hopper was mentally alert and able to respond to questions. However, she soon began having trouble breathing. At 1:19 p.m. on August 7, she was pronounced dead when, in a state of delirium and confusion, she extubated herself. Although the tube was promptly reinserted and other measures taken, hospital personnel were not able to resuscitate her. The pathologist concluded that Hopper would have died within a matter of minutes regardless of the extubation.

An optometrist had begun treating Hopper in February 1988

for nearsightedness. He testified that according to his records, Hopper began wearing contact lenses in 1966. After examining Hopper's glasses, the optometrist opined that Hopper's unaided vision was 20/300 to 20/400. However, Hopper's daughter testified at trial that in the early morning hours of August 3, while the daughter was standing 15 to 20 feet from Hopper's hospital bed, Hopper motioned with her hands to her daughter to come toward her. Hopper was not wearing her glasses at the time of her daughter's visit; neither is there any evidence that Hopper was wearing glasses when she was shot.

Dr. Beverley Mead, a psychiatrist associated with the Department of Psychiatry serving both the University of Nebraska and Creighton Medical Schools, reviewed the testimony of Hopper's mother and sister, Barksdale, Hansen, treating physicians, nurses, a pathologist, and relevant medical reports. Mead opined that there were many factors that would tend to have some impairment or negative effect on Hopper's cognitive abilities. Mead stated that "there is no question that [Hopper's] ability to communicate was impaired, not only for physical reasons but also because her brain and mind in her condition was not functioning as well as it would in a healthy alert person." However, Mead acknowledged that one "can have accurate statements coming from very seriously impaired people."

III. ANALYSIS

At issue is the district court's receipt into evidence of Hopper's statement to her supervisor on August 1 and her statements of August 2 and 3 while she was in the hospital. It is argued in this connection not only that the statements are inadmissible hearsay, but that their receipt into evidence compromised Jacob's right to confrontation as guaranteed by the U.S. and Nebraska Constitutions.

1. STATEMENT TO SUPERVISOR

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 1989). The reliability and circumstantial guarantees of trustworthiness of certain

nontestimonial statements have permitted courts to carve out various limited exceptions to the hearsay rule. In the absence of such an exception, hearsay statements are inadmissible. Neb. Rev. Stat. § 27-802 (Reissue 1989).

(a) Nature of Statement

One of these exceptions, commonly referred to as the "excited utterance" exception, excludes from the operation of the hearsay rule statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Neb. Rev. Stat. § 27-803(1) (Reissue 1989); *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

The underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *In re Interest of D.P.Y. and J.L.Y.*, 239 Neb. 647, 477 N.W.2d 573 (1991); *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990); *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), quoting 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence 803-33 (1992).

> "For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which 'requires a showing the statements were made without time for conscious reflection.' "

State v. Smith, 241 Neb. at 316-17, 488 N.W.2d at 37, quoting *In re Interest of D.P.Y. and J.L.Y., supra*.

We have written in the past that the determination as to the admissibility of an excited utterance generally rests within the discretion of the trial court and that the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. See, e.g., *In re Interest of R.A. and V.A., supra*; *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983). That statement appears to be an outgrowth of the regrettably overly broad and recently

rejected expression that the admission or exclusion of evidence is a matter left largely to the discretion of the trial court.

We have declared that 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. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992); *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Thus, language in cases such as *In re Interest of R.A. and V.A., supra*, and *State v. Lee, supra*, which suggests that the admission of an excited utterance is left to the discretion of the trial court rather than being controlled by § 27-803(1), is overruled.

Having cleared up the scope of our review on this issue, we turn our attention to the record. As summarized earlier, it establishes that Jacob's visit to the Etherton house was a startling event and that Hopper's statements related to that event. The visit frightened Hopper enough to induce her to secure all of the doors and windows in the house after Jacob's departure. Moreover, Hopper called Etherton and Jacob's mother to tell them what had happened. Thus, the record conclusively demonstrates that Hopper was distressed by Jacob's visit and that her statement to her supervisor was directly related to this startling event.

However, it is argued that the statements fail to meet the third prong of the excited utterance test—the contemporaneous requirement. It is asserted that the statement lacked the element of spontaneity necessary to qualify as an excited utterance, for Hopper had ample opportunity to reflect upon the event before communicating it to her supervisor. Therefore, the crucial issue is whether Hopper's statement was made while she was still under the stress of Jacob's visit. See, *State v. Plant, supra*; *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980).

The record is unclear as to the exact time of Jacob's exchange with Hopper at Etherton's house, only revealing that it occurred sometime in the morning, i.e., presumably anytime before 12 noon. Upon arriving at work at approximately 1 p.m. on August 1, 1989, her sales work not requiring her to keep

regular hours, she stood impatiently outside her supervisor's office waiting to speak with him. She appeared flushed, very fidgety, and visibly upset. The supervisor testified that he had never seen Hopper as agitated and angry as she was on August 1.

As this court stated in *State v. Plant*, 236 Neb. at 329, 461 N.W.2d at 264, "[A] declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event." Wigmore notes that " '[t]he true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue . . . .' " 6 John H. Wigmore, Evidence in Trials at Common Law § 1745 at 193 (James H. Chadbourn rev. 1976). Statements need not be made contemporaneously with the exciting cause but "may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated." *Id.* § 1750 at 203.

In *State v. Plant, supra*, we held that a child's statements 2 days after the stressful event were admissible as excited utterances. In *State v. Red Feather, supra*, wherein the defendant was convicted of first degree sexual assault, we held that statements made by the 7-year-old victim to her treating physician approximately 1 hour after the assault were admissible. See, also, *Starnes v. State*, 148 Neb. 888, 29 N.W.2d 795 (1947) (rape victim's complaints 3 to 4 hours after the offense held admissible as part of the res gestae).

By way of contrast, in *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992), we held the statements of a sexual assault victim made after she had had time to record the event in her diary did not qualify as an excited utterance, as there had been ample time for the victim to consciously reflect on the event. Likewise, a statement made 2 hours after an alleged rape was, in *State v. Castor*, 193 Neb. 86, 225 N.W.2d 420 (1975), held not to be spontaneous and therefore not part of the res gestae. However, the *Castor* opinion sheds little light on the degree of stress the declarant was under at the time she made the

statement. In *Markel v. Glassmeyer*, 132 Neb. 716, 273 N.W. 33 (1937), we held it to be reversible error to admit into evidence the plaintiff's testimony as to his wife's statement that she had been assaulted. The statement came "some hours" after the assault and miles from the situs of the assault. *Id.* at 719, 273 N.W. at 35. The *Markel* opinion is silent as to whether the declarant had any observable manifestations of stress from the assault. The pre-evidence-code case of *Callahan v. Prewitt*, 141 Neb. 243, 3 N.W.2d 435 (1942), held that a statement made 1 hour after an automobile accident was inadmissible as an "excited utterance." The opinion notes that the statements were "made after [the defendant] had had time to think the matter all over, and to anticipate a possible lawsuit, and certainly he realized the position he was in . . . ." *Id.* at 251, 3 N.W.2d at 438.

These cases set the outer boundary of the excited utterance rule and further emphasize the point that the analysis centers on the facts unique to each particular case. Here it is clear that Hopper exhibited observable manifestations that she made the statement while under the stress of excitement caused by Jacob's visit. The statement was thus an excited utterance.

(b) Right of Confrontation

It is further argued that in any event, admission of the statement violated Jacob's right to confrontation under U.S. Const. amend. VI, as made applicable to the states by U.S. Const. amend. XIV, *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), and under Neb. Const. art. I, § 11.

U.S. Const. amend. VI provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Neb. Const. art. I, § 11, provides, in relevant part, "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). See *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983).

We have also written that the mission of the Confrontation

Clauses is to advance practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991); *State v. Roy, supra.*

It is obvious that if the Confrontation Clauses were interpreted literally, they would require, on objection, the exclusion of any statement made by a declarant not present at trial; however, the right to confrontation is not absolute. *State v. Plant, supra.* In truth, however, while the clauses limit the use of hearsay testimony, they do permit its use under certain circumstances, despite a defendant's inability to confront the declarant.

Where it is established that the declarant is unavailable, the question becomes "whether the State, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, has carried its burden of proving that the [declarant's] statements . . . bore sufficient indicia of reliability to withstand scrutiny under the Clause." *Idaho v. Wright*, 497 U.S. 805, 816, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). Thus, the use of hearsay testimony does not violate the Confrontation Clauses if the State can demonstrate (1) the unavailability of the declarant and (2) that the declarant's statement bears adequate indicia of reliability.

"Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Idaho v. Wright*, 497 U.S. at 815, citing *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright*, 497 U.S. at 817. Accord *White v. Illinois*, ____ U.S. ____, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992).

Hopper's statement to her supervisor on August 1 is reliable and does not offend the Confrontation Clauses, for the excited utterance exception to the hearsay rule is one deeply rooted in the common law. See, *Stidum v. Trickey*, 881 F.2d 582 (8th Cir. 1989), *cert. denied* 493 U.S. 1087, 110 S. Ct. 1151, 107 L. Ed. 2d

1055 (1990); *Berrisford v. Wood*, 826 F.2d 747 (8th Cir. 1987), *cert. denied* 484 U.S. 1016, 108 S. Ct. 722, 98 L. Ed. 2d 671 (1988); *State v. Plant, supra.*

Consequently, the district court properly received into evidence the statement Hopper made to her supervisor.

2. HOSPITAL STATEMENTS

It is next urged that the statements Hopper made in the hospital were inadmissible. The claim is not only that the statements constituted inadmissible hearsay, but that foundation for their admission was lacking inasmuch as Hopper was not asked whether she was wearing her glasses or whether the area was illuminated when she was shot. In short, the contention is that the record does not show whether Hopper saw or otherwise perceived her assailant.

The district court ruled that the statements made August 2 were admissible as dying declarations under Neb. Rev. Stat. § 27-804(2)(b) (Reissue 1989) and under the residual exceptions contained in §§ 27-803(22) and 27-804(2)(e) and that the statement made on August 3 was admissible under the aforesaid residual exceptions.

(a) Dying Declaration Exception

Section 27-804(2)(b) renders admissible the statement of a declarant who is unavailable as a witness if the statement is made "while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." Thus, the essential element to the admission of a statement as a dying declaration is that the declarant be conscious of approaching death at the time of the making of the statement.

Dying declarations are to be received with great caution, necessitating a thorough judicial inquiry as to the declarant's sense of impending death. Obviously, a declarant's belief of impending death is best shown by express communication to that effect. However, it is not necessary that a declarant state in specific terms at the time of the making of the statement her or his consciousness of impending death. *Mathews v. State*, 111 Neb. 593, 197 N.W. 602 (1924); *Collins v. State*, 46 Neb. 37, 64 N.W. 432 (1895); *Fitzgerald v. The State*, 11 Neb. 577, 10 N.W.

495 (1881); *Rakes v. The People*, 2 Neb. 157 (1873). A declarant's consciousness of impending death may be established by evidence other than the declarant's own statement. Circumstances surrounding the death may be enough to show consciousness of impending death. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). See, also, *Reese v. Bara*, 479 F. Supp. 651 (S.D.N.Y. 1979); *Com. v. De Shields*, 335 Pa. Super. 89, 483 A.2d 969 (1984); *State v. Verrett*, 419 So. 2d 455 (La. 1982); *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981).

As Wigmore has noted:

> It has been contended that only the *statements of the declarant himself* could be considered for this purpose; or, less broadly, that the *nature of the injury alone* could not be sufficient, i.e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained.

(Emphasis in original.) 5 John H. Wigmore, Evidence in Trials at Common Law § 1442 at 295 (James H. Chadbourn rev. 1974).

Some courts have held that a declarant's sense of impending death may be inferred from the opinions of medical professionals. In *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970), the victim was severely beaten and shot during the course of a bank robbery. While in the hospital emergency room, the victim gave an account of the robbery. The attending physician had not told the victim that death was imminent, nor had the victim expressed an awareness thereof. The court nonetheless permitted the use of the physician's belief that due to the nature and severity of the injuries, the victim likely knew that his chances for living were " 'very slim' " as the basis for admitting the statement. *Id.* at 348. Quoting *Clyde Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892), the *Mobley* court held that a declarant's sense of impending death may be made to appear " 'from the nature and extent of

the wounds inflicted being obviously such that he must have felt or known that he could not survive.' " *Mobley*, 421 F.2d at 347.

Although there is no question that Hopper sustained serious injuries, that at least some of her medical care providers did not expect her to survive, and that at least one physician thought Hopper knew she might die, Hopper responded affirmatively when asked by Barksdale whether she understood she was "going to be okay." Although that last statement was made in the early morning hours of August 3, it raises substantial doubt as to whether Hopper at any time appreciated her impending death.

That being so, none of the statements Hopper made at the hospital qualify as dying declarations.

(b) Residual Exceptions

However, that determination does not settle whether the statements made at the hospital were otherwise admissible. Section 27-803(22) provides that even though the declarant is available as a witness, a statement not specifically covered by the other exceptions to the hearsay rule enumerated in that statute "but having equivalent circumstantial guarantees of trustworthiness" is nonetheless admissible

> if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Section 27-804(2)(e) provides a like residual exception to the hearsay rule as to a statement made by a declarant who is unavailable as a witness.

While we have said that the residual hearsay exception is to be used rarely and only in exceptional circumstances, *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), we have also ruled that where the declarant is dead, the specific exceptions of both §§ 27-803(22) and 27-804(2)(e) are applicable in determining the existence of equivalent circumstantial guarantees of trustworthiness. *State v. Beam*, 206 Neb. 248, 292 N.W.2d 302 (1980).

There is no dispute that the plaintiff-appellee State gave the requisite notice, and it is manifest that Hopper's statements were offered as evidence of a material fact, i.e., by whom was she shot. Furthermore, the record establishes that the statements were more probative on that point than any other evidence the State could procure through reasonable efforts in that, other than the perpetrator, she was the only person who could identify the killer, if anyone could do so. Thus, the critical issue is whether the circumstances surrounding the making of the hearsay statements by Hopper provided the guarantees of trustworthiness comparable to the other hearsay exceptions in the Nebraska Evidence Rules.

At least one jurisdiction, Georgia, has taken the position that where want of knowledge does not appear either from the statement itself or from other evidence in the case, it becomes a question for the jury to determine whether the declaration represented the primary knowledge of the declarant or merely the declarant's opinion. *Wright v. State*, 254 Ga. 484, 330 S.E.2d 358 (1985); *Bland v. State*, 210 Ga. 100, 78 S.E.2d 51 (1953); *Strickland v. State*, 167 Ga. 452, 145 S.E. 879 (1928).

However, the U.S. Supreme Court, in *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), in dealing with admissibility of hearsay in a criminal case, wrote:

> [A] statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Later, in *Idaho v. Wright*, 497 U.S. 805, 820, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), the U.S. Supreme Court stated,

"We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement *and that render the declarant particularly worthy of belief*" (emphasis supplied), and concluded:

> To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. . . . A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made may provide no basis for supposing that the declarant is particularly likely to be telling the truth—indeed, the circumstances may even be such that the declarant is particularly *un*likely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant's state-of-mind when he made the statements; the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.
>
> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

497 U.S. at 822-23.

Thus, testimonial accuracy and a witness' perception, memory, and narrative ability are practical concerns regarding any hearsay used for conviction of a defendant.

Aside from the several requirements which must be satisfied for admission of a statement under a residual exception, either § 27-803(22) or § 27-804(2)(e), the absolutely basic requirement is the "equivalent circumstantial guarantees of trustworthiness." According to 2 McCormick on Evidence

§ 324 at 362-64 (John W. Strong 4th ed. 1992):

> In applying the residual exceptions, the most important issue is whether the statement before the court offers "equivalent circumstantial guarantees of trustworthiness" to those offered by the various other specific hearsay exceptions. In making the admissibility determination, courts frequently employ the technique of comparing the circumstances surrounding the statement at issue to the closest hearsay exception. Courts also focus on particular factors suggesting trustworthiness of those statements. . . .
>
> Among these factors are: whether the declarant had a motivation to speak truthfully or otherwise, whether the statement was under oath, the duration of the time lapse between event and statement, *whether the declarant had firsthand knowledge*, and other factors going to the declarant's credibility.

(Emphasis supplied.) See, also, Michael H. Graham, Handbook of Federal Evidence § 803.24 at 941 (3d ed. 1991) (criteria which court should consider include "assurance of personal knowledge of the declarant of the underlying event").

As expressed in § 27-803(22) and § 27-804(2)(e), "these rules" of evidence, that is, the Nebraska Evidence Rules, as contained in chapter 27 of our statutes, also include Neb. Rev. Stat. §§ 27-104, 27-602, and 27-701 (Reissue 1989).

Section 27-104 in part provides:

> (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.
>
> (2) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Section 27-602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has

> personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of section 27-703, relating to opinion testimony by expert witnesses.

Section 27-701 states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

As stated in 1 McCormick on Evidence § 10 at 37-40 (John W. Strong 4th ed. 1992):

> The common law system of proof is exacting in its insistence upon the most reliable sources of information. This policy is apparent in the Opinion rule, the Hearsay rule and the Documentary Originals rule. One of the earliest and most pervasive manifestations of this attitude is the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact. The same requirement, in general, is imposed upon declarations coming in under exceptions to the hearsay rule, that is, the declarant must so far as appears have had an opportunity to observe the fact declared.
>
> . . . .
>
> The burden of laying a foundation by showing that the witness had an adequate opportunity to observe is upon the party offering the testimony. . . .
>
> . . . .
>
> One who has no knowledge of a fact except what another has told him cannot, of course, satisfy the present requirement of knowledge from observation.

According to Graham, *supra*, § 602.1 at 392-93, under the rule embodied in § 27-602:

> Admissible testimony is limited to matters of which the witness has acquired personal knowledge through any of [the witness'] own senses . . . .

> . . . [T]o be admitted pursuant to an exception contained in Rule 803 or 804, the declarant of the extrajudicial statement must also be shown to have personal knowledge as to the matter related.

1 McCormick on Evidence § 53 at 215 states that under the rule stated by § 27-104,

> [t]he judge is not, however, eliminated from the picture but divides his responsibility with the jury in the following manner. The judge requires the proponent to bring forward evidence from which the jury could find the existence of the preliminary fact. The opposing party may then bring in disputing evidence. If on all the evidence the judge determines that the jury could not find the existence of the preliminary fact, he excludes the evidence. Otherwise, the question is for the jury.

Thus, whether a witness had the opportunity to observe and did actually observe the subject matter of the witness' testimony is a preliminary question of admissibility determined by a trial court pursuant to § 27-104. Sections 27-602 and 27-701 require that a witness testifying to objective facts must have had means of knowing the facts from the witness' personal observation.

Federal courts, applying Fed. R. Evid. 104(b), have held that a trial court has an obligation to make a rule 104 preliminary determination regarding admissibility before admitting evidence pursuant to the rule found in the federal counterpart to § 27-602. See, *United States v. Davis*, 792 F.2d 1299 (5th Cir. 1986), *cert. denied* 479 U.S. 964, 107 S. Ct. 464, 93 L. Ed. 2d 409 (the proponent of testimony has the burden to show that the testimony represents a witness' personal knowledge); *U.S. v. Burnett*, 890 F.2d 1233, 1240 (D.C. Cir. 1989) (analysis of admissibility under section mirroring § 27-602 "proceeds under the rubric of Federal Rule of Evidence 104"); *M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc.*, 681 F.2d 930 (4th Cir. 1982) (evidence is inadmissible under Fed. R. Evid. 602 if a trial court finds that the witness could not have actually perceived or observed the subject matter of the witness' testimony). Accord, *Hallquist v. Local 276, Plumbers & Pipefitters Un.*, 843 F.2d 18 (1st Cir. 1988); *U.S. v. Owens*, 699 F. Supp. 815 (C.D. Cal. 1988), *aff'd* 889 F.2d 913 (9th Cir. 1989).

State courts, applying the counterparts of the rule contained in § 27-602, have held that a rule 104 determination is necessary for a witness' testimony under the rule embodied in § 27-602. E.g., *State v. Ranieri*, 586 A.2d 1094, 1098 (R.I. 1991) ("[i]n deciding whether a witness is competent for purposes of Rule 602, the trial justice must determine whether a witness had a sufficient opportunity to perceive the subject matter about which he is testifying"); *Burlington Northern R. Co. v. Hood*, 802 P.2d 458, 468 (Colo. 1990) ("[t]he personal-knowledge requirement of Rule 602 is 'a specialized application of the provisions of Rule 104(b) on conditional relevancy,' " quoting rule 602 advisory committee's note).

Regarding opinion testimony under § 27-701 from a witness who is not an expert, we excluded a police officer's testimony regarding the speed of automobiles involved in a collision, since the "officer did not observe the collision and his basis of testifying as to unsafe speed cannot be said to be based on any rational perception of the facts." *Belitz v. Suhr*, 208 Neb. 280, 285-86, 303 N.W.2d 284, 288 (1981).

At least one federal court has held that a rule 104 determination by the trial court is necessary before admitting evidence pursuant to Fed. R. Evid. 701. See *U.S. v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992) ("[t]he questions of whether the proffered opinion is rationally based on the witness's knowledge and whether it will be helpful are, like all preconditions to the admissibility of evidence, determinations to be made by the trial judge").

A number of federal courts have held that a declarant's personal knowledge of the facts composing the subject matter of a witness' testimony is a factor in determining whether an out-of-court statement is sufficiently reliable to be admitted under the residual hearsay exception to the Federal Rules of Evidence, which closely mirrors Nebraska's residual exception. See, *U.S. v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990), *questioned on other grounds*, *U.S. v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991) (declarant's "testimony concerned matters within her personal knowledge"); *United States v. Marchini*, 797 F.2d 759, 764 (9th Cir. 1986), *cert. denied* 479 U.S. 1085, 107 S. Ct. 1288, 94 L. Ed. 2d 145 (1987), *questioned on other*

grounds, *U.S. v. Gomez-Lemos, supra* (declarant's "testimony related strictly to facts within her observation and personal knowledge"); *United States v. Barlow*, 693 F.2d 954, 962 (6th Cir. 1982), *cert. denied* 461 U.S. 945, 103 S. Ct. 2124, 77 L. Ed. 2d 1304 (1983), *questioned on other grounds*, *U.S. v. Gomez-Lemos, supra* (declarant's testimony "conveyed information of which she had personal knowledge"); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied* 431 U.S. 914, 97 S. Ct. 2174, 53 L. Ed. 2d 224 (1977), *criticized on other grounds*, *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) (declarant "was relating facts . . . of which he possessed firsthand knowledge").

Other courts have reasoned and held that a hearsay statement, as is the situation in any in-court testimony, is inadmissible unless sufficient evidence shows that the declarant has personal knowledge regarding the subject matter of his or her testimony. In other words, the exceptions to the hearsay rule are subject to the conditions imposed for admissibility under other rules of evidence, such as the rule contained in § 27-602 (witness competency and personal knowledge) and § 27-701 (exclusion of opinion evidence and an inference by a nonexpert witness who lacks "perception" for the testimony). For example, in *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983), *cert. denied* 464 U.S. 865, 104 S. Ct. 204, 78 L. Ed. 2d 178, the Arizona Supreme Court held that it was error to admit hearsay statements regarding the identity of the person who had placed a bomb under the declarant's car, since there was no showing that the declarant had personal knowledge of the bomber's identity. The court found error despite its belief that the statements otherwise qualified as both excited utterances and dying declarations. According to the court:

> There is . . . a general requirement imposed on declarations coming in under all exceptions to the hearsay rule that the declarant, like witnesses, must have had an opportunity to observe or personal knowledge of the fact declared. *State v. Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981); *State v. Dixon*, 107 Ariz. 415, 489 P.2d 225 (1971); Ariz.R.Evid. 602.

State v. Adamson, 136 Ariz. at 255, 665 P.2d at 977. According

to the *Adamson* court, the declarant's statements that " 'the mafia was responsible' " and " 'Adamson did it' " should not have been admitted because the statements were not " 'based on events perceived by [the declarant] through one of the physical senses.' " *Id.* (quoting from 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 602[01] (1992)). See, also, *Jones v. State*, 52 Ark. 345, 12 S.W. 704 (1889) (when the declarant could not and, therefore, did not see who shot him, statement identifying the shooter was properly excluded); *State v. Weir*, 569 So. 2d 897, 900 (Fla. App. 1990), *decision quashed, holding approved* 591 So. 2d 593 (Fla. 1991) ("evidence showing the declarant did not accurately observe the facts recounted is allowed, and can be the basis for a court's exclusion of the dying declaration altogether"); 2 McCormick on Evidence § 313 at 331 (John W. Strong 4th ed. 1992) ("[i]f it appears that the declarant did not have adequate opportunity to observe the facts recounted, the declaration will be rejected for lack of firsthand knowledge"); 5 John H. Wigmore, Evidence in Trials at Common Law § 1445(2) at 304 (James H. Chadbourn rev. 1974) ("[t]he declarant must have had actual observation or opportunity for observation of the fact which he relates"). Cf. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (in reference to the Confrontation Clause, it was inconceivable that cross-examination could have shown that the declarant was not in a position to know whether the defendant participated in the murder which was the subject of the declarant's out-of-court statement).

The failure of anyone to inquire of Hopper whether she saw or otherwise perceived Jacob leaves the record in doubt as to whether the statement that Jacob did the shooting was an expression of Hopper's knowledge or merely an expression of her opinion. What we do know is that the shooting occurred at approximately 3:45 in the morning and that the premises were dark when the police arrived approximately 15 minutes later.

Under these conditions, the "equivalent circumstantial guarantees of trustworthiness" requirement has not been met; it cannot be said that the test of cross-examination would be of marginal utility. Consequently, the statements Hopper made in the hospital on August 2 and 3 are not admissible under the

residual exceptions to the hearsay rule.

IV. JUDGMENT

Because the district court erroneously admitted into evidence the statements Hopper made in the hospital declaring Jacob to be her assailant, we, as first stated in part I, reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KEITH EDWARD SMITH, APPELLANT.

494 N.W.2d 126

Filed January 15, 1993. No. S-88-465.

1. **Verdicts: 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, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. _____: _____. An appellate court will not set aside a guilty verdict in a criminal case where such a verdict is supported by relevant evidence, and only where evidence lacks sufficient probative force as a matter of law may the appellate court set aside a guilty verdict as unsupported by the evidence beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** Absent evidence showing an abuse of discretion, an appellate court will not disturb a sentence imposed within statutory limits.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Leonard P. Vyhnalek for appellant.

Keith Edward Smith, pro se.

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

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

GRANT, J.

After a jury trial, defendant, Keith Edward Smith, was convicted of attempted robbery, in violation of Neb. Rev. Stat. §§ 28-201 and 28-324(1) (Reissue 1989), and use of a knife in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). Defendant was sentenced on April 26, 1988, to 3 1/2 to 10 years in prison for the attempted robbery and 1 1/2 to 3 years for the use of a knife, with the sentences to run consecutively.

Defendant's trial counsel filed a notice of appeal on May 20, 1988, as well as appropriate praecipes for the preparation of the bill of exceptions and the transcript. On September 2, defendant's trial counsel filed a motion to withdraw on the grounds that defendant had commenced in the U.S. District Court for the District of Nebraska an action against trial counsel and other persons and that, therefore, a conflict of interest had been established between defendant and his counsel. On September 14, this court authorized trial counsel to withdraw, but denied defendant's motion to appoint counsel, filed in this court, "without prejudice to filing such application in the district court." Defendant filed two more motions for the appointment of counsel in this court, and similar orders were issued. Apparently, for reasons not known to this court, no motions for the appointment of counsel were filed at this time in the state district court. On January 20, 1989, this court granted the State's motion for summary affirmance of defendant's conviction.

Later, pursuant to a request from the office of the Attorney General of Nebraska, responding to an order issued in a case filed by defendant in the U.S. District Court, this court reinstated defendant's appeal on November 15, 1991, and ordered the trial court to appoint appellate counsel. Counsel, different from trial counsel, was appointed by the trial court, and the case was briefed, argued, and submitted to this court as a reinstated appeal.

In this court, defendant, through his counsel, assigns three errors, contending that the trial court erred in (1) determining that the evidence, if believed, was sufficient to sustain defendant's conviction; (2) imposing an excessive sentence; and

(3) allowing "trial counsel to withdraw without appointing counsel for appeal. . . ."

Defendant has also filed a "Pro Se Reply Brief." In this reply brief, defendant sets out two assignments of error: (1) that "[a]ppellant was not rendered effective assistance of Counsel at critical stages of his prosecution" and (2) that his sentence was excessive. We will not address the first pro se assignment, since it was raised in a reply brief, and in any event, in the best interests of defendant, the contentions in that assignment should be presented after a factual hearing on the merits of defendant's contention. The flood of factual allegations submitted to this court might then be considered by a factfinding court. The second pro se assignment will be considered with the same issue raised by counsel.

The third assignment of error raised by defendant's counsel is now moot, because as stated above, counsel has been appointed and the case has been submitted as an appeal.

With regard to defendant's first assignment of error raised by counsel as to the sufficiency of the evidence, the record before us shows the facts herein set out. JoAn and Henry Hauser manage the Stanford Motel in North Platte, Nebraska. On February 1, 1988, they were sitting in their apartment, which is connected to the lobby of the motel. Their 4-year-old grandson was seated in the lobby watching television. At approximately 10 p.m., their grandson summoned JoAn Hauser to attend a customer. When JoAn Hauser entered the lobby, she saw a man standing outside and looking in. When she opened the door for him, the man said he thought the door was locked and then requested a room.

JoAn Hauser walked back behind the counter, laid a customer card on the counter for him to fill out, and turned left toward the key rack. Feeling a bit uneasy by this time, JoAn Hauser turned to her husband, who was "just back" of the doorway, and gave him a "funny look." Henry Hauser walked to the back area of the motel and secured a gun. Meanwhile, JoAn Hauser placed a key on the counter. The man told her to step back from the counter and give him all the cash she had. When JoAn Hauser hesitated, the man threatened to kill her grandson, who was sitting by the lobby door, if she did not

comply.

At this point, the man raised his shirt and pulled a knife that was about 12 inches long and had a curved blade on it from underneath the shirt. Henry Hauser described the knife as looking like a "Green River Hunting Knife," which is similar to an old butcher knife that has been reworked. Upon seeing the man wave the knife in front of JoAn Hauser's face, Henry Hauser stepped in between JoAn Hauser and the man, pointed the gun at the man's face, and told him to drop the knife. The man did so. When Henry Hauser directed JoAn Hauser to call the police, the man stated that he would not wait for the police, and he picked up the knife from the floor and fled. Henry Hauser testified that he did not shoot the man because of the presence of JoAn Hauser and his grandchild.

Other evidence was adduced by the State as to certain footprints in the snow and certain tennis shoes defendant was wearing. This evidence was not conclusive as to any issue, but on the whole, evidence was brought forward which aided defendant, since the footprints in the snow seemed to be made by shoes smaller than the size of defendant's feet.

Further evidence adduced by the State established that the motel registration card, handled by the intruder on the night of the attempted robbery, did not show sufficient fingerprints for identification. A handwriting expert also testified that she had examined the registration card, but determined, on the basis that there was only a part of one word for examination, that there was no basis to conclude defendant had written the word, but also that there was no way to eliminate defendant as the possible writer.

Defendant testified that he did not commit the crimes with which he was charged. Defendant's wife testified that defendant was home with her the entire evening of February 1, 1988. On cross-examination by the State, however, defendant's wife admitted that she initially told the police that her husband was gone from the home on February 1 from 9 to 11 p.m. She explained that she had made a mistake in her original statements to the police.

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, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Byam*, 239 Neb. 186, 474 N.W.2d 688 (1991); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Andersen*, 238 Neb. 32, 468 N.W.2d 617 (1991); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

An appellate court will not set aside a guilty verdict in a criminal case where such a verdict is supported by relevant evidence, and only where evidence lacks sufficient probative force as a matter of law may the appellate court set aside a guilty verdict as unsupported by the evidence beyond a reasonable doubt. *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991).

There is no question that the Hausers were victims of an attempted robbery on February 1, 1988. The question is whether there was sufficient evidence, if believed, to prove beyond a reasonable doubt that the defendant committed the crime in question. The intruder was identified by two eyewitnesses, JoAn and Henry Hauser. JoAn Hauser described the assailant as wearing a blue flannel shirt with navy blue and white squares and a black line through it to make it plaid. Henry Hauser identified the assailant as wearing a two-tone blue plaid shirt with little white stripes in it. The minute differences in their descriptions are not sufficient to render their identification testimony unbelievable, as a matter of law, and overturn the convictions in this case.

The trial court did not err as contended in the first assignment of error set out by defendant's appellate counsel.

With regard to the assignment of error, made by both defendant's counsel and defendant pro se, as to the excessiveness of the sentence, we first note our established law. Absent evidence showing an abuse of discretion, an appellate court will not disturb a sentence imposed within statutory limits. *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990); *State v. Garza*, 236 Neb. 215, 459 N.W.2d 747 (1990). The maximum term of imprisonment for each offense is 20 years, and the minimum term is 1 year, with a possible fine of $25,000.

Because of the seriousness of the crime, the sentencing judge felt probation was inappropriate.

Although the defendant previously had not been convicted of a felony, other factors are taken into consideration in determining whether to imprison a convicted offender. See Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986). "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, 490-91, 476 N.W.2d 905, 914 (1991) (citing *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990)).

The 310-page presentence report demonstrates that defendant had a long history of psychological problems and also shows that there were valid concerns as to defendant's conduct and the safety of the public, particularly in view of defendant's convictions. A jury convicted defendant of a potentially violent crime. A 4-year-old child was threatened. We cannot say, as a matter of law, that the trial court abused its discretion in sentencing defendant.

The trial court did not err in any of the matters raised and considered herein. The judgment of the trial court is affirmed.

AFFIRMED.

ALAN G. EHLERS ET AL., APPELLEES, V. CECIL LEE PERRY, APPELLEE AND CROSS-APPELLANT, STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLEE AND CROSS-APPELLEE, CITY OF LINCOLN, DOING BUSINESS AS LINCOLN GENERAL HOSPITAL, APPELLANT, AND DAN L. MCCORD, INTERVENOR-APPELLEE.

494 N.W.2d 325

Filed January 15, 1993. No. S-89-1490.

1. **Equity: Claims: Property.** Interpleader is an equitable proceeding for determination of adverse claims by rival claimants to the same property or fund held by a third person as a stakeholder.
2. **Claims: Property.** Interpleader is based on the theory that adverse claimants should litigate between or among themselves their conflicting rights or claims to property or a fund, without involving the stakeholder who, disclaiming any interest in the property or fund, has, in good faith, offered to deliver, or has delivered, the property to a court or has deposited the money in the court's registry.
3. **Claims: Property: Liability.** The function or purpose of interpleader is to protect a disinterested person, as a stakeholder, against conflicting claims to property or a fund and to avoid the stakeholder's exposure to multiple liability or a multiplicity of suits.
4. **Equity: Claims: Property: Liability.** The equitable remedy of interpleader requires that (1) the same property or fund is subject to adverse titles or rival claims by at least two parties to the proceedings; (2) all adverse titles or rival claims must be based on or depend on, or be derived from, a common source; (3) the person who seeks relief by interpleader has neither an interest in nor a claim against the subject property or fund and, as a stakeholder, is legally disinterested in claims against the property or fund; (4) the stakeholder must have incurred no independent liability to the claimants; and (5) the stakeholder has delivered the property to a court or offers to deliver the property to a court, deposit the money into the court's registry, or otherwise dispose of the property or fund as the court may direct.
5. **Waiver: Words and Phrases.** A 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.
6. **Liens: Words and Phrases.** A lien is a right afforded by law to have an obligation satisfied out of particular property.
7. **Liens.** A lien does not displace a prior right or prior equities that are superior.
8. **Assignments: Words and Phrases.** An assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment.
9. **Assignments: Liens.** An assignment transfers to an assignee only the rights of the assignor; thus, if the assigned property is subject to a lien, the assignee takes the assigned property subject to the lien.

10. **Assignments: Consideration: Gifts.** Unless a transfer by an assignment is a gift, an assignment is effective only when supported by valid consideration.
11. **Contracts: Assignments: Gifts.** As in the ordinary case of a contract, an assignment, other than a gift, requires a benefit to the assignor or a detriment to the assignee.
12. **Trial: Stipulations: Parties: Attorneys at Law.** A stipulation, entered by parties to a proceeding or by their attorneys within the scope of authority for representation of the parties, establishes the fact or facts stipulated and binds the parties in the proceeding.
13. **Health Care Providers: Liens.** A hospital lien under Neb. Rev. Stat. § 52-401 (Reissue 1988) attaches on a patient's admission to the hospital for treatment.
14. **Statutes.** If a statute is susceptible to more than one reasonable construction, a court uses the construction that will achieve the statute's purpose and preserve the statute's validity.
15. **Health Care Providers: Liens: Assignments.** The statutory assignment to the Department of Social Services of Nebraska under Neb. Rev. Stat. § 68-1026 (Reissue 1990) is subject to a valid hospital lien acquired under Neb. Rev. Stat. § 52-401 (Reissue 1988) when the hospital lien exists before the Department of Social Services obligates itself to pay, or pays, medical assistance benefits pursuant to an application under § 68-1026.
16. **Subrogation: Words and Phrases.** Subrogation is substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.
17. **Subrogation: Liability.** To be entitled to subrogation, one must pay a debt for which another is liable.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded with direction.

Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

Dan L. McCord for appellee Perry.

Robert M. Spire, Attorney General, Royce N. Harper, and Wynn Clemmer for appellee Department of Social Services.

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

SHANAHAN, J.

The City of Lincoln, doing business as Lincoln General Hospital (LGH), appeals from the judgment of the district court for Seward County in an interpleader action concerning proceeds from settlement of a negligence claim covered by a

policy of automobile liability insurance issued by Battle Creek Mutual Insurance Company to Alan G. Ehlers.

INTERPLEADER

Nebraska's interpleader statute, Neb. Rev. Stat. § 25-325 (Reissue 1989), states:

> Upon the affidavit of a defendant, before answer in an action upon contract or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court may make an order for the safekeeping, or for the payment, or deposit in court . . . and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. . . . If such third party appear, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof.

Interpleader is an equitable proceeding for determination of adverse claims by rival claimants to the same property or fund held by a third person as a stakeholder. See *Klaber v. Maryland Casualty Co.*, 69 F.2d 934 (8th Cir. 1934).

Interpleader is based on the theory that adverse claimants should litigate between or among themselves their conflicting rights or claims to property or a fund, without involving the stakeholder who, disclaiming any interest in the property or fund, has, in good faith, offered to deliver, or has delivered, the property to a court or has deposited the money in the court's registry. See, *Klaber v. Maryland Casualty Co., supra*; *United Benefit Life Insurance Company v. Katz*, 155 F. Supp. 391 (E.D. Pa. 1957).

The function or purpose of interpleader is to protect a disinterested person, as a stakeholder, against conflicting claims to property or a fund and to avoid the stakeholder's exposure to multiple liability or a multiplicity of suits. *Texas v.*

Florida, 306 U.S. 398, 59 S. Ct. 563, 83 L. Ed. 817 (1939); *National Fire Ins. Co. v. Sanders*, 38 F.2d 212 (5th Cir. 1930); *First State Bank v. Citizens State Bank*, 10 F.R.D. 424 (D. Neb. 1950); *United Benefit Life Insurance Company v. Katz, supra.*

The equitable remedy of interpleader requires that (1) the same property or fund is subject to adverse titles or rival claims by at least two parties to the proceedings; (2) all adverse titles or rival claims must be based on or depend on, or be derived from, a common source; (3) the person who seeks relief by interpleader has neither an interest in nor a claim against the subject property or fund and, as a stakeholder, is legally disinterested in claims against the property or fund; (4) the stakeholder must have incurred no independent liability to the claimants; and (5) the stakeholder has delivered the property to a court or offers to deliver the property to a court, deposit the money into the court's registry, or otherwise dispose of the property or fund as the court may direct. See, *Strasser v. Commercial Nat. Bank*, 157 Neb. 570, 60 N.W.2d 672 (1953); *Citizens Nat. Bank of Wisner v. McNamara*, 120 Neb. 252, 231 N.W. 781 (1930); *Farming Corporation v. Bridgeport Bank*, 113 Neb. 323, 202 N.W. 911 (1925).

STANDARD OF REVIEW

> In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an 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.

Chambers-Dobson, Inc. v. Squier, 238 Neb. 748, 750, 472 N.W.2d 391, 395 (1991). Accord, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial

court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). Accord, *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

BASIS OF INTERPLEADER ACTION

The facts and documentary evidence were stipulated by the parties.

Perry's Admission to LGH.

On May 24, 1987, Cecil Lee Perry was injured while he was a passenger in an automobile that collided with a car driven by Alan G. Ehlers and, on May 24, was admitted to LGH for medical treatment and care. On May 27, Joseph Perry, on behalf of his brother, Cecil Perry, signed LGH's admission form which included: "STATEMENT TO PERMIT PAYMENT OF HOSPITAL AND MEDICAL INSURANCE BENEFITS TO HOSPITAL: . . . I request that payments of authorized benefits be made to the hospital in my behalf." Perry's injuries included a severed spinal cord at the sixth cervical vertebra, resulting in quadriplegia.

Perry's Application to DSS.

On June 30, as expressed in the parties' stipulation, "[s]ince Perry is quadriplegic, he signed 'X' on the application for assistance and assignment form" of the Nebraska Department of Social Services (DSS) which contained:

> I understand that as a condition of receiving medical assistance all rights to third party payments for medical care and services paid on behalf of myself and any other members of the assistance unit for whom I can legally make an assignment are assigned to the Nebraska Department of Social Services as required by State Law.
>
> I understand that third party payments include any payment owed under a court or administrative agency and payment under an insurance policy. Medicare benefits are not assigned.

Although a signature line was supplied near and below the foregoing and other printed material on page 17 of the DSS application, no signature appeared on page 17 at the place provided. However, opposite the printed direction "SIGN HERE" on page 18, Perry, as acknowledged by the stipulation, made his "X" in the space provided for the "Signature of Applicant."

Neb. Rev. Stat. § 68-1026 (Reissue 1986) provided in pertinent part:

> The application for medical assistance benefits . . . constitutes an automatic assignment of the rights specified in this section to the Department of Social Services effective from the date of eligibility for such benefits. . . .
>
> Pursuant to this section, the applicant or recipient assigns to the department any rights to medical care support available to him or her . . . and any rights to pursue or receive payments from any third party liable to pay for the cost of medical care and services arising out of injury, disease, or disability of the applicant or recipient . . . . Benefits assigned to the department by operation of this section may be directly reimbursable to the department by liable third parties . . . when prior notification of the assignment has been made to the liable third party.

Events After Perry's Application to DSS.

Perry was discharged from LGH on July 2. At that time, Perry's unpaid account at LGH reflected charges of $86,308.74. Perry was readmitted to LGH on July 26 and remained hospitalized until his discharge on July 30. The charges for Perry's second admission to LGH totaling $8,098.39 also were unpaid.

Attorney Dan L. McCord, pursuant to a written contingent fee contract dated July 31, undertook representation of Perry for one-third of any recovery on Perry's personal injury claim against Ehlers.

LGH, on August 5, served a "Notice of Hospital Lien" on Battle Creek concerning the charges for Perry's hospitalization from May to July. LGH based its lien on Neb. Rev. Stat. § 52-401 (Reissue 1988), which states in pertinent part:

> Whenever any person shall employ a . . . hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person shall claim damages from the party causing the injury, such . . . hospital . . . shall have a lien upon any sum . . . obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed . . . . In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services . . . except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

On August 17, pursuant to the June 30 application for medical assistance benefits, DSS made the first in a series of payments for Perry's medical expenses. On August 19, Perry was again admitted to LGH, and he was discharged on August 31. Unpaid charges for Perry's third admission to LGH were $21,902.64. Thereafter, in view of his condition, Perry was admitted to Madonna Professional Care Center. On September 3, DSS served on Battle Creek notice of DSS' subrogation interest under Neb. Rev. Stat. § 68-716 (Reissue 1986): "An application for medical assistance benefits shall give a right of subrogation to the Department of Social Services. Subrogation shall include every claim or right which the applicant may have against a third party when such right or claim involves money for medical care. . . ."

The Interpleader Action.

In early September 1987, McCord, on behalf of Perry, filed a negligence action against Alan Ehlers. The negligence action was settled with approval of Perry, LGH, and DSS for $100,000, subject to LGH and DSS' resolving their dispute concerning priority of their claims and liens regarding services rendered to Perry. When LGH and DSS were unable to resolve their differences, Battle Creek filed an interpleader action to determine distribution of the $100,000 settlement which Battle

Creek paid into court. Defendants in the interpleader action were Perry, LGH, and DSS, with McCord as an intervenor in the proceedings. The legal interests of Gary Ehlers, Loren Wiemer, and First Insurance as plaintiffs in the interpleader action are undisclosed.

The parties stipulated to the following: McCord, pursuant to his contingent fee contract with Perry for legal services, was entitled to one-third of Perry's recovery resulting from the Ehlers settlement by Battle Creek. LGH had provided Perry with hospital services totaling $116,309. DSS had paid $292,446 in medical expenses other than hospital expenses at LGH for Perry. The parties also stipulated facts bearing on Perry's general damages caused by the automobile accident, for example, Perry's age, education, employment history, permanent injury, and life expectancy.

LGH based its claim on the hospital lien under § 52-401. DSS based its claim on two theories: (1) the assignment specified in § 68-1026, which assignment, according to DSS, became effective and operated from May 1, 1987, determined by DSS to be the date of Perry's eligibility for medical assistance benefits, and (2) the right of subrogation pursuant to § 68-716. Although the date of May 1, 1987, might have some administrative significance for accounting purposes, neither DSS nor the record discloses why or how May 1, 1987, was determined as the date of Perry's eligibility for state benefits or when that determination was made.

On the basis of the stipulations, the court determined that McCord, LGH, and DSS had "compromised their claims and waived their statutory liens, if any, because they knew that the [$100,000] settlement was insufficient to satisfy any one of their individual liens and claims." Further, based on the evidence regarding Perry's injury from the automobile accident, the court found that if Perry's negligence action had gone to trial, Perry would have been awarded $4.85 million. Therefore, in order to arrive at a pro rata distribution of the $100,000 settlement fund, the court divided $100,000 by the amount of the hypothetical award, $4.85 million, resulting in a factor of .020618 applied to the amount of each claim asserted in the interpleader action. On that basis, the court ordered the

following distributions: McCord—$33,333; DSS—$6,030; LGH—$2,399; and Perry—$58,238, the balance of the $100,000 settlement fund after distributions to McCord, DSS, and LGH. Finally, the court concluded that, as the result of Perry's assignment of payments by a third party, DSS was entitled to Perry's distributive share of the $100,000 deposited in court, i.e., $58,238, in addition to DSS' share outright, $6,030.

ASSIGNMENTS OF ERROR

In this appeal, the parties have stipulated that McCord's attorney fee is no longer an issue, and consequently, they do not contest the ordered distribution of $33,333 from the settlement fund to McCord for his fee. Rather, the appellate disputes involve the balance of the settlement fund, $66,667, remaining after payment of McCord's fee.

LGH asserts that "there was no evidence to support the Court's conclusion that, in stipulating to settlement of Perry's personal injury claim, the parties waived their various liens against and claims to a share of the settlement proceeds" and claims that it had an assignment of the settlement fund as the result of the language in LGH's admission form and that the court erred by finding that Perry's assignment to DSS was superior to LGH's statutory lien under § 52-401. Perry has cross-appealed and, without denying his assignment to DSS, claims that the court erred in its judgment that Perry's assignment precluded his receiving any distribution from the $100,000 settlement fund.

WAIVER OF CLAIMS

"A 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." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986). Accord *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). See, also, *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992) (execution of child custody agreement was not irrevocable waiver of parental right to custody).

Although LGH and DSS obviously knew that the $100,000 settlement was insufficient to satisfy their individual claims,

nothing in the record indicates that LGH and DSS voluntarily or intentionally relinquished their claims for payment from the settlement fund. Consequently, we conclude, as a matter of law, that the district court erred in its finding that LGH and DSS had waived their statutory claims. Because the claims remained in effect, the district court should have determined the priority of claims by LGH and DSS and should not have resorted to Perry's hypothetical award as a basis for a pro rata distribution to the parties.

LIEN V. ASSIGNMENT

A lien is "a right afforded by law to have an obligation satisfied out of particular property." *Dupuy v. Western State Bank*, 221 Neb. 230, 233, 375 N.W.2d 909, 912 (1985). A lien does not displace a prior right or prior equities that are superior. See, *Verschoor v. Miller*, 259 Iowa 170, 143 N.W.2d 385 (1966); *Briley v. Madrid Improvement Co.*, 255 Iowa 388, 122 N.W.2d 824 (1963). On the other hand, an assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment. See *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991). An assignment transfers to an assignee only the rights of the assignor; thus, if the assigned property is subject to a lien, the assignee takes the assigned property subject to the lien. See *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980). Unless a transfer by an assignment is a gift, an assignment is effective only when supported by valid consideration. See, *Abraham v. Abraham*, 203 Neb. 384, 279 N.W.2d 85 (1979); *Scott v. First Nat. Bank, Adm.*, 224 Md. 462, 168 A.2d 349 (1961); *Robert S. Pinzur, Ltd. v. The Hartford*, 158 Ill. App. 3d 871, 511 N.E.2d 1281 (1987); *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985); *Sheeran v. Sitren*, 168 N.J. Super. 402, 403 A.2d 53 (1979). As DSS points out, consideration for a contract requires either a benefit to the promisor or a detriment to the promisee. See, *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984). As in the ordinary case of a contract, an assignment, other than a

gift, requires a benefit to the assignor or a detriment to the assignee.

Although LGH argues that the provision in its admission form, "STATEMENT TO PERMIT PAYMENT OF HOSPITAL AND MEDICAL INSURANCE BENEFITS TO HOSPITAL: . . . I request that payments of authorized benefits be made to the hospital in my behalf," results in Perry's assignment of the $100,000 settlement fund, the particular language in LGH's admission form has but one reasonable meaning: a patient's hospital and medical insurance benefits are payable directly to LGH rather than to the patient. The settlement fund from Perry's automobile accident is not derived from hospital and medical insurance benefits. Consequently, we conclude that the designated language in LGH's admission form is not an assignment of the settlement fund deposited in the interpleader action.

LGH next argues that Perry's assignment to DSS was ineffective because the DSS application lacks Perry's signature at the place internally specified for written assignment of Perry's right to receive payments from a third party. None of the parties disputes that Perry made his "X" at the place provided for an applicant's signature on the last page of the DSS application for medical assistance benefits. Moreover, for trial of the interpleader action, the parties stipulated that Perry "signed 'X' on the application for assistance." A signature is "whatever mark, symbol or device one may choose to employ as representative of himself [or herself]." *Griffith v. Bonawitz*, 73 Neb. 622, 627, 103 N.W. 327, 329 (1905). A stipulation, entered by parties to a proceeding or by their attorneys within the scope of authority for representation of the parties, establishes the fact or facts stipulated and binds the parties in the proceeding. See *White v. Mertens*, 225 Neb. 241, 245, 404 N.W.2d 410, 413 (1987): "Parties are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances" (citing *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977)). See, also, *State v. Davis*, 224 Neb. 205, 397 N.W.2d 41 (1986); *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972). Since the stipulation is binding on the parties in the present action and appeal, LGH is unable to

contradict the stipulated fact that Perry signed the DSS application. Because the application was signed by Perry, resulting in a statutory assignment pursuant to § 68-1026, we reject LGH's contention that Perry's application was formally invalid due to the absence of his signature at the particular place provided beneath the printed assignment contained in the DSS application.

Therefore, as a question presented for the first time to this court, the key question in determining priority of the interests acquired by LGH and DSS is the time at which LGH's lien and the assignment to DSS became legally effective.

In *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 284, 475 N.W.2d 901, 905 (1991), we held that a hospital lien "attaches upon admission of the patient to the hospital for treatment." Thus, LGH's lien attached on May 24, 1987, when Perry was admitted for hospital care. On August 5, LGH satisfied the notice requirement of § 52-401 by serving written notice on Battle Creek and Ehlers concerning LGH's hospital lien.

If by itself a DSS application under § 68-1026 operates as a transfer of an applicant's right to receive payments from a third party, DSS would be entitled to receive such payments without obligating itself to pay medical assistance benefits or without paying medical expenses on behalf of the applicant, both of which would be a classic case of DSS' getting something for nothing. Therefore, in the present case, Perry's assignment to DSS became legally effective either on the date on which DSS obligated itself to pay medical expenses pursuant to Perry's application, a date undisclosed in the record, but obviously sometime after June 30, 1987, or on August 17, the date on which DSS commenced payments on behalf of Perry for his medical expenses necessitated by the automobile accident. Thus, the benefit to Perry was DSS' first payment of his medical expenses, and conversely, the detriment to DSS was its payment of medical expenses on Perry's behalf. Consequently, Perry's assignment to DSS became legally effective on August 17 after LGH's lien had attached on May 24.

However, given the language of § 68-1026, the dispositive issue concerning LGH and DSS is whether the statutory

assignment to DSS, resulting from Perry's application for benefits, is retroactive to May 1, 1987, asserted by DSS as the date of Perry's eligibility for state benefits, so that the assignment to DSS takes precedence over LGH's lien, which attached on May 24.

While an interpretation of § 68-1026, albeit a somewhat dubious interpretation, might be that "eligibility for such benefits" is not expressly restricted to the time after an application under § 68-1026, one then encounters the incongruity that an applicant is eligible for medical assistance benefits before occurrence of the event that necessitates the medical expenses which are the basis of the application. In Perry's situation, according to DSS, Perry became eligible for medical benefits more than 3 weeks before the accident that caused the injuries which were the basis of his application to DSS. Would that all government operated so efficiently.

However, in our examination of § 68-1026, we find no statutory language expressing a clear legislative intent that an assignment to DSS is retroactive and thereby supersedes a valid hospital lien acquired under § 52-401 when the hospital lien has attached before DSS obligates itself to pay, or does pay, medical assistance benefits in response to an application under § 68-1026. Thus, if Perry's June 30 application under § 68-1026 resulted in an immediate statutory assignment that was retroactive to May 1, determined by DSS as the date of Perry's eligibility for benefits, then the statutory assignment to DSS would circumvent LGH's lien and would be superior to the hospital's lien against the settlement fund in the interpleader action. In the foregoing situation, and through circumvention by retroactivity of the statutory assignment, DSS would eliminate a property right validly acquired by LGH on May 24 under § 52-401, thereby raising a serious constitutional question whether the State had unconstitutionally deprived LGH of its property in the form of a valid statutory lien. If a statute is susceptible to more than one reasonable construction, a court uses the construction that will achieve the statute's purpose and preserve the statute's validity. See, *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984); *State ex rel. Johnson v. Marsh*, 149 Neb. 1, 29 N.W.2d 799 (1947). See, also,

Union Stock Yards Co. v. Nebraska State Railway Commission, 103 Neb. 224, 170 N.W. 908, *modified* 103 Neb. 224, 172 N.W. 528 (1919).

Therefore, we now hold that the statutory assignment to DSS under § 68-1026 is subject to a valid hospital lien acquired under § 52-401 when the hospital lien exists before DSS obligates itself to pay, or pays, medical assistance benefits pursuant to an application under § 68-1026. For that reason, LGH's lien, validly acquired before DSS made payments pursuant to Perry's application for medical assistance benefits, is superior to DSS' statutory assignment under § 68-1026.

Since LGH charged Perry $86,308.74 for care during his initial hospital admission that commenced on May 24, 1987, it is immaterial and, therefore, undecided, whether LGH's claim is based on the aggregate of charges reflected in three distinct liens for separate hospital confinements, that is, the sum of all charges for multiple admissions to the hospital, or whether LGH's claim is based on one continuing lien for care commenced on May 24 as the result of the automobile accident and concluded on August 31 at a charge of $116,309. Before Perry's assignment to DSS became legally effective, the charges for his initial hospital admission alone were $86,308.74, an amount exceeding the settlement fund of $66,667 available for distribution after McCord's fee. Therefore, LGH's charges, included within its hospital lien, exceed the amount of the settlement fund available for distribution through the interpleader action.

DSS' SUBROGATION RIGHT

DSS fares no better with its claim based on a subrogation right acquired under § 68-716 rather than a statutory assignment effected pursuant to § 68-1026.

Subrogation is substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. See, *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990); *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange*, 204 Neb.

414, 282 N.W.2d 601 (1979); *Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

" ' " 'Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.' " ' " *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. at 194, 459 N.W.2d at 734. To be entitled to subrogation, one must pay a debt for which another is liable. See, *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange, supra*; *Luikart v. Buck*, 131 Neb. 866, 270 N.W. 495 (1936); *Garrity v. Rural Mut. Ins. Co., supra*; *In re Anchor State Bank*, 234 Wis. 261, 291 N.W. 329 (1940); *Kansas City Title & Trust Co. v. Fourth Nat'l Bank*, 135 Kan. 414, 10 P.2d 896 (1932).

Thus, DSS did not acquire a subrogation right until August 17, 1987, when DSS began paying Perry's medical expenses. Since DSS began payment on behalf of Perry well after LGH's lien attached, DSS' subrogation right is inferior to LGH's lien.

PERRY'S CROSS-APPEAL

In his cross-appeal, Perry contends that the court erred in concluding that the assignment under § 68-1026 entitled DSS to receipt of Perry's share of the settlement proceeds. However, since we have determined that satisfaction of LGH's lien will consume all the settlement proceeds after the distribution for McCord's fee, resolution of any dispute between Perry and DSS is unnecessary under the circumstances.

CONCLUSION

Because the district court erred in finding that LGH and DSS had waived their individual and statutorily based claims against the settlement fund deposited in the interpleader action and erred in finding that Perry's assignment to DSS was superior to LGH's lien, we reverse the district court's judgment and remand this cause to the district court with direction to enter judgment for LGH and distribute to LGH $66,667, the sum remaining in the settlement fund after distribution of $33,333 to McCord for his attorney fee.

REVERSED AND REMANDED WITH DIRECTION.

BIENVENIDA JARAMILLO, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARMEN LUPE JARAMILLO, DECEASED, APPELLEE, V. MERCURY INSURANCE COMPANY, A CORPORATION, APPELLANT. RUBY JARAMILLO AND BIENVENIDA JARAMILLO, AS LEGAL GUARDIAN AND NEXT FRIEND OF RUBY JARAMILLO, APPELLEES, V. BIENVENIDA JARAMILLO, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARRYL A. ORTIZ, DECEASED, APPELLEE, AND MERCURY INSURANCE COMPANY, A CORPORATION, APPELLANT. CINDY JARAMILLO AND BIENVENIDA JARAMILLO, AS LEGAL GUARDIAN AND NEXT FRIEND OF CINDY JARAMILLO, APPELLEES, V. BIENVENIDA JARAMILLO, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARRYL A. ORTIZ, DECEASED, APPELLEE, AND MERCURY INSURANCE COMPANY, A CORPORATION, APPELLANT.

494 N.W.2d 335

Filed January 15, 1993. Nos. S-90-275, S-90-962, S-90-963.

1. **Contracts.** The validity of a contract is to be determined by the lex loci contractus, that is, by the law of the place where the contract was made, unless there is something in the contract which is prohibited by express statute or infringes on some positive rule of public policy.
2. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court lacks jurisdiction to entertain appeals from other than final orders.
3. _____: _____: _____. Ordinarily, an order in a civil action, that is to say, in a cause brought under the provisions of chapter 25 of our statutes, is final when no further act of the trial court is required to dispose of the cause.
4. **Summary Judgment: Liability: Appeal and Error.** Generally, an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not appealable.
5. **Final Orders.** An order which affects a substantial right in an action and which in effect determines the action and prevents a judgment is final.
6. **Insurance: Final Orders: Appeal and Error.** An order declaring an insurer has a duty to defend is final and appealable.
7. **Summary Judgment.** Summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law.
8. **Proof.** Generally, the law of Nebraska governs the placement of the burden of proof.
9. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Judgment in No. S-90-275 reversed, and

cause remanded with direction. Judgments in Nos. S-90-962 and S-90-963 affirmed.

Richard L. Walentine and James G. Bitzes, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

John B. Ashford, of Bradford, Coenen & Ashford, for appellees.

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

CAPORALE, J.

I. INTRODUCTION

Each of these three cases, which were consolidated for briefing and argument in this court, arises out of an automobile accident that occurred on July 15, 1986, in Dodge County, Nebraska, when the automobile owned by the decedent Carmen Lupe Jaramillo and occupied by her and her two minor children, appellees Ruby and Cindy Jaramillo, and which was driven by Carryl A. Ortiz, collided with a truck. As a result, both the driver and owner were killed and the two children were injured.

In her capacity as the personal representative of the owner's estate, appellee Bienvenida Jaramillo brought case No. S-90-275 against the owner's automobile liability insurer, the appellant, Mercury Insurance Company, for a declaration that the insurer was obligated to pay the judgment she had earlier obtained against the driver.

Appellee Ruby Jaramillo and appellee Bienvenida Jaramillo, in her capacity as legal guardian and next friend of Ruby Jaramillo, brought case No. S-90-962 against Bienvenida Jaramillo as personal representative of the driver's estate and against appellant Mercury. This suit seeks damages from both the driver's estate and Mercury as the driver's insurer.

Appellee Cindy Jaramillo and appellee Bienvenida Jaramillo, this time in her capacity as legal guardian and next friend of Cindy Jaramillo, brought case No. S-90-963 against Bienvenida Jaramillo, again in her capacity as personal representative of the driver's estate, and against appellant Mercury. This suit also seeks damages from both the driver's

estate and Mercury as the driver's insurer.

In each case, the district court sustained the appellees' motions for summary judgment and declared that Mercury's policy provided coverage for the death in the one instance and the injuries in the other instances. Mercury has appealed, asserting, in summary, that the court erroneously interpreted its policy.

For the reasons elucidated hereinafter, we reverse the judgment of the district court in the owner's case (No. S-90-275) and direct that the cause be dismissed. In the children's cases (Nos. S-90-962 and S-90-963), we affirm the judgments of the district court.

II. FACTS

The owner, who was the natural mother of the children described earlier, was unmarried at the time of the accident and was a resident of Los Angeles County, California. The driver was likewise a resident of that location. Bienvenida Jaramillo is the maternal grandmother of the two minor children.

The owner, driver, and two children had spent the 10 days prior to the accident visiting the owner's sister in Bristow, Nebraska. At the time of the fateful event, they were en route to visit the owner's brother in Chicago, Illinois, and the driver was operating the owner's automobile with the owner's permission.

At all relevant times, Mercury was a corporation organized and doing business by virtue of the laws of California and was authorized by that state to issue automobile liability policies. The policy in question was in full force and effect on the day of the accident, named the owner as the insured, and on the page declaring the applicable coverages listed the automobile involved as one of the vehicles insured.

Under the liability portion of the policy, Mercury undertakes to "pay on behalf of the insured all sums . . . which the insured shall become legally obligated to pay as damages because of . . . bodily injury **sustained by any person other than an insured** . . . arising out of the ownership or use of the owned automobile . . . ." (Emphasis in original.)

The policy also reads, in pertinent part:

> **Persons Insured:** The following are insured . . .

> (a) with respect to the owned automobile
>
> (1) the named insured and any relative,
>
> (2) any other person using an owned automobile, with the permission of the named insured, and persons residing with such permissive user and related to such permissive user by blood, marriage or adoption, including wards and foster children . . . .

(Emphasis in original.)

The policy next provides that "**[n]amed [i]nsured** means the individual identified as such in the declarations" and that "**[i]nsured** means a person . . . described under 'Persons Insured.' " (Emphasis in original.) "Relative" is defined, so far as is relevant to our inquiry, as "a person who resides with the named insured and is related to the named insured by blood . . . ." "Use of a motor vehicle" is defined as the "operating, maintaining, or loading and unloading thereof." "Owned Automobile" is defined as a "motor vehicle listed in the declarations."

The policy also reads:

> **Exclusions:** *This policy does not apply . . .*
>
> . . . .
>
> *. . . to liability for bodily injury to an insured or liability for bodily injury to an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured, including, in both instances, those persons who would have otherwise been included within this policy's definition of an insured but who are excluded from coverage while operating or using a motor vehicle.*

(Emphasis in original.)

III. ANALYSES

The parties have treated these cases as if the adjudication in the owner's suit would necessarily determine the adjudication in the children's suits; however, as foreshadowed in part I above, such is not so. For that reason, we treat the two categories separately.

1. Owner's Case

In substance, Mercury's position is that although as one driving a listed automobile with the owner's permission the

driver was unquestionably an insured, Mercury is nonetheless not obligated to pay the judgment against the driver's estate because the beneficiary of that judgment, the owner's estate standing in the shoes of the owner, was itself an insured and thus within the aforequoted exclusion. The owner's estate, on the other hand, argues, in substance, that the use of the phrases "named insured," "an insured," and "the insured" renders the policy unclear and ambiguous, requiring that it be construed in favor of the owner's estate, as was done by the district court.

(a) Applicable Law

Obviously, since the policy was issued in California and we sit in Nebraska, the threshold question is under what state's law the policy is to be tested.

Our rule is that the validity of a contract is to be determined by the lex loci contractus, that is, by the law of the place where the contract was made, unless there is something in the contract which is prohibited by express statute or infringes on some positive rule of public policy. *First Mid America Inc. v. MCI Communications Corp.*, 212 Neb. 57, 321 N.W.2d 424 (1982); *Jorgensen v. Crandell*, 134 Neb. 33, 277 N.W. 785 (1938). The term "contract" includes policies of insurance. See, *Exstrum v. Union Casualty & Life Ins. Co.*, 167 Neb. 150, 91 N.W.2d 632 (1958); *Lawrence v. Equitable Life Ins. Co.*, 128 Neb. 72, 257 N.W. 530 (1934).

Thus, we analyze this dispute over the interpretation of the policy under the law of California, leaving for consideration in section (c)(ii) of this part of the opinion whether there is any Nebraska statute or policy which prevents application of that law.

(b) Interpretation of Policy

Under the law of California, the words used in an insurance policy are to be interpreted according to the plain meaning which a layperson would ordinarily attach to them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists. *National Auto. & Cas. Ins. v. Underwood*, 9 Cal. App. 4th 31, 11 Cal. Rptr. 2d 316 (1992), citing *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982).

> On the other hand, "any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and . . . if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates." . . . The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy. . . . Its effect differs, depending on whether the language to be construed is found in a clause providing coverage or in one limiting coverage. "Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured . . . exclusionary clauses are interpreted narrowly against the insurer. . . ." . . . . "An insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again, 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect' . . . thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' . . ."

Pisciotta, 30 Cal. 3d at 807-08, 640 P.2d at 768, 180 Cal. Rptr. at 632. See, also, *McGreehan v. California State Auto. Ass'n*, 235 Cal. App. 3d 997, 1 Cal. Rptr. 2d 235 (1991).

" 'In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract. . . .' " *Fireman's Fund Ins. v. Allstate Ins.*, 234 Cal. App. 3d 1154, 1169, 286 Cal. Rptr. 146, 155-56 (1991), quoting *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal. App. 3d 1127, 266 Cal. Rptr. 422 (1990).

An oft-stated rule in California is that "a policy will be construed to protect an additional insured against a claim for injuries suffered by a named insured unless such a risk is expressly and unambiguously excluded." *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 200, 514 P.2d 953, 957, 110 Cal. Rptr. 1, 5 (1973). An exclusionary clause "must be

conspicuous, plain and clear." *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962).

"A policy provision is ambiguous if it is capable of at least two reasonable constructions." *Underwood*, 9 Cal. App. 4th at 39, 11 Cal. Rptr. 2d at 319, citing *Producers Dairy Delivery Co. v. Sentry Ins.*, 41 Cal. 3d 903, 718 P.2d 920, 226 Cal. Rptr. 558 (1986). "An ambiguity may appear either on the face of the policy or when a provision is applied to a particular claim for benefits." *Castro v. Fireman's Fund Am. Life Ins.*, 206 Cal. App. 3d 1114, 1119, 253 Cal. Rptr. 833, 835 (1988), citing *Rullman v. State Farm Mut. Automobile Ins. Co.*, 8 Cal. App. 3d 606, 87 Cal. Rptr. 551 (1970).

Thus, the first task in determining whether an insurance policy is ambiguous is to determine whether the policy is "reasonably susceptible of a construction other than that found by the trial court." *Producers Dairy Delivery Co.*, 41 Cal. 3d at 912, 718 P.2d at 925, 226 Cal. Rptr. at 563.

It appears, as Mercury asserts, that the exclusionary language in the policy is derived from the California Insurance Code. Cal. Ins. Code § 11580.1 (West 1988) states, in relevant part:

> (c) In addition to any exclusion as provided in paragraph (3) of subdivision (b), the insurance afforded by any such policy of automobile liability insurance to which subdivision (a) applies, including the insurer's obligation to defend, may, by appropriate policy provision, be made inapplicable to any or all of the following:
>
> . . . .
>
> (5) Liability for bodily injury to an insured or liability for bodily injury to an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured.

The term "insured" is defined in Cal. Ins. Code § 11580.06 (West 1988), which states that this term of art "shall include the person or persons to whom any policy subject to this article is issued as named insured and any other person to whom coverage is afforded under the terms of any such policy."

The California code goes further by differentiating between "the insured" and "an insured," as used in § 11580.1(c)(8):

> The term "the insured" as used in paragraphs (1), (2), (3), and (4) shall mean only that insured under the policy against whom the particular claim is made or suit brought. The term "an insured" as used in paragraphs (5) and (6) shall mean any insured under the policy including those persons who would have otherwise been included within the policy's definition of an insured but, by agreement, are subject to the limitations of paragraph (1) of subdivision (d).

Therefore, the issue essentially becomes how the phrase "an insured," as used in the policy, is treated under California law.

In *Allstate Ins. Co. v. Condon*, 198 Cal. App. 3d 148, 243 Cal. Rptr. 623 (1988), the court determined the enforceability of an insurance policy exclusion that excluded coverage in certain instances involving "a person insured." The claimant argued that the term "a person insured" was ambiguous, thus necessitating nonenforcement of the exclusion under California law. The court, however, interpreted § 11580.1(c)(8) to state that " 'an insured' is defined as referring to all insureds under the policy, contrasted to one insured person when identified as 'the insured.' " *Condon*, 198 Cal. App. 3d at 153, 243 Cal. Rptr. at 626.

> It is true the Allstate policy herein refers to "*a* person insured". . . . "A" and "an" are analogous modifiers; one or the other is used dependent upon whether the word it modifies begins with a consonant or a vowel sound. . . . If Allstate had used the term "an person insured," the policy provision would have been grammatically incorrect. Because proper grammar necessitated this deviation from the precise statutory language, for purposes of section 11580.1, subdivision (c), "a person insured" is the functional analog of "an insured person." The Insurance Code thus defines "a person insured" as "any person insured under the policy."

(Emphasis in original.) *Condon*, 198 Cal. App. 3d at 153-54, 243 Cal. Rptr. at 626. Therefore, in accordance with this interpretation, "an insured," the language used in the subject

exclusion, means "any person insured under the policy."

In *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 514 P.2d 953, 110 Cal. Rptr. 1 (1973), a case relied upon by the owner's estate, the California Supreme Court heard three consolidated appeals involving the interpretation of identical automobile insurance policies. In each of the consolidated cases, the owner of an automobile, while riding as a passenger in his own automobile, was injured or killed in an accident caused by the negligence of the driver of the automobile. The owners held insurance policies providing liability coverage to permissive users of the owned automobile for injuries caused to "other persons," but excluded liability coverage for injury caused to "the insured." Because the parties advanced no less than three alternative interpretations of the exclusionary clause, the court concluded that the exclusions were ineffective, for they were not phrased in clear, plain, and unmistakable language. But see *Schwab v. State Farm Fire & Cas. Co.*, 27 Ariz. App. 747, 558 P.2d 942 (1976), declaring *Jacober* to be contra to the weight of authority.

Indeed, *Jacober* was distinguished in *State Farm Mut. Auto. Ins. Co. v. Hartle*, 59 Cal. App. 3d 852, 131 Cal. Rptr. 141 (1976). In *Hartle*, the court was faced with facts similar to those in the present case; therein a named insured was injured while riding as a passenger in her own automobile, which was being driven by a permissive operator. The named insured's insurance policy contained various exclusionary clauses, including one that provided that the insurance did not apply to " 'bodily injury to any insured or any member of the family of an insured residing in the same household as the insured.' " *Id.* at 855, 131 Cal. Rptr. at 143. The *Hartle* court differentiated its case from *Jacober* by noting that in *Jacober* the California Supreme Court "did not consider the effect of the Insurance Code provisions . . . ." *Hartle*, 59 Cal. App. 3d at 856, 131 Cal. Rptr. at 144. Indeed, the California Legislature did not enact § 11580.1 until 1970, after the events giving rise to the causes of action in *Jacober* had occurred.

Noting that the "*any* insured" language appearing in the policy differed from the "*an* insured" language found in § 11580.1, the *Hartle* court concluded that "the meaning of the

two terms appears to be the same, particularly in view of the specific language of subdivision (c) which states that 'The term "an insured" as used in paragraphs (5) and (6) . . . shall mean any insured under the policy.' " *Hartle*, 59 Cal. App. 3d at 857, 131 Cal. Rptr. at 144. The court held that the exclusion fell within the ambit of that permitted under § 11580.1 of the code and that it was effective to exclude coverage to the permissive user for bodily injury to the named insured.

However, the owner's estate claims that *Hartle* is inapplicable, arguing that "the policy language involved in *Hartle* is not the same as that involved in the subject policy. The Mercury policy does not say it excludes 'any insured' from coverage under the policy." Brief for appellee at 7. While the estate is correct in pointing out that the policy here utilizes language excluding "an insured" rather than *Hartle*'s "any insured," *Hartle* stands for the proposition that the two phrases are interchangeable.

In *State Farm Mut. Auto. Ins. Co. v. Ammar*, 126 Cal. App. 3d 837, 179 Cal. Rptr. 146 (1981), the minor children of the named insured were injured as a result of the named insured's negligent driving. The children sued their mother, who forwarded the claims to State Farm. A clause in the policy excluded liability coverage for claims brought by (1) the named insured, (2) any other insured, and (3) any member of the family of the named insured or other insured residing in the same household with the named insured or other insured. The California Court of Appeal affirmed the trial court's findings that the policy language was plain, conspicuous, clear, permitted by § 11580.1(c), constitutional, and not against public policy and that State Farm had no duty to defend or pay the claims of the children.

The owner's estate also cites *Employers Nat. Ins. Co. v. Cornett*, 172 Cal. App. 3d 245, 218 Cal. Rptr. 185 (1985), for the proposition that the exclusionary language in the present case is invalid. In that case a child, while a passenger in an automobile operated by his mother, was injured when the automobile collided with another automobile, which was operated by an employee of a construction company.

The insurer in *Cornett* filed a declaratory judgment action to

determine its liability with respect to the construction company's claim for comparative indemnity against the mother. The insurer had issued a policy to the mother and father of the child. The policy provided coverage for the father (the named insured) and " 'any resident of the same household.' " *Cornett*, 218 Cal. Rptr. at 186. The court's analysis centered on the viability of the exclusionary clause which stated that the policy did not apply " 'to liability for bodily injury to an insured.' " *Id.* The court held that the exclusionary language contained in the policy did not apply to the construction company's claim for implied comparative indemnity against the mother. The decision focused almost entirely on the retroactivity of the last portion of § 11580.1(c)(5), added after the date of the accident. The italicized amended portion of that section permitted the exclusion of coverage of " '(5) Liability for bodily injury to an insured *or liability for bodily injury to an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured.*' " (Emphasis in original.) *Cornett*, 218 Cal. Rptr. at 187. Consequently, the *Cornett* analysis is of no utility in the present case.

Moreover, the *Cornett* court incorrectly deemed the language in the policy to be identical to that in *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 514 P.2d 953, 110 Cal. Rptr. 1 (1973) (excluding coverage for injury to "*the* insured"). Rather, the questioned language in *Cornett* excluded coverage for "an insured." Indeed, the California Supreme Court, in denying review of *Cornett*, ordered that the opinion not be officially published; it thus has no precedential value in the context for which it has been cited to us. See Cal. Ct. Misc. R. 977 (rev. 1992).

Thus, a "named insured" is but a species of insured and is encompassed within either of the phrases "an insured" and "the insured." The policy is not ambiguous merely because it does not define the commonly understood articles "an" or "the." The owner comes squarely within the portion of the subject exclusion which declares that it does not apply "to liability for bodily injury to an insured."

The owner's estate urges, however, that the policy is nonetheless rendered ambiguous by the language which follows

the words of the exclusion just quoted.

In the interest of completeness, we assume, but do not decide, that the owner's estate has standing to concern itself with the meaning of the remainder of the exclusion, notwithstanding that it clearly falls within the first portion thereof.

In that connection, we begin by recalling that § 11580.1 authorizes an insurer to exclude from coverage indemnity benefits accruing "directly or indirectly" to an insured. According to *Cornett, supra*, that language was added to allow insurers to provide an exclusion for coverage in situations that became prevalent after the California Supreme Court rendered a decision which allowed partial comparative indemnity. Although the *Cornett* court found language excluding liability coverage for "bodily injury to an insured" not to encompass the cross-complaint for comparative indemnity brought by the employer of one driver in a suit by the injured son of the other driver, the *Cornett* court acknowledged that under appropriate exclusionary language, such a result was authorized by the amended statute. Thus, rather than rendering vague the exclusionary language applicable to the situation at hand, the language expressly implements what § 11580.1 authorizes.

In short, the subject exclusion does nothing more or less than implement the insuring clause which prominently calls attention to the fact that its provisions do not cover bodily injury sustained by an insured. The policy is clearly a third-party contract which protects an insured only from liability claims presented by noninsureds.

(c) Public Policy

Having interpreted the policy, we next consider whether, as the owner's estate claims, the subject exclusion is nonetheless unenforceable because it contravenes the public policy of the State of California and, if it does not, whether it contravenes our public policy.

(i) California Considerations

The most recent pronouncement on the subject by California's highest court is found in *Farmers Ins. Exch. v. Cocking*, 29 Cal. 3d 383, 628 P.2d 1, 173 Cal. Rptr. 846 (1981),

in which the California Supreme Court was called upon to resolve a constitutional challenge to § 11580.1(c) of the code. The court held the denial of a claim specifically falling within the express exclusion of § 11580.1(c)(5) to be insulated from attack on general public policy grounds because the California Legislature expressly authorized such. The California Legislature declared in Cal. Ins. Code § 11580.05 (West 1988) that " '*this article expresses the total public policy of this state respecting the contents of* [*automobile liability insurance*] *policies* . . . .' " (Emphasis in original.) *Cocking*, 29 Cal. 3d at 388, 628 P.2d at 3, 173 Cal. Rptr. at 848.

Moreover, the *Cocking* court upheld § 11580.1(c)(5) as constitutional in the face of an equal protection challenge, writing: "[T]he Legislature has merely excluded one class from mandatory liability coverage, consistent with a preexisting judicial rule, founded upon freedom of contract and the insurer's legitimate interest in minimizing future losses attributable to fraud or collusion." *Cocking*, 29 Cal. 3d at 390, 628 P.2d at 4, 173 Cal. Rptr. at 849. See, also, *State Farm Mut. Auto. Ins. Co. v. Ammar*, 126 Cal. App. 3d 837, 179 Cal. Rptr. 146 (1981); *20th Century Ins. Co. v. Stuart*, 129 Cal. App. 3d 370, 181 Cal. Rptr. 61 (1982).

The owner's estate misplaces reliance on *State Farm Mut. Auto. Ins. Co. v. Smith*, 109 Cal. App. 3d 575, 167 Cal. Rptr. 410 (1980), in which the court held that § 11580.1 of the code and its authorization of family exclusion clauses exceeded rational bounds and was invalid as violative of equal protection. A hearing before the California Supreme Court on *Smith* was sought prior to the *Cocking* decision. See *Reserve Ins. Co. v. Pisciotta*, 118 Cal. App. 3d 985, 173 Cal. Rptr. 852 (1981), *vacated* 30 Cal. 3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982). However, according to Westlaw Insta-Cite, on July 22, 1981, approximately 2 months after the supreme court handed down *Cocking*, it retransferred *Smith* to the court of appeal. The opinion on retransfer was not published. Therefore, the *Smith* holding is of no value in determining the issue before us.
in determining the issue before us.

Since the language of the exclusion in question marches in step with the words of the California Legislature and has not

been found to suffer any constitutional infirmity, it is not violative of California public policy.

(ii) Nebraska Considerations

At this point, the question becomes whether the exclusion nonetheless cannot be enforced in this state because it violates some Nebraska statute or public policy. We begin by noting that the owner's estate does not claim any such impediment to enforcement; its analysis of the case proceeds on the premise that the matter is to be resolved entirely under the law of California. In that regard, it is correct.

While language can be found comforting to a court which wishes to avoid the application of a rule of law it does not like, see, e.g., *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986), it is "a rare case in which a claim validly existing under the law of one American state can be said to be so far outside the pale of social, economic, and moral standards currently imposed by our civilization as to be violative of the strong public policy of any sister state." Robert A. Leflar et al., American Conflicts Law § 45 at 145 (4th ed. 1986).

Thus, a Tennessee court in *Diviney v. Vineyard*, No. 01-A-01-9012-CV00458, 1991 WL 66480 (Tenn. App. May 1, 1991), applied the guest statute of Alabama in denying recovery for injuries sustained in an accident that occurred in Alabama; a Missouri court in *Bruton v. Shelter Mut. Ins. Co.*, 748 S.W.2d 379 (Mo. App. 1988), applied the law of Arkansas in determining whether the seller owned an automobile involved in an accident in Missouri; and a Texas court in *Crisman v. Cooper Industries*, 748 S.W.2d 273 (Tex. App. 1988), applied Florida's statute of repose in a products liability suit brought on behalf of the family of a decedent who was killed when a pickup truck with an allegedly poorly marked trailer pulled in front of the vehicle in which the decedent was riding as a passenger in Florida.

Indeed, not only does the owner's estate not point to any Nebraska statute or other source of Nebraska public policy which denies enforceability to the subject exclusion, we have approved a similar exclusion in a policy of insurance issued in Nebraska. See *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233

Neb. 248, 444 N.W.2d 676 (1989) (the court ruled enforceable an exclusion from protection for bodily injury to the insured or any member of the family of the insured residing in the same household as the insured).

2. CHILDREN'S CASES

While the joining by each child of the driver's estate with Mercury as defendants in a single suit for damages seems irregular, we do not concern ourselves with the issue, for no question as to the correctness of that procedure is presented to us.

(a) Jurisdiction

However, since we lack jurisdiction to entertain appeals from other than final orders, *In re Interest of L. W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), we are required to determine on our own inquiry whether the orders granting appellees' motions for summary judgment against Mercury are final.

Ordinarily, an order in a civil action, that is to say, in a cause brought under the provisions of chapter 25 of our statutes, is final when no further act of the trial court is required to dispose of the cause. *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991); Neb. Rev. Stat. § 25-1902 (Reissue 1989). Generally, an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not appealable. *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966). However, an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment is final. *In re Interest of R.G., supra.*

Here, the policy obligates Mercury to defend any suit alleging bodily injury and seeking damages payable under its terms. Thus, the summary judgments in these cases affect one of Mercury's substantial rights and prevent a judgment in its favor on that issue. Accordingly, the judgments are final and appealable. *West American Insurance Co. v. Vago*, 197 Ill. App. 3d 131, 553 N.E.2d 1181 (1990), *appeal denied* 133 Ill. 2d 574, 561 N.E.2d 710 (order declaring insurers had duty to defend but dismissing without prejudice the issue as to duty to indemnify held to be final and appealable).

(b) Interpretation of Policy

As reflected in part II, any relative of the named insured is an insured. So far as is relevant to the facts before us, in order to qualify as such a relative, the person in question must not only be related to the named insured by blood, but must also reside with that insured. There can be no question that children are related to their natural mother by blood. See, *In re Kristin B.*, 187 Cal. App. 3d 596, 232 Cal. Rptr. 36 (1986) (grandparents are blood relatives); *Nye v. Grand Lodge, Ancient Order of United Workmen of Ind., et al.*, 9 Ind. App. 131, 36 N.E. 429 (1893) (blood relationship is a term of very comprehensive meaning, including those persons who are of the same family stock or descended from a common ancestor); *Baker v. Hardy*, 96 Neb. 377, 148 N.W. 80 (1914) (mother blood relative of son).

However, we neither find nor are directed to any proof in this record that the children resided with their mother. It cannot be inferred from the mere fact that the children spent the last 10 days preceding the accident with their mother that they resided with her.

A summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law. *Howard v. Blue Cross Blue Shield, ante* p. 150, 494 N.W.2d 99 (1993); *Allied Mut. Ins. Co. v. Musil, ante* p. 64, 493 N.W.2d 171 (1992); *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). The movant has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented remains uncontroverted, the movant is entitled to judgment as a matter of law. *Howard, supra*; *Alder, supra*. After the movant has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing the existence of an issue of material fact which, as a matter of law, prevents the entry of judgment in favor of the movant. *Howard, supra*; *Alder, supra*.

The court in *Olson v. Omaha & C. B. Street R. Co.*, 131 Neb. 94, 267 N.W. 246 (1936), a negligence action arising out of an Iowa occurrence, seemingly recognized that under Restatement

of Conflict of Laws § 595 (1934), the law of the forum governs the placement of the burden of proof, but concluded that inasmuch as a plaintiff's freedom from contributory negligence was a condition of the Iowa cause of action, the law of Iowa controlled and thus placed upon the plaintiff the burden of proving herself free of contributory negligence. Most courts apply the forum's rule as to who has the burden of proof on an issue, Robert A. Leflar et al., American Conflicts Law § 124 at 342 (4th ed. 1986), and that is the rule we generally follow.

Under our law, the burden to prove that an exclusionary clause applies rests upon the insurer. See, *Thorell v. Union Ins. Co., ante* p. 57, 492 N.W.2d 879 (1992); *Robinson v. State Farm Mut. Auto. Ins. Co.*, 188 Neb. 470, 197 N.W.2d 396 (1972). As a matter of academic interest, such is also the rule of California. *American Star v. Insurance Co. of the West*, 232 Cal. App. 3d 1320, 284 Cal. Rptr. 45 (1991).

So far as the record shows, there is no factual dispute that the children are not insureds and that they are thus entitled to judgment as a matter of law.

IV. JUDGMENTS

Reiterating that which was written in part I, the district court's judgment in the owner's case is reversed and the cause remanded with the direction that it be dismissed; the judgment in each of the children's cases is affirmed.

JUDGMENT IN NO. S-90-275 REVERSED, AND CAUSE REMANDED WITH DIRECTION.
JUDGMENTS IN NOS. S-90-962 AND S-90-963 AFFIRMED.

WHITE, J., concurs in No. S-90-275.

EVERETT LEE STEWART, SR., AND LOIS STEWART, SPECIAL ADMINISTRATORS OF THE ESTATE OF PAMELA JEAN STEWART, DECEASED, APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

494 N.W.2d 130

Filed January 15, 1993. No. S-90-298.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence.
2. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages: Words and Phrases.** In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer. Vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly wrong.

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

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Jo A. Cavel for appellant.

Edward F. Fogarty, of Fogarty, Lund & Gross, and Thomas J. Tarsney for appellees.

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

FAHRNBRUCH, J.

The City of Omaha (City) appeals a $356,932 judgment entered against it for the wrongful death of Pamela Jean Stewart, who was killed during a police pursuit of a motorcycle

and its driver when the motorcycle collided with another motor vehicle. Stewart was a passenger on the motorcycle. We affirm the judgment of the district court for Douglas County.

Since the suit was brought by Stewart's parents, as special administrators of her estate, under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991), the case was tried to a district judge without a jury.

In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence. *Mid Century Ins. Co. v. City of Omaha, ante* p. 126, 494 N.W.2d 320 (1992).

Considering the evidence in the light most favorable to her estate, the record reflects that Stewart was a passenger on a motorcycle operated by Jonathan William on the evening of August 20, 1987. Omaha police officer Brian Haskell, while in his marked police cruiser, spotted the motorcycle, recognizing it as one which he had attempted to stop 4 days earlier and which had successfully eluded him. The officer testified that he attempted to stop the motorcycle to identify both the vehicle and its driver. Haskell's check of the motorcycle's license plate number revealed that the motorcycle had not been reported stolen, although the license plates had expired. The plates were registered to a black Kawasaki. Haskell said that William's motorcycle appeared to be a red Suzuki or Honda, and thus he believed that the registration was for some other vehicle. In fact, the motorcycle driven by William was a black Kawasaki with a red gas tank.

Haskell testified that after receiving the registration information, he pulled behind the motorcycle, which had stopped in a parking lot. The officer testified that when he turned on his rotating emergency lights, William looked over his shoulder at the officer, had some conversation with Stewart, and then sped out of the parking lot. Haskell testified that at this point, he turned on his siren and initiated pursuit.

In a deposition admitted into evidence, William testified that he and Stewart had stopped in a parking lot and that he spoke

with his sister who was in her own car. William said that after he became aware of the officer's presence, he suggested to Stewart that she ride with his sister but that Stewart wanted to remain with William. After William and Stewart left the parking lot, William said Stewart "nudged" him to get his attention. William testified that his motorcycle had no mirrors and that when Stewart rode with him, she would routinely watch for traffic conditions from behind. William said that when Stewart nudged him, it was not to tell him to run from the officer, but to alert him to the rapidly approaching police car.

William testified that when he looked back, he saw the police car with its activated red lights. William accelerated the motorcycle, and the officer turned on his siren. William ran four stop signs during the approximately 2-minute chase. The record reflects that the motorcycle and the police cruiser reached speeds of 50 to 70 m.p.h. in a residential neighborhood having a speed limit of 25 m.p.h. William said that during the chase, there were times when he slowed to 15 to 20 m.p.h. William testified, "I believe [Stewart] was scared to get off the bike. I mean, I'd have been scared to get off the bike." William also said that he once came to an almost complete stop and told Stewart to get off the motorcycle. William testified that during this timeframe, which he acknowledged was momentary, Stewart made no response to his request before he resumed his flight. William testified that even if Stewart had said something as he resumed accelerating, he would not have been able to hear her comment over the noise of the motorcycle. At William's trial for felony motor vehicle homicide, he testified that there were three occasions when he stopped to let Stewart off the motorcycle.

Haskell testified that there were no people present on the lawns or sidewalks of the residential area through which the pursuit took place. He said that "[i]f there would have been pedestrians on the street, that would have made a difference" in his decision to pursue "[b]ecause, if there's children in the area playing, I'm not going to take the chance of one of them running out in front of me and having me run over them." Three other witnesses testified that there were children present in the area during the pursuit. One witness testified that there

were people on the lawns and sidewalks and that children were riding their bikes on the playground area adjacent to the crash site. The driver of the automobile involved in the accident reported that "there was people everywhere" in the area.

Haskell testified that he at no time believed that the hazards caused by his pursuit outweighed the need to apprehend the persons on the motorcycle and that while in pursuit, he felt that the motorcycle was probably stolen because "people don't usually run from traffic violations." The officer also testified that the motorcycle came to a complete stop at one point and that the officer stopped behind it, took off his seatbelt, and started to get out of his cruiser. He said that William "was doing something with the motorcycle," conversed with the passenger, and then took off again. The officer said that both William and Stewart had a clear opportunity to dismount from the motorcycle at that time. He said that during the pursuit, William and Stewart and bystanders were exposed to life-threatening risks. The officer testified that he felt that the motorcycle was stolen. The chase continued until the motorcycle ran a stop sign and collided with an automobile driven by another motorist. The driver of the automobile testified that Stewart was catapulted headfirst into a light pole. Stewart died as a result of her injuries.

In their first cause of action, Stewart's parents, as special administrators of her estate, alleged that the City was negligent by and through its police officer's actions because of the officer's unreasonable failure to abandon the pursuit once it became apparent that the seriousness of the offense, the density of population in the area of pursuit, and the risk of damage to Stewart and other innocent persons far outweighed the need for apprehension.

In the petition's second cause of action, it was alleged that the City was strictly liable to Stewart's estate by operation of § 13-911 in that Stewart was an innocent third party whose death was proximately caused by the vehicular pursuit by the Omaha police officer.

The City affirmatively alleged, in part, that (1) Stewart's injuries and death were proximately caused by her contributory negligence, (2) Stewart assumed the risk of her conduct, (3) an emergency situation was created by the attempt of William and

Stewart to flee from the police officer and that the police officer's actions were reasonable and lawful under such an emergency situation, and (4) Stewart was not an innocent third person within the meaning of § 13-911 but was a willing participant in an unlawful attempt to flee from a police officer and escape arrest. The district court found that the City was liable on both causes of action. The City's motion for a new trial was overruled.

In its appeal, the City claims that the trial court erred in finding that (1) Stewart was an innocent third party within the meaning of § 13-911, (2) Stewart neither assumed the risk nor was contributorily negligent in remaining a passenger on William's motorcycle, (3) Haskell's actions were negligent and a proximate concurring cause of Stewart's fatal injuries, and (4) the City was liable in damages.

Section 13-911 provides that

> [i]n case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer. This section shall be considered part of the Political Subdivisions Tort Claims Act and the provisions of sections 13-901 to 13-926 shall apply.
>
> For purposes of this section, vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

This statute has created strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a pursuing law enforcement officer employed by the political subdivision; and (3) the claimant is an innocent third party. The City argues that Stewart was not an "innocent third party" because "she was

responsible for the situation in which she found herself that day." Brief for appellant at 16. In a related argument, the City claims that Stewart was contributorily negligent and that she assumed the risk of her death when she "deliberately chose to remain a passenger" on the motorcycle. Brief for appellant at 43.

The City also claims that, beginning in the parking lot prior to the chase, Stewart had at least two opportunities to dismount from the motorcycle. Both William and Haskell testified that there was a conversation between William and Stewart in the parking lot. Although William's testimony indicates that he had been concerned that the police "were out to get me" and that he was concerned for Stewart, there is no evidence that he told Stewart that he intended to flee from Haskell. Instead, William merely suggested that Stewart ride with his sister.

Haskell also testified that William came to a complete stop at one point during the pursuit and that both parties had an opportunity to dismount at that time. However, at William's criminal trial, the officer testified that he "thought *maybe* [William] was going to pull over" at this point. The officer later testified at the criminal trial that he *never once saw William stop the motorcycle during the course of the pursuit*. A tape recording between Haskell and a police dispatcher during the chase does not contain any comment by Haskell that the motorcycle had stopped. The trial court found that the officer's "testimony in the criminal case was inconsistent with his testimony at this trial."

William also testified that at one point during the chase he "either slowed up or came to almost [a] complete stop," at which time he told Stewart to get off the motorcycle. However, he conceded that the amount of time Stewart had to dismount was "momentarily." William testified that the noise of the motorcycle was such that had Stewart objected to his again accelerating his motorcycle, he could not have heard her. The trial court found that Stewart "had no opportunity to dismount during this high-speed chase of two-minute duration. The roar of the motorcycle and the police siren prevented any communication between Pamela Jean Stewart and Jonathan William."

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly wrong. *Mid Century Ins. Co. v. City of Omaha, ante* p. 126, 494 N.W.2d 320 (1992). The court's findings that Stewart was an innocent third party who neither assumed the risk of her injuries nor was contributorily negligent are not clearly wrong. The City's first two assignments of error are without merit.

The court also found that "[t]he continued pursuit of a motorcycle with a passenger, at high speeds through a densely populated neighborhood, was negligent and a concurring proximate cause of the fatal injuries sustained by Pamela Jean Stewart." The evidence reflects that the Pursuit Driving Guidelines of the Omaha Police Division, in effect on August 20, 1987, stated that "[n]o pursuit shall be undertaken or continued when, in the judgment of the officer, the risk of injury outweighs the need for apprehension." The officer had been informed by radio that the motorcycle had not been reported stolen, but that the license had expired. The officer testified that there were no people present on the lawns or sidewalks of the residential area during the pursuit. Other witnesses testified that there were children present riding their bikes and that there were people "everywhere" in the area.

The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. See *Mid Century Ins. Co. v. City of Omaha, supra*. The court's findings of fact are not clearly wrong and will not be set aside. The City's third assignment of error is without merit.

The trial court was not clearly wrong in finding that (1) Stewart was an innocent third party within the meaning of § 13-911 who neither assumed the risk of her injuries nor was contributorily negligent and (2) Haskell was negligent in his pursuit of the motorcycle. Therefore, the City's fourth assignment of error is also without merit.

The City is liable to Stewart's estate under both causes of action. The judgment of the district court is affirmed.

AFFIRMED.

WATS MARKETING OF AMERICA, INC., APPELLANT, V. SAM J. HOWELL, DOUGLAS COUNTY TREASURER, ET AL., APPELLEES.

494 N.W.2d 526

Filed January 22, 1993. No. S-90-251.

Taxation: Actions: Pleadings. A petition filed by a taxpayer which alleges that a tax assessed and levied against the property of the taxpayer is invalid for any reason other than the valuation of the property and that the taxpayer has complied with the requirements of Neb. Rev. Stat. § 77-1735 (Reissue 1986) states a cause of action under the statute.

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

Howard N. Kaplan and Robert L. Lepp, of McGill, Parsonage & Lanphier, P.C., for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, John E. Huber, Paul F. Peters, and Jo A. Cavel for appellees Howell et al.

William Jay Riley, of Fitzgerald, Schorr, Barmettler & Brennan, for appellee Metropolitan Technical Community College.

Michael Kelley, of Kelley, Kelley & Lehan, P.C., for appellee Metro Area Transit Authority.

Kelley Baker, of Harding & Ogborn, for appellee Douglas County School District No. 54.

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

BOSLAUGH, J.

This is an action by the plaintiff, Wats Marketing of America, Inc., to recover taxes in the amount of $45,991.58 assessed and levied against its personal property in 1988.

The petition, which was filed August 24, 1989, contained essentially the same allegations as the petition filed in *First Data Resources v. Howell, post* p. 248, 494 N.W.2d 542 (1993), decided today. The prayer of the petition was that the County Treasurer of Douglas County or such other proper party be

ordered to refund the taxes paid by the plaintiff on the personal property and not otherwise refunded, together with interest and costs.

The defendants in this case are the County Treasurer of Douglas County, Nebraska, and the various governmental subdivisions which share in the taxes levied against the personal property of the plaintiff. The defendants filed separate demurrers alleging that the district court lacked jurisdiction of the subject matter of the action and that the petition failed to state facts sufficient to constitute a cause of action.

On February 6, 1990, the trial court sustained the demurrers of the defendants and dismissed the petition. From that judgment the plaintiff has appealed.

In this case the defendants made the same contentions as in *First Data Resources, supra*, and the trial court found that the petition presented an issue concerning the valuation of the plaintiff's property. This was erroneous, and the judgment must be reversed for the reasons stated in *First Data Resources, supra*.

The judgment is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., not participating in the decision.

FIRST DATA RESOURCES INC., APPELLANT, V. SAM J. HOWELL, DOUGLAS COUNTY TREASURER, ET AL., APPELLEES.

494 N.W.2d 542

Filed January 22, 1993. No. S-90-252.

Taxation: Actions: Pleadings. A petition filed by a taxpayer which alleges that a tax assessed and levied against the property of the taxpayer is invalid for any reason other than the valuation of the property and that the taxpayer has complied with the requirements of Neb. Rev. Stat. § 77-1735 (Reissue 1986) states a cause of action under the statute.

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

Howard N. Kaplan and Robert L. Lepp, of McGill, Parsonage & Lanphier, P.C., for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, John E. Huber, Paul F. Peters, and Jo A. Cavel for appellees Howell et al.

William Jay Riley, of Fitzgerald, Schorr, Barmettler & Brennan, for appellee Metropolitan Technical Community College.

Michael Kelley, of Kelley, Kelley & Lehan, P.C., for appellee Metro Area Transit Authority.

Kelley Baker, of Harding & Ogborn, for appellee Douglas County School District No. 54.

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

BOSLAUGH, J.

This is an action by the plaintiff, First Data Resources Inc., under Neb. Rev. Stat. § 77-1735 (Reissue 1986) to recover taxes in the amount of $603,019.32 assessed and levied against its personal property in 1988. The petition, which was filed on August 24, 1989, alleged as follows:

> 16. On or about November 23, 1988, Plaintiff paid its first half personal property taxes, totalling $301,509.66, under protest, for the combined Defendant County of Douglas tax year 1988 and the Defendants City of Omaha and Omaha School District tax year 1989.
>
> 17. Within thirty (30) days after making such payment, Plaintiff made written demand for a refund of the taxes to Defendant Sam J. Howell pursuant to Neb. Rev. Stat. §77-1735.
>
> 18. On or about January 10, 1989, Defendant County of Douglas, by and through its Board of Commissioners, unanimously passed a resolution denying Plaintiff's

requested refund. Such amount has not been refunded.

19. On or about June 22, 1989, Plaintiff paid its second half personal property taxes, totalling $301,509.66, under protest, for the combined Defendant County of Douglas tax year 1988 and the Defendants City of Omaha and Omaha School District tax year 1989.

20. Within thirty (30) days after making such payment, Plaintiff made a written demand for a refund of the taxes to Defendant Sam J. Howell pursuant to Neb. Rev. Stat. §77-1735.

21. On or about July 11, 1989, Defendant County of Douglas, by and through its Board of Commissioners, unanimously passed a resolution denying Plaintiff's requested refund. Such amount has not been refunded.

. . . .

24. The system of taxing personal property in Nebraska has resulted in the personal property of railroads, car line companies, associated railroad property, pipeline personal property, certain agricultural income producing machinery and equipment, business inventory, certain household goods, and other items of tangible personal property listed in Neb. Rev. Stat. §77-202 (Reissue 1988) [sic] escaping taxation.

25. The assessment and levy of personal property tax on First Data Resources Inc.'s personal property is unconstitutional, unlawful, arbitrary, and capricious and should be declared violative of each and all of the following provisions of the United States and Nebraska Constitutions:

a. The equal protection clause of the 14th Amendment of the United States Constitution;

b. The uniform and proportional requirements of Article VIII, Section 1 of the Nebraska Constitution; and

c. The equal protection clause of Article I, Section 1 of the Nebraska Constitution.

Although § 77-1735 was amended in 1989 and 1991, at the time the petition in this case was filed it provided:

If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the

> property shall have paid the same to the treasurer or other proper authority in all respects as though the same was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount so demanded. Upon the trial, if it shall be determined that such tax or any part thereof was for any reason invalid, judgment shall be rendered therefor with interest and such judgment shall be collected as in other cases. . . .

Section 77-1735 gives

> the taxpayer the right to maintain an action at law to recover such a tax or any part thereof, and [makes] it the duty of the courts to determine whether such tax or any part thereof [is] illegal, unauthorized, or invalid, and to render judgment for the taxpayer for the amount so determined.

(Syllabus of the court.) *Loup River Public Power District v. County of Platte*, 144 Neb. 600, 14 N.W.2d 210 (1944). See, also, *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986); *Frye v. Haas*, 182 Neb. 73, 152 N.W.2d 121 (1967); *Misle v. Miller*, 176 Neb. 113, 125 N.W.2d 512 (1963).

In an action for a refund of taxes pursuant to § 77-1735, the taxpayer must (1) claim the tax is invalid for any reason other than the valuation of the property, (2) have paid the tax as though it was legal and valid, (3) have demanded the tax within 30 days after payment from the county treasurer to whom paid, and (4) not have received a refund from the tax within 90 days of his demand for refund.

The defendants in this case are the County Treasurer of Douglas County, Nebraska, and the various governmental subdivisions which share in the taxes levied against the personal property of the plaintiff. The defendants filed separate demurrers alleging that the district court lacked jurisdiction of the subject matter of the action and that the petition failed to state facts sufficient to constitute a cause of action.

On February 6, 1990, the trial court sustained the demurrers of the defendants and dismissed the petition. From that

judgment the plaintiff has appealed.

The defendants argue and the trial court found that the petition presented an issue concerning the valuation of the plaintiff's property and that the plaintiff's remedy was by way of protest to the county board of equalization. That is an incorrect interpretation of the plaintiff's petition.

The plaintiff has alleged that the taxes assessed and levied against its personal property in 1988 were unconstitutional and void and that it has complied with the requirements of § 77-1735 to obtain a refund of the taxes which it paid. The petition was sufficient to state a cause of action under § 77-1735, which is a matter over which the district court has subject matter jurisdiction.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., not participating in the decision.

WHITE, J., not participating.

WATS MARKETING OF AMERICA, INC., APPELLANT, V. JOHN M. BOEHM, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

FIRST DATA RESOURCES INC., APPELLANT, V. JOHN M. BOEHM, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

494 N.W.2d 527

Filed January 22, 1993. Nos. S-90-333, S-90-334.

1. **Actions: Taxation.** An action in the nature of a suit for a declaratory judgment may be brought under Neb. Rev. Stat. § 77-1736.04 (Reissue 1986) to determine whether taxes on personal property which have been paid by the plaintiff were illegal and void.
2. **Actions: Taxation: Pleadings.** In order to state a cause of action under Neb. Rev. Stat. § 77-1736.04 (Reissue 1986), it must be alleged that the plaintiff has paid taxes which have been held to be illegal by a court of competent jurisdiction.
3. **Taxation.** Neb. Rev. Stat. § 77-1736.04 (Reissue 1986) provides for a refund only of tax paid during the year for which the tax is determined to be illegal.

4. **Constitutional Law: Taxation: Limitations of Actions.** Any action for the recovery of any excise or other tax, which has been collected under any statute of the State of Nebraska, which has been finally adjudged to be unconstitutional, must be brought within 1 year after the final decision of the court declaring it to be unconstitutional. Neb. Rev. Stat. § 25-208 (Reissue 1989).
5. **Taxation: Limitations of Actions.** The statute of limitations begins to run from the time the tax is paid, not from the time the illegality is judicially determined.

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

Howard N. Kaplan and Robert L. Lepp, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellees Boehm and Department of Revenue.

Ronald L. Staskiewicz, Douglas County Attorney, and John E. Huber for appellees Howell and County of Douglas.

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

BOSLAUGH, J.

Since these cases involve similar issues, they were consolidated for argument in this court.

Case No. S-90-333 is an action brought by Wats Marketing of America, Inc., in the nature of an action for a declaratory judgment declaring that the taxes assessed and levied against the personal property of the plaintiff in Douglas County, Nebraska, for the years 1982 through 1989 were wholly void.

Case No. S-90-334 is a similar action brought by First Data Resources Inc., for a judgment declaring that the taxes assessed and levied against the personal property of the plaintiff in Douglas County, Nebraska, for the years 1972 through 1989 were wholly void.

The defendants in each case are the Tax Commissioner of the State of Nebraska; the Department of Revenue of the State of Nebraska; the County of Douglas, Nebraska; and the County Treasurer of Douglas County, Nebraska.

All of the defendants filed demurrers. Each of the demurrers of the county defendants alleged that the trial court had no

jurisdiction of the subject matter of the action and that the petition failed to state facts sufficient to constitute a cause of action. The demurrers of the State defendants included an additional allegation that there was a defect of parties defendant.

On March 9, 1990, the trial court sustained all of the demurrers and dismissed the petitions. From those judgments the plaintiffs have appealed.

At the time the original petitions in these cases were filed, Neb. Rev. Stat. § 77-1736.04 (Reissue 1986) provided for a refund of taxes which had been previously adjudged and determined to be illegal. The statute stated in part:

> If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any personal property or real estate tax, assessment, or penalty or any part thereof was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such illegal tax, assessment, or penalty for the year such tax, assessment, or penalty is determined to be illegal shall, without the necessity of filing a claim therefor, be repaid and refunded in the county where originally paid to the person paying such tax, assessment, or penalty. Where the tax, assessment, or penalty so declared illegal is applicable either throughout the state or in taxing districts beyond the geographic jurisdiction of the court making such declaration of illegality then, for the purpose of this section, a judgment or final order shall mean a judgment or final order of the Supreme Court. . . .

Although the statute seems to contemplate an automatic refund of taxes which have been held to be illegal, we have held that a taxpayer may sue under the statute to obtain a declaration that taxes which have been paid were illegal. See *Higgs v. Hall County*, 184 Neb. 508, 168 N.W.2d 920 (1969).

In order to state a cause of action under § 77-1736.04, it must

be alleged that the plaintiff has paid taxes which have been held to be illegal by a court of competent jurisdiction.

The plaintiffs' amended petitions were filed in these cases on November 6, 1989. The petition in case No. S-90-334 alleged that First Data Resources had paid general personal property taxes to Douglas County for the taxable years 1972 through 1989, and the petition in case No. S-90-333 alleged that Wats Marketing had paid general personal property taxes to Douglas County for the taxable years 1982 through 1989. The petitions further alleged:

> 8. In Northern Natural Gas Co. v. State Board of Equalization . . . the Nebraska Supreme Court held that the state could not constitutionally tax the personal property of one taxpayer while exempting the personal property of other taxpayers.
>
> 9. The system of taxing personal property in Nebraska has resulted in the personal property of railroads, car line companies, associated railroad property, pipeline personal property, certain agricultural income producing machinery and equipment, business inventory, and certain household goods and other items of tangible personal property listed in Neb. Rev. Stat. §77-202 (Reissue 1988) escaping taxation.
>
> 10. The personal property taxes subject to this action are wholly void in that Plaintiff[s were] not subject to taxation and accordingly, there is no tax which the plaintiff[s] should in equity be bound to pay; alternately, the tax is wholly void in that it was assessed for an unlawful purpose; alternatively, under the holdings of Trailer-Train Car Co. v Leuenberger [and] Northern Natural Gas Co. v. State Board of Equalization [and] under the equal protection clause of the 14th Amendment to the U. S. Constitution, Article VIII, Section 1 of the Nebraska Constitution, and the equal protection clause of Article I, Section 1 of the Nebraska Constitution, the personal property taxes which are the subject of this action are wholly void and illegal in that such taxes are not assessed in compliance with provisions of the law imposed.

The plaintiffs prayed for judgments declaring the taxes assessed and levied against the personal property of the plaintiff First Data Resources for the years 1972 through 1989 and against Wats Marketing for the years 1982 through 1989 "are void, illegal and without force of law," for costs, and for such other relief as the court deemed equitable and just.

The defendants argue that the judgments of the trial court should be affirmed because no court has held that the taxes assessed and levied against the property of the plaintiffs were illegal and the decisions referred to in the petitions of the plaintiffs dealt with issues of equalization, and since the property of the plaintiffs is locally assessed, the plaintiffs' sole remedy was by protest to the county board of equalization. This argument is an incorrect characterization of the plaintiffs' petitions.

Although the decisions referred to in the plaintiffs' petitions did not involve the particular taxes which were assessed and levied against the property of the plaintiffs, the plaintiffs rely upon those decisions as establishing the legal basis for determining that the taxes assessed and levied against the property of the plaintiffs were illegal and void.

Any language in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), which might support the defendants' argument that the plaintiffs' cases are for equalization of their personal property's value with that of other similarly situated personal property was specifically disapproved in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). In the *MAPCO* decision, we stated the process of equalization cannot be applied to property that is not taxed. The plaintiffs' personal property cannot be equalized with property that is exempt from taxation.

Since we determine that the judgments appealed from must be reversed as to some of the defendants in each case and the causes remanded for further proceedings, it is appropriate to note that in the event the plaintiffs prevail on the merits in their respective cases, they are not entitled to recover a refund for all of the years alleged in their petitions. Section 77-1736.04 provides for a refund only of tax paid during *the year* for which

the tax is determined to be illegal. If the plaintiffs are successful in their cases, they will be entitled to a refund only of any illegal tax they paid in 1989. Furthermore, if the plaintiffs are successful in their separate actions under Neb. Rev. Stat. § 77-1735 (Reissue 1986), in which the plaintiffs requested refunds of taxes paid on November 23, 1988, and June 22, 1989, any taxes paid on June 22, 1989, cannot be refunded under both sections.

Neb. Rev. Stat. § 25-208 (Reissue 1989) provided in part:

> In the absence of any other shorter applicable statute of limitations, any action for the recovery of any excise or other tax, which has been collected under any statute of the State of Nebraska, which has been finally adjudged to be unconstitutional, shall be brought within one year after the final decision of the court declaring it to be unconstitutional.

Under § 25-208, the plaintiffs had the right to bring actions for a refund within 1 year or less after the decision in *Northern Natural Gas Co., supra*. The statute of limitations begins to run from the time the tax is paid, not from the time the illegality is judicially determined. *Dorland v. City of Humboldt*, 129 Neb. 477, 262 N.W. 22 (1935); *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N.W. 661 (1933). Therefore, for taxes paid in 1989, the plaintiffs' causes of action were brought within the time prescribed in the statute of limitations, but for taxes paid in years prior to 1989 the plaintiffs' causes of action are barred by § 25-208.

With respect to the demurrers of the State defendants alleging a defect of parties defendant, the Department of Revenue and the defendant Boehm argue that the district court properly sustained their demurrers because the allegations of the amended petitions provided no basis for joining the Tax Commissioner or the Department of Revenue as party defendants to the action. We agree.

In order for a person to be a necessary party to a cause of action, it must appear that the person may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such person is called upon to do, or can be compelled to do as a duty, the person is not a necessary party. *Mills v.*

Ehler, 407 Ill. 602, 95 N.E.2d 848 (1950).

The amended petitions in these cases establish that the plaintiffs are locally assessed taxpayers and their taxable property is subject to assessment and levy for tax purposes by the county in which their property is located. If the plaintiffs prevail on the merits in these cases, Boehm and the Department of Revenue cannot be compelled to respond to the relief sought by the plaintiffs. Under § 77-1736.04, it is the duty of the county treasurer to pay any refund due under this section.

The only references in the plaintiffs' amended petitions to Boehm and the Department of Revenue are statements that "Boehm is the . . . Tax Commissioner . . . and is the chief executive officer of the Nebraska Department of Revenue" and that the "Department of Revenue is . . . responsible for executing faithfully the revenue laws of the State of Nebraska." No relief was requested against Boehm or the Department of Revenue, and in the event the plaintiffs are successful in obtaining a declaration that the taxes assessed and levied against their personal property were void and illegal, Boehm and the Department of Revenue cannot be compelled to respond in any way. We conclude that the demurrers were properly sustained as to Boehm and the Department of Revenue.

Since the plaintiffs have a right to amend after a demurrer has been sustained, the judgments dismissing the petitions are reversed and the causes remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., not participating in the decision.

SHANAHAN, J., concurring.

Although I agree with the court's disposition of this case on a procedural question, I do not join the majority's expression:

> Any language in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), which might support the defendants' argument that the plaintiffs' cases are for equalization of their personal property's value with that of other similarly situated personal property was specifically disapproved in

> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). In the *MAPCO* decision, we stated the process of equalization cannot be applied to property that is not taxed. The plaintiffs' personal property cannot be equalized with property that is exempt from taxation.

The preceding expression by the majority is dicta and unnecessary for resolution of this case.

DONNELLE GALLION, APPELLANT, V. SHANNON P. O'CONNOR AND THE DOUGLAS COUNTY PUBLIC DEFENDER'S OFFICE, APPELLEES.

494 N.W.2d 532

Filed January 22, 1993. No. S-90-560.

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

Donnelle Gallion, pro se.

Michael J. Mooney, of McCormack, Cooney, Mooney, Hillman and Elder, for appellees.

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

HASTINGS, C.J.

Plaintiff, Donnelle Gallion, appeals the order of the district court which sustained the joint demurrer of Shannon P. O'Connor and Thomas M. Kenney and dismissed plaintiff's amended petition. We affirm.

Gallion filed an amended petition in district court naming "Shannon P. O'Connor, Office of Douglas County Public Defender, Defendants." He alleged that on April 14, 1988, "the Office of Douglas County Public Defender was appointed by Douglas County Court to represent plaintiff in defense of criminal charges" pending against him and that "[d]efendant O'Connor was assigned by the Office to plaintiff's cases."

Gallion went on to allege certain acts of negligence on the part of O'Connor in the handling of Gallion's case, by reason of which Gallion claimed that he was improperly held and subjected to "unwanted psychiatric treatment," resulting in humiliation, damage to his personal reputation, and violation of his civil rights, for which he sought a money judgment.

A joint demurrer was filed by counsel on behalf of "Shannon P. O'Connor, Assistant Public Defender, and Thomas M. Kenney, Douglas County Public Defender, Defendants," although Kenney was not named in the amended petition as a defendant. The demurrer stated that it was filed "pursuant to §25-806, §13-920 and §13-903 R.R.S. Neb. as amen[d]ed."

Neb. Rev. Stat. § 25-806 (Reissue 1989) provides in part that a defendant may demur to a petition only when it appears on its face "(1) that the court has no jurisdiction of the person of the defendant or the subject of the action . . . or (6) that the petition does not state facts sufficient to constitute a cause of action."

The district court sustained the demurrer

> by reason of Plaintiff's failure to comply with Tort Claims Act as amended in 1987 RRS 13-920 (1). It appears from the Amended Petition that more than one year has elapsed since plaintiff's cause of action accrued and that plaintiff can no longer comply with provisions of act. Therefore the Amended Petition is dismissed with prejudice.

Neb. Rev. Stat. § 13-920(1) (Reissue 1991) provides as follows:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment occurring after May 13, 1987, unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued in accordance with section 13-905.

The alleged negligent conduct on the part of O'Connor occurred after April 14, 1988, and therefore falls within the provisions of § 13-920(1). It may be inferred from the language

of Gallion's pleading that O'Connor's conduct in representing Gallion occurred while O'Connor was acting in the scope of his office or employment. Gallion's suit certainly was one commenced against an employee of a political subdivision for money.

The remaining question is whether Gallion's action for money damages was because of personal injury suffered by him within the meaning of § 13-920.

Gallion claims that as a result of the alleged negligence of O'Connor, he was subjected to humiliation, damage to his personal reputation, and violation of his civil rights. Neither plaintiff nor the defendants have cited any cases which are of help to us in finding a definition of personal injury, nor has our independent research disclosed any Nebraska cases directly on point.

However, in *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 354, 215 N.W.2d 105, 111 (1974), a suit for injuries and damages by reason of false imprisonment, this court said:

> When one is unlawfully restrained of his personal liberty, arrested and paraded through a store under guard of a police officer, confined in the local jail for 3 1/2 to 4 hours, fingerprinted and "mugged" for permanent FBI records, charged with a criminal offense, and compelled to retain counsel for their defense, damage is obvious and serious. Mental anguish and distress, humiliation and disgrace are virtually presumed.

We do find some direction from cases in other jurisdictions, which reasoning we adopt.

In *Koon v. Atlantic Coast Line R. Co.*, 90 Ga. App. 877, 84 S.E.2d 703 (1954), the term "personal injury" denotes an injury to the physical body of a person, including pain and suffering from such injury; injury to a person's health; or injury to that person's reputation, as contradistinguished from injury to his or her property.

The term "personal injuries" is broader, more comprehensive, and more significant than the term "bodily injuries" and does not necessarily mean or involve the element of personal contact, according to *New Amsterdam Casualty Co. v. Hart*, 153 Fla. 840, 16 So. 2d 118 (1943).

The three elements of damages which comprise the term "personal injuries" are medical expenses and loss of earnings, which are essentially economic loss, and mental and physical pain, which is noneconomic loss. *Kozlowski v. Briggs Leasing Corp.*, 96 Misc. 2d 337, 408 N.Y.S.2d 1001 (1978).

Any condition which creates an actionable annoyance and inconvenience to one in his or her home or business is an offense against the person and is a personal injury, as respects a right of recovery therefor. *Howell v. City of Dothan*, 234 Ala. 158, 174 So. 624 (1937).

False imprisonment qualifies as a personal injury, such term being defined to include libel, slander, malicious prosecution, assault and battery, false imprisonment, and other actionable injuries to the person. *Gray v. Wallace*, 319 S.W.2d 582 (Mo. 1958); *N. Y. P. & N. R. R. Co. v. Waldron*, 116 Md. 441, 82 A. 709 (1911).

The term "personal injury" may cover every variety of injury to a person's body, feelings, or reputation, and thus, an action was governed by the limitations period applicable to personal injury actions. *Rolnick v. Rolnick*, 55 Misc. 2d 243, 284 N.Y.S.2d 908 (1967).

We conclude that plaintiff was seeking money damages on account of personal injuries allegedly suffered by him.

Accordingly, this action was included within the provisions of § 13-920. The plaintiff having failed to comply with the provisions of that section of the Political Subdivisions Tort Claims Act by submitting his claim in writing to the governing body of Douglas County within 1 year, the court had no jurisdiction over the subject matter of this action, and defendants' joint demurrer was properly sustained.

The judgment of the district court is affirmed.

AFFIRMED.

MAPCO AMMONIA PIPELINE, INC., APPELLANT AND CROSS-APPELLEE, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE AND CROSS-APPELLEE, AND GAGE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.
MID-AMERICA PIPELINE COMPANY, APPELLANT AND CROSS-APPELLEE, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE AND CROSS-APPELLEE, AND GAGE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.
TRAILBLAZER PIPELINE COMPANY, APPELLANT AND CROSS-APPELLEE, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE AND CROSS-APPELLEE, AND GAGE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.
NATURAL GAS PIPELINE COMPANY OF AMERICA, APPELLANT AND CROSS-APPELLEE, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE AND CROSS-APPELLEE, AND GAGE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.

494 N.W.2d 535

Filed January 22, 1993. Nos. S-91-1069, S-91-1070, S-91-1071, S-91-1072.

Taxation: Discrimination. The State may grant relief to taxpayers who have been subjected to an illegal and discriminatory tax by refunding the difference between the tax actually paid and what the tax would have been if all property which should have been taxed was on the tax rolls.

Appeal from the State Board of Equalization and Assessment. Affirmed.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee State Board of Equalization.

Patrick T. O'Brien, of Bauer, Galter, O'Brien & Allan, for appellees Gage County et al.

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

BOSLAUGH, J.

This is an appeal from the order of the State Board of Equalization and Assessment (State Board) entered on the remand of *MAPCO Ammonia Pipeline v. State Bd. of Equal.*,

238 Neb. 565, 471 N.W.2d 734 (1991), and other similar cases involving appeals from the August 15, 1990, findings and order of the State Board denying the appellants' claims for property tax relief. In the prior case (*MAPCO I*), the appellants had requested that the value of their real and personal property be equalized with the value of railroad rolling stock and other similar property that had been treated as exempt from taxation.

In *MAPCO I*, we held that the process of equalization cannot be applied to property that is not taxed; that personal property and real property are both tangible property and must be equalized and taxed uniformly under Neb. Const. art. VIII, § 1, as it then existed; that the State Board erred in failing to assess or tax the rolling stock of railroad or carline companies in 1990; that although the federal court had enjoined the collection of a particular tax because it was discriminatory, the property in question had not been exempted; that *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974) was overruled; and that the provisions of Neb. Rev. Stat. § 77-202(6) through (9) (Reissue 1990) were unconstitutional. The effect of *MAPCO I* was to determine that the property which had been improperly and unconstitutionally exempted should be returned to the tax rolls and its value equalized with all other property subject to tax.

We further held that the remedy to which the appellants were entitled was not for their property to be "equalized" at zero percent of actual value, but for it to be taxed uniformly and proportionately in compliance with art. VIII, § 1, as it then existed. The order of the State Board was reversed and the cause remanded with directions to assess the property of the appellants and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes.

Following the remand, the State Board met and conducted hearings on October 2 and 30, 1991, at which time the State Board received evidence and heard evidence as to how the State Board could comply with the directions of this court on the remand.

In addition to the appellants which had appeared and participated in the hearing involved in *MAPCO I*, a number of governmental subdivisions, including Gage County, cities, and

various school districts, appeared and participated in the hearings and offered evidence which was objected to by the appellants on the ground that participation in the hearings on remand should be restricted to parties who had appeared and participated in the original hearings involved in *MAPCO I*. The State Board sustained the objections of the appellants and decided to not consider the evidence offered by the governmental subdivisions, which appear in this appeal as appellees and by cross-appeal contend that the State Board should have received and considered the evidence which they offered.

The political subdivisions will be directly affected by the action taken by the State Board on the remand because they had imposed and collected taxes based upon the prior action of the State Board and were faced with the possibility of being required to refund to taxpayers substantial amounts of money, depending upon the action taken by the State Board on remand of the *MAPCO I* decision.

Because the political subdivisions were interested parties, they had a right to appear before the State Board and offer evidence, and the State Board should have considered their evidence. However, since we review the record de novo and all of the evidence in question is in the record, the error is cured by our considering the evidence in this appeal.

The appellants had earlier moved to dismiss the cross-appeal. Ruling on that motion was reserved until the appeal was heard in this court. That motion is now overruled.

At the conclusion of the hearings on October 30, 1991, the State Board ordered the Tax Commissioner to reduce the equalized unit value of the appellants' property as certified by the board for tax year 1990 by 18.81 percent. It is from that order that the appellants have appealed.

The sole issue on this appeal is a determination of the relief to which the appellants are entitled as a result of the error in the August 15, 1990, findings and order of the State Board which were involved in *MAPCO I*.

The appellants contend that the value of their property should be reduced to zero for tax purposes so that they will receive the same treatment as those taxpayers whose property

has been treated as exempt from taxation.

The relief which the State Board gave to the appellants was determined by calculating the ratio between the value of property considered exempt under § 77-202(6) through (9) plus the value of railroad rolling stock and the value of all tangible property in Nebraska, including that considered to be exempt. The calculation is based largely on the testimony of Dennis Donner, an administrator of the property tax division for the Nebraska Department of Revenue. To some extent his testimony as to values was based on estimates, but it appears to be the best evidence available. The appellants had the opportunity to cross-examine Donner and offered no evidence to contradict his testimony as to values.

In *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), the U.S. Supreme Court considered the matter of the relief to which taxpayers who have been subjected to an illegal and discriminatory tax are entitled under the Due Process Clause of the 14th Amendment to the U.S. Constitution. The Court noted that the state might choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments, or the state could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. Alternatively, the Court held that the state might assess and collect back taxes from taxpayers who had received the unlawful benefits or it might utilize a combination of partial refunds and partial retroactive assessments of tax increases.

The remedy which the State Board selected in this case conforms to the second method—a refund of the difference between the taxes levied against the property of the appellants and the taxes which the appellants would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed.

We believe the relief ordered by the State Board corrects the disproportionality in the taxation of appellants' property within the class of all tangible property in compliance with article VIII, § 1, of the Nebraska Constitution and the Due Process Clause of the 14th Amendment to the U.S.

Constitution. The actual disproportionality borne by the appellants is not measured by the fact that certain property escaped taxation, but by the effect of the nontaxation of certain property in relation to the class of all real and personal property. The appellants have been provided a remedy which assures that they are obligated to pay no more than their fair share of the total property tax burden, which is the amount they would have paid if the State had properly included all property on the tax rolls that should have been taxed.

The order of the State Board of Equalization and Assessment is affirmed.

AFFIRMED.

CAPORALE, J., not participating in the decision.

SHANAHAN, J., dissenting.

After *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (*MAPCO I*), registered 10 on a Richter scale for taxquakes, today's decision, as aftershock from *MAPCO I*, again shakes Nebraska's personal property tax structure because the majority retroactively applies *MAPCO I* rather than prudently applying *MAPCO I* prospectively.

Prospective application of a judicial change in substantive law has been recognized and repeatedly approved by various courts, ranging from the U.S. Supreme Court to numerous state courts. Perhaps the foremost federal decision on prospective application of a substantive change in law is *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), wherein the Supreme Court expressed the following standard which has been accepted for more than 20 years:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or

> retard its operation. . . . Finally, [the court must weigh] the inequity imposed by retroactive application, for [w]here a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

(Internal citations and quotation marks omitted.) See, also, *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990); *Gt. Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

Judicial decisions that substantively change state tax laws, especially changes that lead to or necessitate tax refunds resulting from invalidation of a tax law under which taxes have been collected, are usually applied prospectively rather than retroactively, as reflected in many tax decisions by courts of other states; for example, *Carrollton-Farmers v. Edgewood Independent*, 826 S.W.2d 489 (Tex. 1992) (although the method of financing public education violated the Texas Constitution, retroactive effect of the decision declaring the tax law unconstitutional would damage the school system in a manner that could not further the purpose of the Texas Constitution; hence, the constitutional rule expressed in the decision was applied only prospectively); *Metropolitan Life v. Com'r of Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985) (refusal to order a refund of an unconstitutional premiums tax on foreign insurance companies, since the state had relied on a tax system that had existed for decades, and compulsory refunds would cause financial hardship to the state); *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (invalidation of a tax was prospectively applied to prevent the city from suffering an undue fiscal burden from tax refunds); *Bond v. Burrows*, 103 Wash. 2d 153, 690 P.2d 1168 (1984) (refused to require refund of unconstitutional sales tax that would result in great financial and administrative hardship to the state); *Rio Algom Corp. v. San Juan County*, 681 P.2d 184 (Utah 1984) (tax invalidation was prospectively applied so that fiscal solvency of local governments might be preserved); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983) (application of judicial decision invalidating state transpor-

tation tax deferred until 6 months after the tax decision); *Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision invalidating sales tax was prospectively applied to avoid unjust results); *Soo Line R. Co. v. State*, 286 N.W.2d 459 (N.D. 1979) (notwithstanding that a system for taxing centrally assessed property was unconstitutional, the judicial decision declaring unconstitutionality of the tax system was prospectively applied to prevent chaos); *Jacobs v. Lexington-Fayette Urban Cty. Government*, 560 S.W.2d 10 (Ky. 1977) (a decision, invalidating an unconstitutional personal property tax, was prospectively applied lest there be a hardship on all citizens of local government and a chaotic disruption of services); and *Southern Pacific Company v. Cochise County*, 92 Ariz. 395, 377 P.2d 770 (1963) (property tax system which systematically undervalued certain classes of property was unconstitutional, but judicial decision declaring unconstitutionality of the tax system operated only prospectively in order to prevent great hardship on government).

As reflected by many decisions of this court, a prospectively applied judicial change of substantive law is no stranger in Nebraska. See, *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966) (abolition of tort immunity for nonprofit charitable hospitals); *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (abolition of tort immunity for governmental subdivisions concerning claims based on negligence in the operation of motor vehicles); *Johnson v. Municipal University of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969) (abolition of tort immunity for municipal universities); *Root v. School Dist. No. 25*, 184 Neb. 570, 169 N.W.2d 464 (1969) (abolition of tort immunity for local school districts); *Sosso v. Sosso*, 196 Neb. 242, 242 N.W.2d 621 (1976) (abolition of district court jurisdiction to terminate parental rights in actions for dissolution of marriage). More recently, in *Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 322, 431 N.W.2d 613, 617 (1988), we overruled prior Nebraska case law that a bid at a judicial sale was revocable before acceptance, and applied prospectively a new rule, making bids at judicial sales irrevocable, because "Commercial Federal relied upon a rule in existence for 94 years. Fairness and equity dictate that the

above-announced rule of law be effective as of the date of this opinion."

Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), was this court's landmark decision which recognized and acknowledged that the Legislature was constitutionally authorized to exempt personal property from taxation pursuant to Neb. Const. art. VIII, § 2, in its previous form existing at the time of *Stahmer*: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation."

After *Stahmer*, this court decided *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), and *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987), both of which determined that certain aspects of real estate taxation were unconstitutional in view of Neb. Const. art. VIII, § 1, the uniformity clause of the Nebraska Constitution. Neither *Kearney Convention Center* nor *Banner County* involved any question concerning the Legislature's power to exempt personal property from taxation. Relying on *Kearney Convention Center* and *Banner County*, the majority of this court, in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), concluded that centrally assessed personal property of pipeline companies was unconstitutionally classified for tax purposes. However, even after those four post-*Stahmer* tax decisions, *Stahmer* itself endured without comment by the majority of this court. Moreover, in those four post-*Stahmer* decisions, this court, in striking down parts of Nebraska's statutory structure for taxation of personal property, wrapped itself in a crazy quilt of inconsistencies fashioned from legal whole cloth, rather than wearing a robe made of constitutional fabric.

With that background, in *MAPCO I*, this court overruled *Stahmer*, a tax decision which had stood for nearly 20 years, thereby dramatically and essentially changing the previous and longstanding view of the Legislature's tax exemption power under article VIII, § 2, and, further, declaring that the

constitutionally and expressly conferred power of the Legislature for tax exemption of personal property was somehow subordinated to article VIII, § 1, the uniformity clause concerning taxation of tangible property. A strong argument exists that as the result of *MAPCO I*, the Legislature's exemptive power regarding taxation of tangible personal property was not merely judicially subordinated to another constitutional provision, but was effectively and entirely eliminated from the Nebraska Constitution. Nonetheless, *MAPCO I*, as a revolutionary ruling and a clean break with Nebraska precedent, was absolutely and totally beyond expectation and predictability by the Nebraska Legislature. The governmental hardship inflicted by *MAPCO I*, including the very real probability of myriad tax refunds, defies a definitive description. Thus, *MAPCO I* clearly meets the standard expressed in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), for prospectivity in applying a change of substantive law.

To compound the chaos, the majority has relied on *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). In *McKesson Corp.*, the Supreme Court examined a tax scheme devised by the State of Florida to alleviate its preferential and, therefore, discriminatory tax treatment of beverages made from Florida-grown citrus crops. Florida contended that a tax refund to the disfavored distributors was unnecessary to rectify Florida's Commerce Clause violation, because if the state had known that the tax would be declared unconstitutional, a higher tax would have been imposed on all distributors. According to Florida, the disfavored distributors would have paid the same tax under this "hypothetical" tax scheme as was actually paid under the discriminatory tax system. In holding that Florida's hypothetical tax scheme violated the Due Process Clause of the U.S. Constitution, the Court stated:

> [Florida and its agencies] suggest that, in order to redress fully petitioner's unconstitutional deprivation, the State need not *actually* impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim, the State need only place

> petitioner in the same tax position that petitioner *would have been placed* by such a hypothetical scheme. . . .
>
> We implicitly rejected this line of reasoning in *Montana National Bank* [*of Billings v. Yellowstone County*, 276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928),] and [*Iowa-Des Moines National Bank v.*] *Bennett*, [284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931),] and we expressly do so today. . . . The deprivation worked by the Liquor Tax violated the Commerce Clause because the tax scheme's purpose and effect was to impose a relative disadvantage on a category of distributors (those dealing with nonpreferred products) largely composed of out-of-state companies, not because its treatment of this category of distributors diverged from some fixed substantive norm. Hence, the salient feature of the position petitioner "should have occupied" absent any Commerce Clause violation is its equivalence to the position actually occupied by petitioner's favored competitors.
>
> But the State's offer to restore [McKesson] only to the same *absolute* tax position it would have enjoyed if taxed according to a "hypothetical" nondiscriminatory scheme does not in hindsight avoid the unlawful deprivation: It still in fact treats petitioner worse than distributors using the favored local products, thereby perpetuating the Commerce Clause violation during the contested tax period.

(Emphasis in original.) 496 U.S. at 41-43.

As a result of today's decision, this court has approved a tax remedy which bears a marked resemblance to the Florida "hypothetical" tax scheme condemned by the due process analysis in *McKesson Corp.* However, the due process issue which this court generates today could easily be eliminated through prospectively applying *MAPCO I*. See *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990).

Because I still maintain that *MAPCO I* is incorrect in its declaration that certain personal property tax exemptions are unconstitutional, and since the majority has applied *MAPCO I* retroactively rather than prospectively, I dissent from the disposition authorized by the majority in today's decision.

AMOCO PIPELINE CO. ET AL., APPELLANTS AND CROSS-APPELLEES, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE AND CROSS-APPELLEE, AND GAGE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.

494 N.W.2d 541

Filed January 22, 1993. Nos. S-91-1052 through S-91-1068, S-91-1073 through S-91-1101.

Appeal from the State Board of Equalization and Assessment. Affirmed.

John K. Boyer, Amy S. Bones, Norman H. Wright, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants Amoco Pipeline Co. et al.

William E. Peters, of Peters & Chunka, P.C., for appellants Williams Pipeline Co. et al.

Paul M. Schudel and Nana G.H. Smith, of Woods & Aitken, for appellants Wauneta Telephone Co. et al.

Tim Engler and V. Gene Summerlin, of Harding & Ogborn, for appellants Hartington Telephone Co. et al.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee State Board of Equalization.

Patrick T. O'Brien, of Bauer, Galter, O'Brien & Allan, for appellees Gage County et al.

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

BOSLAUGH, J.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated November 1, 1991, ordering the Tax Commissioner to reduce the equalized unit value of the appellants' property as certified by the State Board for tax year 1990 by 18.81 percent. The appellants in several of these cases are the owners of centrally assessed property in the State of Nebraska and operate pipeline systems in Nebraska. The appellants in the remaining cases are public service entities within the meaning of Neb. Rev. Stat.

§ 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications systems in Nebraska. The property of the public service entities is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. § 77-801 et seq. (Reissue 1990).

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 263, 494 N.W.2d 535 (1993). In light of our decision in that case, the order of the State Board of Equalization and Assessment is affirmed.

AFFIRMED.

CAPORALE, J., not participating in the decision.

SHANAHAN, J., dissenting.

Because the cases are disposed of by the majority's opinion in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 263, 494 N.W.2d 535 (1993) (*MAPCO II*), I renew my dissent expressed in *MAPCO II*.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HUMBERTO JUAN AGUILAR, RESPONDENT.

494 N.W.2d 346

Filed January 22, 1993. No. S-92-1097.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, Humberto Juan Aguilar, an attorney admitted to the practice of law in Nebraska, was a licensed attorney in Florida. Aguilar was suspended from the practice of law in Nebraska on June 28, 1991, for failure to pay membership dues to the Nebraska State Bar Association. On October 29, 1992, the Supreme Court of Florida disbarred Aguilar for 20 years for violating "Rules 3-4.3 and 3-4.4 of the [Florida] Rules of

Discipline and Disciplinary Rules 1-102(A)(3), (4), (5) and (6) of The Code of Professional Responsibility and Rules 4-8.4(b), (c) and (d) of The Rules of Professional Conduct." Subsequently, a motion for reciprocal discipline was filed in this court.

In its order disbarring Aguilar, the Supreme Court of Florida approved the referee's report which found that Aguilar had been the attorney for the leader of a large cocaine-smuggling operation. The referee further found that during the period from 1984 to 1987, Aguilar had conspired with other individuals to import large amounts of cocaine into the United States and had defrauded the United States by concealing the income gained through the drug trafficking. In addition, the referee found that Aguilar had developed an elaborate system to "launder" the proceeds from the illegal transactions.

Following his federal indictment on the aforementioned criminal charges, Aguilar was released on bail. Aguilar then sold his house in Miami, Florida, and fled to escape prosecution. Aguilar remains a fugitive.

Based on the referee's findings, the Supreme Court of Florida disbarred Aguilar from the practice of law, without leave to reapply, for a period of 20 years. The Nebraska State Bar Association then filed a motion for reciprocal discipline, asking this court to impose similar disciplinary measures against Aguilar.

Pursuant to Neb. Ct. R. of Discipline 21 (rev. 1992), after giving notice to a Nebraska bar member, this court will reciprocate the disciplinary measures of another state on the Nebraska bar member. Aguilar was notified of the motion for reciprocal discipline and given 30 days to show cause why he should not be disbarred in Nebraska. Aguilar did not comply with the show-cause order.

Accordingly, Aguilar is hereby disbarred from the practice of law in Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. NANCY S. FILKIN, APPELLANT.

494 N.W.2d 544

Filed January 29, 1993. No. S-91-408.

1. **Arrests: Search and Seizure.** Inventory searches are permissible after an arrest.
2. **Constitutional Law: Search and Seizure.** Under the Fourth Amendment to the U.S. Constitution, the propriety of inventory searches is judged by a standard of reasonableness.
3. **Search and Seizure: Police Officers and Sheriffs: Arrests.** It is reasonable for the police to search the personal effects of a person under lawful arrest as part of the routine procedure incident to booking and jailing the suspect.
4. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** Reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment to the U.S. Constitution, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.
5. **Criminal Law: Search and Seizure: Police Officers and Sheriffs.** The policy or practice governing inventory searches should be designed to produce an inventory; the individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.
6. **Constitutional Law: Search and Seizure.** There is no constitutional requirement that inventory policies be established in writing.
7. **Constitutional Law: Search and Seizure: Proof.** The State bears the burden of proving that a law enforcement agency's search was made pursuant to a standardized criteria or established routine required by the Fourth Amendment to the U.S. Constitution.
8. **Criminal Law: Directed Verdict: Evidence.** In a criminal case a court can direct a verdict only where there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character, lacking in probative value, that a guilty finding cannot be supported by the evidence.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT, Judges, on appeal thereto from the District Court for Hall County, WILLIAM H. RILEY, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

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

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CAPORALE, J.

Pursuant to verdict, the defendant-appellant, Nancy S. Filkin, was adjudged by the district court to be guilty of possessing a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. §§ 28-405(c)(3)[Schedule II] and 28-416 (Reissue 1989). Filkin appealed, claiming the district court erred in (1) receiving evidence obtained following her arrest from a search of the contents of her purse and (2) refusing to direct a verdict in her favor. The Nebraska Court of Appeals reversed the judgment of the district court, and the plaintiff-appellee, State of Nebraska, successfully petitioned for further review. We reverse the judgment of the Nebraska Court of Appeals and remand the cause with the direction that the Nebraska Court of Appeals affirm the judgment of the district court.

Pursuant to a "no-knock" search warrant, officers entered a house where they found four individuals, including Filkin, who did not reside there. Filkin and the other three individuals were arrested and removed from the premises. Sgt. Ronald Ochsner testified that when he placed her under arrest, Filkin was not carrying a purse. However, Deputy Richard McKinny, who transported Filkin to the Hall County jail, testified that Filkin had her purse with her when he transported her to the jail.

Upon arrival at the Hall County jail, McKinny took Filkin to the female booking area, removed her handcuffs, and remained present during the booking process.

McKinny testified that the Hall County booking process involved "a lot of record-keeping questions, health questions, as well as a search of the property brought in by the prisoner." According to McKinny, the standard operating procedure at the Hall County jail was to inventory property "[t]o see that there are no contraband objects, and, also, for an accurate record for when that prisoner is released, so that the prisoner gets everything back that they brought in with them." He also said that the primary purpose of the search was to assure the safety of the officers.

Corrections officer Cynthia Gorman testified that Hall County has a standard operating procedure for booking individuals, including the inventorying of any personal items that the individual might have. The standard operating procedure with regard to a purse, according to Gorman, is to remove all items to ensure that no money or valuables were contained therein. Moreover, if a corrections officer discovers what is or is believed to be an illegal substance, such substance is to be turned over to the arresting officer.

Filkin's closed purse was opened and inventoried by Gorman under the watchful eye of McKinny. In the process, the officers discovered a black film canister, which they opened. The canister was found to contain, among other things, a small self-seal bag holding .05 grams of a white or off-white powder, later determined to be methamphetamine.

Filkin filed a motion which, insofar as is relevant to our review, sought to suppress the fruits of the search of the film canister, contending that the search violated U.S. Const. amend. IV and Neb. Const. art. I, § 7. The district court overruled Filkin's suppression motion, finding that the search of Filkin's purse was pursuant to standard booking policy and was proper. Defense counsel properly renewed his objection to the search at trial.

By finding that the search of the purse was conducted pursuant to standard booking policy, the district court necessarily found by implication that the search was not one conducted incident to the arrest—quite understandably so, given Ochsner's testimony that Filkin did not have the purse in her possession when she was arrested and the sketchy facts of record as to how the purse came to be in Filkin's possession while she was being transported to the Hall County jail.

The concern, of course, is that the officers, by bringing the purse with them, could convert a search incident to arrest into an inventory search, thus availing themselves of the somewhat broader search standard applicable to that situation than applies under the search-incident-to-arrest setting. See 2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 5.5(b) (2d ed. 1987).

Nonetheless, it was quite reasonable for law enforcement

officials to have retrieved Filkin's purse, for the purse and its contents would assist them in positively identifying Filkin. See, e.g., *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983) (one of the governmental interests served by inventory searches is identification); *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

Moreover, the officers had a duty to protect any valuables that might have been contained in the purse. Indeed, repercussions may have resulted had an officer not retrieved Filkin's purse. See, e.g., *State v. Quinn*, 565 S.W.2d 665, 672 (Mo. App. 1978) (if officer had not retrieved bag left on step of porch, "he may well have been subject to criticism or at worst legal action. To wait on the street and 'stand over' the bag until a search warrant could be obtained would be impractical").

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nebraska's constitutional provision with respect to searches and seizures is virtually identical. Neb. Const. art. I, § 7; *State v. Dixon, supra.*

We have consistently held that inventory searches are permissible after an arrest. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983). But under the Fourth Amendment, the propriety of inventory searches is judged by a standard of reasonableness. *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Illinois v. Lafayette, supra*; *U.S. v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987); *State v. Dixon, supra*. However, such searches must be performed in accordance with standard operating procedures.

The first case in which the U.S. Supreme Court implicitly relied upon a police regulation was *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). In *Opperman*, the defendant's automobile was towed to a city impound lot after it received two parking tickets while

parked in the same location for approximately 7 hours. A police officer inventoried the contents of the vehicle, discovering marijuana in the unlocked glove compartment. The *Opperman* Court, finding the search to be constitutional, held that such intrusions were consistently upheld "where the process is aimed at securing or protecting the car and its contents." 428 U.S. at 373. Noteworthy is that the search in *Opperman* "was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department." 428 U.S. at 380 (Powell, J., concurrence). However, the *Opperman* Court did not discuss whether the regulations were written or oral, nor did it mention whether the regulations were of a formal or informal nature.

Six years later, in *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), on facts mirroring those in the present case, the U.S. Supreme Court held it to be reasonable for the police to search the personal effects of a person under lawful arrest as part of the routine procedure incident to booking and jailing the suspect. In *Lafayette*, the defendant was arrested for disturbing the peace and was taken to the police station. The defendant carried a purse-type shoulder bag on the trip to the station house. Amphetamine pills were subsequently discovered in the bag as police inventoried the contents therein.

The *Lafayette* Court explained the function of the inventory search:

> At the station house, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A *standardized procedure* for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons

> have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. . . . Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure. It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independently of a particular officer's subjective concerns. . . . Finally, inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity.

(Emphasis supplied.) 462 U.S. at 646. Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372 (1970), *cert. denied* 399 U.S. 912, 90 S. Ct. 2211, 26 L. Ed. 2d 568.

The *Lafayette* Court emphasized that an officer had *testified* that "it was standard procedure to inventory 'everything' in the possession of an arrested person," thus satisfying the standardized procedure requirement. 462 U.S. at 642.

The next U.S. Supreme Court case concerning an inventory search was *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). There, the defendant was arrested for driving while under the influence of alcohol. After being taken into custody but prior to the arrival of the tow truck, an officer inventoried the contents of the defendant's vehicle. During the inventory, the officer opened a closed backpack in which he discovered controlled substances, cocaine paraphernalia, and a large amount of cash.

In holding the search to be constitutionally sound, the *Bertine* Court noted that "[i]n the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were *following standardized procedures*, acted in bad faith or for the sole purpose of investigation." (Emphasis supplied.) 479 U.S. at 372. The Court concluded that "here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even

though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." 479 U.S. at 374. Moreover, in a footnote, the Court reiterated that its decisions "have always adhered to the requirement that inventories be conducted according to standardized criteria." 479 U.S. at 374 n.6. Thus, *Colorado v. Bertine* suggests that the applicable regulations must leave police with little discretion as to whether a closed container is to be inventoried.

Finally, in *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990), the state highway patrol obtained the defendant's permission to open the trunk of his automobile following his arrest for driving while under the influence of alcohol. The automobile was impounded, and an inventory search revealed two marijuana cigarette butts in the ashtray and a locked suitcase in the trunk. Impoundment facility employees, at the direction of a state trooper, forced open the suitcase and discovered a garbage bag containing a large quantity of marijuana.

The *Wells* Court upheld the lower court's finding that the trial court erred in failing to suppress the evidence of marijuana found in the suitcase.

> Our view that standardized criteria [citing *Bertine*] or established routine [citing *Lafayette*] must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime, [citing *Bertine*]."

495 U.S. at 4.

Because the state Supreme Court found that the state highway patrol had no policy whatsoever with respect to the opening of closed containers encountered during an inventory search, the search did not comport with the demands of the Fourth Amendment. However, the *Wells* Court also stated that inventory searches need not be conducted in a totally

mechanical manner.

Some police discretion remains, however. Dictum in *Wells* states that police "may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." 495 U.S. at 4.

In summary, the holdings of *Opperman*, *Lafayette*, *Bertine*, and *Wells* make clear that an inventory search must be conducted pursuant to standardized policies or established routine. The questions which remain ask what qualifies as "standardized" criteria or "established" routines and how the State must show their existence. But see *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989), which in dicta improvidently focuses on the reasonableness of the search of an impounded vehicle rather than on the existence of standardized inventory procedures.

While a written policy is obviously the best means by which to establish the existence of a standardized policy, see Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442 (1990), and at least one state has held that such procedures must be in writing to pass muster under the state Constitution, *Commonwealth v. Bishop*, 402 Mass. 449, 523 N.E.2d 779 (1988), such written policy is not an indispensable requirement.

For example, in *U.S. v. Frank*, 864 F.2d 992 (3d Cir. 1988), *cert. denied* 490 U.S. 1095, 109 S. Ct. 2442, 104 L. Ed. 2d 998 (1989), the fact that an officer testified to the existence of standard police procedures and a detective testified that he followed them was held to be sufficient to render an inventory search valid. Noting that "[n]o Supreme Court case has ever held an inventory search invalid because of the absence of formalized pre-existing standards," the U.S. Court of Appeals for the Third Circuit proclaimed that "no standard for the scope of the inventory other than the listing of every item of property would satisfy the relevant governmental interests." 864 F.2d at 1003-04. The court continued, stating that

> [c]ertainly the [Supreme] Court did not intend to lay down a constitutional requirement that the police have a written

> standard for conducting an inventory that merely states the obvious. Such a requirement would add nothing to the protection of privacy interests, for no standard ever would be laid down except that of completeness. Inventory searches by their nature afford the police the opportunity to eliminate expectations of privacy in personal property lawfully in police custody. It seems likely, therefore, that all that *Bertine* requires is a standard as to *when* inventories should be made.

(Emphasis supplied.) 864 F.2d at 1004. See, also, *U.S. v. Kornegay*, 885 F.2d 713 (10th Cir. 1989), *cert. denied* 495 U.S. 935, 110 S. Ct. 2179, 109 L. Ed. 2d 508 (1990) (officer testimony of customary and standardized procedure held sufficient in absence of written guidelines); *Madison v. United States*, 512 A.2d 279 (D.C. App. 1986) (although capitol police did not have written guidelines, fact that officer testified he had been trained by his supervisors and conducted search in accordance with such training held sufficient); *State v. Weide*, 155 Wis. 2d 537, 549, 455 N.W.2d 899, 905 (1990) ("[a]lthough it may be preferable, there is no rule of law that the policy or procedure governing the inventory search must be in writing"). Cf. *People v. Bayles*, 76 Ill. App. 3d 843, 846-47, 395 N.E.2d 663, 666 (1979), *aff'd* 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied* 453 U.S. 923, 101 S. Ct. 3160, 69 L. Ed. 2d 1005 (1981) (officer testified that he had " 'nothing on paper' " concerning his inventory policy, replied that he " 'really couldn't tell you whether I have or not, it's a possibility' " to whether he instructed his deputies to open closed containers, and that it was his practice to open and inventory a closed container " 'if it's not locked' ").

Thus, there is no constitutional requirement that inventory policies be established in writing.

However, the State bears the burden of proving that a law enforcement agency's search was made pursuant to a standardized criteria or established routine required by the Fourth Amendment. *U.S. v. Judge*, 846 F.2d 274 (5th Cir. 1988). A failure of proof on the State's behalf requires a finding that the search suffered from constitutional infirmities. See, also, *People v. Dandrea*, 736 P.2d 1211 (Colo. 1987); *Matter of*

B. K. C., 413 A.2d 894 (D.C. App. 1980).

While the evidence as to the standards used by the Hall County officials is sparse, the record does, through the testimony of McKinny and Gorman, establish the existence of a standard procedure and that the search was conducted in accordance with that procedure. Although not expressly stated, the clear inference from that testimony is that the film canister was opened in accordance with that standardized procedure.

Arguably, Gorman may have been derelict in her duties had she not searched the purse and its contents. As appellate review is by its nature done in hindsight, it is appropriate to remind ourselves that

> [w]e are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house. It is evident that a station-house search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Illinois v. Lafayette, 462 U.S. 640, 648, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983).

The foregoing determination that the items found upon the search of the purse were properly received in evidence dooms to failure Filkin's claim that the district court erred in not directing a verdict in her favor pursuant to her motion at the close of all the evidence. The applicable rule is that in a criminal case a court can direct a verdict only where there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character, lacking in probative value, that a guilty finding cannot be supported by the evidence. *State v. Hernandez, ante* p. 78, 493 N.W.2d 181 (1992); *State v. Valdez*, 236 Neb. 627, 463 N.W.2d 326 (1990).

Section 28-416(3) prohibits the knowing or intentional possession of methamphetamine unless obtained for a lawful purpose as described therein. The evidence, if believed by the jury, establishes that Filkin did indeed possess methamphetamine, and the circumstances warrant an inference that she

did so knowingly or intentionally. The record is devoid of any suggestion that she possessed it for any lawful purpose. Thus, the district court properly overruled Filkin's motion for a directed verdict.

Accordingly, as noted in the first paragraph of this opinion, the judgment of the Nebraska Court of Appeals is reversed and the cause remanded with the direction that the Nebraska Court of Appeals affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CHARLES G. PETERSON, APPELLANT.

494 N.W.2d 551

Filed January 29, 1993. No. S-91-507.

1. **Motions to Suppress: Appeal and Error.** When reviewing a trial court's determination on a motion to suppress, this court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. **Expert Witnesses: Trial.** It is not an abuse of discretion for the trial court to admit expert testimony regarding the analysis of a substance necessarily consumed in testing, provided that the scientific or technical basis of the expert's opinion and the specific facts of the case on which the expert's opinion is based are before the jury and that the opposing party has the opportunity to cross-examine the expert as to these foundational matters.
3. **Verdicts: Appeal and Error.** After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence, if the evidence sustains some rational theory of guilt.
4. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict of the fact finder must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Emil M. Fabian, of Fabian & Thielen, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

GRANT, J.

After a jury trial, defendant, Charles G. Peterson, was convicted of attempted first degree murder, in violation of Neb. Rev. Stat. §§ 28-303(1) and 28-201(1), (2), and (3) (Reissue 1989), and of use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). The victim was defendant's wife, Suzanne R. Peterson. Before trial, defendant's motion to suppress the evidence of results obtained from the testing of shoes discovered in defendant's vehicle was denied. Defendant was sentenced to consecutive terms of imprisonment of not less than $16^2/_3$ years nor more than 40 years for the attempted first degree murder conviction and not less than $6^2/_3$ years nor more than 15 years for the use of a firearm to commit a felony conviction.

Defendant timely appealed. In this court, he assigns three errors, contending that the trial court erred in (1) denying defendant's motion to suppress; (2) failing to grant defendant's motion to dismiss for the reason that the evidence was insufficient, as a matter of law, to support a conviction of attempted first degree murder; and (3) failing to grant defendant's motion to dismiss for the reason that the evidence was insufficient, as a matter of law, to support a conviction of use of a firearm to commit a felony. We affirm.

The record presents the following facts: Suzanne Peterson testified that on the morning of August 3, 1990, she was awakened by what she believed at the time to be an aneurysm or "a blood clot [that] had formed and exploded in her brain." At the time, she was recovering from an operation on her knee and was worried about blood clots forming and "was concerned something might be happening." She was in her upstairs bedroom at the time and immediately "sprang off" the bed and headed out the door. As she ran, she called out to defendant for assistance. She testified that she heard her husband respond to her and that she went toward him. She testified that she first

saw her husband after reaching the lower set of steps which would take her to the great room of the house. She asked her husband to call an ambulance because she had suffered an "explosion" in her brain. When she received no response to that request, she proceeded toward the kitchen where a telephone was located. As she proceeded in this direction, she felt another explosion. She was knocked down on her back. Once again she asked defendant to call an ambulance. She testified that although defendant phoned for an ambulance, he did not give the location of their home. She also asked defendant to call her parents. Defendant told her that he had attempted to, but that they were not home. Suzanne Peterson further testified that defendant then left the area and went upstairs. She next saw defendant at the front door before he walked past her to leave the house through the garage.

After she was alone, Suzanne Peterson attempted to call an ambulance herself, but discovered the phone was disconnected. She then dragged herself toward the sliding glass door and raised herself up with her left arm to unlock the door. Her cries for help were eventually heard by neighbors, and ultimately a police officer arrived and broke through the front door to assist her. After receiving emergency treatment at her home from the responding rescue squad, she was transported to the Offutt Air Force Base hospital, Ehrling Berquist. She was then told that she had been shot twice, once in the head and once in the back. She suffered permanent paralysis below the waist and permanent loss of vision in her right eye.

Defendant was arrested on the same day, August 3. He testified that he was at work the entire morning of August 3. He consented to a search of his vehicle, and during the search, a pair of black patent leather shoes was found in the trunk. On close examination, dark stains could be seen on the shoes. Later, these stains were determined to be bloodstains. Defendant was subsequently charged with attempted first degree murder and use of a firearm to commit a felony.

Defendant filed a motion for inspection, pursuant to Neb. Rev. Stat. § 29-1913 (Reissue 1989), and a more general discovery motion. The motions were granted, but defendant was later advised by the prosecution that there were no

remaining blood samples from the shoes for further testing, because the blood samples had been consumed in the State's testing. Defendant then filed a motion to suppress the evidence obtained from the State's testing.

At the hearing on the motion to suppress, Nebraska State Patrol crime lab forensic serologist Dr. Reena Roy testified that she was asked to test the shoes for blood. On August 10, 1990, she collected eight swabs of samples from the shoes, three from the left shoe and five from the right shoe. After removing those samples, it appears she then swabbed the shoes for additional samples, but did not find any more blood samples. Using the samples obtained from the shoes and following standard procedures, Dr. Roy proceeded to determine for each of the eight samples (1) whether blood was presumptively present (leucomalachite green test), (2) whether blood was conclusively present, (3) to what species the blood belonged (Ouchterlony test), (4) genetic markers (phosphoglucomutase, adenosine deaminase, adenylate kinase), and (5) blood type. On the left shoe, Dr. Roy was able to complete the first two tests and determine that the three samples were blood of some type, but she was unable to make any further tests due to insufficient samples of the material to be tested. Dr. Roy reached the same results for samples 4 and 5 on the right shoe. For samples 1, 2, and 3 on the right shoe, Dr. Roy completed enough tests to determine that all three samples were human blood, type A. Both defendant and the victim, as well as 40 percent of the Caucasian population, have type A blood. Further tests were not possible because there were no sufficient samples remaining. The trial court denied the motion to suppress.

In his first assignment of error, the defendant contends that the trial court erred in denying his motion to suppress all evidence of blood tests or analyses conducted by Dr. Roy on the shoes. When reviewing a trial court's determination on a motion to suppress, this court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). 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. Jacob, ante* p. 176, 494 N.W.2d 109 (1993); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

Section 29-1913(2) excludes evidence of scientific tests or analyses when the prosecutor or his representatives make the evidence necessary for tests or analyses unavailable through their negligence or intentional acts. The issue here is whether Dr. Roy, as a representative of the prosecuting authority, was negligent in conducting every test for each sample, or whether she demonstrated bad faith by swabbing the entire shoe and thereby removing any remaining samples.

In regard to the charge of negligence, it cannot be said that the trial court abused its discretion in finding that Dr. Roy was not negligent in her testing. Dr. Roy testified that when she conducted the tests on the shoes, she followed the standard procedure of the office as well as scientifically accepted procedure. The first three samples from the left shoe tested positive for the presence of blood. Further tests of those samples were impossible because there were no sufficient remaining samples to test. From the five samples on the right shoe, she was able to determine that samples 1, 2, and 3 were human blood and to determine the blood type of the samples. For samples 4 and 5, Dr. Roy determined only that they were blood. Dr. Roy testified that samples used for testing could not be reused.

Standard procedure required running each of the eight samples through each of a series of tests to determine its composition, although determination of one sample had already been made. Dr. Roy testified that this procedure is followed because the determination of the composition of one sample does not prove the presence of the same substance in another area within the tested material. Dr. Roy did not make any assumptions as to any samples which she was unable to test based on the results of prior tests on the shoes. There were eight areas which had the suspect stain, and these were the areas she swabbed. The defendant does not appear to dispute that she followed the standard procedure for testing for blood. Certainly, defendant would have a valid objection if Dr. Roy had not followed those procedures and had simply presumed

the other samples were of the same substance.

Defendant first contends that "[l]aw enforcement officials acted in bad faith in violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, in failing to preserve potentially useful evidentiary material." (Emphasis omitted.) Brief for appellant at 11. We agree with defendant's statement that in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), the U.S. Supreme Court held that the failure of law enforcement officials to preserve evidence potentially useful to a defendant is not a denial of due process of law unless a defendant can show bad faith on the part of law enforcement personnel.

In his brief, defendant conceded that "the State's failure to preserve one or more of the eight (8) spots of blood or the twenty-five (25) samples of blood obtained from those spots, probably does not, when taken alone, rise to the level of 'bad faith.' " Brief for appellant at 12. We agree. The evidence of Dr. Roy shows that the entire amount of the small samples in the eight spots of blood was consumed in the testing conducted by Dr. Roy. There was no bad faith in the conduct of any law enforcement agents in this regard.

Defendant contends that a different situation is presented in Dr. Roy's testimony that she "swabbed" both shoes in an effort to recover further samples. It is this action, apparently, that defendant categorizes as bad faith. We do not so find. The dispositive answer is that Dr. Roy discovered no further sample in this effort, and therefore, there was no remaining sample to test. There was nothing to preserve. Dr. Roy did not act in bad faith in this procedure.

Defendant then contends that, in any event, the conduct of the State violated § 29-1913. That statute provides:

> (1) When in any felony prosecution . . . the evidence of the prosecuting authority consists of scientific tests or analyses of . . . blood . . . or other stains, upon motion of the defendant the court where the case is to be tried may order the prosecuting attorney to make available to the defense such evidence necessary to allow the defense to conduct like tests or analyses with its own experts. The

> order shall specify the time, place, and manner of making such tests or analyses by the defense. Such an order shall not be entered if the tests or analyses by the defense cannot be made because of the natural deterioration of the evidence.
>
> (2) If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

Pursuant to this statute, defendant requested that the State produce, for defendant's analysis, "one pair of black patent leather shoes allegedly removed from Defendant's automobile trunk and any blood samples attached to or removed therefrom." This motion was granted by the court, but defendant was eventually advised by the State that the blood samples or specimens which had been removed from defendant's shoes no longer existed. Defendant then filed his motion to suppress, pursuant to § 29-1913(2), requesting that the trial court exclude from evidence "any and all blood tests or blood analysis conducted by the [State]." The trial court denied defendant's motion, and defendant now contends that that ruling was erroneous.

Defendant cites two cases concerning § 29-1913(2): *State v. Brodrick*, 190 Neb. 19, 205 N.W.2d 660 (1973), and *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989). *Brodrick* involved possession of a controlled substance. The evidence consisted of one tablet, which was tested by the State's chemist and then discarded. This court determined there was neglect on the part of the representatives of the State because the residue from the test could have been saved and subjected to independent tests by the defense. Also, the chemist testified that the county attorney had requested that the chemist save part of the tablet if possible. The chemist, disregarding the request of the county attorney, discarded the residue of the tablet, although it would have remained stable for several months. The present case presents different facts, because Dr. Roy testified there were no remaining samples on the shoes. In

fact, Dr. Roy was not able to complete all the tests for each sample due to insufficient quantities of samples. She also testified that had the county attorney and the defense counsel requested her not to do the tests, or not to test all the spots, she would not have conducted any tests on the shoes. No such request appears to have been made.

In *Tanner, supra*, the issues arising under § 29-1913 were not presented to the trial court because Tanner failed to follow certain procedural rules. The *Tanner* case does not support defendant's position in this case.

Although it does not involve § 29-1913(2), a more analogous case to the present one is *State v. Batchelor*, 191 Neb. 148, 214 N.W.2d 276 (1974). In *Batchelor*, the defendant was convicted of criminal sale of a controlled substance. The defendant sought to exclude the testimony of the State's chemist who analyzed the single tablet that had been seized from the defendant. The residue left from the tested tablet could not be preserved and was unfit for further testing. The chemist had testified that using less than one tablet for the testing procedures would provide questionable results. This court held that under those circumstances, it was not an abuse of discretion by the trial court to find that the State had not negligently or intentionally deprived the defendant of the right to analyze the tablet.

We have held that it is not an abuse of discretion for the trial court

> to admit expert testimony regarding the analysis of a substance necessarily consumed in testing, provided that the scientific or technical basis of the expert's opinion and the specific facts of the case on which the expert's opinion is based are before the jury and that the opposing party has the opportunity to cross-examine the expert as to these foundational matters.

State v. Trevino, 230 Neb. 494, 515, 432 N.W.2d 503, 518 (1988). The trial court did not abuse its discretion in denying defendant's motion to suppress.

Defendant also assigns as error the trial court's failure to grant his motion to dismiss both counts I and II made at the end of the State's case and renewed at the close of the evidence.

Defendant claims that the evidence offered to demonstrate attempted first degree murder and use of a firearm to commit a felony was insufficient as a matter of law.

After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence, if the evidence sustains some rational theory of guilt. *State v. Trevino, supra.*

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict of the fact finder must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. *State v. Andersen*, 238 Neb. 32, 468 N.W.2d 617 (1991).

> With respect to the sufficiency of the evidence to convict of attempted murder, the conviction must be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience.

State v. Benzel, 220 Neb. 466, 470, 370 N.W.2d 501, 507 (1985).

Section 28-303 defines murder in the first degree as killing another person purposely and with deliberate and premeditated malice. The elements of criminal attempt are set out in § 28-201, which provides in part:

> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

The evidence in this case, when viewed in the light most favorable to the State, is sufficient to sustain a conviction of attempted murder in the first degree. The victim's testimony, if

believed by the jury, showed that defendant was present when the victim was shot.

Suzanne Peterson's testimony was supported by other testimony, as well as by the exhibits offered into evidence. All the people who provided her with medical attention stated she was very alert and conscious throughout her ordeal. These witnesses included the first officer to arrive on the scene, a paramedic who attended her at her home, the attending physician in the base hospital emergency room, and the attending physician in the University of Nebraska Medical Center emergency room, to which she was transferred after being seen at the base hospital. All testified that Suzanne Peterson was alert and in control of her faculties and not disoriented or confused.

Suzanne Peterson repeatedly told those assisting her that defendant had been in their home earlier, but that he had left. She had told them this without knowing at the time that she had been shot. The treating physician at the base hospital testified that although the bullet was in her head, there was no brain damage because the bullet had traveled across her face without touching the brain itself.

In addition to the direct testimony of Suzanne Peterson placing defendant at her home at the time of the crime, the verdict is supported by other evidence as well. Defendant's shoes were found in the trunk of his car with suspect stains on them. After testing the samples obtained from the shoes, Dr. Roy determined that the stains consisted of type A blood. Both defendant and Suzanne Peterson had blood type A.

Further, the evidence showed that in June 1990, defendant had purchased additional life insurance on Suzanne Peterson in the amount of $200,000 and had failed to cancel an existing $54,000 policy on her even after repeated requests to do so.

The evidence presented at trial is sufficient to establish, beyond a reasonable doubt, that defendant was guilty of attempted first degree murder.

In his third assignment of error, defendant contends that the trial court erred in not dismissing the charge of the use of a firearm to commit a felony because of insufficient evidence. Section § 28-1205 provides that "[a]ny person who uses a

firearm . . . to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using firearms to commit a felony." Attempted first degree murder is a Class II felony. The evidence supports a finding of the jury that defendant used a gun to shoot his wife in an attempt to kill her. The bullets remaining in the victim's body were conclusive proof that a weapon was used. There is no merit in defendant's third assignment of error.

While defendant adduced evidence that he could not have been at the scene of the assault on his wife, the fact remains that the State adduced sufficient evidence which, if believed by the jury, established beyond a reasonable doubt that defendant was guilty of the crimes he was charged with committing.

The trial court did not err in any of the respects alleged by defendant. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT L. SMITH, APPELLANT.

494 N.W.2d 558

Filed January 29, 1993. No. S-91-745.

1. **Confessions: Police Officers and Sheriffs: Self-Incrimination.** Statements stemming from custodial interrogation may not be used in prosecuting a defendant unless it is demonstrated that procedural safeguards were used to secure the privilege against self-incrimination.
2. **Police Officers and Sheriffs: Words and Phrases.** Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
3. **Constitutional Law: Police Officers and Sheriffs: Self-Incrimination: Right to Counsel.** To protect the privilege against self-incrimination guaranteed by the Fifth Amendment, the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel.
4. **Police Officers and Sheriffs: Right to Counsel: Waiver.** When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights.

5. **Police Officers and Sheriffs: Right to Counsel.** When an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
6. **Confessions: Self-Incrimination: Right to Counsel: Waiver.** Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
7. **Self-Incrimination: Right to Counsel: Waiver.** The determination of whether a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel depends upon the particular facts surrounding the case, including the background, experience, and conduct of the accused.
8. **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 of fact are clearly erroneous.
9. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

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

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

GRANT, J.

After a jury trial in the district court for Sarpy County, defendant, Scott L. Smith, was convicted of the first degree murder of his mother, Linda Smith; the first degree murder of his sister, Amy Smith; and the attempted first degree murder of his father, Lynn Smith. Additionally, defendant was convicted of the use of a firearm in the commission of each of the felonies.

After a sentencing hearing, defendant was sentenced to a life term for each of the murders and to 20 years in prison for the attempted murder, with the provision that each of these terms would be served concurrently. Defendant was also sentenced to a term of 5 years in prison for the use of a firearm in each felony, with the provision that these sentences would be served consecutively to each of the felony sentences.

Defendant timely appealed to this court, where he assigns a single error: "The [district] Court erred as a matter of law in failing to suppress and exclude from evidence the confession given by Appellant to law enforcement personnel." We affirm.

The record shows that on November 10, 1990, Linda Smith and her daughter, Amy Smith, were found dead in their home in Sarpy County. Both had been shot numerous times with a .22-caliber handgun. Lynn Smith, the husband of Linda Smith and father of Amy Smith and defendant, discovered the body of Linda Smith when he came home from work. Upon this discovery, Lynn Smith was confronted by his son, the defendant, who was holding a handgun. Lynn Smith ran out of the house and eventually eluded defendant, who chased him with the gun. Lynn Smith then called the police from a residence in the neighborhood. Defendant was 19 years old at this time.

Shortly thereafter, defendant was found near the home and arrested by Trooper Michael Malmstrom of the Nebraska State Patrol. The trooper told defendant that he was under arrest for suspicion of homicide, placed defendant in a police vehicle, and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Trooper Malmstrom testified that he used a card which sets out 10 items to be read when informing a suspect of his *Miranda* rights. Defendant nodded his head in acknowledgement of each right from one to seven and never indicated that he did not understand what was being said to him. Trooper Malmstrom then read point number eight: "Do you willingly do without the services of a lawyer at this time?" In response, defendant stated that he wished to have a lawyer present. Questioning by the trooper stopped at this point.

Approximately 7 or 8 minutes after the arrest, defendant was

placed in the unmarked police car of Sarpy County Deputy Sheriff Kris Yount, who had known defendant for more than a year. Their relationship had begun when Deputy Yount was investigating an unrelated crime in which defendant was the victim and a witness. Deputy Yount took defendant to the Sarpy County Jail. En route, Deputy Yount asked defendant if he had graduated from high school. Defendant responded by asking: " 'If I told them I don't want to talk, does that mean I can't talk to you, too?' " Deputy Yount informed defendant that since he did not want to make a statement about what happened at his house, she would not ask him about it. Deputy Yount later testified that she was just making conversation at this time. Defendant then said that he had graduated from high school.

A few minutes later, defendant asked if there was a death penalty in Nebraska. Upon Deputy Yount's reply that there was, defendant said, " 'Oh, no,' " and started to cry. Shortly thereafter, they arrived at the Sarpy County Jail, where Deputy Yount told defendant that she would be around the jail for a while. Defendant was then taken to the booking area and booked by another officer while Deputy Yount went to another part of the jail. Defendant was placed in a holding cell after his booking was completed.

Approximately 10 or 15 minutes after Deputy Yount had turned defendant over to the other officer, she was informed that defendant wanted to talk to her. Deputy Yount then got a tape recorder and a *Miranda* rights advisory form and went to the interview room to which defendant had been transferred. When she entered the room, Deputy Yount asked defendant what he wanted to talk to her about. Defendant replied that he wanted to make a statement, at which time Deputy Yount read the *Miranda* rights advisory form to defendant. The form advised that Deputy Yount was a police officer; that defendant had a right to remain silent and not make any statements or answer any questions, but that anything he said could and would be used in court; that he had a right to consult with a lawyer and have the lawyer present during questioning; that if he could not afford a lawyer, one would be appointed for him by the court; that knowing these rights, he was willing to make a statement; and that he willingly waived the services of

an attorney at that time. Each right ended with the question: "Do you understand that?" Defendant wrote "yes" next to each question and initialed each response. Deputy Yount then tape-recorded defendant's statement, which was later transcribed. Defendant later filed a motion to suppress the statement, which was overruled after a pretrial hearing on the matter. At trial, the statement was received in evidence over objection by counsel for the defendant.

In view of the narrow scope of the inquiry presented by the assignment of error, a detailed recitation of the facts surrounding the murders and attempted murder giving rise to this appeal is not necessary. Suffice it to say that the record shows overwhelming evidence to support defendant's convictions.

The single assignment of error made by defendant can be separated into two issues for the purpose of discussion. First, defendant asserts that his statement should have been suppressed because the police allegedly initiated dialogue with defendant after he had invoked his Fifth Amendment right not to proceed without the services of an attorney. Second, defendant contends that the State failed to overcome its burden of proving that a valid waiver of the right to remain silent and right to counsel was made knowingly and intelligently.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. See *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). The Court characterized "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444. See, also, *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

The U.S. Supreme Court has further held: "To protect the privilege against self-incrimination guaranteed by the Fifth Amendment . . . the police must terminate interrogation of an

accused in custody if the accused requests the assistance of counsel." *Minnick v. Mississippi*, 498 U.S. 146, 147, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) (citing *Miranda v. Arizona, supra*).

In the case at bar, defendant was advised of his *Miranda* rights upon his arrest by Trooper Malmstrom, at which time he stated that he wished to have a lawyer. Accordingly, questioning ceased at that time. Defendant was then taken to the Sarpy County Jail by Deputy Yount and transferred to the custody of another officer for booking. While transferring him, Deputy Yount told defendant that she "would be there for a little while" "[i]f he wanted to talk." About 10 to 15 minutes later, defendant told the booking officer: "I want to talk to her." Deputy Yount got a tape recorder and, after again giving defendant his *Miranda* rights by reading them to him and having him initial and sign a *Miranda* rights advisory form, took defendant's statement in which he confessed to the crimes in question.

According to Deputy Yount, when defendant signed the form, he appeared to understand the questions, and he responded clearly. Deputy Yount stated that no threats, force, promises, or coercion of any kind were used to obtain the confession.

It is upon this set of facts that defendant bases his argument that his confession should have been suppressed. In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the U.S. Supreme Court set out the following rule governing subsequent waivers of an accused's invoked right to counsel:

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler*, [441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused,

> such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*

(Emphasis supplied.) *Edwards v. Arizona*, 451 U.S. at 484-85.

Further, in *Minnick v. Mississippi, supra*, the U.S. Supreme Court stated that its holdings in *Miranda v. Arizona, supra*, and *Edwards v. Arizona, supra*, did "not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities." *Minnick v. Mississippi*, 111 S. Ct. at 492.

Our inquiry is limited to determining whether defendant initiated the conversation during which he confessed or whether Deputy Yount initiated the interaction between defendant and herself in violation of *Miranda v. Arizona, supra*, and its progeny. The facts set out above are not disputed, but their legal significance is. Defendant contends that Deputy Yount initiated the dialog with him when she told him, while turning him over for booking, that she " 'would be around for a little while.' " Brief for appellant at 7. In fact, defendant charges that Deputy Yount "was coyly and shrewdly conning [defendant] into entering [into] a discussion about the crimes." *Id.* The State, on the other hand, takes the position that the defendant initiated the dialog when he asked to speak to Deputy Yount.

The U.S. Supreme Court has stated that *Edwards v. Arizona, supra*, is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990). The Court has also held that "[t]his was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

In *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984), the accused told her custodial officers that her attorney had advised her not to say anything unless she was present. The officers, on

their own initiative, contacted the attorney, who told them that she was not representing the accused. The accused was informed of this and, even though she refused to sign the standard *Miranda* rights advisory form, was subjected to further interrogation. In ruling that the accused's statement had to be suppressed, we stated:

> Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Id. at 312-13, 353 N.W.2d at 25.

Unlike in *State v. Joy, supra*, however, there can be no doubt in this case that when defendant asked to speak to Deputy Yount, he " 'initiated' further conversation in the ordinary dictionary sense of that word." *Oregon v. Bradshaw*, 462 U.S. at 1045. Defendant's request "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Oregon v. Bradshaw*, 462 U.S. at 1045-46. The fact that Deputy Yount had told defendant that she would be around for a little while prior to defendant's request does not negate the fact that defendant initiated the dialog. Deputy Yount's statement was not intended to start a conversation, but merely informed defendant that she would be available if he wished to initiate a dialog. The State met its burden of proving that defendant waived his privilege against self-incrimination and his right to counsel.

Since there was no violation in this case of the rule in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the next inquiry is:

> [W]hether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including

> the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Edwards v. Arizona, 451 U.S. at 486 n.9.

This determination depends upon " 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). See, also, *Edwards v. Arizona, supra*.

Among the circumstances to be considered in this case, two are of particular import to our deliberations: First, the evidence shows that defendant is at least somewhat mentally deficient; second, he had been the victim of a sexual assault some time before the incidents in the case at bar. The assault had been the subject of a trial in 1989. Although both defendant and the State concede that these factors are present, there is disagreement as to their effect on defendant's waiver of his *Miranda* rights.

The defendant's primary witness on this subject, Cynthia Topf, Ph.D., testified that one IQ test measured defendant's full-scale IQ at 65. This would place defendant below the mean of average intelligence, in the diagnostic category of mild mental retardation. Dr. Topf also testified, however, that another test measured defendant's IQ at 73, placing him in the borderline range of intelligence, slightly above the 70-point cutoff for mental retardation. Dr. Topf said that defendant would not be able to understand words and phrases that he read as well as the average person, and she stated:

> [T]here may be some words that Scott would not be able to read or understand. I think the larger problem would be the total understanding of what the sentences mean, the ability . . . to read the sentence might have been there, but to comprehend it I don't believe would have been there.

In addition, Dr. Topf had diagnosed defendant as suffering from posttraumatic stress disorder some 3 months before the incident at trial. Posttraumatic stress disorder was described by Dr. Topf as being characterized by delusions or hallucinations—a break with reality. She said she believed that

defendant was subject to such occurrences when he was under stress, and said that, in her opinion, he was experiencing a brief reactive psychosis on November 10, 1990, the day of the murders. Accordingly, she said that defendant would not have been able to understand the *Miranda* rights advisory form and its significance. Dr. Topf said she believed that the disorder was a result of the sexual assault of defendant by a family friend, which sexual assault was the subject of a trial some 6 months before the incident at issue.

Dr. Louis Martin, a physician specializing in psychiatry, testified on behalf of the State. Dr. Martin had had contact with defendant for approximately 8 to 10 weeks while he was being evaluated in the Lincoln Regional Center after the murders. Based upon these contacts and the findings of his staff, Dr. Martin testified that defendant understood and comprehended the information contained in the *Miranda* rights advisory form, as read to him by Deputy Yount. The fact that defendant asked for an attorney after being read his rights by Trooper Malmstrom supported Dr. Martin's opinion that defendant understood his rights, because when a person is given options and chooses one, such a person probably understands what he is talking about, "particularly if as in this instance the choice appeared . . . to be consistent with . . . a protection of his rights."

Dr. Martin also testified that he saw no clinical indication that the defendant was not aware of what was going on when he was at the police station or before arriving there. Accordingly, he testified that he did not agree with Dr. Topf's conclusion that defendant had suffered a psychotic break on November 10, 1990. Dr. Martin based this determination on the completeness of defendant's confession, stating that "it would be very unusual for a person who had been psychotic, later and within a relatively brief period of time, to be able to give you an account of events as they occurred at that time, which was a rational consistent account."

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 of fact are clearly erroneous. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992);

State v. Gibbs, 238 Neb. 268, 470 N.W.2d 558 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

In the instant case, in overruling defendant's motion to suppress, the district court found that defendant validly waived his right to counsel, knowingly and intelligently, and that his statement was properly admissible. The evidence fully supports these findings. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE VICTOR, APPELLANT.

494 N.W.2d 565

Filed January 29, 1993. No. S-91-933.

1. **Postconviction: Appeal and Error.** In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.
2. **Postconviction.** An evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided.
4. _____: _____. In the absence of a factual allegation, an initial demonstration of an extraordinary and relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state trial court in a motion for postconviction relief are without merit.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions 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.

6. **Appeal and Error.** Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
7. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal.
8. **Postconviction: Right to Counsel: Appeal and Error.** Under Neb. Rev. Stat. § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1989 & Cum. Supp. 1992). This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
9. **Constitutional Law: Postconviction: Right to Counsel: Death Penalty.** Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.
10. **Postconviction: Right to Counsel.** Where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

J. Joseph McQuillan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WHITE, J.

The defendant, Clarence Victor, appeals a decision of the district court for Douglas County to deny his pro se request for postconviction relief under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992).

Victor was convicted of first degree murder and use of a weapon to commit a felony in the 1987 death of 82-year-old Alice Singleton. Victor was sentenced to death for the murder offense and given a consecutive sentence of 20 years for the

felony weapon offense. The convictions were upheld on direct appeal. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990) (*Victor I*). The U.S. Supreme Court denied Victor's application for a writ of certiorari, *Victor v. Nebraska*, 498 U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1195 (1991), and Victor sought state postconviction relief from the district court. Victor was represented at both the trial and the appellate level by the same attorney, but was denied court-appointed counsel on his motion for postconviction relief.

Defendant sought relief from the district court based on alleged violations of the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and alleged violations of article I, §§ 3, 9, and 13, of the Nebraska Constitution. These claims summarily contended that (1) the trial court improperly instructed the jury on the law regarding the concept of "reasonable doubt"; (2) the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional; (3) the death penalty was improperly imposed because the aggravating circumstance in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) is vague and results in an arbitrary imposition of capital punishment; (4) the sentencing panel and the Nebraska Supreme Court erroneously refused to consider defendant's inability to conform his conduct to law because of mental defect or intoxication as required by § 29-2523 (2)(g); (5) neither the sentencing panel nor the Nebraska Supreme Court compared the facts of defendant's case with other "criminal homicides" of same or similar circumstances to determine the proportionality of defendant's sentences with the results of similar cases; (6) at the sentencing hearing, the sentencing panel erroneously admitted defendant's confession to a 1964 homicide because the confession did not conform to *Miranda* requirements; (7) defendant's confession to the present homicide was not voluntary, was a product of an unlawful arrest, and was obtained without a valid waiver of his *Miranda* rights; and (8) trial and appellate counsel was ineffective in failing to raise or in improperly raising each of the aforementioned issues.

On September 17, 1991, the district court denied defendant's motion for an evidentiary hearing and simultaneously entered

an order overruling the motions for postconviction relief and vacation of sentences. After obtaining court-appointed counsel, defendant perfected this appeal. He now asserts that the district court erred in (1) refusing to grant an evidentiary hearing; (2) failing to appoint counsel to represent defendant for his motion to vacate sentences and convictions; (3) finding that defendant was not denied effective assistance of counsel; and (4) failing to retroactively apply *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), with regard to the reasonable doubt jury instruction. On this appeal, defendant also argues, for the first time, the failure of previous counsel to disclose a conflict of interest in representing defendant and in failing to submit evidence in support of the pretrial motion for change of venue.

In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

Victor first argues that he was entitled to an evidentiary hearing under § 29-3001 on the additional allegations raised in his motion to vacate sentences filed before the district court.

"An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution." *Sanders*, 241 Neb. at 689, 490 N.W.2d at 214. See, also, *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985).

Conversely, an evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief. *State v. Maeder*, 240 Neb. 955, 486 N.W.2d 193 (1992); *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

The bulk of assigned errors raised in defendant's motion for relief before the district court were previously raised on direct appeal and finally determined by this court in *Victor I*. The

record discloses that trial and appellate counsel did raise and argue the legality of Victor's confession, the constitutionality of § 29-2523(1)(d), the receipt into evidence of the 1964 manslaughter confession at the sentencing hearing, the determination that the aggravating circumstance found in § 29-2523(1)(d) existed and the mitigating circumstance found in § 29-2523(2)(g) did not exist, and the contention that the sentences were disproportionate and excessive.

We have repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided. See, *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991); *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). Defendant's only attempt to avoid the procedural bar of the previously raised issues is by asserting that he was denied effective assistance of counsel because trial and appellate counsel *improperly* raised these issues. However, defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support these bare conclusions. Since defendant failed to make a factual showing to indicate he was entitled to relief, the district court did not err in denying defendant an evidentiary hearing on these previously litigated issues.

Relying on the U.S. Supreme Court's decision in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), defendant further argues that the jury instruction on reasonable doubt was unconstitutional in that it confused the jury and suggested a higher degree of doubt than is required under the 14th Amendment. Subsequent to defendant's trial and appeal, this court has had the opportunity to review the constitutionality of a jury instruction identical to the one challenged here. See *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). In *Morley*, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional by the U.S. Supreme Court in *Cage*. Therefore, whether or not trial and appellate counsel failed to

object to or appeal the jury instruction and whether or not the district court should have provided Victor the opportunity to advance this claim in an evidentiary hearing are now irrelevant, causing this assignment of error also to be without merit.

The majority of Victor's claims were raised and fully reviewable from the record on direct appeal. Defendant's contentions that counsel failed to disclose a conflict of interest and failed to submit evidence in support of the pretrial motion for change of venue were not raised before the district court and are accordingly irrelevant to the court's decision to deny an evidentiary hearing. Victor's assigned error addressing the reasonable doubt instruction was decided by our opinion in *State v. Morley, supra*, and is consequently without merit. Finding that Victor has failed to allege facts that would constitute a denial or violation of his constitutional rights causing the judgments and convictions against him to be void or voidable, we hold that the district court did not err in denying an evidentiary hearing on his postconviction motion.

In his motion for relief to the district court, defendant alleged that the Nebraska Supreme Court committed error on his direct appeal. Victor first argued that the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional. Victor also argued that the Nebraska Supreme Court erroneously refused to consider his inability to conform his conduct to law because of mental defect or intoxication. Defendant does not now further argue or advance these previously assigned errors except, perhaps, as they arise under the alleged errors of the district court in denying an evidentiary hearing and court-appointed counsel. In the absence of a factual allegation, an initial demonstration of an extraordinary and relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state trial court in a motion for postconviction relief are without merit. Consequently, it was proper for the district court to address these errors without providing an evidentiary hearing and without appointing counsel.

When the defendant in a postconviction proceeding

> alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.

State v. Carter, 241 Neb. 645, 650, 489 N.W.2d 846, 852 (1992). A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions " ' "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. Lyman*, 241 Neb. 911, 915, 492 N.W.2d 16, 19 (1992).

Defendant asserts that previous counsel failed to disclose a conflict of interest in the representation of defendant at both the trial and appellate level and in allegedly assisting defendant in drafting the petition for postconviction relief. Defendant also claims that trial counsel failed to submit evidence in support of the pretrial motion for change of venue.

These issues were not raised in the motion for postconviction relief filed with the district court, nor were they specifically assigned as error in defendant's brief. "Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition." *State v. Whitmore*, 238 Neb. 125, 132, 469 N.W.2d 527, 532 (1991). Additionally, when a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

Considering that the allegation of an undisclosed conflict of interest was not raised or ruled on by the trial court and recognizing that there is not a record to review, we will not address the matter. Nor are we able to review the claim that trial counsel failed to submit evidence in support of the pretrial motion for change of venue. The only reviewable record about

trial counsel's efforts to seek a change of venue is an inexplicit three-line notation on the criminal docket sheet. This notation merely references that a hearing was held on defendant's motion for a change of venue and that the motion was overruled after "evidence" was presented. Therefore, the ineffective assistance of counsel claim based on these two newly alleged grounds is not properly before this court.

As previously determined in the evidentiary hearing analysis, the failure of counsel to object to or appeal the reasonable doubt jury instruction is now moot in light of our decision in *State v. Morley, supra*. The claims advanced by defendant regarding whether trial and appellate counsel failed to raise, or improperly raised, issues numbered (2), (3), (4), (5), (6), and (7) in the motion filed by defendant before the district court are also without merit. Defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support a conclusion that appellate counsel improperly raised the six constitutional issues challenged here. Defendant has failed to demonstrate how counsel's performance in raising the constitutional issues on direct appeal was deficient, and defendant has not attempted to advance a theory to show how this unknown deficiency prejudiced the defense.

In sum, defendant's assertion that he was denied effective assistance of counsel for various failures by trial and appellate counsel is without merit based on the record before us.

Victor alleges that in light of his undisputed indigency, the district court erred in failing to provide him court-appointed counsel. Under § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under §§ 29-3001 through 29-3004. This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988).

Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to appoint counsel for indigent death row inmates seeking state postconviction relief. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991)

(citing *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989)), *cert. denied* 498 U.S. 827, 111 S. Ct. 2279, 115 L. Ed. 2d 965. See, also, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

Victor contends, however, that since he was represented at both the initial trial and direct appeal by the same attorney, his motion for postconviction relief was his " 'first appeal as of right' " to raise an ineffective assistance of counsel claim. Brief for appellant at 23. Defendant relies on a criminal defendant's constitutional right to appointed counsel established by the U.S. Supreme Court in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). In *Douglas*, the U.S. Supreme Court stated that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis omitted.) 372 U.S. at 357. By postulating that the postconviction proceeding provided him was his one and only appeal as of right to allege ineffective assistance of counsel, Victor maintains that it was error for the district court to deny him appointed counsel to assist him in advancing these claims.

Defendant further relies on the U.S. Supreme Court's decision in *Coleman v. Thompson*, ____ U.S. ____, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh'g denied* ____ U.S. ____, 112 S. Ct. 27, 115 L. Ed. 2d 1109, to argue that the district court was constitutionally required to provide him with appointed counsel for his postconviction motion. In *Coleman*, the issue pertinent to this review was whether ineffectiveness of counsel on appeal from the state habeas trial court judgment was an independent constitutional violation to constitute cause for federal habeas relief. Noting that the prisoner could only prevail if he were constitutionally entitled to appointed counsel in state postconviction proceedings, the U.S. Supreme Court reiterated the general rule that there is no right to counsel in state collateral proceedings. The Court queried whether there should be an exception to this general rule for those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. The Court declined to answer the question, however, in light of the fact that effectiveness of

counsel before the state habeas *trial* court was not at issue. Any language in the *Coleman* opinion suggesting that a state trial court collateral proceeding may be considered a prisoner's "one and only appeal" was merely a passing inquiry and provides little insight or authority to defendant's argument here. 111 S. Ct. at 2568.

The U.S. Supreme Court has consistently recognized that the states have no obligation to provide postconviction relief proceedings and that when states do so provide, due process does not require that the states supply lawyers as well. See *Pennsylvania v. Finley, supra.*

Under Nebraska case law, where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel. *State v. Wiley, supra.* Here, however, the assigned errors in the postconviction petition before the district court were either procedurally barred or without merit, establishing that this postconviction action contains no justiciable issue of law or fact. We therefore find that it was not an abuse of discretion for the district court to deny court-appointed counsel.

Finding no merit in the assignments of error properly before this court, we affirm the decision of the district court in its entirety.

AFFIRMED.

IN RE APPLICATIONS A-16027, A-16028, A-16031, A-16032, A-16033, A-16036, A-16038, A-16039, A-16600, A-16603, AND A-16606.

UPPER BIG BLUE NATURAL RESOURCES DISTRICT, APPELLANT, V. CITY OF FREMONT ET AL., APPELLEES.

495 N.W.2d 23

Filed January 29, 1993. No. S-92-024.

1. **Administrative Law: Waters: Appeal and Error.** Regarding the Director of Water Resources' rulings on water diversion applications, the review of an appellate court is limited to whether the director's determinations are supported

by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.

2. **Constitutional Law: Administrative Law: Legislature: Appeal and Error.** The constitutionality of a legislative act can be raised for the first time on a direct appeal to the Supreme Court from a decision of an administrative agency.
3. **Constitutional Law: Administrative Law: Courts: Legislature: Waters.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution. The Department of Water Resources is an administrative agency and, as such, has no authority to declare an act of the Legislature unconstitutional.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The party claiming a statute to be unconstitutional has the burden of establishing the unconstitutionality of the statute.
6. _____: _____: _____. Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Statutes.** The Nebraska Supreme Court is obligated to endeavor to interpret a challenged statute in a manner consistent with the Nebraska Constitution.
8. _____: _____. Neither constitutional nor statutory provisions are open to construction as a matter of course.
9. **Constitutional Law.** Construction of a constitutional clause is appropriate only when it has been demonstrated that its meaning is not clear and that construction is necessary.
10. **Constitutional Law: Legislature: Intent.** Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed to the Legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect.
11. **Constitutional Law: Intent.** Effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions.
12. **Constitutional Law: Legislature.** If the Constitution does not define what is to be considered in the public interest, the Legislature may so decide.
13. **Constitutional Law: Waters.** The right to appropriate water under the Nebraska Constitution can and must be limited by the demands of the public interest.
14. **Waters.** An application to divert water is only a request for permission to appropriate public waters of the state. No rights shall be deemed to have been acquired until the provisions of Neb. Rev. Stat. § 46-237 (Reissue 1988) shall have been complied with.

15. **Constitutional Law: Statutes: Legislature: Waters.** Article XV, § 6, of the Nebraska Constitution is not self-executing, and it is therefore within the Legislature's province to pass statutes to determine the public interest.
16. **Constitutional Law: Waters.** Neb. Rev. Stat. §§ 46-288 and 46-289 (Reissue 1988), which provide factors to be considered by the Director of Water Resources in evaluating water diversion applications, do not violate Neb. Const. art. XV, §§ 4, 5, or 6.
17. _____: _____. Subsections (4) and (5) of Neb. Rev. Stat. § 46-289 (Reissue 1988), which provide factors to be considered by the Director of Water Resources in evaluating applications for interbasin transfers, are not violative of the doctrine of prior appropriation and do not violate Neb. Const. art. XV, §§ 4, 5, or 6.
18. _____: _____. Neb. Rev. Stat. §§ 46-288 and 46-289 (Reissue 1988) do not violate article V, § 1, of the Nebraska Constitution.

Appeal from the Department of Water Resources. Affirmed.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

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

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

James E. Doyle IV, of Cook, Wightman & Doyle, for appellee Central Platte Natural Resources District.

Bridgitt B. Erickson, Platte County Attorney, for appellee County of Platte.

BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ., and BLUE, D.J., and COLWELL, D.J., Retired.

GRANT, J.

Applicant, Upper Big Blue Natural Resources District (Upper Big Blue), appeals the December 16, 1991, order of the director of the Department of Water Resources, denying Upper Big Blue's applications to make intrabasin and interbasin diversions of unappropriated waters from the Platte and Blue Rivers. Upper Big Blue timely appealed to this court.

The six errors assigned by Upper Big Blue may be divided

into two categories. The first category is made up of four attacks on the constitutionality of various Nebraska statutes and subsections of such statutes; the second category is directed to the alleged errors in the director's rulings in view of the alleged unconstitutionality of the various statutes. Since we hold that the attacked statutes are constitutional, we do not reach these last two assigned errors.

The lengthy record before the director shows the facts as hereinafter set out. On December 17, 1981, Upper Big Blue filed 14 applications with the Department of Water Resources, seeking to divert unappropriated waters from the Platte and Blue Rivers for a water-based-resources venture known as the Landmark Project. The project was intended to replace and replenish dwindling ground water supplies located under project lands.

In addition to a right for direct irrigation from natural flow of the Platte River, Upper Big Blue applied for the right to impound water from the Platte and from the west fork of the Big Blue River in six reservoirs. These reservoirs were to be designed to provide water for an estimated 114,000 acres. The areas involved included York, Hamilton, Butler, Polk, Seward, Clay, and Fillmore Counties. Seven of the applications sought the transfer of Platte River flows to the Blue River basin. These applications involved an interbasin transfer. In March 1983, the department, pursuant to the Nongame and Endangered Species Conservation Act (NESCA), Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978), directed Upper Big Blue to consult with the Nebraska Game and Parks Commission (Game Commission). Section 37-435(3) of NESCA, as in effect at the time of the original applications herein, provided in relevant part:

> All other state departments and agencies shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of sections 37-430 to 37-438 by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434, and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not

> jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. [For purposes of this subsection, state agency shall mean any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.]

When § 37-435(3) was amended in 1987, the sentence set out above in brackets was added. This amendment apparently operated to remove the statutory requirement (originally set out in § 37-435(3) and made operative by the case of *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982) (*Little Blue II*)) that a natural resources district consult with the Game Commission on matters concerning endangered species before obtaining a water permit. In *Little Blue II*, we stated:

> "An administrative agency is required to act under the law as it stands when its order is entered. A change of law pending an administrative determination must be followed and the new law applied, at least in relation to permits for the doing of future acts, unless the statute contains a saving clause."

210 Neb. at 874, 317 N.W.2d at 734 (quoting 2 Am. Jur. 2d *Administrative Law* § 326 (1962)). Although this issue was not raised by any of the parties to this case, it is apparent that § 37-435(3), as in effect at the time of the original applications, is not applicable to the case at bar. As stated above, an administrative agency such as the department must apply the law as it stands when it enters its order, which in this case was December 1991. Nonetheless, the public policy of Nebraska, as set out in Neb. Rev. Stat. §§ 2-3229 and 46-209 (Cum. Supp. 1992) and 46-2,107 (Reissue 1988), remains that Nebraska is committed to the policy of protecting endangered species. The department needed information on this subject and obtained such information from the Game Commission. In this opinion, we will not determine the constitutionality of § 37-435(3)

(Cum. Supp. 1992) because, at this point in time, Upper Big Blue cannot contend it is affected by that statute, as amended.

We note, in passing, that in many areas of the law (e.g., liquor laws, tax laws, water laws), the law changes yearly, and if an appellant desires to attack the constitutionality of a statute, such an appellant would be well advised to tell the reviewing court just what statute the appellant is complaining about.

Upper Big Blue complied with the directive and filed with the department a biological opinion issued by the Game Commission in May 1986. The opinion concluded as to the Big Blue diversion:

> It is the biological opinion of the Game and Parks Commission that the Big Blue (Landmark) project, consisting only of the proposed Platte River diversion below Grand Island (described as the Big Blue diversion), with or without Prairie Bend, Catherland, Twin Valley, and Plum Creek Reservoir, will not jeopardize the continued existence of the whooping crane, bald eagle, or the peregrine falcon or result in the destruction or adverse modification of critical habitat, assuming habitat flow requirements are met by all projects. The Big Blue diversion will not jeopardize the continued existence of the least tern or the piping plover with the stipulations providing for the conservation of the least tern and piping plover as described in the conservation program section of this biological opinion. No further consultation is needed.

As to the Plum Creek Reservoir, the opinion concluded:

> The portion of the Big Blue (Landmark) project, consisting only of the operation of the proposed Plum Creek Reservoir without the Prairie Bend, Catherland, and Twin Valley projects, will not jeopardize the continued existence and will promote the conservation of the whooping crane, bald eagle, least tern, and the piping plover with the stipulations providing for the conservation of the whooping crane, least tern, and piping plover as described in the conservation program section of this opinion. Operation of Plum Creek Reservoir, with or without Prairie Bend, Catherland, and Twin Valley projects will not jeopardize the peregrine falcon or result

> in the destruction or adverse modification of critical habitat. Operation of Plum Creek Reservoir with the Prairie Bend, Catherland, and Twin Valley projects as proposed, will jeopardize the continued existence of the whooping crane, bald eagle, least tern, and the piping plover. The cumulative impacts of these four projects would be expected to reduce appreciably the likelihood of the survival or recovery of the four species within the State of Nebraska by reducing the distribution of and adversely modifying or destroying migration habitat (feeding, loafing, and roosting) for the whooping crane; by reducing the distribution of and adversely modifying or destroying winter habitat (feeding) for the bald eagle; and by reducing the reproduction, numbers and distribution of and adversely modifying or destroying summer habitat (nesting, and feeding) for the least tern and piping plover. Additional consultation is needed and recommended, if reasonable and prudent alternatives are to be developed.

Finally, the Game Commission's opinion stated:

> Should significant changes be made in the design and operation of the Big Blue project involving the Big Blue diversion and/or Plum Creek Reservoir, or in the operation of Prairie Bend, Catherland, and Twin Valley, consultation will need to be reinitiated. The Commission should be informed of such changes so that impact on endangered or threatened species may be determined.

After the issuance of the May 1986 Game Commission opinion, Upper Big Blue scaled down the Landmark Project. In October 1987, Upper Big Blue filed with the department a "Motion to Amend and Withdraw Applications" and in November 1987 filed a "Motion for Leave to File Amended Applications and to Withdraw Other Applications." Also during November 1987, three additional applications were filed. Upper Big Blue then reinitiated consultation with the Game Commission. The Game Commission rendered a supplemental opinion on December 22, 1987, which reaffirmed the original biological opinions of the Game Commission. As a result of the amended and withdrawn applications, the Landmark Project was reduced from six to two reservoirs.

The amended and new applications proposed that water from the Platte and Blue Rivers be used to provide surface irrigation to an estimated 67,000 acres and to recharge the ground water of an estimated 20,000 acres.

Numerous parties objected to the amended and new applications. Several of these parties were included in the proceedings: the City of Fremont; Lower Platte North Natural Resources District; Central Platte Natural Resources District; Twin Valley Conservation Association, Inc.; Metropolitan Utilities District of Omaha; Central Nebraska Conservation Association, Inc.; Catherland Reclamation District; and the National Audubon Society.

An evidentiary hearing began on April 30, 1990, and continued until June 8. The written transcript fills more than 4,300 pages. Under § 37-435(3) of NESCA, a formal consultation with the Game Commission was initiated following the hearing. The Game Commission's official biological opinion for the amended project was filed on November 14, 1990. The opinion concluded:

> It is the biological opinion of the Game and Parks Commission that the Landmark project will jeopardize the continued existence of the least tern and the piping plover. The project's diversion from the Platte River, as currently proposed, would be expected to reduce appreciably the likelihood of the survival or recovery of these species within the State of Nebraska. The diversion would reduce and adversely modify the reproduction, numbers, and distribution of the least tern through the adverse modification or destruction of habitat for fish species utilized as food by the least tern, and would reduce the the [sic] reproduction numbers, and distribution of the least tern and piping plover . . . through the adverse modification or destruction of breeding habitat.
>
> . . . .
>
> Current information concerning the western prairie fringed orchid, American burying beetle and the pallid sturgeon and the project's effects is not sufficient to make a determination as to whether the project will jeopardize their continued existence.

The opinion further provided that additional studies were necessary to make a determination as to whether the Landmark Project would jeopardize the further existence of the western prairie fringed orchid, the American burying beetle, and the pallid sturgeon.

As a result of this second biological opinion, another evidentiary hearing began on March 25, 1991, and ended on March 28. An additional 900 pages of testimony were added to the record.

All of Upper Big Blue's amended and new applications (six interbasin transfers and five intrabasin proposals) were considered throughout the proceedings as a single package. The parties understood that the project could not be successfully pursued if one group of applications was approved and the other was not. Consequently, the participants directed their attention and efforts to the provisions of Neb. Rev. Stat. §§ 46-288 and 46-289 (Reissue 1988), which set out the factors to be considered in evaluating applications for interbasin transfers. The department order also stated, "In addition to those requirements, however, all other applicable provisions of Chapter 46, Article 2 and §§ 37-430 through 37-438 were applied."

In deciding Upper Big Blue's applications, the director specifically considered:

a. Whether there was unappropriated water in the sources of supply. (Neb. Rev. Stat. § 46-234 (Reissue 1988) provides that if there is no unappropriated water in the source of supply, the department may refuse such application.)

b. If prior appropriations have been perfected to water the same lands identified in Upper Big Blue's project. (Section 46-234 provides that if a prior appropriation has been perfected to water the same land to be watered by the applicant, the department may refuse such application.)

c. If existing facilities other than those owned or operated by Upper Big Blue are to be used by it. (Section 46-234 provides that an application may be refused if such facilities are to be used and the applicant fails to show, by documentary evidence, agreements with the owner and operator of the facilities to allow the applicant to use such facilities.)

d. Whether the Platte River exceeds 100 feet in width at the proposed location of diversion (as required by Neb. Rev. Stat. § 46-206 (Reissue 1988)).

e. Whether Upper Big Blue's applications and appropriations, when perfected, are not otherwise detrimental to the public welfare (Neb. Rev. Stat. § 46-235 (Reissue 1988)).

f. Whether denial of the applications is demanded by consideration of the public interest as provided in §§ 46-234, 46-235, and 46-289, which considerations include, but are not limited to (1) the economic, environmental and other benefits of the proposed interbasin transfer and use; (2) any adverse impacts of the proposed interbasin transfer and use; (3) any current beneficial uses being made of the unappropriated water in the basin of origin; (4) any reasonable foreseeable future beneficial uses of the water in the basin of origin; (5) the economic, environmental, and other benefits of leaving the water in the basin of origin for future beneficial uses; (6) alternative sources of water supply available to Upper Big Blue; and (7) alternative sources of water available to the basin of origin for future beneficial uses.

g. If constructed and operated, whether the project would jeopardize endangered or threatened species or their habitat.

In connection with issue f, § 46-289 provides, in part: "The application shall be deemed in the public interest if the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin."

The director entered the order on December 16, 1991, finding in favor of Upper Big Blue on issues a through e and against Upper Big Blue on issues f and g. As a result of the director's findings on issues f and g, Upper Big Blue's applications were denied.

The order concluded:

> The law in Nebraska is clear. It is specified in § 37-435 and was discussed by the Supreme Court in *Little Blue NRD v. Lower Platte North NRD* (Little Blue II) 210 Neb. 862 (1982). For Landmark's applications to be approved, Applicant bears the burden of proving that its Project will not jeopardize nongame or endangered species or their

> habitat. . . . [I]f that conclusion cannot be reached, the Director is obligated to turn down Landmark's requests.
>
> Such a conclusion could not be reached for the pallid sturgeon, the burying beetle and the prairie fringed orchid. Although it was demonstrated that the Commission's conclusions regarding the piping plover and the interior least tern were not compelling, Applicant failed to establish that its Project would not jeopardize those bird species.
>
> For these reasons, Landmark's application must be rejected.

As stated above, Upper Big Blue assigns four errors in its appeal contesting the constitutionality of various statutory provisions relied upon by the director in formulating his decision. The first assignment of error contends that

> Section 37-435(3) of the Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§37-430 to 37-435 (1988, Cum. Supps. 1990 and 1991) ("NESCA"), is unconstitutional because the prohibition contained therein denied to Upper Big Blue its substantive right to divert unappropriated waters for irrigation purposes, which is otherwise guaranteed by Neb. Const. art. XV, §§4, 5, and 6.

In its second assignment of error, Upper Big Blue contends that

> Neb. Rev. Stat. §§46-288 and 46-289 (1988), are unconstitutional because the factors contained therein, which are required to be considered by the Director in determining whether an application for interbasin transfer and use should be granted, denied to Upper Big Blue its substantive right to divert unappropriated waters for irrigation purposes, which is otherwise guaranteed to it by Neb. Const. art. XV, §§4, 5, and 6.

In its third assignment of error, Upper Big Blue contends that

> [s]ubsection[s] (4) and (5) of §46-289, are unconstitutional because the factors contained therein, which are required to be considered by the Director in determining whether an application for interbasin transfer and use should be granted, denied to Upper Big Blue the protection of the

doctrine of prior appropriation, which is otherwise guaranteed by Neb. Const. art. XV, §§4, 5, and 6.

In its fourth assignment of error, Upper Big Blue contends that the "Legislature, by enacting §§46-288 and 46-289, usurped the power of the judiciary contrary to Neb. Const. art. V, § 1," which provides that "[t]he judicial power of the state shall be vested in a Supreme Court, district courts, county courts . . . and such other courts inferior to the Supreme Court as may be created by law."

The proper standard of review for this court to follow in cases involving appeals from the department under the provisions of Neb. Rev. Stat. § 46-210 (Cum. Supp. 1992) is to search only for errors appearing in the record, i.e., to determine whether the judgment conforms to law, is supported by relevant evidence, and is not arbitrary, capricious, or unreasonable. *In re Applications A-14137, A-14138A, A-14138B, and A-14139*, 240 Neb. 117, 480 N.W.2d 709 (1992); *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).

The constitutionality of a legislative act can be raised for the first time on a direct appeal to the Supreme Court from a decision of an administrative agency. *Golden Five v. Department of Soc. Serv.*, 229 Neb. 148, 425 N.W.2d 865 (1988); *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966). The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution. The department is an administrative agency and, as such, has no authority to declare an act of the Legislature unconstitutional. *Metropolitan Utilities Dist., supra.*

The applicable law concerning statutory construction when the constitutionality of a statute has been attacked is well established. First, a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *Distinctive Printing & Packaging Co. v.*

Cox, 232 Neb. 846, 443 N.W.2d 566 (1989). Further, the party claiming a statute to be unconstitutional has the burden of establishing its unconstitutionality. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *In re Application A-16642, supra*. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Haman v. Marsh, supra*; *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990); *In re Application U-2, supra*. The Nebraska Supreme Court is also obligated to endeavor to interpret a challenged statute in a manner consistent with the Nebraska Constitution. *In re Application A-16642; supra*; *In re Application U-2, supra*.

Upper Big Blue's first two assignments of error contend that the considerations contained within §§ 37-430 to 37-438, 46-288, and 46-289, which are to be evaluated by the director in considering applications for interbasin water transfers, are unconstitutional because they deny Upper Big Blue the substantive right to divert unappropriated waters which is otherwise guaranteed by Neb. Const. art. XV, §§ 4, 5, and 6.

Upper Big Blue's position is that the statutory considerations in §§ 37-435(3), 46-288, and 46-289 are invalid limitations on the constitutional right to divert unappropriated waters. The relevant sections of the Nebraska Constitution provide as follows: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Neb. Const. art. XV, § 4. "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." Neb. Const. art. XV, § 5.

> The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall

> have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

Neb. Const. art. XV, § 6.

It is clear that nothing in the above provisions guarantees a party the right to divert unappropriated waters. The question, then, becomes one of the effect to be given to the qualifier contained in article XV, § 6: "The right . . . shall never be denied except when such denial is demanded by the public interest."

Upper Big Blue would have the court conclude that although this limitation is not defined within the Nebraska Constitution, the statutory guidelines "go way beyond" what is required to delineate the meaning of public interest. Brief for appellant at 24. In essence, the argument goes, the constitutional proviso is clear upon its face, and no further construction is required.

Before proceeding with an analysis of this point, it must be remembered that neither constitutional nor statutory provisions are open to construction as a matter of course. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988); *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Construction of a constitutional clause is appropriate only when it has been demonstrated that its meaning is not clear and that construction is necessary. *In re Application A-16642, supra*; *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987). Stated another way, the issue is whether §§ 4, 5, and 6 of article XV of the Nebraska Constitution are self-executing.

The standard for such an interpretation has been set forth by the Nebraska Supreme Court in *State, ex rel. Walker, v. Board of Commissioners*, 141 Neb. 172, 179, 3 N.W.2d 196, 200 (1942):

> "Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are

> to be carried into effect, or if the language of the Constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect."

This standard requires that three distinct inquiries be made concerning article XV, §§ 4, 5, and 6: (1) whether the constitutional provisions merely indicate a line of policy to be followed, without a corresponding means of implementation; (2) whether the language is directed toward the Legislature, giving it the power to enact means of implementation; or (3) whether it appears from the language of the sections or the circumstances of their adoption that subsequent legislation was contemplated to provide the means of implementation. Under *State, ex rel. Walker, supra*, if any of these tests are satisfied, the constitutional provisions in question are not self-executing.

In *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 606, 244 N.W.2d 183, 186 (1976), the following rule of constitutional interpretation was set out: " '[E]ffect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions.' " In the instant case, a summary of the history of the circumstances surrounding the adoption of article XV, §§ 4, 5, and 6, is enlightening:

> The primary author of the amendments was Joseph G. Beeler, Chairman of the Water Power and Natural Resources Committee of the Constitutional Convention of 1919-1920, the Committee which drafted and submitted article XV, sections 4-6, for approval. Although the three sections were submitted to the Convention as a unit, Beeler took the time to address each section individually before the delegates to the Convention.
>
> Regarding section 4 (declaring water to be a "natural want"), Beeler stated somewhat uncritically: "It is a declaration which intends to give to irrigation the standing of being so necessary that it is considered as a natural want."
>
> Regarding section 5 (dedicating water to the beneficial use of the public), he spoke at greater length, explaining

> that the provision expressed Nebraska's opposition to the water policies of the state of Colorado. . . . Section 5 was meant to express Nebraska's view that rights to water are use rights, not full fee interests.
>
> The Chairman characterized section 6 (declaring that the right to divert unappropriated waters of any stream shall not be denied unless demanded by the public interest) as an assurance that Nebraska would not do what Colorado was attempting to do, *i.e.*, to eliminate prior vested appropriative rights: "Section [6] is a limitation upon the right of the Legislature of the state to do such a thing. The first is that the right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. That is, if this becomes a part of the Constitution, the Legislature of the State of Nebraska will have no right to pass any law which will deny . . . the right to appropriate unappropriated waters of the stream except when such denial is demanded by the public interests."

Eric Pearson, *Constitutional Restraints on Water Diversions in Nebraska: The Little Blue Controversy*, 16 Creighton L. Rev. 695, 707-08 (1983) (quoting 2 Proc. Const. Convention 1915 (1919-1920)).

The tests set out in *State, ex rel. Walker, v. Board of Commissioners, supra*, therefore, should be applied to each of the provisions at issue with the above-stated history in mind.

The first test provides that a provision is not self-executing if it merely stipulates a line of policy, but does not supply the means with which to effectuate that policy. Article XV, § 4, declaring water to be a "natural want," only declares the importance of water as a necessity for domestic use and for irrigation. Section 5, dedicating water to the beneficial use of the public, defines the scope of water rights in Nebraska. Section 6, however, declaring that the right to divert unappropriated waters of any stream shall not be denied unless demanded by the public interest, is a declaration of policy. As is clear from the history, § 6 is a limitation on the right of the Legislature to enact laws denying the right to appropriate water except for public interest reasons.

The three sections together serve to enunciate the policy of the framers concerning water rights and their importance to the state. However, article XV, §§ 4, 5, and 6, do not set out any means by which to implement these policies. The limits of such means are defined by § 6, but the means themselves are not designated.

The second test states that if the language is directed to the Legislature, giving it the power to enact means of implementation, then the section is not self-executing.

As stated above, §§ 4, 5, and 6 of article XV are only statements of policy. The Legislature is empowered to execute these policies through legislative directives. This view is supported by Beeler's statement contained in the constitutional history: " 'Section [6] is a limitation upon the right of the Legislature' " " 'to pass any law which will deny . . . the right to appropriate unappropriated waters of the stream except when such denial is demanded by the public interests.' " 2 Proc. Const. Convention at 1915. It is apparent from this limitation that the framers intended that legislation be enacted to effect these policies, but that it be confined to the stated principles. These considerations also serve to affirmatively answer the third inquiry, namely whether the provisions contemplated subsequent legislation to carry them into effect.

In summary, all three parts of the test in *State, ex rel. Walker, v. Board of Commissioners*, 141 Neb. 172, 3 N.W.2d 196 (1942), are met by article XV, §§ 4, 5, and 6. *State, ex rel. Walker*, requires only that one of the queries be satisfied for a constitutional provision to be considered not self-executing. We determine that neither § 4, § 5, nor § 6 of article XV is self-executing. Any references to the contrary in *Little Blue II* are overruled.

This view is supported by *In re Application A-16642*, 236 Neb. 671, 690, 463 N.W.2d 591, 605 (1990): "The relevant clause of § 6 simply permits the state to deny appropriations based upon the dictates of the public interest. It does not prescribe the manner by which the public interest is to be determined nor the mechanisms by which it may be accomplished." We also stated that the statutes at issue in the case could "be viewed as a mechanism for determining whether

the public interest demands that the right to appropriate water from a given stream should be denied." *In re Application A-16642*, 236 Neb. at 689, 463 N.W.2d at 604.

The next step, then, is to examine the statutes attacked by Upper Big Blue as unconstitutional to determine whether they properly implement the policies set out in the relevant constitutional provisions.

Upper Big Blue first argues that § 37-435(3) of NESCA impermissibly limits or alters the rights guaranteed by article XV, § 6, and is therefore unconstitutional. For the reasons set out above, we will not determine this assignment of error.

In its second assignment of error, Upper Big Blue argues that §§ 46-288 and 46-289 also impermissibly limit or alter the rights guaranteed by article XV, § 6, and are therefore unconstitutional. Section 46-288 defines the terms relating to interbasin transfers, including beneficial uses: "Beneficial use shall include, but not be limited to, reasonable and efficient use of water for domestic, municipal, agricultural, industrial, commercial, power production, subirrigation, fish and wildlife, ground water recharge, an interstate compact, water quality maintenance, or recreational purposes." Section 46-289, in setting out factors to be considered by the department when evaluating an application for an interbasin transfer, provides in relevant part:

> The Legislature finds . . . that the transfer of water to outside the boundaries of a river basin may have impacts on the water and other resources in the basin and that such impacts differ from those caused by uses of water within the same basin. . . . The Legislature therefore recognizes the need to delineate factors for consideration by the Director of Water Resources when evaluating an application made pursuant to section 46-233 which involves an interbasin transfer of water in order to determine whether denial of such application is *demanded by the public interest*. Those considerations shall include, but not be limited to, the following factors:
>
> (1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;
>
> (2) Any adverse impacts of the proposed interbasin

transfer and use;

(3) Any current beneficial uses being made of the unappropriated water in the basin of origin;

(4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;

(5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;

(6) Alternative sources of water supply available to the applicant; and

(7) Alternative sources of water available to the basin of origin for future beneficial uses.

The application shall be deemed in the public interest if the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin. The director's order granting or denying an application shall specify the reasons for such action, including a discussion of the required factors for consideration, and shall document such decision by reference to the hearing record, if any, and to any other sources used by the director in making the decision.

(Emphasis supplied.)

In *In re Application A-16642*, 236 Neb. at 689, 463 N.W.2d at 604, we held that the "constitutional right to appropriate [water under the Nebraska Constitution] can and must be limited by the demands of the public interest." In examining the instream flow appropriation statutes, Neb. Rev. Stat. §§ 46-2,107 to 46-2,119 (Reissue 1988), we stated that they could "be viewed as a mechanism for determining whether the public interest demands that the right to appropriate water from a given stream should be denied." *In re Application A-16642*, 236 Neb. at 689, 463 N.W.2d at 604.

The situation here is analogous. Sections 46-288 and 46-289 delineate various factors to be considered by the department in evaluating applications for interbasin appropriations. They, too, can be viewed as mechanisms to be used by the department in determining whether the public interest demands that an interbasin appropriation be denied. Upper Big Blue's contention that the guidelines set out by the statutes are

unconstitutional limitations is not persuasive. Sections 46-288 and 46-289 are the means by which to implement article XV, § 6. Upper Big Blue's second assignment of error is without merit.

Upper Big Blue then asserts, in its third assignment of error, that subsections (4) and (5) of § 46-289 are unconstitutional because they deny to Upper Big Blue the protection of the doctrine of prior appropriation. It is contended that these sections give the department authority to prefer a subsequent intrabasin use over a prior interbasin use, contrary to the doctrine of prior appropriation. Prior appropriation is constitutionally protected by article XV, §§ 4, 5, and 6. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).

Upper Big Blue's contention is based upon the fact that the department, in the order of denial, stated that "[b]ecause Landmark holds a right senior in time to Prairie Bend (II), the later project would not be feasible." Section 46-289(4) provides that the department is to consider "[a]ny reasonably foreseeable future beneficial uses of the water in the basin of origin." The department did so in its evaluation. Initially, it should be noted that a consideration of the foreseeable future beneficial uses clearly fits under the public interest limitation of article XV, § 6. It should also be noted that the doctrine of prior appropriation is not applicable to this situation.

The prior appropriation doctrine does not attach to applications for appropriative rights, but only to actual, vested, appropriative rights. See *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988). An application to divert water is only a request for permission to appropriate public waters of the state. *Id.* See, also, Neb. Rev. Stat. § 46-233 (Reissue 1988). Approval of an application merely authorizes the successful applicant to take other measures to perfect the application into an appropriation. § 46-235. After an application is approved, Neb. Rev. Stat. § 46-237 (Reissue 1988) requires that the applicant file a map or plat detailing the proposed project. That section further provides that "no rights shall be deemed to have been acquired until the provisions of this section shall have been complied with."

By filing its applications to divert water, Upper Big Blue received no "water right." See *In re Applications A-15145, A-15146, A-15147, and A-15148, supra*. We have stated that a water right applicant has no property right in a mere application to divert water:

> The granting of the application, in full or in part, is an adjudication which fixes the maximum volume of the appropriation, the rate of diversion, and the priority date. . . . The grant of the appropriation by the department, however, is a conditional right which becomes a perfected and completed appropriation only when the works are completed and the waters put to a beneficial use in compliance with the conditions and limitations of the grant. It confers upon the applicant the prior right to the water against all subsequent applicants during the progress of the work if, and only if, he finally complies with the conditions and limitations of the appropriation as adjudicated by the department.

North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 28, 74 N.W.2d 863, 867 (1956).

Upper Big Blue contends that its procedural priority should be entitled to the protection of the doctrine of prior appropriation, or the doctrine becomes a sham. It has been made clear, however, that applications are not what the doctrine was intended to protect. Further, if such a construction were made, the public interest limitation of article XV, § 6, would mean nothing, and the fact that one applicant filed before another would become controlling over public interest concerns. Subsections (4) and (5) of § 46-289 are not unconstitutional because they do not deny Upper Big Blue the protection of the doctrine of prior appropriation. Upper Big Blue's third assignment of error is without merit.

In support of its fourth assignment of error, Upper Big Blue contends that §§ 46-288 and 46-289 are "nothing more than a veiled attempt [by the Legislature] to exercise judicial power contrary to Neb. Const. art. V, §1." Brief for appellant at 35. In this connection, Upper Big Blue argues only that "[s]ince art. XV, §6 is self-executing, no legislation is required to effect its purpose, and 'the form of the action by which its provisions

may be enforced, are matters for judicial determination.' " Brief for appellant at 35. We have determined that article XV, § 6, is not self-executing, and it is, therefore, within the Legislature's province to pass statutes to delineate the public interest. Sections 46-288 and 46-289 do not violate article V, § 1, of the Nebraska Constitution. Upper Big Blue's fourth assignment of error is without merit.

For all the reasons set out above, the applicant has failed to satisfy its burden of demonstrating the questioned statutes to be unconstitutional, and, therefore, its constitutional challenges fail.

As stated above, Upper Big Blue's final assignments of error were based on the presumption that §§ 46-288 and 46-289 would be found unconstitutional. Since we have determined that all the challenged statutes are constitutional, these assignments need not be discussed.

The decision of the director is affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DWAYNE TUCKER, APPELLANT.

494 N.W.2d 572

Filed January 29, 1993. No. S-92-083.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Venue: Appeal and Error.** A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion.
3. **Venue: Affidavits.** A change of venue is to be granted upon the motion of the defendant when it shall appear to the trial court by affidavits that a fair and impartial trial cannot be had in the county where the offense was committed.
4. **Venue.** Factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in areas to which venue could be changed, the length of time between dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of offenses charged, and the size of the area from which the venire is drawn.

5. **Venue: Affidavits.** A single affidavit stating that many residents of the county in which the offense was committed hope that defense counsel loses a case because they believe the defendant to be guilty as charged has no probative value for the purposes of determining whether the defendant is entitled to a change of venue.
6. **Venue: Juror Qualifications.** Voir dire examination is a better and more probative forum for ascertaining the existence of community and individual prejudice or hostility toward an accused than even a public opinion poll.
7. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any criminal offense may be prosecuted and punished as if he were the principal offender.
8. _____. Aiding and abetting involves some participation in a criminal act and must be evidenced by some word, act, or deed; no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was express agreement therefor, and mere encouragement or assistance is sufficient.
9. **Criminal Law: Juries.** As an aid in determining the innocence or guilt of a defendant, a jury may consider the voluntary flight of a person immediately or soon after the occurrence of a crime.
10. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists. Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred.
11. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** When some evidence in a case is circumstantial, such evidence is to be treated in criminal cases the same as direct evidence, and the State is entitled upon review to have all conflicting evidence, both direct and circumstantial, resolved in its favor.
12. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
13. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed upon appeal absent an abuse of discretion.
14. **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: JERRY M. GITNICK, Judge. Affirmed.

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

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

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

FAHRNBRUCH, J.

Dwayne Tucker appeals his conviction and life sentence for his participation in the first degree murder of Lisa Lisko, who was shot and killed December 23, 1981, by the defendant's half brother, Willie Tucker, during the perpetration of a robbery of a pancake house in Omaha where Lisko worked.

Because of a mixup as to which counsel was to represent him on direct appeal, Dwayne Tucker, hereinafter referred to as the defendant, was given leave to file a belated direct appeal.

In substance, the defendant complains that (1) his motion for change of venue should have been granted, (2) there was insufficient evidence to convict him, and (3) his sentence is excessive. We find that none of the defendant's assignments of error has merit and affirm his conviction and sentence.

STANDARD OF REVIEW

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Alcorn*, 240 Neb. 400, 481 N.W.2d 921 (1992); *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992); *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992); *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992).

FACTS

On Wednesday, December 23, 1981, at about 10:30 p.m., the then 17-year-old defendant received a telephone call from his half brother, Willie Tucker. Willie asked the defendant if he wanted to help his half brother "make some money." The defendant agreed to meet Willie at the home of their sister Kayletha, near 32nd and Grant Streets in Omaha. There was "a lot of snow on the ground," and it was cold that evening.

Nevertheless, the defendant walked approximately 1 mile to Kayletha's house, arriving at about 11 p.m. About 10 minutes later, the defendant and Willie left Kayletha's home and began walking south on 30th Street. While they were walking, Willie told the defendant, "We are going to rob the pancake house," to which the defendant responded, "Cool." At that time, the defendant knew that he would receive some of the robbery proceeds. The pair then walked to the International House of Pancakes at 29th and Dodge Streets, a distance of approximately 1 1/2 miles from 32nd and Grant.

Arriving at the pancake house sometime after 11 p.m., Willie and the defendant stood outside the building. They debated whether to go ahead with the robbery, because they knew that police officers often went there for dinner. Several witnesses observed Willie and the defendant in the restaurant's lobby area. One of the witnesses saw the same two men leave the restaurant and walk away. She had noticed the two men outside the building two or three times. The witness remembered that they seemed to be avoiding having her look at them. The witness left the restaurant to catch a bus, and as she was boarding the bus, she saw Willie and the defendant return to the restaurant.

After entering the restaurant, the defendant approached the cashier, Lisa Lisko, and requested change to buy cigarettes. As soon as Lisko opened the cash register, Willie produced a handgun, pointed it at Lisko, and told her, "This is a stick-up." Willie demanded the money in the cash register. After Willie convinced Lisko that the stickup was "for real," she handed Willie the money from the cash register. The defendant walked around Willie to leave the restaurant. Looking back from the entryway, the defendant saw Willie looking toward him and pointing the gun at Lisko. The defendant testified he heard three clicks and a gunshot. Lisko died of a gunshot wound to the right chest.

Both the defendant and Willie ran from the restaurant and, taking different routes, met near an interstate highway. The two proceeded to an apartment that Willie shared with his girl friend and their newborn infant. Willie and the defendant went into a bedroom and divided the money from the robbery. The

defendant received $35 as his share of the robbery proceeds. Willie received about the same amount of money.

The same witness who had observed the defendant and Willie in the lobby of the restaurant, and later observed them leaving and reentering the building, recognized Willie as a former neighbor. She learned of the shooting the following day, and contacted police on Monday, December 28. She identified Willie from a photographic lineup as being one of the two males she saw at the pancake house on the evening of December 23. She did not know the defendant and was unable to say he was the other male present at the restaurant.

The defendant was arrested for first degree murder on Thursday, December 31. After being advised of his *Miranda* rights, he admitted, in an untaped statement to two Omaha police officers, that he had been involved in the incident at the restaurant. The defendant then made a recorded statement in which he told police that he wanted to serve time with his brother, because "I was there with him and I stood there with him and I split the money with him."

At trial, the defendant maintained that his half brother had not asked him to do anything in connection with the robbery and did not discuss how the robbery was to take place. The defendant denied entering the restaurant with the intent to assist his brother in a robbery. He testified that he thought Willie had abandoned the robbery scheme before entering the restaurant. After a trial, the defendant was convicted by a jury of first degree murder and was sentenced to life imprisonment. In a separate trial, Willie was convicted of first degree murder and was also sentenced to life imprisonment. See *State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983).

CHANGE OF VENUE

The defendant first assigns as error that pretrial publicity prevented him from having a fair and impartial trial and that the trial court erred in failing to grant his two pretrial motions for change of venue.

A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992). A change of venue is to

be granted upon the motion of the defendant when it shall appear to the trial court by affidavits that a fair and impartial trial cannot be had in the county where the offense was committed. See Neb. Rev. Stat. § 29-1301 (Reissue 1989).

Factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in areas to which venue could be changed, the length of time between dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of offenses charged, and the size of the area from which the venire is drawn. *State v. Williams, supra*; *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); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

In support of his first motion for change of venue, the defendant submitted his attorney's affidavit in which the attorney stated:

> 3. On several occasions news articles have appeared in the Omaha World Herald mentioning that [defense counsel] is representing Defendant, Dwayne Tucker.
>
> 4. That on many occasions [defense counsel] has had residents of the City of Omaha, with whom he is acquainted, indicate to him that it was their wish that he would loose [sic] the case because it was their opinion that Defendant, Dwayne Tucker, was guilty of the crime charged.

The defendant presented no evidence as to how many news articles constitute "several." No articles from the Omaha World-Herald newspaper were presented, nor is there any evidence as to when these articles may have appeared in relation to the time of trial. There was no evidence presented as to the circulation of the Omaha World-Herald in Douglas County, nor was there evidence that residents of Douglas County read the Omaha World-Herald. The defendant fails to explain on appeal how the contents of articles in the Omaha World-Herald or other news media were prejudicial to him in any way.

A single affidavit stating that "many" residents of the county

in which the offense was committed hope that defense counsel loses a case because they believe the defendant to be guilty as charged has no probative value for the purposes of determining whether the defendant is entitled to a change of venue. See *State v. Boppre, supra.* This court has stated that voir dire examination is a better and more probative forum for ascertaining the existence of community and individual prejudice or hostility toward an accused than even a public opinion poll. See, *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), *cert. denied* 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269; *State v. Boppre, supra.* The voir dire of the venire has not been made part of the record in this case. However, the jury roster indicates that out of 40 venirepersons, only 2 were stricken for cause. This is inconsistent with the notion of widespread community prejudice or hostility to the defendant.

The defendant has failed to demonstrate that he could not obtain a fair and impartial trial in Douglas County. Accordingly, the trial court did not abuse its discretion in overruling the defendant's motions for change of venue. The defendant's first assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

Second, the defendant contends that the evidence is insufficient to support his conviction of first degree murder. The defendant was charged with killing Lisko in the perpetration of a robbery, pursuant to Neb. Rev. Stat. § 28-303 (Reissue 1989).

Although it is undisputed that Willie Tucker, and not the defendant, shot Lisko, "A person who aids, abets, procures, or causes another to commit any [criminal] offense may be prosecuted and punished as if he were the principal offender." Neb. Rev. Stat. § 28-206 (Reissue 1989). Aiding and abetting involves some participation in a criminal act and must be evidenced by some word, act, or deed; no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was express agreement therefor, and mere encouragement or assistance is sufficient. *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Even though he knew Willie planned to commit a robbery, the

defendant testified that he never agreed to help Willie. He further testified that he believed Willie had changed his mind about committing the robbery, and that he, the defendant, was merely going to buy a pack of cigarettes and leave the restaurant.

The record reflects that the defendant walked a considerable distance, late at night in the cold and snow, to help Willie "make some money." He continued to accompany Willie even after he learned that Willie planned to make money by robbing the International House of Pancakes. After learning of the plan, the defendant told Willie the plan was "[c]ool." From general knowledge of the meaning of the word "cool," as it is used in today's world, a jury could properly consider that comment by the defendant as approval of the plan to rob the pancake house and an encouragement to the defendant's half brother to commit the planned crime.

Once inside the restaurant, the defendant had Lisko open the cash register by asking for change for a cigarette machine, providing Willie the opportunity to demand the money in the cash drawer. The defendant waited to leave until Willie had the money. He then met Willie at the interstate highway, and the two went to Willie's apartment. Finally, the defendant accepted $35 as his share of the proceeds of the robbery.

Based on these facts, the evidence is more than sufficient for a jury to conclude beyond a reasonable doubt that by the defendant's meeting Willie "to make money," by the defendant's acknowledgement that he knew in advance that Willie was going to rob the International House of Pancakes, by the defendant's comment that the planned robbery was "[c]ool," and by the defendant's act of accompanying Willie to the restaurant, the defendant not only encouraged but also agreed to help Willie in the robbery. The jury could properly draw the inference that the defendant's role in the robbery was to have the cashier open the cash drawer so that his half brother could demand its contents. The jury's finding of guilt is strengthened by the fact that the defendant voluntarily fled from the scene immediately after the robbery and shooting. As an aid in determining the innocence or guilt of a defendant, a jury may consider the voluntary flight of a person immediately

or soon after the occurrence of a crime. See, *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470 (1969); *Davis v. State*, 171 Neb. 333, 106 N.W.2d 490 (1960), *cert. denied* 366 U.S. 973, 81 S. Ct. 1939, 6 L. Ed. 2d 1262 (1961). The inference that the defendant participated in the robbery is further strengthened by the fact that after the defendant and Willie bolted from the restaurant after the robbery and shooting, each took a different route and then met near or at the interstate highway. A jury could conclude that even more convincing evidence of the defendant's participation in the crime with which he was charged is the fact that after these events had taken place, the defendant went into a bedroom of Willie's home and clandestinely, knowingly, and willingly received virtually an equal split of the robbery proceeds.

It is implicit in its verdict that the jury did not find credible the defendant's testimony that he believed Willie had renounced and abandoned the plan to rob the pancake house or that the defendant did not intend to participate in the robbery. The defendant remained with Willie throughout the robbery. He failed to do the one thing which would have unequivocally terminated his participation in the robbery plan devised by Willie. All the defendant had to do after learning of the robbery plan was to turn around and walk home. Instead, the defendant, by labeling the robbery plan "[c]ool," gave Willie encouragement to carry out the plan. The defendant's conduct before, during, and after the crime was also sufficient to convince a jury beyond a reasonable doubt that the defendant was an aider and abettor of the crime with which he was charged.

It is apparent that some of the evidence upon which the jury relied in convicting the defendant was circumstantial. Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981); *Bland v. Fox*, 172 Neb. 662, 111 N.W.2d 537 (1961). Stated another way, circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred. See, *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992); *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556

(1991); NJI Crim. 1.31.

When some evidence in a case is circumstantial, such evidence is to be treated in criminal cases the same as direct evidence, and the State is entitled upon review to have all conflicting evidence, both direct and circumstantial, resolved in its favor. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). Circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992); *State v. Phelps, supra.*

One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990). Because the direct and circumstantial evidence, the defendant's admissions, and the inferences therefrom are sufficient to support a jury verdict that the defendant is guilty beyond a reasonable doubt of aiding and abetting Willie in the robbery of the International House of Pancakes, they are also sufficient to convict him of the first degree felony murder of Lisko, her death having occurred as a natural and probable consequence of that robbery.

EXCESSIVE SENTENCE

Finally, the defendant complains that his life sentence is excessive. Murder in the first degree, of which the defendant was convicted, is either a Class I or a Class IA felony according to § 28-303. The penalty for a Class I felony is death, while the penalty for a Class IA felony is life imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985). Because the defendant was under the age of 18 years at the time Lisko was murdered, the death penalty could not be imposed upon him. See Neb. Rev. Stat. § 28-105.01 (Reissue 1989). Since the defendant is guilty of a Class IA felony, the sole punishment in his case is life imprisonment. See § 28-105(1).

A sentence imposed within statutory limits will not be

disturbed upon appeal absent an abuse of discretion. *State v. Hall, ante* p. 92, 492 N.W.2d 884 (1992); *State v. Reichert, ante* p. 33, 492 N.W.2d 874 (1992); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). 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. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992).

The record reflects that in pronouncing sentence, the judge considered the defendant's young age, lack of formal education or secure employment, absence of strong family ties, and general negative attitude toward the laws of society. The imposition of a life sentence is consistent with the sentencing statute. Sentencing the defendant to probation, the only other option, would have been inappropriate under the circumstances of this case. Moreover, placing the defendant on probation would have depreciated the seriousness of the offense the defendant was found to have committed and would promote disrespect for the law, not only by this defendant but by others who might be inclined to commit the same type of offense. The sentencing court did not abuse its discretion.

CONCLUSION

There being no merit to any of the defendant's assigned errors, this court affirms his conviction and sentence in the district court.

AFFIRMED.

THOMAS F. DOWD AND BARBARA A. DOWD, APPELLANTS, V. FIRST OMAHA SECURITIES CORPORATION, DOING BUSINESS AS FIRST NATIONAL BROKERAGE SERVICES, A CORPORATION, APPELLEE.

495 N.W.2d 36

Filed February 5, 1993. No. S-90-093.

1. **Arbitration and Award: Brokers.** Whether a stay should be granted and arbitration required when customers have a dispute with their stockbroker are questions of law.
2. **Appeal and Error.** When reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's ruling.
3. **Constitutional Law: States.** The Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law.
4. **Federal Acts: Arbitration and Award: Courts.** The Federal Arbitration Act requires state courts, as well as federal courts, to grant stays pending arbitration.
5. **Contracts: Arbitration and Award: Public Policy.** This court has consistently held that predispute arbitration agreements oust Nebraska courts of jurisdiction and are therefore unenforceable on public policy grounds. This rule cannot be enforced, however, if it conflicts with the laws of the United States.
6. **Federal Acts: Arbitration and Award: States.** State law, even when incorporated by a choice-of-law provision, cannot prevent the enforcement of an arbitration clause otherwise valid under the Federal Arbitration Act.
7. **Contracts: Arbitration and Award: Federal Acts.** Holdings by Nebraska's Supreme Court that a predispute arbitration agreement is unenforceable and void are preempted when the agreement implicates a Federal Arbitration Act provision requiring arbitration.
8. **Appeal and Error.** A trial court's factual findings will not be set aside on appeal unless clearly wrong.
9. **Arbitration and Award.** Evident partiality within the meaning of 9 U.S.C. § 10 (1988) will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.
10. **Arbitration and Award: Proof: Appeal and Error.** The burden of proving facts that establish a reasonable impression of partiality on the part of an arbitration panel member rests upon the party challenging the panel award.
11. **Judgments: Appeal and Error.** When reviewing a judgment from a bench trial in a law action, an appellate court does not reweigh the evidence, but considers it in the light most favorable to the successful party, resolving evidentiary conflicts in favor of that party.

Appeal from the District Court for Douglas County: JOHN P. MURPHY, Judge. Affirmed.

Michael Boyle and, on brief, Brian J. Muench and Eugene L. Pieper, of Thompson, Crounse, Pieper & Brumbaugh, P.C., for appellants.

Frederick S. Cassman and Sandra L. Maass, of Abrahams, Kaslow & Cassman, for appellee.

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

FAHRNBRUCH, J.

Thomas F. Dowd and Barbara A. Dowd claim, inter alia, that the district court for Douglas County erred (1) in requiring them to submit to arbitration a dispute with their stockbroker, First Omaha Securities (FOS), concerning the liquidation of the Dowds' margin accounts and (2) in confirming the arbitration panel's award in favor of FOS.

FACTS

Alleging wrongful liquidation of their margin accounts, the Dowds sued FOS for breach of their "customer agreement" with FOS, negligence, and breach of a fiduciary duty. The agreement, signed by the Dowds and FOS on May 25, 1982, provided that (1) FOS would act as the Dowds' securities broker, (2) Nebraska law would govern the contract, and (3) any disputes arising from the agreement would be submitted to arbitration. On October 5, 1988, the district court granted FOS' motion to stay further proceedings pending arbitration. The court ruled that U.S. Supreme Court precedent required that the stay be granted.

At the arbitration hearing, Charles Burmeister, an officer of Ameritas Investment Corporation, testified as an expert for the Dowds. Donald Wagner, one of the three arbitration panel members, was a former Ameritas employee who had been fired by that company. Wagner had an age discrimination complaint pending against Ameritas at the time of the hearing. Burmeister told Dowds' attorney about Wagner's termination at Ameritas. However, neither the Dowds nor their attorney knew about Wagner's age discrimination complaint until after the hearing. Wagner did not disclose any relationship with Burmeister or the pending age discrimination complaint on his arbitrator "Appointment and Oath" form. Rule 19 of the American Arbitration Association's Securities Arbitration Rules (rev. 1989) requires panel members to disclose "any circumstance

likely to affect impartiality, including any bias . . . or any past or present relationship with the parties or their representatives."

After the arbitration panel unanimously found in favor of FOS, the Dowds asked the district court to vacate the arbitration award and to dissolve the stay. The Dowds argued that Wagner's failure to disclose his age discrimination complaint against Ameritas constituted "evident partiality" sufficient to warrant vacating the award. As will be shown later, the district judge properly upheld the stay of the state court proceedings and ordered arbitration. The dispute between the Dowds and their stockbroker is governed by federal law, not by Nebraska's Constitution, statutes, or case law. The district court also found that Wagner had no duty to disclose his age discrimination complaint. The judge stated that if Wagner had "any interest whatsoever, *which the Court does not so find*, such interest or bias was de minimis." (Emphasis supplied.) The court denied Dowds' motions and granted FOS' motion to confirm the arbitration award. The Dowds then perfected this appeal.

ASSIGNMENTS OF ERROR

Restated, the Dowds' assignments of error claim that the trial court erred in (1) granting FOS' motion to stay pending arbitration, (2) not applying Nebraska law as set forth in the "customer agreement," (3) enforcing a contractual provision compelling arbitration of future-arising disputes rendered absolutely void by article I, § 13, of the Nebraska Constitution, (4) applying federal law to common-law causes of action brought in a state court, and (5) failing to vacate the arbitration award on grounds of Wagner's failure to disclose a current adversarial relationship with the Dowds' expert witness' employer. We will discuss these assignments of error in order.

DISCUSSION

The Dowds' assignments of error fall into two categories: those dealing with the propriety of requiring the parties to arbitrate, and those questioning the propriety of the arbitration award itself.

Whether a stay should be granted and arbitration required when customers have a dispute with their stockbroker are

questions of law. When reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's ruling. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

In this case, the district court had no alternative but to grant a stay pending arbitration. The FOS-Dowd contract is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 through 15 (1988) (FAA). The Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law. U.S. Const. art. VI, cl. 2; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). Therefore, this court's holdings that a predispute agreement to compel arbitration is void are preempted to the extent they conflicted with the FAA.

The FAA provides, in pertinent part:

> **§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> . . . .
>
> **§ 3. Stay of proceedings where issue therein referable to arbitration**
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

(Title enacted in 1947.)

The U.S. Supreme Court has held that the FAA requires state courts, as well as federal courts, to grant stays pending arbitration. *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The

U.S. Supreme Court has also stated:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

Southland Corp. v. Keating, 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

Although a more detailed discussion of the applicability of the FAA to the Dowd-FOS agreement will be undertaken later, for present purposes it is clear that the district court correctly stayed the Dowd-FOS litigation pursuant to FAA § 3. The parties' "agreement" was a written contract empowering FOS to buy and sell securities for the Dowds. As such, as required by §§ 1 and 2 of the FAA, it directly involved interstate commerce. Aside from particular provisions of Nebraska law regarding arbitration, there is no allegation in the Dowds' petition or motion to dissolve the stay that the contract was unenforceable in law or equity. Therefore, the FAA applies.

In support of their argument that the trial judge erred in applying the FAA to stay their district court action, the Dowds mistakenly rely upon *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953). *Wilko v. Swan* was overruled by the U.S. Supreme Court in *Rodriguez de Quijas v. Shearson/Am. Exp.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). When it granted the stay, the district court ruled that *Wilko* was inapplicable and that this case was governed by two more recent Supreme Court decisions, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

In overruling the Dowds' postarbitration motion to dissolve the stay, the district court held that *Rodriguez de Quijas* controlled and thus upheld the stay. On appeal, FOS also argues that *Rodriguez de Quijas* required that the action be stayed.

The holdings in *Wilko* and *Rodriguez de Quijas* are inapplicable.

Wilko involved a suit by a customer against his brokers under § 12(2) of the Securities Act of 1933 (1933 Act). The brokerage contract contained a clause requiring arbitration of all disputes between the parties. The customer filed suit in the U.S. District Court for the Southern District of New York. The brokers moved to stay the trial pursuant to § 3 of the FAA. The U.S. Supreme Court, relying on a specific provision of the 1933 Act, held that regardless of the FAA, the customer could not be compelled to arbitrate the § 12(2) claim.

The Dowds argue that because *Wilko* had not been overruled when FOS moved to stay the action, granting the stay was error. We disagree.

In their brief, the Dowds state: "In Wilko, the U.S. Supreme Court held that a securities customer's waiver of the right to select the judicial forum was unenforceable." Brief for appellants at 9. The Dowds' characterization of the *Wilko* holding is too broad. *Wilko* applies only to actions brought under the 1933 Act, specifically, those brought under § 12(2). The *Wilko* Court stated, "[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration *of issues arising under the [1933] Act*." (Emphasis supplied.) *Wilko*, 346 U.S. at 438. See, also, *Shearson/American Express Inc. v. McMahon*, 482 U.S. at 228 (holding *Wilko* inapplicable to the Securities Exchange Act of 1934 and stating, "In *Wilko*, the Court held that a predispute agreement could not be enforced to compel arbitration of a claim *arising under § 12(2) of the Securities Act*, 15 U. S. C. § 77*l*(2)" (emphasis supplied)).

The Dowds' petition makes no mention of the Securities Act of 1933, in terms of either causes of action or remedies. As the Dowds point out in their brief, their petition alleges causes of action in "Breach of Contract; Negligence; and Breach of Fiduciary Duty on the part of the Defendant." Brief for appellants at 1. *Wilko* did not deal with these "state" causes of action. Because the *Wilko* exception to the FAA is inapplicable, the provisions of the FAA applied when FOS moved to stay the litigation. The district court correctly held *Wilko* inapplicable

at that time and granted the stay.

The district court did, however, rely upon *Rodriguez de Quijas, supra*, in denying the Dowds' postarbitration motion to dissolve the stay. At issue in *Rodriguez de Quijas*, as in *Wilko*, was the arbitrability of a § 12(2) claim under the 1933 Act. Reconsidering its earlier decision, the U.S. Supreme Court overruled *Wilko* and held that such actions were arbitrable.

In spite of this change in the law, *Rodriguez de Quijas* is no more dispositive of the case at bar than is *Wilko*. There is, however, U.S. Supreme Court precedent to support the denial of Dowds' postarbitration motion to dissolve the court's stay. Pre-*Rodriguez de Quijas* cases hold that state claims falling under the FAA are arbitrable. See, e.g., *Dean Witter Reynolds Inc. v. Byrd, supra*; *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). Although the district court's reliance upon *Rodriguez de Quijas* was misplaced, the court properly stayed the litigation and properly denied the motion to dissolve the stay.

The Dowds' second and third assignments of error contest the propriety of the district court's order to arbitrate. The Dowds argue that the FAA applies only to contracts involving a valid arbitration clause and that the clause in their agreement was absolutely void. The Dowds contend that, by its own terms, their agreement with FOS should be governed by Nebraska law and that under Nebraska law clauses compelling arbitration of future-arising disputes are void. The Dowds correctly note that this court has consistently held that predispute arbitration agreements oust Nebraska courts of jurisdiction and are therefore unenforceable on public policy grounds. *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991) (citing *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989)). This policy is based on Neb. Const. art. I, § 13. This rule cannot be enforced, however, if it conflicts with the laws of the United States. See U.S. Const. art. VI, cl. 2.

As previously stated, from the terms of the FOS-Dowd agreement, the FAA applies and requires arbitration. As such, it conflicts with the law of Nebraska. When such a conflict occurs, federal law prevails under the Supremacy Clause.

MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991).

In *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), *cert. denied* 342 U.S. 812, 72 S. Ct. 25, 96 L. Ed. 614 (1951), one of the syllabus points indicates that in the event of such a conflict, Nebraska law would prevail over the FAA on questions of arbitrability, because arbitration is a procedural issue. The point did not explicitly arise in the opinion itself. Since that decision, the U.S. Supreme Court has specifically held that the FAA creates "a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act." (Emphasis supplied.) *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The syllabus point in *Wilson & Co., Inc.* must therefore be disregarded.

The U.S. Supreme Court has directly addressed situations similar to the case at bar and has held that state law, even when incorporated by a choice-of-law provision, cannot prevent the enforcement of an arbitration clause otherwise valid under the FAA. As previously stated, the U.S. Supreme Court held in *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984):

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." *We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.*

(Emphasis supplied.)

In *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the U.S. Supreme Court held enforceable a California statute that regulated the conduct of an agreed-upon arbitration. In upholding the statute, made applicable by a choice-of-law provision, the Court noted that only state law that *conflicts*

with the FAA is preempted. The Court continued, however:

> [The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. [Citation omitted.]
>
> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."

Id., 489 U.S. at 478 (quoting *Southland Corp., supra*).

The Dowds argue that Nebraska law voids the FOS-Dowd arbitration clause and therefore the FAA cannot apply. The *Volt* opinion refutes this argument. At the time the FOS-Dowd contract was signed, the FAA was in effect. Holdings by Nebraska's Supreme Court that a predispute arbitration agreement is unenforceable and void are preempted when the agreement implicates an FAA provision requiring arbitration. The FAA applied to the FOS-Dowd contract and required arbitration of the dispute.

The Dowds' fourth assignment of error claims that the district court erred by applying federal law to common-law causes of action brought in state court. They argue that this court should adopt the reasoning of the dissenting Justices in *Southland Corp., supra*, and hold that, based on policy reasons, the FAA does not preempt Nebraska law. Even if we were persuaded by the dissenting Justices' reasoning, we could not ignore a ruling of the U.S. Supreme Court on a question of federal law. That court is the final arbiter of such questions. The fourth assignment of error is without merit.

The Dowds' final assignment of error claims that the district court erred by refusing to vacate the arbitration award on grounds of "evident partiality" on the part of one arbitrator on the arbitration panel. This claim is based upon the failure of Wagner, a member of the arbitration panel, to disclose his pending lawsuit against the employer of one of the Dowds' expert witnesses. In denying the Dowds' motion to vacate the arbitration award, the district court ruled that Wagner had no duty to disclose the lawsuit and that Wagner's interest, if any,

was de minimis.

The district court's ruling on Wagner's duty to disclose is a question of law, and we are therefore obliged to reach a conclusion independent of the trial court's ruling. See *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992). A trial court's factual findings will not be set aside on appeal unless clearly wrong. See *City of La Vista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992) (referring to factual findings made in the bench trial of a law action).

In 1988, § 10 of the FAA, which we have determined to be controlling, provided in part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> . . . .
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.

The Dowds claim that Wagner's failure to disclose showed "evident partiality" and therefore warranted vacation of the arbitration award. They point out that rule 19 of the American Arbitration Association's Securities Arbitration Rules requires neutral arbitrators to disclose "any circumstance likely to affect impartiality, including any bias . . . or any past or present relationship with the parties or their representatives." They note that Wagner disclosed nothing on his "Appointment and Oath" form. The Dowds conclude that a reasonable person could draw an inference of partiality from these facts sufficient to vacate the award.

The U.S. Supreme Court dealt with a § 10(b) challenge to an arbitration award in *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968). In *Commonwealth Corp.*, the "neutral" third arbitrator failed to disclose that the defendant was a significant business customer of the arbitrator. After discovering the relationship, the plaintiff challenged the arbitration panel's award. In vacating the award, a plurality of the Court stated:

> We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had,

> unknown to the litigant, any such relationship, the judgment would be subject to challenge. . . . [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges . . . . We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Id., 393 U.S. at 148-49.

Despite this holding, the U.S. Courts of Appeals have not adopted the so-called *Commonwealth Corp.* "appearance of bias" test. Since it was a plurality opinion, the courts of appeals have followed the reasoning delineated in Justice White's concurrence to *Commonwealth Corp.* See, e.g., *Toyota of Berkeley v. Local 1095*, 834 F.2d 751 (9th Cir. 1987), *cert. denied* 486 U.S. 1043, 108 S. Ct. 2036, 100 L. Ed. 2d 620 (1988); *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied* 464 U.S. 1009, 104 S. Ct. 529, 78 L. Ed. 2d 711.

Justice White's concurrence indicated that arbitrators would not be held to the same standard of disclosure as judges. He further stated that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Commonwealth Corp.*, 393 U.S. at 150 (White and Marshall, JJ., concurring).

The principal tenet of the courts of appeals' test is that mere appearance of bias, without more, will not be sufficient to vacate the award. Rather, the challenging party must prove specific facts indicating evident partiality. See *Toyota of Berkeley, supra* (listing various courts of appeals' standards for evident partiality).

Some of the facts indicating partiality include pecuniary interest, familial relationship, and existence of an adversarial relationship. See, *Commonwealth Corp., supra* (intimating that any pecuniary interest casts doubt on the arbitrator's impartiality); *Morelite Const., supra* (vacating an award

because one of the arbitrators was the son of a vice president of the defendant local union's international union); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982) (affirming the vacation of an award because arbitrator failed to disclose a legal dispute between his family's company and one of the parties to the arbitration). The inference of bias seems to be heightened when, in addition to the aforementioned factors, the party does not disclose the suspect relationship. See, *Commonwealth Corp., supra*; *Middlesex Mut. Ins. Co., supra*. Finally, almost every finding of evident partiality occurs when the arbitrator's relationship is with one of the parties, not with a witness. Cf., *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1138 (M.D. Fla. 1987) (holding that arbitrator's failure to disclose that his law partner's brother was the expert witness' attorney did not show evident partiality because the relationship was "trivial"); *Sofia Shipping Co., Ltd. v. Amoco Transport Co.*, 628 F. Supp. 116 (S.D.N.Y. 1986) (holding that arbitrator's failure to disclose his relationship with an employee and witness for the plaintiff, without specific proof of bias, did not show evident partiality).

One problem with a strict application of the "factual proof of bias" approach is that absent an outright admission by the biased party, evident partiality may be impossible to show. The U.S. Court of Appeals for the Second Circuit, recognizing the difficulty of proving actual bias, chose a middle ground between the *Commonwealth Corp.* "appearance of bias" standard and the stricter "proof of bias" standard. *Morelite Const., supra*. The court stated: "[W]e hold that 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Const.*, 748 F.2d at 84.

We believe that the *Morelite Const.* test strikes a proper balance between the "judicial ethics" standard of the *Commonwealth Corp.* plurality and the unrealistic burden of the "proof of bias" standard. We therefore adopt the standard enunciated in *Morelite Const.* and apply it to Wagner's actions.

The burden of proving facts that establish a reasonable impression of partiality on the part of an arbitration panel

member rests upon the party challenging the panel award. See *Sheet Metal Wkrs. Intern. Ass'n v. Kinney Air Cond. Co.*, 756 F.2d 742 (9th Cir. 1985). The only facts that the Dowds have proven to show partiality are Wagner's termination at Ameritas, his age discrimination complaint against that company, and his nondisclosure of these matters after learning that Burmeister would serve as an expert witness. These few facts do not indicate that the district court was clearly wrong in finding that Wagner was not "evidently partial."

This case does not present the factors that typically indicate partiality. The Dowds have not shown that Wagner had any pecuniary interest in the arbitration—neither Wagner nor Ameritas would be financially affected by an award either way. In addition, no familial relationship was shown. Finally, Wagner's age discrimination complaint was not an adversarial relationship with one of the parties. Rather, it was with the employer of an expert witness. The expert witness, Burmeister, stated that he was not involved in Wagner's termination and that his relationship with Wagner had continued to be "cordial." The Dowds simply did not meet their burden of showing that Wagner's relationship with Burmeister's employer seriously casts doubt on his impartiality toward FOS or the Dowds.

The one factor that the Dowds do show is that Wagner did not disclose his complaint against Ameritas. While nondisclosure may heighten an inference of partiality, the burden remains with the Dowds to show that inference in the first instance. They have not.

The "Appointment and Oath" signed by Wagner required only disclosure of a relationship with the parties or their counsel; it did not apply to a complaint against the employer of an expert witness. The district court also found that under rule 19 of the Securities Arbitration Rules, Wagner had no duty to disclose his complaint against Burmeister's employer because Burmeister was not a party or a party's representative. Rule 19 requires disclosure of "*any* circumstance likely to affect impartiality, *including* any bias . . . or any past or present relationship with the parties or their representatives." (Emphasis supplied.) While the district court may have read rule 19 too narrowly, its ultimate ruling was correct.

Wagner's nondisclosure may not have comported with rule 19, but that is not the rule the Dowds ask us to invoke. They seek application of § 10(b) of the FAA, which provides a different test. As the court in *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), noted, a petitioner seeking to vacate an award under § 10(b) must come within the terms of that statute, namely, he must show *evident* partiality by an arbitrator.

When reviewing a judgment from a bench trial in a law action, an appellate court does not reweigh the evidence, but considers it in the light most favorable to the successful party, resolving evidentiary conflicts in favor of that party. See *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992). The district court found that "if there was any interest whatsoever [on the part of Wagner], *which the Court does not so find*, such interest or bias was de minimis." (Emphasis supplied.) The controlling language in the court's finding is that Wagner had no disqualifying interest. Despite making factual findings in the alternative, the district court was not clearly wrong in denying the motion to vacate the award.

The Dowds have not proven sufficient facts that a reasonable person would be required to find that Wagner was partial to FOS or biased against the Dowds. See *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984). Partiality poses a problem when an arbitrator has a relationship with a party to the arbitration that would sway his judgment. Wagner simply had no relationship with the Dowds. His relationship with Ameritas was attenuated. There is simply no partiality "evident" from the record. The district court was not clearly wrong in denying the Dowds' motion to vacate the arbitration panel's award.

The district court correctly granted FOS' motion to stay pending arbitration and correctly denied the postarbitration motion to dissolve the stay. Likewise, the court was not clearly wrong in finding that there was not "evident partiality" such that the award should be vacated. We therefore affirm the judgment of the district court.

AFFIRMED.

WHITE, J., not participating.

JEMCO, INC., A NEBRASKA CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF BOX BUTTE COUNTY, APPELLEE.

495 N.W.2d 44

Filed February 5, 1993. No. S-90-331.

1. **Taxation: Valuation: Appeal and Error.** A taxpayer who has not first filed a protest with the county board of equalization may not appeal a claimed overassessment of his or her own property to the district court.
2. **Jurisdiction.** Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties.

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

A.T. Reddish for appellant.

Laurice M. Margheim, Box Butte County Attorney, for appellee.

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

GRANT, J.

Plaintiff-appellant, JEMCO, Inc., a Nebraska corporation, is the owner of a brick-veneer four-unit apartment building located in Alliance, Box Butte County, Nebraska. The Box Butte County assessor valued JEMCO's property for the year 1989 in accordance with the "Box Butte County 1989 Board of Equalization Resolution," which allowed the value of multifamily dwellings to be adjusted downward without protest by the owners. The value of the property in question was reduced from $83,040 to $80,000 for 1989.

JEMCO did not file a protest with defendant-appellee, Box Butte County Board of Equalization (Board), nor did it present any evidence to the Board. Instead, JEMCO purported to appeal the matter to the district court for Box Butte County, alleging that the reduction was "woefully inadequate." The district court determined that it was without jurisdiction and dismissed JEMCO's petition. JEMCO appeals to this court.

In this court, JEMCO assigns four errors, the first of which is dispositive of the case. In its first assignment, JEMCO contends that the district court erred in dismissing JEMCO's

petition. We find that the district court correctly determined that it was without jurisdiction and did not err in dismissing plaintiff's petition. We affirm.

The record shows that, as stated above, JEMCO is the owner of an apartment building which, prior to January 1, 1989, had an assessed actual value of $83,040. On May 30, 1989, the Board adopted the "Box Butte County 1989 Board of Equalization Resolution," which stated in pertinent part:

> 4. Because appeals from the Board of Equalization last year resulted in a court decision finding that some apartment buildings were overvalued in 1988 and reducing the assessed value of those properties, there is a lack of equalization among properties of this subclass. Due to the fact that some owners of multi family real estate did not appeal to the Board of Equalization, changing the value of only those properties involved in protests would result in evident error and gross injustice if the Board does not decrease the value of all such property, whether or not individual protests were filed. Some taxpayers may have been misled into believing no protest was necessary because of statements made during a rent investigation recently conducted as part of an appraisal of this subclass of property for the Assessor.
>
> 5. The value of properties listed on Schedule A attached hereto should be adjusted downward as indicated on the schedule to equalize each property with other similar property and to place each on the tax roles [sic] at its actual value.

Schedule A lists JEMCO's property as "*Legal description . . . Lot 5 Block 3 Newberry*" with a prior value of $83,040 and a new value of $80,000. These valuations are based upon the unit assessment records for the property, which placed a value of $20,000 on each of the four units in the subject property and a value per square foot of $21.65.

Plaintiff's petition regarding the valuation of its property initially appears to be based on the disparity of the reductions among the various multifamily properties listed on schedule A. JEMCO takes particular exception to the fact that the valuation of its property was reduced only 3.66 percent, while other

multifamily properties received reductions ranging from 3.66 to 39.7 percent. However, JEMCO also presented testimony from a Nebraska-licensed appraiser which showed that the subject property was not worth $80,000, but, rather, should have been reduced in value to $55,000. Although its argument was crafted as an equalization issue, in reality JEMCO has framed a valuation question. In short, JEMCO's main contention is that its property was overassessed by the Board in 1989 when the new, lower levels of valuation were established.

Neb. Rev. Stat. § 77-1502 (Reissue 1990) requires that a board of equalization sit "for the purpose of reviewing and deciding . . . protests," which are to be "filed with the board" within a specified time limit not relevant to this inquiry. Neb. Rev. Stat. § 77-1510 (Reissue 1990) provides that "[a]ppeals may be taken from any action of the county board of equalization to the district court" and prescribes the manner of taking such appeals. Neb. Rev. Stat. § 77-1511 (Reissue 1990) further provides that when a determination of a county board of equalization is appealed, the district court shall hear "and determine anew all questions raised before the county board of equalization . . . ."

From the above statutory language, this court has determined that "a taxpayer who has not first filed a protest with the county board of equalization may not appeal to the district court a claimed overassessment of his or her own property." *Alphomega, Inc. v. Colfax County Bd. of Equal.*, 227 Neb. 529, 530-31, 418 N.W.2d 570, 571 (1988). See, also, *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982); *Jones v. Valley County Board of Equalization*, 208 Neb. 559, 304 N.W.2d 396 (1981); *Power v. Jones*, 126 Neb. 529, 253 N.W. 867 (1934).

It is clear from the record that the question of the subject property's valuation and equalization was never presented to the county board of equalization and, therefore, was never part of a decision from which JEMCO appealed to the district court. Under § 75-1511, since no questions were presented to the Board, the district court lacked jurisdiction to reach any of JEMCO's assigned errors.

JEMCO also indicated in its petition to the district court that because of the actions of the Box Butte County assessor and the Board, the Board was estopped from asserting that the district court lacked jurisdiction. We have stated: " ' "It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent." ' " *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 409, 476 N.W.2d 559, 563 (1991) (quoting *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987)). We have further stated: "Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties." *Anthony v. Pre-Fab Transit Co.*, 239 Neb. at 409, 476 N.W.2d at 563.

JEMCO could not appeal to the district court because it failed to file a protest with the Board. The district court was correct in determining that it had no jurisdiction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANGELA J. GRANT, APPELLANT.

495 N.W.2d 253

Filed February 5, 1993. No. S-91-708.

1. **Jury Instructions: Records: Appeal and Error.** Although Neb. Rev. Stat. § 25-1111 (Reissue 1989) directs that a requested instruction be written, when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction.
2. **Jury Instructions: Lesser-Included Offenses.** Whether a court must instruct a jury on a lesser-included offense depends on answers to the questions: (1) Is the offense for which an instruction is requested actually a lesser-included offense of the crime that has been charged against a defendant? (2) Is an instruction on a lesser-included offense justified under the evidence at trial?
3. _____: _____. If a court determines that an offense described in a requested instruction is a lesser offense included within a greater offense, then, under the two-step analysis and the cognate-evidence approach or method concerning a determination of greater and lesser-included offenses, a court must determine whether the evidence justifies an instruction on the lesser-included offense.

4. _____: _____. After a court has determined that the requested instruction is based on a lesser-included offense, the court must examine the evidence, generated by the State or the defendant, to determine whether the jury could reasonably acquit the defendant of the greater offense, but reasonably find the defendant guilty of the lesser-included offense.
5. _____: _____. Even when an alibi or insanity defense is used or the defendant presents no evidence to rebut the greater offense charged, a lesser-included offense instruction is appropriate if the evidence adduced controverts an elevating element of the greater offense.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
7. **Jury Instructions: Lesser-Included Offenses: Appeal and Error.** When the evidence fails entirely to show a crime of lesser degree than that charged against a defendant, refusal to give a lesser-included offense instruction is not prejudicial error.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Janine F. Ucchino for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

SHANAHAN, J.

Angela J. Grant appeals from her conviction on the charge of knowingly and intentionally delivering cocaine as an illegal controlled substance, a crime defined by Neb. Rev. Stat. § 28-416(1) (Reissue 1989): "Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance."

In her solitary assignment of error, Grant claims that the district court for Douglas County, as orally requested by Grant during the instruction conference at trial, should have

instructed the jury on the offense of illegal possession of cocaine under § 28-416(3) as a lesser-included offense in the delivery charge against Grant. Section 28-416(3) states:

> A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by the act, shall be guilty of a Class IV felony.

In response, the State asserts that Grant's assignment of error concerning the rejected instruction on a lesser-included offense cannot be considered on appeal because Grant's request was oral and, therefore, unwritten, notwithstanding the statutory direction concerning tendered instructions in both civil and criminal trials: "All instructions asked shall be in writing." Neb. Rev. Stat. § 25-1111 (Reissue 1989). See, also, Neb. Ct. R. of Prac. 4A(2) (rev. 1992) (if error is assigned in the refusal to give a tendered instruction, an appellant must specify in a praecipe that the transcript shall include the rejected instruction).

THE COCAINE SALE

On November 20, 1990, the narcotics unit of the Omaha Police Division was aware that illegal controlled substances were being distributed in a section of the city where the residence of Annette Roddy was located and characterized Roddy's residence as "a known narcotics trafficking house." Jimmy Edwards, a "cooperating source" familiar with the area of illegal drug distribution near Roddy's house, worked with police by introducing undercover officers to individuals suspected of selling illegal controlled substances. Around 11 a.m. on November 20, in a monitored telephone call from police headquarters to Roddy, Edwards asked for a "250 of crack" cocaine, that is, a quantity of crack sold for $250. Roddy responded that she did not have any crack, but would "see what I can do for you." Angela Grant, who was staying in Roddy's house, was within earshot of Roddy, who, after hanging up the phone, told Grant that Edwards "wanted to get

some crack." After Grant's insistent urging, " 'Come on; let's go,' " Grant and Roddy departed for a parking lot which was the site indicated by Edwards for the possible purchase of crack.

At the same time, Edwards and James Haiar, an undercover narcotics officer, left the police station in Edwards' pickup truck, driven by Haiar. Other officers in the narcotics unit set up surveillance of the parking lot where Edwards and Haiar would meet Roddy and Grant. An unmarked police van was stationed near the parking lot so that police could photograph events at the site. Other narcotics officers were located nearby to record any conversation electronically transmitted from Haiar, who had been wired with a microphone on his person.

Edwards and Haiar arrived around 12:30 p.m. and met Roddy and Grant in the parking lot. After Roddy said that she and Grant did not bring any cocaine, the two women offered to flag down passing motorists to find out whether any of the passersby had any crack for sale. Both Roddy and Grant, at times separately and at other times jointly, flagged down passing traffic until Roddy recognized a man known as D.J., who pulled his car into the parking lot and stopped next to Edwards' pickup.

Grant and Roddy got into D.J.'s car; Grant sat in the front on the passenger's side, while Roddy sat in the left rear seat. Roddy told D.J. that the men in the pickup wanted "250 worth of crack." D.J. handed a quantity of crack to Roddy, who got out of the car and, closely followed by Grant, went to the pickup, which the women entered. Haiar was seated near the left door, behind the pickup's steering wheel; Edwards was next to Haiar; and Grant was sitting between Edwards and Roddy, who was next to the window on the right side. Roddy was still holding the cocaine in one of her hands when Haiar and Roddy began haggling about the quality of the cocaine and the price being asked. Referring to the cocaine being held by Roddy, Grant said: "Put it in my hands." Roddy handed the cocaine to Grant, who remarked that the crack was "good stuff" and then wrapped the several pieces of cocaine in plastic or cellophane given to her by Edwards. "Casey's" was printed on the wrapper. Haiar gave $250 in cash to Roddy, who got out of the pickup to

deliver the money to D.J. in his car, still parked next to the pickup. Haiar remained in the pickup with Grant, who handed Haiar the wrapped cocaine. Shortly thereafter, Grant got out of the pickup and went to D.J.'s car. Grant and Roddy departed with D.J., who drove the women to Roddy's house. On arrival at the house, D.J. gave Roddy $25 for "helping" in the sale to Haiar, but Roddy did not give Grant any of the $25.

Haiar returned to police headquarters and turned over the wrapped pieces of cocaine to the criminal laboratory section of the Omaha Police Division. Eventually, the several pieces contained in the wrapping were analytically determined to be cocaine.

On December 11, 1990, police, pursuant to warrants, arrested Grant and Roddy. Both were charged with delivering the cocaine obtained from D.J. in the parking lot. However, before Grant's trial, Roddy pled guilty to the charge against her, and she was awaiting sentence when Grant came to trial on the charge of delivering cocaine.

GRANT'S TRIAL

In the State's case against Grant, 49 photographs taken by officers during surveillance of Edwards' pickup and D.J.'s car were introduced, depicting Grant and Roddy at the scene. Also, the tape-recorded conversation involving Grant, Roddy, Edwards, and Haiar in the pickup was played for the jury, who heard various remarks by Grant and Roddy regarding their involvement in the cocaine sale to Haiar.

Also, the several pieces of crack in the Casey's cellophane or plastic wrapping (exhibit 50) were identified by Roddy as the cocaine wrapped in "a little cellophane envelope" by Grant inside Edwards' pickup before Roddy left to deliver the $250 to D.J. Additionally, Haiar identified exhibit 50 as the crack and its wrapping which Grant handed to Haiar in the pickup. According to Haiar, Grant never received "any piece or rock" out of the cocaine which Roddy brought from D.J.'s car, the same cocaine that Roddy handed to Grant, who wrapped and passed the cocaine to Haiar. After the State rested, Grant did not present evidence.

During the conference on proposed instructions, Grant's

lawyer requested that the court give an instruction on possession of cocaine, that is, "an instruction regarding simply possession of a controlled substance . . . in addition to . . . the delivery of a controlled substance." The court declined to give Grant's requested instruction on possession of cocaine because the requested instruction was not "appropriate under the facts and circumstances in evidence in this case." The jury returned its verdict that Grant was guilty of unlawfully delivering a controlled substance (cocaine). See § 28-416(1).

GRANT'S REQUESTED INSTRUCTION

First, we address the State's position that a trial court's refusal to give an orally requested instruction cannot be reviewed on appeal because § 25-1111 directs that all requested jury instructions shall be written.

In *State v. Hegwood*, 202 Neb. 379, 275 N.W.2d 605 (1979), a robbery case, defense counsel, during a conference on instructions, orally requested an instruction on larceny as a lesser-included offense of robbery. The court refused to give the larceny instruction. Hegwood was convicted of robbery and appealed to this court, which stated:

> The trial court in this case knew exactly what defense counsel was requesting and denied the request on the trial court's understanding of the law. To have required, in addition to this presentation directly to the trial court, that the refused instruction be reduced to writing would be a meaningless triumph of form over substance. We do not so hold. The defendant made a proper request to the court for a lesser-included offense instruction. The instruction was warranted. The trial court refused to do so. This was error and requires reversal.

202 Neb. at 383, 275 N.W.2d at 608. See, also, *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980) (pursuant to a prosecutor's oral request, a trial court may properly give a clarifying instruction concerning circumstantial evidence). Cf. *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990) (an appellate court will not review a trial court's ruling on instructions when the instructions are absent from the record).

Thus, although § 25-1111 directs that a requested instruction

be written, when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction. See, *State v. Samuels, supra*; *State v. Hegwood, supra*.

During the instruction conference in Grant's trial, as unmistakably reflected in the bill of exceptions as a part of the record, defense counsel orally, but clearly, requested that the jury be instructed concerning the offense of illegal possession of cocaine, a crime prohibited by § 28-416(3). Also, in referring to the propriety of an instruction on illegal possession of cocaine as a lesser-included offense of unlawful delivery of cocaine, the trial court manifested a clear-cut understanding of the orally requested instruction. Under the circumstances, we are presented with a record that enables us to review the correctness of the trial court's refusal to instruct on illegal possession of cocaine as a lesser-included offense of delivering cocaine.

LESSER-INCLUDED OFFENSES

In considering whether the trial court erred by refusing to instruct on possession of cocaine as a lesser-included offense, we must first examine aspects of law concerning lesser-included offenses.

In *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988), the Iowa Supreme Court discussed the background of the lesser-included offense doctrine:

> Generally, the [lesser-included offense] doctrine allows a trier of fact to convict a defendant of an offense less serious than the one charged. [Christen R. Blair, *Constitutional Limitations on the Lesser-Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445 (1984).] . . .
>
> Historically, the doctrine developed to implement the policy at common law against multiple trials for the same allegations of illegal conduct. The doctrine eventually evolved as an aid to the prosecution when there was a failure of proof of some element necessary for conviction of the offense charged. Mascolo, *Procedural Due Process And the Lesser-Included Offense Doctrine*, 50 Alb.L.Rev.

> 263, 265-66 (1986). Today, the defense, more often than the prosecution, is likely to seek the doctrine's application as a hedge against conviction of the greater offense. Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis For Practitioners*, 5 Conn.L.Rev. 255, 255-56 (1972).

430 N.W.2d at 730.

The Two-Part Analysis for Lesser-Included Offenses.

In *State v. Jeffries, supra*, the court employed a two-part analysis for determining whether a trial court must instruct on a lesser-included offense: "In applying the doctrine [of lesser-included offenses,] courts must ask two questions: what is a lesser-included offense, and when should a trial court instruct on it." 430 N.W.2d at 730.

In addition to Iowa, courts of several other states have adopted the preceding two-part analysis for determining whether a requested instruction on a lesser-included offense must be given, for example, see, *State v. Wilson*, 701 P.2d 1058 (Utah 1985); *State v. Perkins*, 353 N.W.2d 557 (Minn. 1984); *Moore v. State*, 471 N.E.2d 684 (Ind. 1984); *State v. Skjonsby*, 319 N.W.2d 764 (N.D. 1982); and *Com. v. Channell*, 335 Pa. Super 438, 484 A.2d 783 (1984). See, also, Blair, *supra*; Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brook. L. Rev. 191 (1984); Edward G. Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine*, 50 Alb. L. Rev. 263 (1986).

Therefore, whether a court must instruct a jury on a lesser-included offense depends on answers to the questions: (1) Is the offense for which an instruction is requested actually a lesser-included offense of the crime that has been charged against a defendant? (2) Is an instruction on a lesser-included offense justified under the evidence at trial?

The Standard for a Lesser-Included Offense.

The first step of the two-part analysis, set out above, requires that a court determine whether the offense described in the requested instruction on a lesser-included offense is actually an offense included within a greater offense.

In *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), we

reaffirmed the cognate-evidence method or approach to determine whether one offense is related by law and evidence to another, greater offense and is, therefore, a lesser-included offense. In *Garza*, we held that such a determination depends on "whether a lesser-included offense existed based on the elements of the crime as charged in the information and the evidence supporting the charge." 236 Neb. at 207, 459 N.W.2d at 743. Also, in *Garza*, we rejected the strict statutory-elements approach expressed in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982): "To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case." More recently, in *State v. Massa, ante* p. 70, 493 N.W.2d 175 (1992), we again employed the cognate-evidence method or approach to determine whether a court must instruct on a lesser-included offense.

As stated in *State v. Jeffries*, 430 N.W.2d 728, 731 (Iowa 1988):

> Under the cognate approach, a defendant may be convicted of a lesser offense that, under the strict statutory-elements approach, is not necessarily committed in the course of committing the greater offense. The lesser offense is related and, hence, "cognate" in the sense that it has several elements in common with the greater offense but may have one or two elements not essential to the greater crime. . . .
>
> . . . [T]he cognate-evidence method, focuses on the evidence supporting the charge rather than on the statutory elements or the accusatory pleading.

The distinction between a lesser-included offense necessarily included in a greater offense and a lesser-included offense determined under the cognate-evidence method or approach was expressed in *People v Beach*, 429 Mich. 450, 463-64, 418 N.W.2d 861, 867 (1988):

> [W]hen the lesser offense is necessarily included, rather than cognate, the evidence will always support the lesser offense if it supports the greater. However, cognate offenses require the evidence in each particular trial to be examined to determine whether the specific evidence

> adduced would support a conviction of the requested lesser offense.

Subsequently, in *People v Heflin*, 434 Mich. 482, 495, 456 N.W.2d 10, 15 (1990), the Michigan Supreme Court explained the difference between "necessary" lesser-included offenses and those determined under the cognate-evidence method or approach:

> Necessarily included lesser offenses are those in which the defendant cannot commit the greater offense without also committing the lesser offense. On the other hand, cognate lesser included offenses are those in which the lesser offense shares some common elements with the greater offense, but which may also include some elements not found in the greater offense.

See, also, *People v Pouncey*, 437 Mich. 382, 387 n.4, 471 N.W.2d 346, 349 n.4 (1991): "A cognate lesser offense shares several elements and is in the same class of offenses as the greater crime. However, it differs from the greater crime in that it contains some elements not found in the higher offense." See, further, *State v. Boyenger*, 95 Idaho 396, 509 P.2d 1317 (1973) (when the evidence indicates that a defendant might be convicted of a lesser-included offense, an instruction on the lesser offense is appropriate).

Evidence for an Instruction on a Lesser-Included Offense.

If a court determines that an offense described in a requested instruction is a lesser offense included within a greater offense, then, under the two-step analysis and the cognate-evidence approach or method concerning a determination of greater and lesser-included offenses, a court must determine whether the evidence justifies an instruction on the lesser-included offense.

" 'The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.' " *State v. Tamburano*, 201 Neb. 703, 707, 271 N.W.2d 472, 474 (1978) (quoting from *State v. McDonald*, 312 Minn. 320, 251 N.W.2d 705 (1977)).

Thus, after a court has determined that the requested

instruction is based on a lesser-included offense, the court must examine the evidence, generated by the State or the defendant, to determine whether the jury could reasonably acquit the defendant of the greater offense, but reasonably find the defendant guilty of the lesser-included offense. See *State v. Massa, ante* p. 70, 493 N.W.2d 175 (1992). The preceding standard or rule for determining whether an instruction on a lesser-included offense should be given to the jury does not suggest that submission of lesser-included offenses is automatic on request. The key word in the standard or rule is "reasonably," or, as expressed in *State v. Tamburano, supra*, a "rational basis" for an acquittal of the greater charge and a conviction of the lesser. As pointed out in *State v. Williford*, 103 Wis. 2d 98, 111, 307 N.W.2d 277, 282 (1981):

> "The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. Only if 'under a different, but reasonable view,' the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury . . . ." [Quoting from *State v. Bergenthal*, 47 Wis. 2d 668, 178 N.W.2d 16 (1970).]
>
> Indeed, as noted in *Boyer v. State*, 91 Wis.2d 647, 668-69, 284 N.W.2d 30 (1979):
>
> "[T]his court has on several occasion[s] pointed out that it is error to instruct the jury as to lesser offenses when the evidence does not so warrant.
>
> " 'The early cases point out and emphasize and we must stress again, because the question keeps recurring, that a determination of whether an instruction on a lesser included crime should be given to a jury is not solved by merely determining the crime charged includes the lesser offense because juries are not to be given the discretion or freedom to pick and choose what offense the accused should be found guilty of. . . .' "

See, also, *People v Pouncey, supra* (when evidence would support a conviction of the lesser offense, an instruction on the lesser-included offense is required, but, in the absence of

evidence for a conviction of the lesser offense, the instruction should not be given); *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988) (a trial court examines all the evidence to determine whether there is a submissible question of fact for the jury with an instruction on a lesser-included offense); *Moore v. State*, 471 N.E.2d 684 (Ind. 1984) (a trial court reviews the evidence to determine whether that evidence would support acquittal of the greater charge and conviction of the lesser); *State v. Wilson*, 701 P.2d 1058 (Utah 1985) (permissible instruction on a lesser-included offense requires evidential support for acquittal of the greater offense and conviction of the lesser); *State v. Perkins*, 353 N.W.2d 557 (Minn. 1984) (a lesser-included offense instruction is warranted only if the evidence would rationally support a not-guilty verdict on the greater offense and a guilty verdict on the lesser offense); *State v. Skjonsby*, 319 N.W.2d 764 (N.D. 1982) (evidence must support an acquittal as to the greater offense and a conviction of the lesser).

Even when an alibi or insanity defense is used or the defendant presents no evidence to rebut the greater offense charged, a lesser-included offense instruction is appropriate if the evidence adduced controverts an elevating element of the greater offense. See, *State v. Massa, supra*; *State v. Jeffries, supra*.

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

State v. Reynolds, 235 Neb. 662, 691, 457 N.W.2d 405, 423 (1990). Accord, *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

When the evidence fails entirely to show a crime of lesser degree than that charged against a defendant, refusal to give a

lesser-included offense instruction is not prejudicial error. See, *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989); *State v. Buster*, 228 Neb. 387, 422 N.W.2d 373 (1988); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Schwartz*, 219 Neb. 833, 366 N.W.2d 766 (1985).

WAS GRANT ENTITLED TO AN INSTRUCTION ON POSSESSION?

We now consider Grant's requested instruction in light of the two-part, or two-step, analysis to determine whether Grant was entitled to that instruction.

In *Moore v. State*, 471 N.E.2d 684 (Ind. 1984), the defendant was convicted of dealing in cocaine. In Moore's trial, the evidence showed that he personally sold and delivered cocaine to an informant, Karnes. However, the trial court refused to give a jury instruction on possession of cocaine as a lesser-included offense of the delivery charge. The Supreme Court of Indiana, in affirming Moore's conviction, concluded that the trial court properly rejected Moore's requested instruction on possession of cocaine as a lesser offense of delivering cocaine and stated:

> We agree with Defendant that possession of cocaine is an "inherently included" lesser offense of delivering cocaine, inasmuch as it is impossible to commit the greater offense without committing the lesser offense. . . . However, our inquiry does not end there. We must next determine whether there was "evidence of probative value from which the jury could properly find the defendant guilty of such lesser included offense." [Quoting from *Hash v. State*, 258 Ind. 692, 284 N.E.2d 770 (1972).] . . .
>
> In the case at bar, the element distinguishing the lesser and greater offense is delivery. We, therefore, look to see if there was probative evidence that the Defendant committed the crime of possessing cocaine . . . . Substantial evidence was produced that Defendant delivered cocaine to Karnes. Karnes testified that Defendant sold cocaine to him; a tape recording of the transaction demonstrated that he did so, and Defendant himself testified that he sold cocaine to Karnes. This

> evidence is not disputed, notwithstanding that Defendant raised the defense of entrapment; hence, there was no error in refusing to give the tendered instruction on lesser included offenses.

471 N.E.2d at 687.

Because all the elements for illegal possession of a controlled substance are contained within the elements of a person's unlawfully delivering a controlled substance, illegal possession of a controlled substance is a lesser-included offense of unlawfully delivering a controlled substance. However, at Grant's trial, the evidence showed that Grant and Roddy flagged down passing motorists to inquire if occupants had crack for sale. When D.J. happened on the scene, Grant and Roddy obtained cocaine from him as a vendor of the controlled substance. Immediately thereafter, Roddy, carrying the cocaine obtained from D.J., and Grant left D.J.'s car, and the women walked directly to Edwards' pickup. Inside the pickup, Roddy handed the cocaine to Grant, who wrapped all the cocaine and, in turn, passed the wrapped cocaine to Haiar in exchange for the $250 which Haiar then handed to Roddy. The cocaine identified and introduced as physical evidence at Grant's trial was the same cocaine that was manually moved from D.J. to Roddy and then from Roddy to Grant, who immediately wrapped the cocaine, which she then handed directly to Haiar. Therefore, the only cocaine involved in the charge against Grant was the crack that, for practical purposes, moved in a virtually unbroken and steady course from D.J., the seller, through the hands of intermediaries, Roddy and Grant, to the eventual recipient, Haiar. Thus, Grant and Roddy were human instruments for the exchange of cocaine and money between D.J. and Haiar. In that factual setting, a jury could not rationally conclude that Grant possessed the crack for her personal use vis-a-vis delivery in a cocaine sale. Rather, Grant's only possession of the crack formed a link in a chain for delivery of the cocaine from a distributor to a recipient and ostensible consumer other than Grant. Hence, under the evidence, Grant possessed the cocaine for transmission to another, not for her retention and personal consumption. Consequently, the trial court properly refused to give an

instruction on Grant's illegal possession of cocaine for her personal use.

Grant's case is easily distinguished from *State v. Massa, ante* p. 70, 493 N.W.2d 175 (1992). Massa was charged and convicted of intending to deliver marijuana in his possession. During a search with a warrant, police discovered several baggies of marijuana in a house where Massa was present. Additionally, while searching Massa's person, police found a large quantity of cash, a pipe, and a baggie of marijuana in his jeans pocket. We concluded that "[f]rom these facts, the jury could reasonably find that the amount of marijuana found on Massa, coupled with the pipe, was consistent with possession for personal use and contradictory to possession of an amount held for sale." *Id.* at 76, 493 N.W.2d at 180. In contradistinction from *Massa*, Grant's case contains only evidence that the cocaine was moved from D.J., through Grant, to Haiar; hence, nothing indicates that while the cocaine was moving from D.J. to Haiar, Grant intended to retain the cocaine for her personal use and consumption.

CONCLUSION

Because the court properly rejected Grant's request for an instruction on the lesser-included offense and since the court's rejection of the requested instruction is the only assignment of error, we affirm the judgment entered by the trial court on the jury's verdict that Grant knowingly or intentionally delivered cocaine, in violation of § 28-416(1).

AFFIRMED.

RICHARD D. HELVEY, DOING BUSINESS AS RENT ALL RENTALS, LEXINGTON, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. DAWSON COUNTY BOARD OF EQUALIZATION ET AL., APPELLANTS AND CROSS-APPELLEES.

495 N.W.2d 261

Filed February 12, 1993. No. S-89-1411.

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. 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.
2. **Statutes: Constitutional Law.** A court may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by the Nebraska Supreme Court whether the question has been raised by the parties or not.
3. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** On appeal, a court presumes the county 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. 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. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
4. **Taxation: Valuation: Presumptions.** Ordinarily the valuation by the assessor is presumed to be correct.
5. **Taxation: Valuation.** Showing a mere difference of opinion regarding valuation of property for tax purposes is not sufficient to meet a taxpayer's burden of persuasion.
6. **Taxation: Valuation: Evidence: Appeal and Error.** In an appeal to a county board of equalization or to a district court, and from the district court to the Nebraska Supreme Court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
7. **Taxation: Valuation: Appeal and Error.** As a general rule, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with

values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with direction.

John H. Marsh, Dawson County Attorney, and Michael F. Maloney for appellants.

John DeCamp, of DeCamp Legal Services, for appellee.

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

PER CURIAM.

In this case, the issue before the district court for Dawson County was whether certain personal property held for rental purposes was "business equipment" subject to personal property tax rather than being exempt as "business inventory."

The Dawson County Board of Equalization (Board), after a hearing, determined that personal property held for rental purposes by Richard D. Helvey, doing business as Rent All Rentals, was business equipment and thus taxable. The district court reversed the Board's decision and found the property to be business inventory and thus exempt. The Board appealed to this court.

Because this court in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), determined that the statute, Neb. Rev. Stat. § 77-202(7) (Reissue 1990), exempting business inventory from personal property tax was unconstitutional, and because the assessment of Helvey's property was not arbitrary or unreasonable, the decision of the district court is reversed and the cause remanded to the district court with direction to enter judgment consistent with this opinion.

> An appeal from action by a county board of equalization is an equity action tried de novo in the district court. . . . 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.

(Citations omitted.) *Dowd v. Board of Equal.*, 240 Neb. 437, 439, 482 N.W.2d 583, 585 (1992).

The record reflects that in January 1980, Helvey opened a store in Dawson County from which he rented to customers various items, including garden tools, home appliances, and light contractor tools. Helvey collected sales tax on the rental payments from his customers.

Helvey testified that his first property tax schedule was filed in March 1981, at which time he met with the Dawson County assessor for assistance in filling out the return. Helvey testified that they discussed the nature and type of business in which he was engaged. According to Helvey, the assessor never expressed an opinion on the taxability of rental equipment, but "we just both assumed that she knew and I knew that [rental] inventory was exempt." At the hearing before the county board of equalization, he claimed that because sales tax was charged on the property rented, the property was resale property and that he need list only his office furniture and fixtures on the personal property tax return. Each year thereafter, Helvey filed a similar return.

When Helvey sold his store in May 1984, the assessor accelerated the tax due on the business. See Neb. Rev. Stat. § 77-1214 (Reissue 1990). The assessor testified that upon learning of the sale, she became aware that Helvey had not been taxed on his personal rental property. The assessor testified that she made several attempts between May and December 1984 to persuade Helvey to file schedules of his personal rental property for the years 1981 through 1984. When those attempts proved unsuccessful, the assessor sent Helvey schedules in which she had placed a value of $75,000 on the personal rental equipment which had been omitted for each of the 4 years in question. The valuations and assessments were made by the assessor under Neb. Rev. Stat. § 77-412 (Reissue 1981 & Cum. Supp. 1984), recodified as § 77-1233.04 (Reissue 1990). Their assessment was based on the selling price of the business, less "blue sky." Helvey filed a protest with the Board.

In May 1985, to make a more accurate assessment, the assessor subpoenaed Helvey's records. The process of assessment was accomplished primarily through the use of Helvey's state and federal income tax returns and bank records and the contract of sale of the business. The assessment process was complicated by the fact that the tax returns did not differentiate between Helvey's property at his Dawson County store and property at a store he owned in Red Willow County. Using bank records of Helvey's deposits, the assessor allocated 63 percent of the personal rental property to the Dawson County store and 37 percent to the store located in Red Willow County. Although Dawson County retained possession of his financial records, Helvey was allowed access to them.

On June 6, 1985, the assessor met with Helvey's lawyer and informed him that a revised assessment was forthcoming which was based on the materials obtained through subpoena. Helvey did not furnish any additional information to the assessor. On July 15, 1985, Helvey was notified that the revised assessment of his personal rental property in Dawson County was $49,480, $67,200, $72,640, and $99,909 for the years 1981 through 1984, respectively. Because the property had not been voluntarily reported, a 50-percent penalty was also assessed pursuant to § 77-412.

The Board heard Helvey's protest on July 30 and August 1, 1985. Before the Board, Helvey argued that the property was business inventory, which was exempt from personal property tax pursuant to § 77-202(7) (Reissue 1981 & Cum. Supp. 1984). He argued that other businesses located in Dawson County were not taxed on their personal rental property and that other counties did not tax such property. Helvey also claimed that the assessment was inaccurate, in that items which were intended only for resale were included in the list of taxable rental property. According to Helvey, these resale-only items were listed as business inventory on his federal income tax returns. However, Helvey also stated that there were a few items included in the business inventory amounts that were rental items. He was unable to document an allocation of personal rental property versus property intended only for resale, but his "guess" was that resale-only property averaged $30,000 per

year. Helvey also complained that the apportionment of the property between Dawson County and Red Willow County was erroneous because the gross receipts contained in the amounts allocated to Dawson County contained loan amounts being repaid to him and personal checks which Helvey occasionally put into the business. However, Helvey was unable to say what the proper allocation between the two stores should have been.

The assessor testified that it had always been her policy to tax personal rental property in Dawson County. She offered and the Board received into evidence a list of lessors of taxable rental equipment reported in Dawson County in 1985 and the amount of rental property tax paid by those lessors on that equipment. The list was offered as an example of office procedures employed by the assessor with regard to rental property.

The assessor testified that in allocating amounts between Helvey's two stores, she computed only amounts from 1982 and then extrapolated those amounts to the years 1981, 1983, and 1984. She stated that she "used [the year 1982] for an estimate because it would take me six months to go through these records." She also testified that 1982 was the only year for which she had complete records. The assessor denied that her apportionment between Helvey's two stores was incorrect and stated that any loan amounts or personal deposits of Helvey had been omitted from the total deposits.

On August 1, 1985, the Board found that (1) the property was taxable, (2) the penalty imposed by the assessor was proper, and (3) "the assessment of the assessor is presumed to be correct and that [Helvey] has completely failed to present any evidence to show that the assessment was erronious [sic] or arbitrary in any manner and that the assessment as presented by the assessor should be approved and accepted."

Helvey appealed the Board's findings to the district court for Dawson County. Helvey claimed, in part, that the Board erred in that (1) the method utilized by the assessor in preparing Helvey's tax schedules was arbitrary, capricious, and unreasonable, (2) the property in question was not subject to personal property tax under Nebraska law, (3) the laws and regulations relied upon by the Board and the assessor in

determining the taxability of Helvey's property are unconstitutional, (4) the valuation, assessment, and levy of the tax on Helvey's property were not in accordance with the methods provided by law or with the standards promulgated by the Tax Commissioner, (5) the tax was not levied by valuation uniformly and proportionately upon all tangible property, (6) the imposition of a penalty and interest on the taxes on personal property was arbitrary, unreasonable, and inequitable, and Helvey was not given an opportunity to seek waiver of the penalties and interest, and (7) the tax on Helvey's property pursuant to applicable statutes is unconstitutional and void because the statutes are not uniformly applied throughout the state and are applied in a discriminatory and unequal manner.

The district court reversed the Board's decision, finding that Helvey's personal rental property constitutes business inventory exempt from taxation. The court relied on the definition of "inventory" found in Neb. U.C.C. § 9-109 (Reissue 1992), which definition includes items which are held out for sale or lease. The court also concluded that the action of the Board was unreasonable and arbitrary, finding significant the

> totality of the circumstances presented in this case, including the subpoenaing and maintaining of [Helvey's records] until right before the hearing; including the testimony of [Helvey] that much, if not a great majority, of the equipment involved was subject to sale and was, in fact, sold; including the method of assessment employed by the county assessor, including the unrefuted testimony that very few counties were taxing such property at all; including the difference in assessment from the property in McCook, Nebraska, as opposed to the property in Lexington, Nebraska; and including the actions of the county in relationship to [Helvey] as they relate to the tax years in question and the acceptance of his tax form . . . .

The Board appealed the decision of the district court that Helvey's personal rental property was exempt from taxation. The Board claims, in summary, that the court erred in (1) relying on the definition of business inventory found in the U.C.C. rather than that found in the Nebraska Department of

Revenue regulation, 316 Neb. Admin. Code, ch. 42, § 003.02 (1985), and (2) finding that the Board's action was unreasonable and arbitrary.

Section 77-202(7) provided that "[b]usiness inventory shall be exempt from the personal property tax." The exemption in this subsection was among those exemptions found unconstitutional by this court in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). Therefore, we need not decide whether Helvey's personal rental property was business inventory within the meaning of this statute because the property was taxable in any event. "[A court] may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by this court whether the question has been raised by the parties or not." *State v. Bardsley*, 185 Neb. 629, 632, 177 N.W.2d 599, 601-02 (1970), *overruled on other grounds, State v. Rosenberger*, 187 Neb. 726, 193 N.W.2d 769 (1972). See, also, *Mara v. Norman*, 162 Neb. 845, 77 N.W.2d 569 (1956).

Because Helvey's personal rental property is not tax exempt, we must next decide whether the district court was correct in determining that the assessment was "unreasonable and arbitrary." While an appeal from a county board of equalization is heard de novo in the district court, Neb. Rev. Stat. § 77-1511 (Reissue 1990) requires that "[t]he court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low."

> On appeal, a court presumes the [county] 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. . . . 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.

(Citation omitted.) *Dowd v. Board of Equal.*, 240 Neb. 437,

439, 482 N.W.2d 583, 585 (1992). The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989).

In this case, Helvey did not meet his burden to rebut the presumption that the Board acted upon sufficient and competent evidence. He complained at the Board hearing that the assessor's figures were incorrect, but he did not calculate an alternative assessment. He stated that the figures listed on his tax returns as inventory consisted primarily of resale-only items, but he could not document any amounts. Helvey stated that on average there was $30,000 of resale property each year, but he conceded that that figure was a guess.

Helvey first realized in May 1984 that the assessor intended to tax his personal rental property. He remained in possession of his business records until May 1985. Even after the records were given to the assessor pursuant to subpoena, Helvey had access to them with which to develop his challenge to the assessment. His attorney met with the assessor in early June 1985 to discuss the forthcoming revised assessments, but no additional documents were ever furnished to the assessor which might have led to a change in her assessments.

In sum, Helvey was able to show only that he disagreed with the assessment. Ordinarily the valuation by the assessor is presumed to be correct. *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 138 N.W.2d 641 (1965). Showing a mere difference of opinion regarding valuation of property for tax purposes is not sufficient to meet a taxpayer's burden of persuasion. In *Spencer Holiday House v. County Bd. of Equal.*, 215 Neb. 194, 200, 337 N.W.2d 759, 763 (1983), we held:

> "In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a

systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."

In *LeDioyt v. County of Keith*, 161 Neb. 615, 630, 74 N.W.2d 455, 464 (1956), we held:

> As a general rule the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

As we view the record, the only satisfactory evidence of value of Helvey's personal rental property came from the testimony of the Dawson County assessor.

Helvey argues on cross-appeal that the taxation of his property violates the Equal Protection Clause of the U.S. Constitution; article VIII, § 1, of the Nebraska Constitution; and this court's decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). Helvey contends that a taxpayer has the right to have his property taxed at the lowest level assessed on similar property even though this departs from the statutory requirement.

The evidence produced by Helvey is insufficient to show that Helvey's property was improperly or unfairly taxed. Helvey testified, substantially based upon hearsay, that other businesses, both inside and outside of Dawson County, were not taxed on similar property. The Dawson County assessor testified that "we have always had rental equipment on our schedule and we have always taxed it." Helvey presented insufficient evidence to support his claim that taxation of his property was violative of the U.S. or Nebraska Constitutions. The assignments of error on cross-appeal have no merit.

Because the exemption for business inventory from personal property tax was ab initio unconstitutional, Helvey's personal rental property was subject to personal property tax. Helvey failed to prove that his property was either arbitrarily or unreasonably assessed. The decision of the district court that Helvey's personal rental property was not taxable is reversed, and the cause is remanded to the district court with direction to

enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

SHANAHAN, J., concurring.

The majority retroactively applies *MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991) (MAPCO I)* to a tax dispute which originated in 1981. Because *MAPCO I* should be applied prospectively, I disagree with the basis for the majority's disposition of Helvey's appeal. *See MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 263, 494 N.W.2d 535 (1993) (Shanahan, J., dissenting).

However, I reach the same conclusion as that of the majority in this case, namely, Helvey's personal property is subject to taxation. Although Neb. Rev. Stat. § 77-202(7) (Reissue 1981 & Cum. Supp. 1984) provided that "[b]usiness inventory shall be exempt from the personal property tax," the Nebraska Department of Revenue regulation, 316 Neb. Admin. Code, ch. 41, § 2(2) (1980), provided: "A lease or rental is not a sale, goods held for lease or rental by a taxpayer cannot be included in business inventory." Furthermore, "[a]gency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law." *Nucor Steel v. Leuenberger*, 233 Neb. 863, 866, 448 N.W.2d 909, 911 (1989).

The record shows that § 2(2) was properly adopted by the Department of Revenue, was filed with the Secretary of State's office on November 19, 1980, and remained effective until March 18, 1985, when the regulation was superseded by 316 Neb. Admin. Code, ch. 42, § 003.02 (1985). Therefore, according to § 2(2), Helvey's personal property held for rental or lease was not business inventory, but was tangible personal property taxable during the years 1981 through 1984. Consequently, the district court's ruling to the contrary was incorrect as a matter of law. Since the evidence is insufficient in Helvey's case to show that the county board of equalization's action was arbitrary and capricious, the district court's ruling should be reversed and the cause remanded with direction to reinstate the county board's order or decision that Helvey's personal property was taxable inasmuch as the property was held for rental or lease.

KELLY HOLDEN, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, KAREN HOLDEN, APPELLANT, V. HOWARD SCHWER, APPELLEE.

495 N.W.2d 269

Filed February 12, 1993. No. S-90-259.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Animals: Strict Liability: Proof.** An owner may be strictly liable for injuries inflicted by his dog without any proof that the owner knew of the dog's dangerous propensities.
4. **Animals.** When the words "killing," "wounding," "worrying," or "chasing" as used in Neb. Rev. Stat. § 54-601 (Reissue 1988) are read together, they exclude playful and mischievous acts of dogs.
5. **Recreation Liability Act: Negligence: Fees.** The owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility.
6. **Recreation Liability Act.** The Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Reissue 1988), does not require a landowner to fully dedicate his property to the public before he comes under the protection of the act. Rather, in order to facilitate the purpose of the act, a landowner need allow only some members of the public, on a casual basis, to enter and use his land for recreational purposes to enjoy the protection of the act.
7. _____. The Recreation Liability Act does not exclude an activity from being recreational simply because the activity may have a secondary benefit as transportation.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Joseph B. Muller, of The Law Offices of Ronald J. Palagi, P.C., for appellant.

Thomas A. Grennan, of Gross & Welch, P.C., for appellee.

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

GRANT, J.

Plaintiff-appellant, Kelly Holden, a minor, by and through her mother and next friend, Karen Holden, filed her petition in the Sarpy County District Court against defendant-appellee, Howard Schwer, seeking damages for injuries allegedly incurred as a result of defendant's ordinary negligence and because of defendant's violation of Neb. Rev. Stat. § 54-601 (Reissue 1988) (making dog owners strictly liable for certain damages done by dogs). Plaintiff alleged that she was on defendant's property on July 4, 1988, and was injured while riding a three-wheeled vehicle when, as a result of actions by defendant's dog, she hit a barbed wire fence.

In his answer to plaintiff's petition, defendant denied that § 54-601 had any application to plaintiff's case and denied that he owed any duty of ordinary care to plaintiff because of the provisions of the Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Reissue 1988). Defendant later filed a motion for summary judgment. After a hearing, the court sustained the motion and entered judgment in favor of defendant, dismissing plaintiff's petition. Plaintiff timely appealed to this court.

Plaintiff, in substance, assigns three errors, alleging that the trial court (1) "erred, as a matter of law, when it granted summary judgment when there were genuine issues of material fact, as well as disputes concerning the inferences which could be drawn from the undisputed facts"; (2) "erred in its application of the law regarding liability of dog owners"; and (3) erred in its application of the Nebraska Recreation Liability Act. We affirm.

The record shows that on July 4, 1988, the plaintiff, who was then 15 years old, was attending a family picnic of a friend, Jessica Romick. The picnic took place on the lake property of defendant's farm near Papillion.

Defendant's farm consists of 140 acres, 120 of which are devoted to agricultural use. The remaining 20 acres, including a 6-acre lake, are used primarily for recreational purposes. Defendant often gave others permission to use this land without charge for hunting, fishing, and other purposes. On the day of the accident, defendant had given the Romick family

permission to use the land for the picnic.

On the day of the accident, plaintiff was driving a three-wheeler upon which Romick was riding as a passenger. The vehicle was neither owned nor furnished by defendant. Defendant's dog called Smokey, a 6- or 7-month-old German shepherd puppy, had been running alongside of and around the vehicle throughout the day as plaintiff and others drove it down the farm lane.

As plaintiff was driving the three-wheeler, the dog stopped in the lane, either sitting down or simply standing still. Plaintiff veered in order to avoid the dog and ran into a fence near the lane. She alleges that she suffered cuts and bruises, resulting in permanent scars.

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. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Murphy v. Spelts-Schultz Lumber Co., supra*; *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

Plaintiff first argues that § 54-601, the "dog bite statute," serves to impose liability upon the defendant. The statute, as in effect in 1988, provided in part:

> Dogs are hereby declared to be personal property for all intents and purposes, and the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs, and (2) to any person, firm or corporation by reason of such dog or dogs killing, wounding, worrying, or chasing any person or persons or any sheep or other domestic animals

belonging to such person, firm or corporation.

Section 54-601 has been applied a number of times by this court and has been found to make an owner strictly liable for injuries inflicted by his dog without any proof that the owner knew of the dog's dangerous propensities. See, *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989); *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979). We have recognized, however, that not all actions by dogs create liability for their owners under § 54-601. In enacting the statute, the Legislature "removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute." *Donner v. Plymate*, 193 Neb. 647, 649, 228 N.W.2d 612, 614 (1975).

In *Donner*, the plaintiff sustained an injury when the defendant's dog, while exercising, ran into the plaintiff's knee while she was stepping back and caused her to fall. The plaintiff acknowledged that the dog was in a playful mood, and when asked to describe what the dog was doing when the injury happened, she answered: " 'Chasing at me and I stepped back, took one step and he hit my right knee.' " *Id.* at 648, 228 N.W.2d at 613.

The *Donner* plaintiff further described the dog's activities as chasing her and stated that the dog was not mean, did not growl at her, and seemed playful; that the dog would run in circles during the exercise periods and had run at her on at least a dozen occasions; and that this was done by the dog in an effort to get exercise and be playful.

In determining whether liability should be imposed on owners for their dogs' playful acts, this court stated:

> The purpose of the original statute was to protect domestic animals, which are ordinary prey of dogs. Brown v. Graham, 80 Neb. 281, 114 N.W. 153. This protection was extended to persons in 1961 by L.B. 205, the history of which indicates a legislative concern for children and adults being attacked by dogs in the Douglas County area.

193 Neb. at 649, 228 N.W.2d at 614.

This court concluded that the plaintiff in *Donner* was not

entitled to relief because "[w]hen the words killing, wounding, worrying, or chasing as used in section 54-601, R. R. S. 1943, are read together they exclude playful and mischievous acts of dogs." 193 Neb. at 650, 228 N.W.2d at 614. We note that "worrying," in the sense used in § 54-601, means harassing "by tearing, biting, or snapping esp. at the throat (wolves [worrying] the sheep)." Webster's Third New International Dictionary, Unabridged 2636 (1981).

In the case at bar, the actions of the defendant's dog called Smokey, a 6- or 7-month-old puppy, were almost identical to those of the dog in *Donner*. The passenger on the vehicle, Romick, stated that the dog was just being playful when she and the plaintiff were driving along the lane and that he did not appear to be vicious "at all." Plaintiff stated that the dog was not actually "chasing" the vehicle, but would run behind it, in front of it, and in large circles around it. Janis Smith, the mother of Romick, was a witness to the accident, and she stated in her deposition that "the dog doesn't have a mean bone in his body. He was not being vicious in any way. He was acting like the three or four month [sic] puppy that he was." She also described the dog as being playful as he was running alongside and around the three-wheeler. She testified that "he was definitely barking at the vehicle. When the vehicle stopped and shut off when the boys rode up, he made no further movements of any kind. He just sat there and waited for the vehicle to start up again so he could have a good time again."

The factual situation shows that plaintiff's injuries were caused, in part, by the playful and mischievous acts of defendant's dog. As we held in *Donner*, such actions are not within the scope of protection afforded by § 54-601. The motion for summary judgment was properly sustained by the trial court as to this issue.

Plaintiff next contends that the Nebraska Recreation Liability Act does not insulate the defendant from liability. Plaintiff concedes that if the Recreation Liability Act applies to the factual situation present in this case, no liability would attach. The threshold question, therefore, is whether the act applies to the incident before us.

The stated purpose of the Recreational Liability Act is to

"encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-1001.

Accordingly, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." § 37-1002. The act further states that

> an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

§ 37-1003. An owner is still liable, however, "(1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land." § 37-1005. Therefore, as this court has held, "the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility." *Cassio v. Creighton University*, 233 Neb. 160, 165, 446 N.W.2d 704, 709 (1989).

The history of the act shows that it was passed out of a concern that landowners, such as farmers, who allow people to use their land for recreation should be protected. See Agriculture and Recreation Committee Hearing, L.B. 280, 75th Leg. (March 25, 1965). The primary point of contention between the parties in the case at bar is whether the act applies to persons, such as the defendant, who do not open their land to the public at large, but who use their discretion in granting permission to enter.

Plaintiff argues that for the defendant to be protected by the act, he must give "carte blanche permission" to the members of the public at large to use his property in any way they see fit.

Brief for appellant at 9. There is nothing in the act, however, which would support such a contention. Such a position would defeat the purpose of the act. The legislative history shows that the purpose of the act is to "encourage the landowners in our state . . . to make recreational facilities available to those that like to hunt or fish on their property by changing the liability angles . . . that . . . exist." Floor Debate, L.B. 280, Agriculture and Recreation Committee, 75th Leg. 1159 (April 30, 1965). It would not encourage landowners to allow others to use their property if, to come under the protection of the act, they had to allow any person, at any time, under any circumstances, to come onto their property and use it in any manner that person saw fit.

While this precise issue has not been addressed in the Nebraska cases applying the act, because the act is a model liability relief law drafted by the Council of State Governments, its application by other jurisdictions provides guidance.

In *Johnson v. Stryker Corp.*, 70 Ill. App. 3d 717, 388 N.E.2d 932 (1979), a teenager suffered fatal injuries after diving into a shallow pond on the defendant owner's property. The owner had permitted his land to be used for recreational purposes on a casual basis by some, but not all, members of the general public. The Illinois Recreational Use of Land and Water Areas Act statement of purpose, Ill. Rev. Stat. ch. 70, para. 31 (1971), was nearly identical to its Nebraska counterpart, § 37-1001. The Illinois court held that the recreational land use act barred the suit and stated that it was

> unable to find any case which has held that these or similar statutes are only applicable when the land is thrown open to the public use. . . . [T]he Act is applicable to those who permit open lands to be used recreationally on a casual basis, as the defendant has done here.

70 Ill. App. 3d at 721, 388 N.E.2d at 934.

The Supreme Court of Kentucky decided a case which also squarely addresses this issue. In *Coursey v. Westvaco Corp.*, 790 S.W.2d 229 (Ky. 1990), a 13-year-old plaintiff sued for injuries sustained when he dove into a water-filled sandpit located on the defendant's property. Kentucky is one of at least 15 other states that, like Nebraska, has adopted, essentially

unchanged, the recreational land use act promulgated by the Council of State Governments. See 24 Council of State Governments, Suggested State Legislation 150 (1965). The plaintiff in *Coursey*, as does plaintiff Holden, argued that for the defendant to come under the protection of the act, a dedication of his property to the public was necessary. The Kentucky court held that "[t]o require a formal dedication of the land would defeat the purpose of the Act by reducing the number of owners who would" allow their land to be used by the public. 790 S.W.2d at 232. Therefore, as to the plaintiff's contention in *Coursey* that a landowner had to open his land to all members of the public in order to be protected under the act, the Kentucky Supreme Court answered, simply, "*No.*" (Emphasis in original.) 790 S.W.2d at 232.

Based on our consideration of the reasoning of the *Coursey* and *Johnson* courts, among others, we hold that the Recreation Liability Act does not require a landowner to fully dedicate his property to the public before the landowner comes under the protection of the act. Rather, in order to facilitate the purpose of the act, a landowner need allow only some members of the public, on a casual basis, to enter and use his land for recreational purposes to enjoy the protection of the act. Defendant's acts of allowing some members of the public, including plaintiff, to use his land without charge satisfy the first tier of the act's requirements—making his land available to the public.

A secondary contention of plaintiff is that even if the defendant is considered to be part of the class protected under the first part of the act, the second part of the act is not satisfied because plaintiff was not injured while pursuing a recreational activity. Plaintiff seeks to characterize her use of the three-wheeler as mere transportation and claims that this would place her venture outside of the act. Although this court has not addressed a case which defines recreational activities, guidance from other jurisdictions is again available.

In *Singletary v. Crown Zellerbach*, 554 So. 2d 846 (La. App. 1989), the Louisiana Court of Appeal decided a case which is squarely on point to the one at bar. The plaintiff in *Singletary* brought an action to recover for injuries sustained in an

accident involving a three-wheeler which was being operated on property leased by the defendant. While driving the vehicle down a dirt road on the property, the plaintiff hit a gate and was injured. The plaintiff's main contention was that riding a three-wheeler did not constitute "recreational activity." *Id.* at 848. Applying a recreational land use act almost identical to Nebraska's, the Louisiana court found that "the purpose of the recreational land use statutes is to encourage landowners to make land and water areas available to the public for recreational purposes." *Id.* The court specifically held that "the activity of riding three-wheelers on the property in question during a camping trip is a recreational activity within the scope of [Louisiana's recreational land use act]," and, therefore, no liability attached to the landowner. *Id.*

In the instant case, the activity of riding the three-wheeler down the defendant's farm lane cannot be construed as mere transportation, but was clearly a recreational activity. Although an aspect of the activity was transportation, the primary use of the three-wheeler was for fun and enjoyment. The act does not exclude an activity simply because the activity may have a secondary benefit as transportation. We find plaintiff's argument that her activities constituted only transportation and not recreation to be without merit.

For the reasons cited above, the trial court's granting of summary judgment in favor of defendant, Howard Schwer, is affirmed.

AFFIRMED.

WHITE, J., dissenting.

In *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975), this court held that the mens rea of a dog was an essential element of the application of Neb. Rev. Stat. § 54-601 (Reissue 1988). The holding that we are, or any juror is, capable of judging whether a dog is at a given time playful or malicious is preposterous. We could, with equal reliability, predict the future from the examination of a goat's entrails. I would reverse out of hand the holding in *Donner*.

I submit further that the Recreation Liability Act does not protect the landowner from the application of the strict liability of § 54-601. I would reverse.

EUGENE J. VALASEK AND WANDA M. VALASEK, HUSBAND AND WIFE, APPELLANTS, V. ANN BERNARDY, A SINGLE PERSON, ET AL., APPELLEES.

495 N.W.2d 275

Filed February 12, 1993. No. S-90-434.

1. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Municipal Corporations: Streets and Sidewalks: Title.** It is generally recognized that under limiting legislation such as prevails in this state, the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated.
3. _____: _____: _____. The fee simple title to the streets of cities or villages, which passes by virtue of the acknowledgment and recording of the plats, passes to and vests in the city or village in the absence of limiting legislation.

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

Donald G. Furlow, of Schmid, Mooney & Frederick, P.C., for appellants.

Timithy Krajicek for appellees Bernardy and Bohac.

Maureen A. Doerner, of Young & LaPuzza, for appellees Chrostek and Benesh.

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

HASTINGS, C.J.

Plaintiffs appeal the order of the district court sustaining defendants' motion for summary judgment. The court's order quieted title in defendants to a portion of the east 20 feet of the west 40 feet of vacated Buckingham Avenue. Plaintiffs assign as error (1) the failure of the trial court to interpret and apply Neb. Rev. Stat. §§ 14-115 and 14-3,107 (Reissue 1991), (2) the failure of the trial court to grant plaintiffs' motion for default judgment against defendant Zigmond Chrostek, and (3) the

sustaining of defendants' motion for summary judgment.

The record consists of the pleadings of the parties, a stipulation of facts agreed to by defendants, various conclusionary affidavits of an official of the assessor's office of Douglas County purporting to express the position of that office as to the effect of the two vacation ordinances of the city of Omaha, an affidavit of the attorney for several of the defendants alleging the action of the assessor's office in changing certain legal descriptions, copies of two ordinances passed by the city council of the city of Omaha, and copies of various deeds on file with the register of deeds for Douglas County.

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

The facts as may be found in the record are not in dispute. Plaintiffs, Eugene J. and Wanda M. Valasek, husband and wife, are the record titleholders of Lots 1 through 6, Block 44; a part of Lot 7, Block 43; and a part of Lot 1, Block 56, all in the original city of South Omaha, now a part of the city of Omaha, together with portions of vacated Railroad Avenue, G Street, and H Street, all of which property is adjacent to and abuts upon the west line of the original Buckingham Avenue.

Defendants John Bernardy, a single person, now deceased, and Ann Bernardy, a single person, are the record titleholders of Lot 3, Block 45, except for the south 109.4 feet thereof. Defendants Joseph E. and Catherine P. Bohac, husband and wife, are the record titleholders of the south 109.4 feet of Lot 3, Block 45. Edward Chrostek, a single person; Zigmond Chrostek, a single person; Carl Chrostek, a single person; William Chrostek, a single person; and Walter Chrostek, a single person, now deceased, are the record titleholders of Lot 2, Block 45. Joseph J. and Margaret Benesh, husband and wife, are the record titleholders of Lot 1, Block 45. All of defendants' properties are in the original city of South Omaha, now a part

of the city of Omaha.

On June 19, 1984, upon the petition of the owners of more than 75 percent of the property abutting on the east 40 feet of Buckingham Avenue between G Street and 29th Street, the city council of the city of Omaha passed ordinance No. 30361, (first ordinance), which vacated the east 40 feet of Buckingham Avenue referred to above. It is apparent that this ordinance was passed pursuant to the authority of § 14-3,107, which provides as follows: "The city is authorized to vacate . . . any street . . . upon petition of the owners of seventy-five percent of the taxable frontage feet abutting upon such street . . . . Whenever a street is vacated . . . the part so vacated shall revert to the abutting owners on the respective sides thereof."

The terms of the first ordinance reserved to the city of Omaha the right to maintain, operate, repair, renew, and construct various utility installations, but reserved no other title.

On April 11, 1989, the city council passed ordinance No. 31757 (second ordinance) under the provisions of "Section 14-375, Reissue, Revised Statutes of Nebraska, 1943," which ordinance vacated the

> west 40 feet of Buckingham Avenue from "G" Street south approximately 310 feet to 29th Street, abutted by Lots 1, 2, 3, 4, and 5, Block 44 and vacated east 40 feet of Buckingham Avenue adjacent and Lot 1, vacated east 40 feet of Buckingham Avenue adjacent and Lot 2, vacated east 40 feet of Buckingham Avenue adjacent and (except south 109.4 feet) Lot 3, vacated east 40 feet of Buckingham Avenue adjacent and south 109.4 feet Lot 3, Block 45, South Omaha, located in the Northeast Quarter Section 4-14-13 . . . .

Again, this ordinance reserved to the city of Omaha rights to maintain, operate, repair, renew, and construct various utilities, but no other title. The second ordinance recited that a "Committee of Appraisers" had been appointed to appraise damages to property affected by the vacation and that the "Committee of Appraisers found no cause for any damages as a result of the vacation." Those findings were accepted, and that conclusion was adopted by the city council.

Neb. Rev. Stat. § 14-375 (Reissue 1991) provides as follows:

> Upon the recommendation of the city planning board, the city council may, by ordinance or resolution, vacate any street . . . within any such city without any petition being filed therefor. Before any such street . . . shall be vacated, the council shall appoint a committee of at least three members thereof, who shall faithfully and impartially and after reasonable notice to the owners and parties interested in property affected by such vacation, assess the damages, if any, to such owners and parties affected. They shall take into consideration the amount of special benefits, if any, arising from such vacation and shall file their report in writing with the city clerk. . . . The award of appraisers shall be final and conclusive as the order of a court of general jurisdiction, unless appealed from.

In their petition, plaintiffs alleged the foregoing facts and, further, by reason of the first ordinance, conceded that by operation of law, defendants had acquired ownership interest in and to the east 40 feet of Buckingham Avenue abutting on defendants' real property. It was further alleged that by reason of the second ordinance, plaintiffs, by operation of law, had acquired title to the remaining 40 feet of Buckingham Avenue, "which abuts Plaintiffs' real property on the east," i.e., the west 40 feet of Buckingham Avenue, and plaintiffs prayed that the court quiet title to that property in them.

Defendants generally admitted the facts alleged by plaintiffs, but not the conclusion that plaintiffs acquired, by operation of law, title in and to the west 40 feet of Buckingham Avenue. Rather, defendants insist that plaintiffs acquired title to the west 20 feet of Buckingham Avenue, but that defendants acquired title to the remaining 20 feet of Buckingham Avenue (the east 20 feet of the west 40 feet of Buckingham Avenue), which abuts on defendants' present property, including the previously acquired east 40 feet of Buckingham Avenue obtained by operation of law as a result of the first ordinance. Defendants prayed that the court quiet title in them as to that east 20 feet of the west 40 feet of Buckingham Avenue.

Plaintiffs filed what they denominated as a "Joint Motion

for Summary Judgment," which, although signed only by plaintiffs, was treated by the parties and by the district court as a joint motion filed by both plaintiffs and defendants. In addition, plaintiffs filed a separate motion for default judgment as to defendant Zigmond Chrostek for the reason that he had failed to appear, answer, or otherwise plead to the petition.

The trial court, upon submission of the various motions, overruled plaintiffs' motion for default judgment and motion for summary judgment, but sustained defendants' motion for summary judgment. The court entered an order quieting title to the west 20 feet of Buckingham Avenue, now vacated, in plaintiffs, and quieting title to the east 60 feet of Buckingham Avenue, now vacated, in defendants.

The trial court gave no reasons for its holding. Defendants argue that upon passage of the first ordinance, vacating the east one-half of Buckingham Avenue, they acquired title to the center of the street and, therefore, under the provisions of § 14-3,107, acquired title to the entire 40 feet abutting on their western boundary, they being the only "abutting owners" at the time of vacation. This is strictly in keeping with the provisions of § 14-3,107.

Defendants then insist that the vacated east one-half of Buckingham Avenue, now a part of their property, lying along the eastern boundary of the remaining one-half of Buckingham Avenue was abutting property to that remaining one-half of Buckingham Avenue and that when the latter one-half was vacated by the second ordinance, they acquired title to the center of the remaining one-half of the vacated street. However, as a matter of fact, this vacation was accomplished under the provisions of § 14-375, which makes no provision as to reversion of title.

Plaintiffs insist that the second ordinance was passed, pursuant to § 14-3,107, "upon petition of the owners of seventy-five percent of the taxable frontage feet abutting upon such street." Therefore, pursuant to § 14-3,107, "[w]henever a street is vacated . . . the part so vacated shall revert to the abutting owners on the respective sides thereof." They claim that having been abutting owners, they acquired title to the

entire west one-half of the street.

They too overlook the obvious, because on the face of the second ordinance it is recited that "under *Section 14-375*, Reissue, Revised Statutes of Nebraska, 1943 . . . the City Council may vacate a street or alley without petition upon City Planning Board recommendation." (Emphasis supplied.)

Plaintiffs contend that the title which the city of Omaha held in the street was not a fee simple absolute, but a determinable fee. As a consequence, they say, upon abandonment of the purpose for which the city obtained title, viz, for street purposes, title reverted to the abutting landowners. They cite what they call the "polestar case" for this principle, *Seefus v. Briley*, 185 Neb. 202, 174 N.W.2d 339 (1970). Brief for appellants at 17. The court in *Seefus*, quoting *Hillerege v. City of Scottsbluff*, 164 Neb. 560, 83 N.W.2d 76 (1957), stated:

> "It is true, as appellant asserts, that it has been sometimes stated that the fee of the street is in the municipality. This form of statement was sufficient for the *facts the court was then considering* and it was not necessary for it to determine or precisely declare in those cases the exact nature of the ownership a city has of a street or the condition and qualification of its title. It is generally recognized that *under legislation such as prevails in this state* the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated.". . .
>
> This principle is sustained in Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62, wherein it is stated: "Plaintiffs now argue that the greatest possible interest which defendant city could possess after it annexed the village of Havelock, including Sixty-ninth Street, was a fee simple determinable title, subject to being determined or diverted upon vacation of the street by defendant, which has occurred, and that plaintiffs are owners in fee simple absolute of one-half such street adjacent to their real property. We agree." See, also, Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295.

(Emphasis supplied.) 185 Neb. at 205-06, 174 N.W.2d at 342.

See, *Carter v. State*, 198 Neb. 519, 254 N.W.2d 390 (1977); *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960). See, also, *Belgum v. City of Kimball*, 163 Neb. 774, 81 N.W.2d 205 (1957).

The *Seefus* court went on to formally recognize that "[t]he city does not own the alley in fee absolute, its interest being defined as a qualified base or determinable fee. Such city has such a title until the happening of the event which terminates its interest, in this case the vacation of the alley." 185 Neb. at 206, 174 N.W.2d at 343.

However, it is necessary to examine the italicized portions of the previous quotation, i.e., " '*facts the court was then considering*' " and " '*under legislation such as prevails in this state.*' " In *Seefus*, the vacation of the alley was accomplished under Neb. Rev. Stat. § 16-611 (Reissue 1962), which provided in part:

> When an alley is vacated *the same shall revert to the owner of the adjacent real estate* one half on each side thereof except that when any alley is taken wholly from one or more lots, upon the vacation thereof, it shall revert to the owner or owners of the lot or lots from which it was originally taken.

(Emphasis supplied.)

The holding in *Seefus* was predicated on *Hillerege*. The *Hillerege* court, in turn, quoted the following statement from *B. & M. R. R. Co. v. Reinhackle*, 15 Neb. 279, 18 N.W. 69 (1883): " 'The fee of streets is in the public; but it is held in trust for public use. The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property specially injured thereby. . . .' " *Hillerege*, 164 Neb. at 573, 83 N.W.2d at 84.

Neither *B. & M. R. R. Co.* nor *Hillerege* involved the vacation of streets.

Dell, supra, involved a quiet title action as to a portion of the vacated street of the original village of Havelock, later annexed by the city of Lincoln. This court stated:

> As recently as Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295, citing authorities, we held: "The acknowledgment and recording of a plat laying

out land into lots and blocks and showing thereon the streets and alleys, under section 17-417, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.

"Under section 17-558, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.

"A plat made and recorded in statutory form since the enactment of sections 17-417 and 17-558, R. R. S. 1943, is subject to the provisions of both sections which must be considered in pari materia.

"While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417, R. R. S. 1943, such fee is a qualified . . . base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is *determined* by the vacation of streets and alleys by the municipality as provided for in section 17-558, R. R. S. 1943." The same rules apply to sections 15-106 and 15-701, R. R. S. 1943. See, also, Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, which involved a city of the first class. Therein we held, citing authorities, that: "The title to a street vested in a city is not *generally* a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated."

(Emphasis supplied.) *Dell*, 170 Neb. at 185-86, 102 N.W.2d at 70.

All of the above-cited authorities dealing with the concept of a determinable fee were opinions written against the backdrop of statutes which specifically provided for the reversion of title to the abutting property owners upon vacation of the street. Although until 1959 there existed Neb. Rev. Stat. § 14-324 (Reissue 1954), which provided for vacation upon petition of the owners of 75 percent of the taxable front footage abutting on the lot as well as by the city council upon recommendation of the planning commission and the reversion of the vacated street

to the abutting property owners, there also existed Neb. Rev. Stat. § 14-375 (Reissue 1954), which provided for vacation by the council on recommendation of the planning commission with no mention of reversion. Section 14-324 was repealed in 1959. See 1959 Neb. Laws, ch. 36, § 46, p. 210. It was, in effect, reenacted as § 14-3,107 (Cum. Supp. 1959), which left in the requirement of a petition by the owners of 75 percent of the taxable abutting front footage and the provision for reversion of the vacated street to the abutting property owners, but made no provision for vacation solely on the recommendation of the planning commission. That section, § 14-3,107 (Reissue 1991), as well as § 14-375 (Reissue 1991), was in effect at the time of the vacations herein.

Although the record is somewhat sketchy in this regard, we can infer from it that the plat containing this property was originally dedicated as a part of the creation of the city of South Omaha, which was then annexed by the city of Omaha. As stated in *Lindsay v. Omaha*, 30 Neb. 512, 517-18, 46 N.W. 627, 628 (1890):

> Sections 104 and 105 of chapter 14, Compiled Statutes, provide for the laying out of cities, villages, and additions thereto, into lots, streets, alleys, and squares, by the owners or proprietors of land, the platting of the same, and the acknowledging and recording of the plats thereof; and section 106 provides that "[t]he acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes."
>
> Some years ago, in writing the opinion in the case of *O. & R. V. R. Co. v. Rogers*, 16 Neb., 117, I made a thorough examination of the adjudicated cases of the states having statutory provisions similar, or nearly so, to our own above cited, and came to the conclusion that the fee simple title to the streets of cities or villages, which passes by virtue of the acknowledgment and recording of the plats, passes to and vests in the city or village.
>
> Section 56 of chapter 12*a* of the Compiled Statutes provides as follows: "The mayor and council shall have

power . . . to provide for the opening, vacating, widening, and narrowing of streets, avenues, and alleys within the city, under such restrictions and regulations as may be provided by law." This provision relates to cities of the metropolitan class, but there is also a similar provision relating to cities of the first class.

Examining Comp. Stat. ch. 12*a*, § 56 (1889), the section cited in *Lindsay*, we liken it to § 14-375; i.e., there was no requirement in the former section that a petition be filed by adjoining property owners, the mayor and city council were authorized to vacate a street under whatever restrictions and regulations might be provided by law, and it made no provision for reversion of the fee title to abutting property owners, all of which is also true of § 14-375.

Plaintiffs' claim that the city holds only a qualified base or determinable fee as set forth in *Seefus v. Briley*, 185 Neb. 202, 206, 174 N.W.2d 339, 342 (1970), must be qualified by the language of that case, " 'under legislation such as prevails in this state.' " That has obvious reference to the statutory provisions in *Seefus* and cases cited therein which specifically provided that upon vacation, title reverts to the abutting owners. Such is not the case here.

Under the rule in *Lindsay*, we must conclude that in this instance, the fee simple title remains in the city of Omaha. What authority by statute, charter, or ordinance the city has to convey or otherwise dispose of this title is not before us. However, it is abundantly clear that there was no reversion of title to either the plaintiffs or the defendants under the second vacating ordinance as authorized by § 14-375. It is unnecessary for us to discuss § 14-115 because it is not involved herein, nor is the question of a default judgment any longer of concern to a resolution of this case.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., not participating.

NATHANIEL ROBINSON, APPELLEE, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

495 N.W.2d 281

Filed February 12, 1993. No. S-90-450.

1. **Civil Rights: Attorney Fees.** A party who prevails on a ground other than 42 U.S.C. § 1983 (1988) is entitled to attorney fees under 42 U.S.C.A. § 1988 (Cum. Supp. 1992) if § 1983 would have been an appropriate basis for relief.
2. _____: _____. When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, attorney fees may be awarded under 42 U.S.C.A. § 1988 (Cum. Supp. 1992).
3. **Actions.** A federal claim is insubstantial only if its unsoundness so clearly results from the previous decisions of the U.S. Supreme Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.
4. **Constitutional Law: Federal Acts: Civil Rights: Attorney Fees.** The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (Cum. Supp. 1992), has as its primary purpose the elimination of financial barriers to the vindication of constitutional rights and the stimulation of voluntary compliance with the law, and the act should be liberally construed to accomplish its objectives.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery for appellant.

Thomas F. Dowd, of Thomas F. Dowd & Associates, for appellee.

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

HOWARD, D.J., Retired.

This is an appeal from the district court for Douglas County's award of attorney fees under 42 U.S.C. § 1988 (1988), the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes such an award to a plaintiff who prevails in a civil rights claim recognized by 42 U.S.C. § 1983 (1988), and it involves the question of whether a fee is allowable when relief was granted on a ground other than the violation of a civil right and absent a claim under § 1983.

The plaintiff, Nathaniel Robinson, a custodial employee of

the City of Omaha, filed for candidacy for an elective position on the Board of Directors of the Omaha Public Power District. Thereafter, the City of Omaha notified him that his candidacy violated § 6.11 of the Omaha home rule charter, and as a result, he was given three options: (1) take a leave of absence, (2) withdraw his candidacy, or (3) resign his employment. Section 6.11 provides, in relevant part:

> Any non-elective officer or employe in the city service who seeks nomination or becomes a candidate for any elective office in any public body, except to serve as a delegate or alternate to caucuses or conventions of political parties, shall immediately forfeit his position in the city service; provided, however, nothing in this section shall prohibit a non-elective officer or employe from seeking nomination or becoming a candidate for any elective office in any public body who first shall have received a leave of absence from the city service, approved by his or her department head and the Personnel Board of the City of Omaha.

Substantially the same restriction is found in the Omaha Municipal Code, specifically at § 23-7(b).

Instead of selecting an option, Robinson filed suit in the U.S. District Court for the District of Nebraska, alleging two causes of action. In his first cause of action, he alleged that the pertinent provisions of the Omaha home rule charter and the Omaha Municipal Code violated his constitutional rights under § 1983. His second cause of action was brought as a state pendent claim, wherein the applicable charter and code provisions were alleged to have violated Neb. Rev. Stat. § 20-160 (Reissue 1991), which reads in part: "Unless specifically restricted by a federal law or any other state law, no employee of the state or any political subdivision thereof . . . shall be prohibited from participating in political activities except during office hours or when otherwise engaged in the performance of his or her official duties."

Following trial, the U.S. District Court dismissed the action on a finding that the provisions were not constitutional violations. The court declined, however, to pass upon the state pendent claim. Robinson thereupon perfected an appeal to the

U.S. Court of Appeals for the Eighth Circuit, which vacated the district court's order of dismissal and remanded the cause to the district court with directions to abstain from further proceedings " 'pending the disposition of state-law issues in the state courts.' " *Robinson v. City of Omaha, Neb.*, 866 F.2d 1042, 1045 (8th Cir. 1989). Robinson then sought a determination of the applicability of the state law on which his second cause of action was premised by filing with this court a request for certification of law from the U.S. District Court. This court declined to hear the request, whereupon Robinson filed his petition with the district court for Douglas County, Nebraska, challenging the Omaha charter and code provisions as being in violation of § 20-160. On Robinson's motion for summary judgment, the state district court found the challenged provisions to be in conflict with § 20-160 and thus unenforceable. No appeal was taken from this order. The district court awarded plaintiff $7,637.50 in attorney fees upon his application made by virtue of § 1988. As amended in 1991, 42 U.S.C.A. § 1988 (Cum. Supp. 1992) provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The city's assignments of error may be summarized as contending that plaintiff did not prevail on a § 1983, or civil rights, claim. We affirm.

The U.S. Supreme Court, interpreting the legislative history of the act in *Maher v. Gagne*, 448 U.S. 122, 132, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980), has ruled that a plaintiff prevailing "on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim" could be awarded attorney fees. This court recently recognized this rule, holding:

> The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), provides that attorney fees may be awarded to the prevailing party, other than the United States, in any action to enforce a provision of § 1983.

> Furthermore, a party who prevails on a ground other than § 1983 is entitled to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief.

Dennis v. State, 234 Neb. 427, 429-30, 451 N.W.2d 676, 678 (1990), *rev'd on other grounds sub. nom., Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).

A number of courts have further interpreted the act, holding that "the fact that a party prevails on a ground other than § 1983 does not preclude an award of attorney's fees under § 1988. If § 1983 would have been an appropriate basis for relief, then [the plaintiff] is entitled to attorney's fees under § 1988 even though relief was actually awarded on another ground." *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1141-42 (8th Cir. 1984).

The criteria needed for a plaintiff to receive an award of attorney fees when he prevails on grounds other than § 1983 are well established: "When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under § 1988." *Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985). See, also, *Maher, supra*; *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. 1990). This is true even if the plaintiff's federal claims are never reached because the plaintiff prevails on state constitutional grounds. *Maher, supra*; *Carreras, supra*.

> These guidelines are derived from language in the House report accompanying . . . § 1988: "To the extent a plaintiff joins a claim under one of the statutes enumerated in [§ 1988] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see Hagans v. Lavine, supra; United*

> *Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs, supra* at 725 . . . ." H.R.Rep.No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908.

Reel v. Arkansas Dept. of Correction, 672 F.2d 693, 698 (8th Cir. 1982).

There are three requirements, therefore, which must be met in order for a plaintiff who is successful on a nonconstitutional claim in a civil rights suit to be awarded an attorney fee. First, the constitutional and nonconstitutional claims must arise from the same nucleus of operative fact. Second, the plaintiff must have presented a substantial federal claim. Third, the plaintiff must have succeeded in the suit to a degree necessary to attain the status of a prevailing party. *Reel, supra*; *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978).

Plaintiff here has no doubt satisfied the requirement that the claims arise from a common nucleus of operative fact, and he has attained the status of a prevailing party.

The final determination to be made is whether the constitutional claim is substantial under *Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). The *Hagans* test states: " 'A claim is insubstantial only if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " ' " 415 U.S. at 538, citing *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 30 S. Ct. 326, 54 L. Ed. 482 (1910). When judged by this standard, the equal protection claim at issue cannot be said to be either frivolous or so insubstantial as to be beyond the jurisdiction of the federal courts.

Here, plaintiff had initially filed his action in the U.S. District Court for the District of Nebraska, suing the City of

Omaha under § 1983. He alleged that provisions of the Omaha home rule charter and the Omaha Municipal Code violated his federal constitutional rights under the 1st and 14th Amendments. The district court found that the provisions were not facially unconstitutional, but declined to hear the state law issues. Plaintiff then appealed to the U.S. Court of Appeals for the Eighth Circuit.

The court of appeals vacated the district court's order and remanded the cause to the district court with directions to abstain from further proceedings pending the disposition of the state law issues by state courts. The court of appeals, in so holding, found that the abstention doctrine from *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 2d 971 (1941), was applicable, stating: " '*Pullman* requires a federal court to refrain from exercising jurisdiction when the case involves a potentially controlling issue of state law that is unclear, and the decision of this issue by the state courts could avoid or materially alter the need for a decision on federal constitutional grounds.' " *Robinson v. City of Omaha, Neb.*, 866 F.2d 1042, 1043 (8th Cir. 1989), quoting *Moe v. Brookings County, South Dakota*, 659 F.2d 880 (8th Cir. 1981). The substantiality of plaintiff's constitutional claim is therefore to be determined from other sources.

Only a very few courts have addressed the exact question presented in this appeal. Representative of these decisions is *Mancuso v. Taft*, 476 F.2d 187, 189 (1st Cir. 1973), where the constitutionality of a city home rule charter prohibiting " 'continuing in the classified service of the city after becoming a candidate for nomination or election to any public office' " was challenged. The U.S. Court of Appeals for the First Circuit recognized that this rule divided the citizenry into two groups of candidates for public office: those classified civil servants, who were prohibited from filing as candidates, and all other citizens, who were free to run for office. The court held that "candidacy is both a protected First Amendment right and a fundamental interest. Hence any legislative classification that significantly burdens that interest must be subjected to strict equal protection review." 476 F.2d at 196. In applying this standard, the court found that while the state had a compelling interest in

maintaining the honesty and impartiality of its public work force, the exclusionary measure of the home rule charter was not "even reasonably necessary to satisfaction of this state interest." *Id.* at 198.

In *Hagans v. Lavine, supra*, the U.S. Supreme Court provided additional guidance for determining when a federal claim is substantial. The *Hagans* Court held:

> [W]e cannot "say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction." [Citation omitted.] Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits."

415 U.S. at 542-43.

It follows that the case at bar also presented a substantial constitutional claim as required under the *Hagans* test. See, also, *Johnson v. Cushing*, 483 F. Supp. 608 (D. Minn. 1980) (right to run for political office is a federal constitutional right); *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga. 1981) (right to vote is a constitutionally protected right).

The case is not different from what it would have been if plaintiff had initially filed in the state court, combining the § 1983 claim with the claim that the charter provision is invalid on other grounds. Plaintiff is not to be penalized for withholding the assertion of the § 1983 claim in this case so as not to jeopardize the maintenance of that claim in the federal court, especially when he had in effect been directed to obtain its separate adjudication. The Civil Rights Attorney's Fees Awards Act of 1976, § 1988, has as its primary purpose "to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." *Seattle School Dist. No. 1 v. State of Wash.*, 633 F.2d 1338, 1348 (9th Cir. 1980). The act should be liberally construed to accomplish its objectives. *Seals v. Quarterly County Court, etc.*, 562 F.2d 390 (6th Cir. 1977).

The award of attorney fees was correct. Plaintiff may move for the allowance of fees for services in this court in accordance with Neb. Ct. R. of Prac. 9F, as amended, effective January 1, 1993.

AFFIRMED.

WILLIAM GUENTHER, A MINOR, BY MARVIN GUENTHER, HIS FATHER AND NEXT FRIEND, APPELLANT, V. SHELLY R. STOLLBERG AND GAIL STOLLBERG, APPELLEES.

495 N.W.2d 286

Filed February 12, 1993. No. S-90-551.

Minors: Actions. A minor child has no common-law cause of action for the loss of the consortium of a nonfatally injured parent.

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

Steven M. Watson, P.C., of Marks & Clare, and Thomas B. Donner for appellant.

Donald D. Schneider, of Don Schneider Law Office, for appellees.

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

PER CURIAM.

The minor child, appellant William Guenther, sued the appellees, Shelly R. and Gail Stollberg, through his father and next friend, Marvin Guenther, alleging that the Stollbergs negligently but nonfatally injured the child's mother and thereby caused him to suffer the loss of her consortium. The district court concluded the child had not stated a cause of action, sustained the Stollbergs' demurrer, and after the child elected not to amend, dismissed his petition. By asserting the dismissal was erroneous, the child invites us to recognize a cause of action for a minor child's loss of a negligently injured

parent's consortium. We decline the invitation and affirm the judgment of the district court.

We have defined consortium to mean comfort, society, love, and protection. *Creason v. Myers*, 217 Neb. 551, 350 N.W.2d 526 (1984), citing *Sowle v. Sowle*, 115 Neb. 795, 215 N.W. 122 (1927), and *Larsen v. Larsen*, 115 Neb. 601, 213 N.W. 971 (1927). We have long held that a husband may recover for the loss of his nonfatally injured wife's consortium, *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, 59 N.W. 921 (1894), and permit a wife to recover for the loss of her nonfatally injured husband's consortium, *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974). But while we have recognized that a parent has a cause of action for the loss of a nonfatally injured minor child's services, *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984), we have neither been cited to nor are we aware of any case in which we have permitted a parent to recover for the loss of a nonfatally injured minor child's consortium. Although its recognition has been advocated by some academicians, neither was a cause of action for the loss of a nonfatally injured parent's consortium known at common law. See, e.g., W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 125 at 935-36 (5th ed. 1984); Maureen Ann Delaney, Comment, *What About the Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia*, 41 Am. U. L. Rev. 107 (1991); David P. Dwork, Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. Rev. 722 (1976).

The Supreme Judicial Court of Massachusetts became the first court to succumb to these entreaties. See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980). Other states soon followed. See, e.g., *Berger v Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

As best we can determine, 13 states now recognize a common-law claim for loss of parental consortium. See, *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987); *Villareal v. State, Dept. of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Higley v. Kramer*, 581 So. 2d 273 (La. App. 1991), *writ denied* 583 So. 2d 483; *Ferriter v. Daniel*

O'Connell's Sons, Inc., supra; *Berger v Weber, supra*; *Pence v. Fox*, 248 Mont. 521, 813 P.2d 429 (1991); *Williams v. Hook*, 804 P.2d 1131 (Okla. 1990); *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990); *Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985); *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wash. 2d 131, 691 P.2d 190 (1984); *Belcher v. Goins*, 184 W. Va. 395, 400 S.E.2d 830 (1990); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984); *Nulle v. Gillette-Campbell Fire Bd.*, 797 P.2d 1171 (Wyo. 1990). See, also, *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981), *modified on other grounds, Audubon-Exira v. Ill. Cent. Gulf R. Co.*, 335 N.W.2d 148 (Iowa 1983) (limiting recovery to that afforded by controlling statute which *Weitl* improperly construed).

The reasons given for recognizing the action include that it is just the right thing to do; that a tort-feasor as a matter of policy should be held accountable for all damages resulting from his or her wrongful acts, including injuries to familial relationships, which are significant and worthy of compensation, see, e.g., *Reagan v. Vaughn, supra*; that it is inherently inconsistent to permit children to recover for the wrongful death of a parent but not for nonfatal injuries to a parent which also deprive them of love, companionship, and the like, see, e.g., *Berger v Weber, supra*; and that children possess rights comparable to those of the rest of society and any restriction of these rights must be justified by strong public policy, see, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc., supra*.

Nonetheless, many jurisdictions have chosen not to recognize a cause of action for loss of parental consortium. See, *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986) (maritime law); *Jones v. Lifespring, Inc.*, 713 F. Supp. 426 (D.D.C. 1988); *Green v. A.B. Hagglund and Soner*, 634 F. Supp. 790 (D. Idaho 1986) (applying Idaho law); *Gray v. Suggs*, 292 Ark. 19, 728 S.W.2d 148 (1987); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Lee v. Colorado Dept. of Health*, 718 P.2d 221 (Colo. 1986); *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668 (1979); *Zorzos v. Rosen By and Through Rosen*, 467 So. 2d 305 (Fla. 1985); *W. J. Bremer Co. v. Graham*, 169

Ga. App. 115, 312 S.E.2d 806 (1983), *writ denied* 252 Ga. 36, 312 S.E.2d 787 (1984); *Dearborn Fabricating & Engin. v. Wickham*, 551 N.E.2d 1135 (Ind. 1990); *Schmeck v. City of Shawnee*, 231 Kan. 588, 647 P.2d 1263 (1982); *Durepo v. Fishman*, 533 A.2d 264 (Me. 1987); *Gaver v. Harrant*, 316 Md. 17, 557 A.2d 210 (1989); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982); *Barbera v. Brod-Dugan Co.*, 770 S.W.2d 318 (Mo. App. 1989); *Russell v. Salem Transportation Co., Inc.*, 61 N.J. 502, 295 A.2d 862 (1972); *De Angelis v. Lutheran Medical Center*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983); *Vaughn v. Clarkson*, 324 N.C. 108, 376 S.E.2d 236 (1989); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *High v. Howard*, 64 Ohio St. 3d 82, 592 N.E.2d 818 (1992); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P.2d 318 (1982); *Steiner by Steiner v. Bell Telephone Co.*, 358 Pa. Super. 505, 517 A.2d 1348 (1986), *aff'd* 518 Pa. 57, 540 A.2d 266 (1988); *Still by Erlandson v. Baptist Hosp.*, 755 S.W.2d 807 (Tenn. App. 1988).

Among the reasons advanced for not doing so are that a child has no legal entitlement to his or her parent's love, guidance, and companionship, see, e.g., *High v. Howard, supra*; that such an action would result in exposing the tort-feasor to the possibility of having to pay double damages, see, e.g., *Russell v. Salem Transportation Co., Inc., supra*, and *Borer v. American Airlines, Inc., supra*; and that the monetary value of a parent's guidance, companionship, and affection is simply too speculative for damages to be assessed, see, e.g., *Borer v. American Airlines, Inc., supra*, and *Russell v. Salem Transportation Co., Inc., supra*.

Perhaps one of the more thoughtful analyses of the problems attendant to recognizing the cause of action is found in *Hoesing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980). The plaintiffs therein sought to recover damages for injuries caused to their parents by the defendant. In predicting that this court would follow the majority rule and deny recovery, the *Hoesing* court noted that the resolution of whether to permit a cause of action for loss of parental consortium must be based on public policy considerations.

"Plaintiff's claim, viewed in the abstract and divorced

> from its surroundings, carries both logical and sympathetic appeal. . . . Certain aspects of spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent. Nevertheless our decision must take into account considerations in addition to logical symmetry and sympathetic appeal. . . . [N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasor's responsibility for damages under the general rule of tort liability (Civ.Code § 1714), the courts must locate the line between liability and nonliability at some point, a decision which is essentially political."

Hoesing, 484 F. Supp. at 478-79, quoting *Borer v. American Airlines, Inc., supra.*

The *Hoesing* court also observed:

> In determining whether to recognize a cause of action for loss of parental consortium, this Court must consider the intangible, non-pecuniary nature of consortium loss. The companionship and guidance of a parent cannot be regained by a monetary award. The loss that a child suffers is such that he can never be compensated for it. Allowing the plaintiff to recover damages for loss of parental consortium creates a future benefit for the child which is essentially unrelated to the loss suffered. . . .
>
> In addition to the non-compensatory nature of any damages award, the Court must also consider the social burden of providing damages for loss of parental consortium. The burden of paying awards for loss of consortium will be borne by the public generally in increased insurance premiums. . . . An additional social cost is the expenditure of valuable judicial resources in litigating these claims. This cost would be substantial, since a claim of loss of consortium would be raised in any case involving a serious injury to a parent. . . . When the social costs are weighed against the non-compensatory nature of the monetary award, it appears that the social costs outweigh the purported benefits. . . .

> . . . .
>
> Another reason for refusing to extend liability for loss of consortium is the difficulty in placing a pecuniary value on the plaintiffs' loss. There is no standard by which a trier of fact can determine whether a particular dollar amount is an adequate award in any given setting. This difficulty in ascertaining the amount of damages leads in turn to the risk of double recovery: "to ask the jury, even under carefully drafted instructions, to distinguish the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them may be asking too much."

484 F. Supp. at 479-80, quoting *Borer v. American Airlines, Inc., supra.*

Distinguishing recovery for marital consortium under Nebraska law, the *Hoesing* court noted that "[u]nlike recovery for loss of marital consortium, recovery for parental consortium involves serious problems of multiplication of claims and of inflation of damage awards." 484 F. Supp. at 480.

Finally, the *Hoesing* court pointed out that

> allowing recovery for nonfatal injuries would entail problems of multiplication of actions not present in the wrongful death context. If recovery were permitted for nonfatal injuries, a child would have a claim in every situation in which a parent is injured. The number of suits engendered by such a ruling would be far greater than the number of wrongful death actions involving loss of parental consortium. This multiplication of litigation counsels against expanding liability for loss of parental consortium, even though a child may presently recover for loss of consortium in a wrongful death action.

484 F. Supp. at 481.

One of the more noteworthy developments is that in *Sizemore v Smock*, 430 Mich. 283, 422 N.W.2d 666 (1988), the Michigan Supreme Court refused to recognize the right of a parent to recover for the loss of a negligently injured child's consortium for many of the reasons the dissenters in *Berger v Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981), urged for not recognizing a cause of action in a child for the loss of a

negligently injured parent's consortium. Whatever this development may suggest, for the reasons articulated by the federal district court in *Hoesing v. Sears, Roebuck & Co., supra*, we elect not to modify the common law by recognizing a cause of action for a minor child's loss of a negligently injured parent's consortium.

Thus, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The majority declares that a compelling reason to refuse to entertain an action by a minor for the loss of the care, comfort, and companionship of a parent is that there may very well be an increase in litigation, and cites as authority a U.S. District Court case, *Hoesing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980).

The concern of a non-common-law court for the difficulties of a court administering the common law is neither persuasive nor controlling; rather, I submit, we should be guided by the solemn duty enjoined on us by article I, § 13, of the Nebraska Constitution's Bill of Rights, which provides that "[a]ll courts shall be open, and every person, for any injury done him in his . . . person . . . shall have a remedy by due course of law, and justice administered without denial or delay."

SHANAHAN, J., dissenting.

Although there is a sound foundation in law and logic for a minor child's common-law action based on loss of parental consortium when the child's parent is injured and survives in a disabled condition, this court's majority today adopts *Hoesing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980), as an expression of Nebraska policy and concludes that the cause of action does not exist in Nebraska because (1) a child has no legal entitlement to parental love, guidance, and companionship; (2) such a cause of action might result in double recoveries through damages awarded in both the parent's personal injury action and the child's lawsuit; and (3) the monetary value of parental guidance, companionship, and affection is too speculative and, therefore, cannot supply the basis for a sustainable damages award.

However, I disagree with the majority because, as an additional step in existing Nebraska law, a child should be able to recover for the loss of parental consortium when the child's parent survives a disabling injury tortiously caused by another. Moreover, the majority's attempted distinction between the parental cause of action for the loss of a child's consortium and a child's cause of action for loss of parental consortium lacks a valid basis.

Although a parental cause of action at common law was originally based on loss of a child's services when the child was injured, today a child is generally viewed not simply as a source of parental pecuniary benefit but, rather, as a source of comfort, companionship, love, and society. Indeed, in *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), we recognized that if recoverable damages for a child's wrongful death were restricted to the monetary value of the child's services, an average child's life would probably have negative worth under an absolutely pecuniary standard; hence, parents can recover for the tortious loss of society and companionship with their children. See, also, *Williams v. Monarch Transp.*, 238 Neb. 354, 359, 470 N.W.2d 751, 755 (1991): " 'The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.' " (Quoting *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974).) As we also observed in *Williams v. Monarch Transp.*: " '[A]n individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value . . . .' " 238 Neb. at 360, 470 N.W.2d at 755 (quoting *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960)).

As noted by the majority, in *Macku v. Drackett Products Co.*, 216 Neb. 176, 179, 343 N.W.2d 58, 60 (1984), we acknowledged that under Nebraska's common law, parents have a cause of action for a tortiously caused "loss or damage sustained on account of" their child's bodily injury which is not

fatal to the child.

Concerning a child's action for loss of parental consortium, the Supreme Court of Washington made the following observation in *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wash. 2d 131, 134, 691 P.2d 190, 192 (1984):

> The state of the law in this area is anomalous in that a child may recover for loss of consortium if the parent dies as a result of another's negligence, but not if the severely injured parent remains alive but in a vegetative state. Surely the child's loss of the parent's love, care, companionship and guidance is nearly the same in both situations. Also, permitting a husband or wife but not children to recover for loss of consortium erroneously suggests that an adult is more likely to suffer emotional injury than a child.

A child's cause of action for loss of parental consortium provides a real remedy for the prospective loss of a genuine benefit to a child. In *In re Interest of A.G.G.*, 230 Neb. 707, 717, 433 N.W.2d 185, 192 (1988), this court emphasized the parental duty to provide "care, protection, affection, love, guidance, and the opportunity to display filial affection." True, *In re Interest of A.G.G.* was a proceeding under the Nebraska Juvenile Code to terminate parental rights. Nonetheless, *In re Interest of A.G.G.* is judicial recognition of the parental duty to provide a child with the various elements of consortium and is acknowledgment that failure to perform the duty is a basis to terminate parental rights. From this, we may infer that when a person is obligated to act in a specific way toward another, that is, one has a duty to act in a specified manner, the beneficiary of the duty has a right to expect the conduct ordered by the duty and is entitled to performance of that duty. Since this court has acknowledged that a parent has the legal duty to provide a child with familial association, including care, companionship, guidance, and society, see *In re Interest of A.G.G., supra*, it is impossible to deny that a child has the corresponding right to expect and, therefore, is entitled to those benefits that a parent is legally obligated to provide. Hence, a child is entitled to those benefits which compose parental consortium. Tortious interference with a child's expectation or receipt of those

benefits is actionable misconduct for which there should be a remedy under any system of civil law. Therefore, William Guenther should be allowed his day in court to present his case for loss of parental consortium as a consequence of his mother's disability caused by the subject automobile accident.

The majority also contends that allowing a child's cause of action might increase the number of lawsuits and result in double recovery, that is, damages awarded in the parent's personal injury action and damages recovered on the child's consortium claim.

First, regarding the bogeyman or, to be politically correct, the bogeyperson of additional lawsuits injected into the civil system, a court should examine the merits of a cause of action and determine whether a cause of action is jurisprudentially justifiable and requires redress lest tortious interference with a right pass without a remedy. Moreover, suitable rules for joinder of actions would prevent multiple suits arising from the same tortious conduct. For instance, appropriate and judicially fashioned rules can provide for joinder of the child's consortium claim with a parent's personal injury action, either by compulsory joinder or a joinder at a defendant's option. See, *Villareal v. State, Dept. of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Ueland v. Pengo Hydra-Pull Corp., supra*; *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

Second, the specter of double recoveries, as one of the "things that go bump in the night," vanishes in the light of adequate jury instructions to provide the correct standard for awarding damages.

The majority's contention that the value of parental guidance, companionship, and affection is too speculative for assessment damages is specious and without merit under existing Nebraska law. As recognized in *Maloney v. Kaminski*, 220 Neb. 55, 69-70, 368 N.W.2d 447, 458 (1985):

> The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case. [Citations omitted.] There is no requirement that there be evidence of the dollar value of companionship,

> counseling, or advice. It is a matter left to the sound discretion of the jury.

Thus, if a fact finder, especially a jury, is competent to assess damages for the loss of society, comfort, and companionship suffered by a parent or spouse, there is no legal reason that ascertaining similar damages to a child is impossible when the child's parent is injured.

Although *Hoesing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980), is correct that a child can never be monetarily compensated for the loss of parental companionship and guidance, a monetary award "is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society, yet we believe that allowing such an award is clearly preferable to completely denying recovery." *Theama v. City of Kenosha*, 117 Wis. 2d at 523, 344 N.W.2d at 520. "Although a monetary award will not enable a child to regain the loss of a parent's love, companionship, and guidance, we believe such an award may enable the child to lessen the impact of the loss." *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wash. 2d 131, 139, 691 P.2d 190, 194 (1984). Money certainly cannot replace a parent's love, companionship, and guidance, but a monetary award enables a child to obtain some substitute for familial association lost through parental injury and disability which prevents the normal beneficial relationship between parent and child.

Finally, the majority refers to *Sizemore v Smock*, 430 Mich. 283, 422 N.W.2d 666 (1988), but in *Sizemore* the Supreme Court of Michigan pointed out that *Berger v Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981), was not overruled and remains an integral part of Michigan common law governing actions for loss of consortium. "Whatever [this court's majority] may suggest" or imply, the Supreme Court of Michigan continues to recognize a child's cause of action for the loss of consortium as the result of disability from a negligently inflicted injury to the child's parent.

Even the majority of this court does not quarrel with or dispute a child's right to recover for the loss of parental consortium as the result of wrongful death. However, a casket

cannot be the solitary standard for compensating a child's loss of parental consortium. Consequently, this court should have recognized a child's cause of action for loss of parental consortium as the result of a negligent defendant's injuring and disabling the child's parent.

STATE OF NEBRASKA, APPELLEE, V. STEVEN W. CHILDS, APPELLANT.

495 N.W.2d 475

Filed February 12, 1993. No. S-91-192.

1. **Constitutional Law: Motor Vehicles.** A motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle.
2. _____: _____. An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.
3. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment to the U.S. Constitution.
4. **Investigative Stops: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
5. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Statutes.** Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes.
6. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Evidence.** If police, for an investigatory purpose, unconstitutionally stop a person, evidence obtained by a search of the person stopped is constitutionally inadmissible as the "fruit of the poisonous tree."
7. **Constitutional Law: Criminal Law: Search and Seizure: Evidence.** Evidence obtained by an unreasonable search and seizure, including evidence that is indirectly derived from the unconstitutional search and seizure, is constitutionally inadmissible in a criminal trial.
8. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops.** To determine whether stopping a person on a public street is constitutionally permissible, a court must assess all the circumstances surrounding the stop, including all of the objective observations and

considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, JERRY M. GITNICK, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

David W. Childs for appellant.

Don Stenberg, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

Michael F. Gutowski for amicus curiae Nebraska Civil Liberties Union Foundation.

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

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992), this court has accepted the petition of Steven W. Childs for our review of the decision by the Nebraska Court of Appeals, namely, *State v. Childs*, 1 NCA 478 (1992), wherein the Nebraska Court of Appeals affirmed Childs' conviction of driving while under the influence of alcohol (drunk driving), in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990). At issue is the refusal of the district court for Douglas County to suppress evidence obtained at the time of Childs' arrest and used by the State for Childs' conviction in a bench trial.

Around 2:30 a.m. on October 16, 1990, Officer Greg Wyant of the Omaha Police Division was on routine cruiser patrol near 60th and Northwest Radial Highway in Omaha when he observed a blue 1989 Ford Tempo moving on the highway. Wyant saw nothing suspicious or out of the ordinary about the general appearance of the Ford or its operation, that is, no appearance of physical deficiency of the car, such as a missing or burned-out headlight, no unusual or erratic movement, and nothing unlawful in the driver's handling of the automobile. However, from his cruiser Wyant did see "In Transit" stickers

or decals displayed on the Ford's front and rear windows. At that time, Wyant did not know who was driving the Ford, although the driver was later identified as Childs. Also, Wyant had no information that a vehicle, matching the description of the Ford, or its occupant had been involved in any criminal activity. Nevertheless, Wyant stopped the Ford, walked by the "In Transit" sticker displayed on one of the Ford's windows, noted that the sticker was still within the In Transit period and was therefore valid, and then went to the driver's window where he asked Childs for a bill of sale and motor vehicle registration for the Ford. During this exchange, Wyant noticed that Childs exhibited "symptoms of intoxication." As a result of field sobriety tests administered to Childs, Wyant arrested him for drunk driving.

After the drunk driving complaint was filed in the district court, Childs filed his suppression motion, seeking exclusion of evidence obtained as the result of Wyant's stop which, Childs claimed, was an unlawful stop with a consequent unreasonable search and seizure contrary to U.S. Const. amend. IV and Neb. Const. art. I, § 7.

At the suppression hearing, Wyant testified about his general observations of Childs' Ford shortly before the highway stop. During his testimony, Wyant acknowledged that while he was in his cruiser and before he stopped Childs, he did see the In Transit stickers or decals displayed on the windows of Childs' car. The decals inside Childs' Ford satisfied the printing and display requirements of Neb. Rev. Stat. § 60-320(3)(b) (Reissue 1988) (window display, front and rear, of a decal on which In Transit shall be printed in black letters at least 2 inches high). As Wyant confirmed, each of the displayed decals on Childs' car was "a legal in-transit from a dealer." Wyant also testified that his sole reason or purpose for stopping Childs' car was "to check the validity of the in-transits" and that he had no information or indication that any Nebraska law or Omaha ordinance had been violated, or was being violated, by Childs, either apart from his driving or while driving the Ford that Wyant stopped.

The district court denied Childs' suppression motion. At his bench trial, Childs renewed his constitutional objection that

Wyant obtained evidence in violation of Childs' right to be free from an unreasonable search and seizure by police. See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. Subject to Childs' constitutional objection, the State introduced evidence, obtained after Wyant stopped Childs, showing that Childs was under the influence of alcoholic liquor when Wyant stopped Childs' automobile. See § 39-669.07. The court found Childs guilty of drunk driving and imposed a sentence on him.

In Childs' appeal to the Nebraska Court of Appeals, the focal point became several Nebraska statutes pertinent to registration of motor vehicles.

Neb. Rev. Stat. § 60-302 (Cum. Supp. 1990) provides that "[n]o motor vehicle . . . unless otherwise expressly provided, shall be operated on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3." Any person who operates a vehicle which has not been registered is subject to the penalty for a Class III misdemeanor. See Neb. Rev. Stat. §§ 60-302.03 and 39-6,188 (Reissue 1988). Section 60-320(3)(b), the statute in effect when Childs was arrested, provided an exception to the registration requirement: A person who purchases a motor vehicle from a licensed dealer may drive the vehicle on a Nebraska highway

> without charge or registration of such vehicle or trailer. There shall be displayed on the front and rear windows of such motor vehicle . . . a decal on which shall be plainly printed in black letters not less than two inches high the words In Transit. . . . Such transit decal shall allow such owner to operate the motor vehicle . . . for a period of fifteen days in order to effect proper registration of the new or used motor vehicle or trailer . . . . Upon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of possession by such person of such motor vehicle . . . .

Section 60-320(5) states in part that "[i]t shall be the duty of all law enforcement officers to arrest and prosecute all violators" of the aforementioned statutes concerning registration of motor vehicles and use of In Transit decals.

In affirming Childs' conviction, the Nebraska Court of Appeals concluded that the district court properly denied Childs' suppression motion, since "Childs was stopped because he had In Transit stickers on his windows" and Wyant's stop was "required by § 60-320," *State v. Childs*, 1 NCA 478, 481 (1992), for the reason that

> the only way to determine if the registration is current in a newly purchased vehicle is to stop the vehicle. Pursuant to the statute these random stops may only be directed at vehicles which carry In Transit stickers. The stops shall only be made for the first 15 days of vehicle ownership, and the officer must check the bill of sale and certificate of title. This type of stop is not the "standardless and unconstrained" governmental discretionary evil about which the U.S. Supreme Court was concerned in [*Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)].

1 NCA at 481-82. The Nebraska Court of Appeals continued:

> The Nebraska statute does not grant the police "unlimited interference with the use of the highways" [*United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)], merely a 15-day window where the motorist may be stopped, § 60-320(3)(b). Lastly, the motorist, recognizing that the registration date on the In Transit stickers cannot be read unless the driver is stopped, is essentially on notice, and therefore the driver's concern or fright at being stopped is appreciably less. This court agrees with the trial court that based on the record in this case, the stop was neither arbitrary, oppressive, nor an indiscriminate abuse of discretion and is therefore consistent with the Fourth Amendment.

1 NCA at 482.

SUPPRESSION OF EVIDENCE

Childs' First Assignment of Error.

As his first assignment of error, Childs claims that the district court erred by denying Childs' suppression motion concerning evidence obtained as the result of Wyant's stop and used by the

State to convict Childs.

Standard of Review.

> In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.

State v. Thomas, 240 Neb. 545, 547, 483 N.W.2d 527, 530 (1992). Accord, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). See, also, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

CONSTITUTIONALITY OF THE STOP

State's Burden.

"If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Staten*, 238 Neb. at 21, 469 N.W.2d at 118. Accord, *State v. Thomas, supra*; *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989); *State v. Abdouch, supra*; *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133.

Constitutional Guarantee Against Unreasonable Search and Seizure.

Both the U.S. Const. amend IV and Neb. Const. art. I, § 7, guarantee "[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."

Thus, to determine whether evidence obtained after, and produced by, Childs' stop was constitutionally inadmissible, we must first determine whether Wyant's stopping Childs' car violated U.S. Const. amend. IV or Neb. Const. art. I, § 7.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court considered the right to privacy

of a person who, while walking on a public street, was stopped and searched by police. In *Terry*, the Court observed:

> The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 251 (1891). . . . Unquestionably [Terry] was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland.

392 U.S. at 8-9.

Thus, a motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle, or, as expressed in *Delaware v. Prouse*, 440 U.S. 648, 662, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979): "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." See, also, *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

In *Delaware v. Prouse, supra*, a case involving a police officer's discretionary spot check for a driver's license and motor vehicle registration, the U.S. Supreme Court also stated:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. . . . The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of

> individuals against arbitrary invasions. . . .' " *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U. S. 523, 528 (1967).

440 U.S. at 653-54.

Investigatory Stops; Basis.

"[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten*, 238 Neb. 13, 18, 469 N.W.2d 112, 116 (1991). Accord, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *State v. Staten*, 238 Neb. at 18, 469 N.W.2d at 116-17.

Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes. In *Delaware v. Prouse, supra*, the U.S. Supreme Court emphatically rejected arbitrary police stops for the sole purpose of conducting a regulatory inspection of vehicles or drivers and offered the following observation and condemnation:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.

440 U.S. at 661.

If police, for an investigatory purpose, unconstitutionally stop a person, evidence obtained by a search of the person stopped is constitutionally inadmissible as the "fruit of the

poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). See *State v. Thomas, supra.*

> In *Wong Sun*, the U.S. Supreme Court required exclusion not only of evidence directly produced by a constitutionally invalid search but also evidence indirectly derived from the unconstitutional search. Reference to "fruit of the poisonous tree" in *Wong Sun* is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in *Wong Sun*, whether evidence is the derivative product of a constitutionally invalid search turns on the question " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " 371 U.S. at 488. (Quoting from J. Maguire, Evidence of Guilt (1959).)

State v. Abdouch, 230 Neb. 929, 943-44, 434 N.W.2d 317, 326 (1989). Accord *State v. Thomas, supra.* Thus, evidence obtained by an unreasonable search and seizure, including evidence that is indirectly derived from the unconstitutional search and seizure, is constitutionally inadmissible in a criminal trial.

Although there may be some circumstances " 'in which wholly lawful conduct might justify the suspicion that criminal activity was afoot,' " *State v. Thomas*, 240 Neb. at 559, 483 N.W.2d at 537 (quoting from *Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980)), to determine whether stopping a person on a public street is constitutionally permissible, a court must assess all the circumstances surrounding the stop, including "all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior." *State v. Ebberson*, 209 Neb. 41, 45, 305 N.W.2d 904, 907 (1981).

In its opinion rendered in Childs' appeal, the Nebraska Court of Appeals cited *United States v. Martinez-Fuerte*, 428

U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), as support for its conclusion that Wyant's stop of Childs was constitutionally permissible. However, *Martinez-Fuerte* can be readily distinguished from Childs' case: (1) In *Martinez-Fuerte*, the questioned stop occurred at a permanent border checkpoint, whereas Wyant stopped Childs while he was in the process of lawfully driving on a public street, and (2) according to the U.S. Supreme Court, decreasing the number of illegal entrants into the United States was a national policy, but posed formidable law enforcement problems. Ensuring compliance with vehicular registration statutes does not rise to the level of, and cannot be compared with, the enforcement of immigration laws in conjunction with a national policy.

Moreover, in *Martinez-Fuerte*, the Court recognized that random and roving patrol stops were constitutionally intolerable because such stops " 'would subject the residents of [the area] to potentially unlimited interference with their use of the highways, solely at the discretion of [police].' " 428 U.S. at 558-59. Therefore, *Martinez-Fuerte* and its involvement of a legitimate and permanent or stationary checkpoint is inapplicable to Childs' case.

DID WYANT CONSTITUTIONALLY STOP CHILDS?

In our analysis of the undisputed testimony, Wyant, before stopping Childs, had no indication and, therefore, no real or factually based suspicion that Childs had been engaged in, was presently engaged in, or was about to engage in any criminal activity. According to Wyant, the sole and simple basis for his stopping Childs' car was to "check if the vehicle was within the in-transit period."

The State asserts that Wyant had a particularized suspicion that Childs was violating § 60-302 because, in every situation where a motorist drives a car displaying an In Transit decal, "the officer who sees a car being driven on a street without plates should suspect a violation is occurring in his presence." Brief for appellee at 6. If the State's argument that an In Transit plate furnishes a particularized suspicion of lawbreaking, and, therefore, criminal activity, the result would be a constitutionally suspect presumption that every motorist who

uses In Transit decals is presumed to be a lawbreaker involved in criminal activity. Yet, "[t]he presumption of innocence, although unarticulated in the U.S. and Nebraska Constitutions, is a basic component of a defendant's fair trial and, therefore, an aspect of due process in the criminal justice system." *State v. Jasper*, 237 Neb. 754, 759, 467 N.W.2d 855, 859 (1991). Accord *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). See, also, *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Moreover, § 60-302, read in conjunction with § 60-320(3)(b), authorizes operation of a motor vehicle for 15 days provided that the vehicle properly displays In Transit decals.

It is true that § 60-320(3)(b) states that

> [u]pon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of possession by such person of such motor vehicle or trailer.

However, the preceding statute does not direct police to stop all vehicles displaying In Transit decals. Hence, the inescapable questions are: For a stop to check the validity of In Transit decals, what is the standard for a police officer's stopping a particular vehicle but not another? On what basis does an officer stop an In Transit motorist from among all other In Transit motorists who, for all appearances and purposes, are lawfully traveling on a public highway or street? None of the Nebraska statutes implicated in Childs' case supplies a reasonable standard for stopping a motorist whose vehicle displays In Transit decals. Moreover, whatever might be statutorily prescribed or authorized for stopping In Transit motorists is subject to the constitutional safeguard against an unreasonable search and seizure. Without a reasonable standard for stopping motorists to check the validity of In Transit decals, a distinct and perhaps substantial segment of the motoring public is left to random and roving stops by police in the " 'unfettered discretion of officers in the field.' " *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986) (quoting from *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d

367 (1979)).

When faced with a question similar to that in Childs' appeal, courts in at least two other states have held that police exceed their authority for an investigatory stop of a vehicle when the basis for the stop is solely the display of temporary or In Transit license plates, placards, or decals. See *State v. Chatton*, 11 Ohio St. 3d 59, 63, 463 N.E.2d 1237, 1240 (1984), *cert. denied* 469 U.S. 856, 105 S. Ct. 182, 83 L. Ed. 2d 116: "[O]nce the police officer herein observed the temporary tags, appellee could no longer be reasonably suspected of operating an unlicensed or unregistered vehicle." See, also, *State v. Farley*, 308 Or. 91, 94, 775 P.2d 835, 836 (1989): "Upon seeing the temporary permit, the justification of any investigation was vitiated. Plain and simple, the officer had no statutory authority to proceed further. That authority ended with the officer's discovery that the traffic infraction he was investigating had not actually occurred."

We cannot accept that every motorist who operates a vehicle displaying In Transit decals waives the protection against an unconstitutional stop and invalid search and seizure as a consequence of the stop. First, even if In Transit decals were issued in return for a motorist's waiver of the constitutional protection against an unreasonable search and seizure, surrender of the constitutional guarantee in exchange for In Transit decals might well be too costly and excessive a price to pay for driving a vehicle on a public highway or street. Second, assuming that a waiver of the protection against an unreasonable search and seizure were constitutionally permissible under the circumstances, none of the evidence in Childs' case supports existence of a waiver, "the voluntary and intentional relinquishment of a known right, privilege, or claim, [which] 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). Accord, *Ehlers v. Perry, ante* p. 208, 494 N.W.2d 325 (1993); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

We believe that there are other, less intrusive means to check the validity of In Transit decals without random and roving

stops for that purpose. However, we decline to comment about those other available means, lest our expression be an intrusion into the province of the legislative or executive branch, or both branches, appropriately controlling operation of motor vehicles on public highways and streets. Consequently, we hold that because Wyant lacked a reasonable and articulable suspicion or basis for the conclusion that Childs had been involved, was presently involved, or was about to become involved in any criminal activity, Wyant's stopping Childs violated U.S. Const. amend. IV and Neb. Const. art. I, § 7. See, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). For that reason, the district court, pursuant to Childs' suppression motion and his constitutional objection renewed at trial, should have suppressed and excluded the convictive evidence obtained after Wyant unconstitutionally stopped Childs. Since the State has used constitutionally inadmissible and tainted evidence to convict Childs, his conviction should have been set aside.

DUE PROCESS

Childs also contends that the State's dismissing the charge against him in the county court, after that court had sustained his suppression motion, and then refiling the same charge in the district court violates his right to due process. However, in view of our conclusion that the stop of Childs was unconstitutional, we need not address the due process question.

CONCLUSION

In light of our holding in this further review of Childs' appeal, we reverse the judgment of the Nebraska Court of Appeals, reflected in *State v. Childs*, 1 NCA 478 (1992), and remand this cause to the Nebraska Court of Appeals with direction that the Nebraska Court of Appeals shall enter judgment reversing the district court's conviction of Childs and remand Childs' case to the district court for further proceedings.

REVERSED AND REMANDED WITH DIRECTION.

PROPERTIES INVESTMENT GROUP OF MID-AMERICA, A NEBRASKA PARTNERSHIP, APPELLEE, V. JBA, INC., A CORPORATION, APPELLANT.

495 N.W.2d 624

Filed February 19, 1993. No. S-90-069.

1. **Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Landlord and Tenant: Damages: Abandonment.** A landlord has a duty to relet the premises in order to mitigate damages when the tenant abandons the premises prior to the expiration of the lease, and that duty to mitigate requires the landlord to take all reasonable steps to reduce his damages.
5. **Landlord and Tenant: Damages: Abandonment: Proof.** In a landlord's action to recover rent upon the tenant's abandonment of the leased premises, the tenant has the burden to show that the landlord unreasonably failed to relet the premises and mitigate damages.
6. **Breach of Contract: Damages.** In a breach of contract case, the proper measure of damages is an amount which will compensate the injured party for losses which fulfillment of the contract would have prevented or breach of it has entailed.
7. _____: _____. Generally speaking, losses sustained by reason of breach of contract or gains prevented are both actual and consequential damages.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified, and cause remanded with direction.

Thomas J. Culhane and David A. Hecker, of Erickson & Sederstrom, P.C., for appellant.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan for appellee.

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

FAHRNBRUCH, J.

In this appeal, a lessee that breached a long-term commercial warehouse lease claims that the district court for Douglas County erred when it entered a $141,308.87 partial summary judgment in favor of the lessor.

The lessee, JBA, Inc., a corporation, primarily complains that a genuine issue of material fact existed as to whether the lessor, Properties Investment Group of Mid-America (PIGOMA), a Nebraska partnership, had taken reasonable steps to mitigate its damages following JBA, Inc.'s breach of the lease. Inherent in the entry of the partial summary judgment in favor of PIGOMA is a finding by the district court that the lessor had taken reasonable steps to mitigate its damages and that no genuine issue of material fact existed in that regard. JBA, Inc., appeals the summary judgment order to this court, claiming that the trial court erred in (1) granting PIGOMA's motion for partial summary judgment, since there was a genuine issue of material fact as to whether PIGOMA had made reasonable efforts to mitigate its damages, and (2) computing PIGOMA's damages by including attorney fees and accounting fees not supported by competent evidence. (In this court, PIGOMA has agreed that the trial court should not have included $800 in accounting fees in the damage award.)

Except for the award of the accounting fees, we affirm the partial summary judgment of the district court.

PRIOR HISTORY AND PROCEEDINGS

The record reflects that in Omaha, PIGOMA owned the commercial warehouse with attached office space which is involved in this appeal. On January 1, 1984, PIGOMA leased the warehouse to a corporation known at the time as JBA, Inc. (Old JBA), for a term of 15 years. In April 1984, with the consent of PIGOMA, Old JBA assigned its interest in the lease to EFT, Inc., which assumed the rights and responsibilities of Old JBA under the lease. EFT, Inc., began occupying the warehouse property April 3, 1984, and subsequently changed its name of EFT, Inc., to JBA, Inc. On October 27, 1987, JBA, Inc., gave notice to PIGOMA that it had decided to cease all of its operations and that JBA, Inc., intended to abandon the

warehouse property at the end of the month, and it attempted to surrender the leasehold premises to PIGOMA. JBA, Inc., also advised PIGOMA that it intended to have JBA, Inc.'s name removed from all utility services to the warehouse property. PIGOMA refused to accept the abandonment, rejected any surrender of the leasehold, and gave JBA, Inc., notice that it intended to relet the premises to a new tenant and hold JBA, Inc., liable for resulting deficiencies in rents and losses arising from utilities, taxes, insurance, and each and every other obligation assumed by JBA, Inc., under the lease. JBA, Inc., stopped paying rent as of November 1987.

On January 7, 1988, PIGOMA filed a petition in the trial court in which it alleged that JBA, Inc., had breached the lease with PIGOMA. The district court was requested by PIGOMA to enter a declaratory judgment finding JBA, Inc., liable under the lease for unpaid rent, interest, taxes, and utilities; breach of the lease's occupancy covenant; and other expenses and obligations JBA, Inc., had assumed under the lease as they might accrue. PIGOMA also requested that the trial court retain jurisdiction of the case following entry of judgment to ascertain and enter as a judgment the amount of PIGOMA's continuing damages. Such procedure is permissible under Neb. Rev. Stat. § 25-21,156 (Reissue 1989) and *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974). See, also, *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990).

Following a hearing, the district court on August 25, 1988, entered a declaratory judgment finding that JBA, Inc., was in breach of its lease with PIGOMA. The court retained jurisdiction over the matter to ascertain and award damages and such other relief as it deemed proper.

On December 20, 1988, the court entered an order awarding damages which it found had accrued through September 30, 1988, as a result of JBA, Inc.'s breach of the lease. The court again retained jurisdiction to enter future awards for damages which might accrue as a result JBA, Inc.'s continued breach of the lease. Neither the record nor the files of this court indicate that an appeal was taken from either of these two orders, each of which affected the substantial rights of each of the parties.

As a result, each of the two orders has become final. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992).

PRESENT PROCEEDINGS

We now begin a review of the proceedings which resulted in the $141,308.87 partial summary judgment in favor of PIGOMA for damages for the period of September 30, 1988, to September 30, 1989, which order is the subject of the present appeal.

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. *Holden v. Schwer, ante* p. 389, 495 N.W.2d 269 (1993).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Holden v. Schwer, supra*.

FACTS OF THIS APPEAL

It was on November 14, 1989, that PIGOMA filed a motion for a partial summary judgment seeking damages which it alleged had accrued between September 30, 1988, and September 30, 1989. At the hearing on the motion, PIGOMA introduced into evidence the affidavits of Craig Hergott and Bruce Bisson, both partners in PIGOMA, and the deposition of Stephen Farrell.

Hergott's affidavit contained documentation of amounts claimed by PIGOMA as damages in the form of unpaid rent, miscellaneous expenses, professional fees, utilities, and taxes which PIGOMA claimed were due under the lease. Hergott stated in his affidavit that JBA, Inc., had not paid rental payments due under the lease from October 1988 through September 30, 1989. The affidavit also stated that from September 1988 through November 9, 1989, the date of the

signing of the affidavit, PIGOMA had continually listed the warehouse property with a licensed realtor.

In his affidavit, Bisson stated in substance as follows: In November 1987, PIGOMA began interviewing realtors to list the property for sale or lease. The property was listed with Progress West, a realty company, on December 4, 1987. This formal listing expired on June 4, 1988. However, Progress West continued to represent PIGOMA in regard to the warehouse property under a verbal agreement from June 4 through October 1988. Under the verbal agreement between PIGOMA and Progress West, the latter continued to advertise and show the property to prospective tenants or purchasers. In October 1988, PIGOMA retained John Dickerson, a certified property manager, to assist in PIGOMA's effort to sell or lease its warehouse property. On March 9, 1989, Dickerson retained Investors Realty to act as listing agent for the property. Bisson stated additionally that during the interim of December 1988 to March 9, 1989, Dickerson negotiated with realtors over the terms of a listing agreement and that PIGOMA itself negotiated with a prospective purchaser, the Opus III and VII corporation (Opus), in January and February 1989 for the sale of the property. Bisson also stated that PIGOMA and Opus reached a verbal agreement concerning the sale of the warehouse property to Opus. He further stated that documents were drafted to consummate the sale from PIGOMA to Opus, but that Opus ultimately refused to consummate the sale because of its own financial concerns. That PIGOMA had expectations of selling the warehouse property to Opus is corroborated by exhibits received in evidence which show that during January and February 1989, legal counsel prepared documents to consummate the sale of the warehouse property to Opus.

Through the introduction of the foregoing evidence, PIGOMA met its burden to show that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law if the evidence presented for summary judgment remained uncontroverted. See *Holden v. Schwer, supra*.

In opposition to PIGOMA's motion for summary judgment, JBA, Inc., introduced into evidence the deposition of Dickerson and the affidavit of Gregory L. Hornish, a vice

president of Business Properties, Inc., a real estate management and brokerage company.

In his deposition, Dickerson testified that although the formal listing of the warehouse property had expired some time in the spring or summer of 1988, Progress West was still allowed to continue as the representative of the property. That arrangement, according to Dickerson, continued until he took over in December 1988. During the arrangement, Progress West still had keys to the property, was still advertising and showing the warehouse property, and had a sign on the building. Progress West's arrangement continued "apparently until just shortly before I took over the property," which was in December 1988. Dickerson testified that he was contacted by PIGOMA in October or November 1988 and that he signed a consulting and management agreement with PIGOMA on December 2. Dickerson testified that between December 2, 1988, and March 9, 1989, the property was not technically listed for sale or lease with a realtor. He testified that during the 3-month period, "[I]n actual handling of the property, I took any calls or inquiries about the property, worked with Progress West on any prospects that they were kind of carrying from their . . . term, and trying to make a somewhat of a smooth transition between Progress West and Investors Realty." Dickerson testified that during the 3-month period, he was also taking proposals for listing the warehouse property. He testified that he held off listing the property during the 3-month period because there was "such good activity going on the property." Dickerson testified that between December 2, 1988, and March 9, 1989, he followed up on some prospects that Progress West had dealt with, but had not brought to a conclusion. Those prospects included a U.S. Army Reserve unit and Dudley moving company. When it was discovered that Dickerson was handling the PIGOMA warehouse property, Lee Rising, of the Roger Haney Corporation, who wanted to list the property, showed the property to some of his prospects. According to Dickerson, Progress West, as well as Investors Realty, also showed the property. Dickerson testified that he made some "cold calls" on some companies that were interested in industrial property. "So I basically followed up on anything

that was in the wind or was unresolved," Dickerson testified.

In his affidavit, Hornish stated that in his professional opinion, it is necessary to list commercial property such as PIGOMA's warehouse with a recognized real estate broker or brokerage firm to have any reasonable prospect of finding a tenant or purchaser for such property. He stated that if such property, having been once listed with a broker, is left unlisted for any significant period of time, there will be an adverse impact upon the prospects for sale or lease of the property. He said that a period of 3 months is a significant period of time for a commercial property to be unlisted.

PIGOMA also introduced the deposition of Stephen Farrell, who testified that a listing agreement was signed on March 9, 1989, between PIGOMA and his company, Investors Realty. He said that although PIGOMA gave him no authority to vary from the sale or lease price it had set, PIGOMA had let him know that it would entertain all reasonable offers. Farrell said that he had made every reasonable effort to sell or lease the property.

JBA, Inc.'s first assignment of error, that a material issue of fact existed as to whether PIGOMA had met its duty to mitigate its damages flowing from JBA, Inc.'s breach of the lease agreement, basically stems from PIGOMA's failure to list the property with a licensed real estate agent or broker from December 2, 1988, to March 9, 1989.

In support of its first assignment of error, JBA, Inc., argues that the affidavit of Hornish created a genuine issue of material fact as to whether PIGOMA had made reasonable efforts to mitigate its damages. In *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990), citing *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982), we held that a landlord has a duty to relet the premises in order to mitigate damages when the tenant abandons the premises prior to the expiration of the lease and that the duty to mitigate requires the landlord to take all reasonable steps to reduce his damages. In *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. at 346, 451 N.W.2d at 262, we also held that "[i]n the landlord's action to recover rent upon the tenant's abandonment of the leased premises, the tenant has the burden to show that the landlord 'unreasonably failed to relet the

premises and mitigate damages.' "

Hornish's affidavit falls far short of even claiming that PIGOMA, through the exercise of reasonable diligence, could or would have sold the warehouse property or could or would have secured a suitable tenant to fill the vacancy created by JBA, Inc.'s breach of its lease. See *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969). At most, Hornish suggests that failure to list commercial property with a broker for 3 months has an adverse impact upon the prospects of a sale or lease of the property. Nowhere in his affidavit does Hornish claim that the steps PIGOMA took to mitigate its damages were unreasonable or that it " 'unreasonably failed to relet the premises' " or " 'mitigate damages.' " In this case, PIGOMA's property had been listed formally and informally with a realtor for nearly a year. The record is devoid of any indication of a genuine prospect for a lease or sale of the property during that time. The evidence is uncontroverted that between December 4, 1987, and June 5, 1988, there was a formal listing of PIGOMA's warehouse property with a realtor and that the realtor continued to represent PIGOMA in regard to its warehouse property until at least December 1988. At that time, PIGOMA employed a certified property manager in an effort to have the property sold or leased. From December 1988 to March 9, 1989, the property manager negotiated with realtors over the terms of a listing agreement, took calls or inquiries about the property, took proposals for listing the warehouse property, and followed up on possible buyers and lessees. On at least three occasions during the 3-month period when the property was not listed, realtors showed the property. The property manager also made some "cold calls" on companies that were interested in industrial property. In addition, the owners of PIGOMA negotiated a sale of the property. Without fault on the part of PIGOMA, the sale was never completed because of the buyer's concern for its finances.

"The duty to mitigate requires the landlord to take all reasonable steps to reduce his damages." *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 346, 451 N.W.2d 259, 262 (1990). PIGOMA's evidence shows that all of the steps it took to sell or lease the property were reasonable. JBA, Inc.'s evidence is

insufficient to create a genuine issue of material fact as to whether PIGOMA had taken all reasonable steps to mitigate its damages. JBA, Inc.'s first assignment of error is without merit.

The court entered judgment in favor of PIGOMA in the amount of $141,308.87, which represented "damages for rent, maintenance and utility bills, along with the expenses for professional services utilized in an effort to find a tenant and/or purchaser for the building following JBA's breach of the lease." The court again retained jurisdiction to ascertain and enter judgment for any damages accruing after September 30, 1989.

In its second assignment of error, JBA, Inc., argues that PIGOMA was not entitled to recover the professional fees awarded in the judgment. JBA, Inc., claims that "there was no evidence from which the court could conclude without resort to speculation and conjecture that the attorney and accounting fees . . . were caused by the breach, or, for that matter, even incurred by [PIGOMA]." Brief for appellant at 17. PIGOMA concedes in its brief that it is not entitled to the accounting fees. Therefore, in regard to professional fees, only at issue are the attorney fees of $1,520. Copies of two bills from PIGOMA's attorneys to PIGOMA were entered into evidence. The descriptions of services on the billings include the following: "[C]onferring . . . re possible sale of building," "conferring . . . re terms of purchase by Opus," and "conferring . . . re lack of action by Opus." The services were provided between January 19 and February 21, 1989. The services which are detailed in the bills for attorney fees are clearly connected to the attempted sale of the property by PIGOMA to Opus.

"In a contract case the proper measure of damages is an amount which will compensate the injured person for loss which fulfillment of the contract would have prevented or breach of it has entailed." *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 46, 424 N.W.2d 885, 888 (1988). "[G]enerally speaking the losses sustained by reason of the breach or the gains prevented are both actual and consequential damages." *Id.* at 47, 424 N.W.2d at 889. In this case, PIGOMA is not attempting to recover attorney fees in its suit against JBA, Inc. Rather, it is attempting to recover

attorney fees as damages resulting from expenses incurred in attempting to mitigate its damages from JBA, Inc.'s breach of the lease. The district court was correct in allowing attorney fees as damages resulting from breach of the lease.

The decision of the district court is affirmed except as to the amount awarded to PIGOMA for accounting fees. The cause is remanded to the district court with direction to enter judgment consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

WHITE, J., not participating.

DAVID W. IPOCK, DOING BUSINESS AS MILLARD UPHOLSTERY, APPELLEE, V. UNION INSURANCE COMPANY, APPELLANT.

495 N.W.2d 905

Filed February 19, 1993. No. S-90-250.

1. **Convictions: Rules of Evidence.** For the purposes of Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1989), one has been convicted of a crime only after a finding of guilt, an imposition of a sentence, and the expiration of the time for appeal.
2. **Pleas: Evidence.** A plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Motions for New Trial: Verdicts: Appeal and Error.** A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.
5. **Motions for New Trial.** A motion for new trial is entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of its own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict.
6. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing

for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Joseph S. Daly and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellant.

Benjamin M. Belmont and Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellee.

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

HASTINGS, C.J.

The defendant, Union Insurance Company, appeals a jury verdict and judgment entered against it in a lawsuit brought by plaintiff, David W. Ipock, doing business as Millard Upholstery, to recover under an insurance policy issued by the defendant to the plaintiff on the plaintiff's motor home, which was destroyed by theft and fire.

The defendant assigns as error the action of the trial court in excluding evidence of plaintiff's recent drug activity and in failing to grant defendant's motion for a new trial based on newly discovered evidence. We reverse, and remand for a new trial.

According to the plaintiff's testimony, he purchased a 1985 Southwind 27-foot self-contained motor home for $12,000 in January 1987. He said that he had received the money for the purchase from his father and that his father had held onto the title, but never titled it in his own name. The vehicle was used for one or more trips between January and October 1987, but no one had title to it during this time period. The plaintiff borrowed license plates from his brother's motor home to put on it so that he would not be stopped and ticketed while he was using the motor home. The plaintiff never legally licensed the vehicle. The vehicle was titled in the name of the plaintiff's

business on October 14, 1987, and insurance coverage was purchased from the defendant 2 days later.

The plaintiff testified that the motor home disappeared from the plaintiff's place of business sometime between December 4 and 7, 1987. Approximately 2 weeks later, the plaintiff was notified that the motor home had been found near Glenwood, Iowa. It had been burned from the floor up and was totally destroyed by the fire. The plaintiff also testified that before its disappearance, the motor home had a value of around $35,000, while after the fire it was unrestorable and had no value.

Officer Kevin Parker of the Omaha Police Division testified that he was assigned to investigate the theft of the plaintiff's motor home. In investigating the plaintiff's past record, he discovered that the plaintiff had reported two vehicles stolen prior to the theft of the motor home, one of which was recovered burned in Sarpy County.

Mack Taylor, chief deputy sheriff for Mills County, Iowa, testified that the motor home was discovered on fire south of Glenwood on December 7, 1987. He investigated at the scene for evidence which would indicate how and why the motor home was at that location. He found that the license plates on the motor home were Michigan plates but that they could be traced to a U-Haul dealer in Omaha. Deputy Taylor testified that he believed the fire started in the center of the motor home, but there was no major wiring or engine in that area of the vehicle. Based on the facts that the motor home had been burned in a secluded area of Mills County, that many vehicle arsons are on unmarked county roads, and that no one was around to notify the police that the vehicle had burned, the deputy stated he thought the fire was of suspicious origin and there was a good possibility it had been set.

Mills County Sheriff Howard Clark similarly testified that he felt the fire had been started by something other than the operation of the motor home itself. He also stated that he spoke with the plaintiff on the phone approximately 2 weeks after the fire and that when he advised the plaintiff that the motor home had been found, the plaintiff asked if there was a fire.

Eileen Cherek testified that she had been employed by the plaintiff as the office manager of his business, Millard

Upholstery. She stated that she was aware that work was being done on the motor home, but that she did not handle the records pertaining to that vehicle. Cherek recalled that on December 4, 1987, she spoke with the plaintiff about the motor home. She testified:

> He said something, and this is not quote for quote, this is just what I can remember. That the motor home was going, and I said, "What do you mean?" And he got upset and he said, "You know I have no other alternative." And at that time I dropped the whole conversation and nothing else was said.

She also testified to a conversation she had with the plaintiff on December 8:

> Basically I walked in the door and he was sitting at my desk, and he looked very upset. I said, "What's wrong?" And he said something to the effect that the motor home was gone, there were problems, the battery had went out and that he was waiting for a phone call, and again he was very upset, and I dropped the conversation.

Cherek testified that approximately 2 weeks later she answered a phone call from the sheriff of Mills County and that when the plaintiff spoke to the sheriff the only comment that really stuck out was the plaintiff's question, "[D]id it burn or what?" She also testified that she was presently involved in a lawsuit with the plaintiff.

Bill Maliszwski testified that he had done upholstery work for the plaintiff between February 1988 and May 1989. He stated that toward the end of that time period the plaintiff had mentioned to him that he had a $25,000 lawsuit going against an insurance company and that "the people that knew about it, if they kept their mouth shut, got a piece of the cake when he got the check." When asked if the plaintiff had said anything about the disappearance of the motor home, Maliszwski said that the plaintiff mentioned that he had it arranged. Maliszwski also said that the plaintiff was aware that he, Maliszwski, lived in the Glenwood area and that the plaintiff asked him several times if he knew anybody down there who knew anything about the motor home being burned. He also testified that the plaintiff had asked for any bills he could place in his motor home file so

he could get reimbursed for them and that the plaintiff told him that the plaintiff was taking receipts from other work and claiming it was done on that particular motor home.

The plaintiff, in rebuttal, denied the conversations claimed by Maliszwski to have occurred particularly with reference to a $25,000 lawsuit, and also testified that Maliszwski had filed a lawsuit against him, the plaintiff, in small claims court because he had stopped payment on Maliszwski's last paycheck.

In regard to Cherek, the plaintiff stated that he was concerned that she had been taking business from him and that she had stolen money from his business to start her own. He also denied making the statements about the motor home which Cherek had attributed to him.

Prior to trial, the plaintiff had filed a motion in limine to preclude inquiry by the defendant into prior felony convictions of the plaintiff which were over 20 years old, and also to preclude inquiry into a recent plea of guilty or no contest to felony drug charges, upon which, however, the plaintiff had not yet been sentenced. The trial court sustained the motion.

After a jury verdict in favor of the plaintiff in the amount of $19,403, the defendant timely filed a motion for a new trial. The motion was based on the claimed error on the part of the trial court in excluding evidence of the plaintiff's recent drug convictions and in failing to grant a new trial on the basis of newly discovered evidence.

The newly discovered evidence was in the form of an affidavit from Cindy I. Waugh, in which she stated that she was acquainted with the plaintiff and that over the course of several conversations with him she had been told by him that he had arranged for the theft and burning of his motor home in order to collect insurance money. On the hearing on the motion for a new trial, the court received the affidavit of Waugh and also the affidavit of the defendant's counsel, Joseph Daly, in which he stated that he had been approached by Waugh on January 29, 1990, after the trial and that prior to that encounter he had not met her and could not, with reasonable diligence, have discovered that she had knowledge of facts or issues involved in the lawsuit. The court overruled the motion for a new trial.

The defendant has two theories as to why evidence of the

recent pleas to drug charges were relevant and should have been admitted.

One theory is based on Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1989), which provides as follows:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.
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> . . . .
>
> (5) Pendency of an appeal renders evidence of a conviction inadmissible.

It was the plaintiff's contention, with which the trial court apparently agreed, that "convicted of a crime," as used in this section, implies a judgment, i.e., a sentence of the court.

In *Marion v. State*, 16 Neb. 349, 20 N.W. 289 (1884), this court found that entering a plea of guilty without a judgment was not a conviction for the purposes of a statute affecting a witness' credibility. In that case, the court noted that if, in order to be a conviction, there must be a judgment of the court upon the plea, then the question as to a prior conviction was improper. The court found that the defendant's objection to such question should have been sustained, and stated:

> There is a conflict of opinions and decisions upon this question, and by some text writers and courts of last resort it is maintained that the word "conviction" usually means the judicial ascertainment of guilt . . . . But we have found no case where the word as applied to the competency of a witness to testify has reference to anything short of the final judgment of the court upon a verdict or plea of guilty.

Id. at 361, 20 N.W. at 295. Similarly, in *Ford v. State*, 106 Neb. 439, 184 N.W. 70 (1921), the court again reviewed the same statute that it had in *Marion* and found that a plea of guilty does not show a conviction under the statute.

Defendant cites several cases from other jurisdictions which

suggest that a finding of guilt without a sentence is sufficient to allow its use as a conviction under a credibility statute.

In *State v. Bobo*, 414 N.W.2d 490, 494 (Minn. App. 1987), the court noted that under that state's applicable statute, " ' "Conviction" means any of the following *accepted and recorded* by the court: (1) a plea of guilty; or (2) a verdict of guilty by a jury or a finding of guilty by the court.' Minn.Stat. § 609.02, subd. 5 (1986)." (Emphasis in *Bobo*.) The defendant in *Bobo* had claimed he was improperly denied an opportunity to impeach a State's witness who testified he had never been convicted of a felony. The court found that since the trial court did not know the precise status of the witness' plea, i.e., whether the plea was accepted or conditional, it did not abuse its discretion in not allowing impeachment on this matter.

Although § 27-609 does not precisely define the term "conviction," it is significant to note that in the instant case, the record does not contain any public record of the plaintiff's plea and, therefore, does not indicate the nature of the pleas.

Perhaps of more significance in this case is the provision found in § 27-609(5) which states that "[p]endency of an appeal renders evidence of a conviction inadmissible." The Nebraska statute's interest in the finality of a conviction may be instructive as to the admissibility of a plea as well. Although in the instant case the record does not disclose that the plaintiff's "conviction" was on appeal, there could have been no appeal until a sentence had been imposed. See *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980) (a finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed). It is also significant that a criminal defendant has at least a limited right to withdraw a plea prior to sentencing, although the burden is upon the defendant to establish the grounds for withdrawal by clear and convincing evidence. *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987). To allow impeachment on the basis of conviction of a crime by virtue of the defendant's plea alone would prejudice those who would attempt to exercise their qualified right to withdraw a plea or those who would choose to appeal on the basis of a later imposed sentence when no such appeal opportunity was yet available.

We therefore hold that for the purposes of § 27-609, one has been convicted of a crime only after a finding of guilt, an imposition of a sentence, and the expiration of the time for appeal.

The defendant argues further, however, that the plaintiff's pleas in the recent drug cases should have been admissible as admissions which would be relevant to rebut the plaintiff's evidence of his income tax returns which showed that his income had not been declining. Apparently, those tax returns were, in the plaintiff's mind, a showing that business was not bad and that therefore, he had no motive to falsify an insurance claim. The defendant contends that showing the admissions of drug dealing would have rebutted the plaintiff's evidence as to his taxable income with evidence of additional sources of income, such as the sale of drugs. This reasoning is difficult to follow, since introducing evidence that the plaintiff earned additional income from the sale of drugs would not rebut the plaintiff's contention that his income had not declined.

In any event, as previously stated, the record does not show whether the plaintiff's "conviction" was by reason of a guilty plea or a plea of no contest. In *State ex rel. Nebraska State Bar Assn. v. Mathew*, 169 Neb. 194, 98 N.W.2d 865 (1959), this court considered whether a plea of nolo contendere could receive evidentiary consideration in a subsequent civil action. Unlike in the instant case, in *Mathew* the civil action involved the same issue as the criminal charge. However, the court noted the general rule that "a plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea." *Id.* at 197, 98 N.W.2d at 867.

The trial court did not err in refusing to permit the defendant's inquiry into the plaintiff's pleas in the recent drug cases.

There remains the question of whether the district court erred in refusing to sustain the defendant's motion for new trial on the basis of newly discovered evidence.

A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *Waite v. A. S. Battiato*

Co., Inc., 238 Neb. 151, 469 N.W.2d 766 (1991).

A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990).

A motion for new trial is entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of its own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989).

In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989); *Fisher Corp. v. Consolidated Freightways, supra.*

The claimed newly discovered evidence was corroborative of the testimony of the witnesses Cherek and Maliszwski, which testimony had been directly contradicted by the plaintiff. If believed, it was evidence of statements made by the plaintiff by which he directly and unequivocally admitted that he had arranged for the theft and burning of his motor home. There is no substitute for the testimony of a live witness as to such information. Because of the denials of the plaintiff as to the information testified to by the other two witnesses, the newly discovered evidence was not cumulative.

The remaining question is whether this evidence could have been discovered by the exercise of due diligence on the part of

the defendant. According to the defendant's counsel's affidavit, it was on January 29, 1990, some 10 days after the completion of the trial herein, that in a chance meeting in the Douglas County Hall of Justice, Waugh approached counsel and told him that she knew about the lawsuit and about the incident involving the motor home and would be willing to testify.

During the hearing on the motion for new trial and during questioning of the defendant's counsel by the court, it became apparent that Waugh was a codefendant of Ipock in the drug cases. Counsel admitted that he examined only the court file on Ipock's cases and did not examine the police report, which he agreed probably would have revealed the name of the witness Waugh. However, the trial judge, in response to a statement by the plaintiff's counsel, asked, "[W]hy would he [the defendant's counsel] need to do any more than just examine the court records to determine the fact of the conviction?"

We believe that statement by the court answers the question. There is no indication that the defendant should have known of the existence of this evidence at the time of trial, and there is nothing to suggest an absence of due diligence on the defendant's part.

The newly discovered evidence was competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

The district court's refusal to grant a new trial was an abuse of discretion, and its judgment is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., concurs in the result.

DEANNA OVERMIER, APPELLANT, V. JAMES PARKS ET AL., APPELLEES.

495 N.W.2d 620

Filed February 19, 1993. No. S-90-304.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for further proceedings.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Robert P. Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellees.

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

GRANT, J.

Plaintiff-appellant, Deanna Overmier, filed a petition in the Scotts Bluff County District Court against the defendants-appellees, West Nebraska General Hospital, Richard Young Psychiatric Services, James Parks (the director of security for the hospital), Charles Richardson (the program director of psychiatric services), and Nancy Cortney (the head nurse of psychiatric services). Plaintiff sought damages on three separate theories: (1) wrongful termination of contract of employment, (2) malicious prosecution, and (3) slander and libel. This case was later separated into two cases after a district

court ruling that plaintiff's claim for wrongful discharge was based on contract, while the other claims were based upon tort. The case presently before this court is one which is based only upon contract, an alleged employment contract with defendant West Nebraska General Hospital, which contract was allegedly breached by defendants. The district court sustained the defendants' motion for summary judgment.

The record shows that plaintiff began her employment with West Nebraska General Hospital in June 1980, when she was hired as a nurse's aide. At the time she was hired, plaintiff was supplied with an employee handbook outlining the terms and conditions of employment and the benefits afforded hospital employees. The lengthy handbook also included procedures to be followed by both employee and employer in grievance, disciplinary, and dismissal actions, and was updated at various times during plaintiff's employment. In 1984, plaintiff was transferred to the psychiatric unit of the hospital, where she worked as a basic nurse until the time of her discharge in April 1987.

On April 7, 1987, hospital personnel officials discharged plaintiff after a series of events which took place in March, when the psychiatric unit of the hospital began receiving a number of progressively harassing and threatening phone calls. The volume of calls began to escalate on March 27, culminating in a bomb threat which was made during the evening of March 30. A police investigation ensued, resulting in plaintiff's being criminally charged with making threatening bomb calls. She was charged on April 2 and suspended orally by the hospital the same day. On April 3, plaintiff was suspended in writing. The hospital then fired her on April 7, citing the bomb-threat calls in the letter of termination.

Immediately after she was suspended on April 2, plaintiff was invited to a review meeting on April 6. She declined to attend. On April 7, plaintiff was terminated based upon "information implicating [her] as an active participant in the harassing and threatening telephone calls of March 30, 1987." In a letter dated April 13, plaintiff notified the hospital that she intended to appeal her discharge. In response, the hospital, on April 16, sent her instructions and the forms needed for an

appeal. The forms were completed by plaintiff and returned to the hospital on April 23. On April 27, after a review of the situation, the hospital notified plaintiff that her termination "should stand."

No further action was taken until the hospital became aware in January 1988 that the criminal charges against plaintiff had been dismissed. At this time, the hospital notified her that a hearing would be provided pursuant to the hospital's "Fair Treatment Procedure" if she desired one. Plaintiff requested the hearing, at which her appeal for reinstatement was denied.

In her petition, plaintiff alleged that she was wrongfully discharged because the employee handbook constituted an employment contract between her and the hospital, the terms of which were not adhered to when she was fired. The trial court found that although plaintiff was an employee at will, the hospital was bound by the procedural guidelines contained in its employment handbook. The court concluded that her termination was justified by the circumstances and that she received all of the procedural safeguards to which she was entitled. The defendants' motion for summary judgment was granted.

In review of a summary judgment, an appellate 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. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Murphy v. Spelts-Schultz Lumber Co., supra*; *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (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 judgment as a matter of law for the moving party. *Murphy v. Spelts-Schultz Lumber Co., supra*; *Spittler v. Nicola, supra*; *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

In her petition, plaintiff alleges that an employment contract existed between her and the hospital, consisting of the terms and conditions specified in the employee handbook. In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). Plaintiff thus had the burden of proving her contract of employment with the hospital and the hospital's breach of that contract.

Incorporated by reference in plaintiff's petition are selected portions of the employee handbook, including the section captioned "Fair Treatment Procedure," which provides in relevant part:

> When an employee thinks or feels any condition affecting him/her is unjust, inequitable, a hindrance to effective performance, or creates a problem, the employee should use the Fair Treatment Procedure for the solution of such problems without fear of recrimination or of placing his/her job in jeopardy.
>
> . . . .
>
> In cases where the complaint is for alleged unfair disciplinary action, the employee must initiate the Fair Treatment Procedure within seven (7) calendar days following the disciplinary action.

Nothing in this provision indicates that discharge actions are exempt from fair treatment procedures. It goes without saying that termination is the ultimate disciplinary action. We therefore assume that plaintiff's discharge was subject to the relevant procedures from the handbook.

Plaintiff's appeal essentially asserts (1) that an employment contract existed between her and the defendant hospital, (2) that under the terms of the contract she could be discharged only after the procedural guidelines of the "Fair Treatment Policy" were followed, (3) that the hospital was required to act in good faith in carrying out these policies, and (4) that these guidelines were not met or carried out in good faith.

Plaintiff concedes that she was not hired for a specific length of time under her employment agreement. In *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983), we held that when employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability. See, also, *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989); *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988). This court has several times held, however, that an employee's "at-will" status can be modified by contractual terms that may be created by employee handbooks and oral representations. *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986).

In *Johnston, supra*, we adopted the reasoning of the Minnesota Supreme Court in *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), and held that personnel handbook provisions may become enforceable as part of the original employment contract if they meet the requirements for the formation of a unilateral contract. Thus, if the handbook language constitutes an offer definite in form which is communicated to the offeree, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract. *Johnston, supra*. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract because by continuing to stay on the job although free to leave, the employee supplies the necessary consideration for the job. *Id.*

A fundamental concept in contract law is that to create a contract there must be both an offer and an acceptance. There

must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Woods v. Woods*, 177 Neb. 542, 129 N.W.2d 519 (1964). Summary judgment is not proper if conflicting evidence is presented to show whether a contract existed. *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990); *Hebard v. AT&T, supra*; *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207 (8th Cir. 1976).

Whether an offer was extended to plaintiff by the hospital's employee manual and whether such an offer, if it existed, was accepted by plaintiff are issues of material fact as to the existence of the alleged contract. Therefore, summary judgment was not proper on the issue of whether a contract existed. As the question of the existence of a contract is a threshold one, we do not reach the other issues addressed by the parties.

We note, however, that it is apparent that if the fact question as to the existence of a contract is established by plaintiff, then further determinations must be made as to the terms of the contract and as to whether defendant hospital breached the contract. As stated in *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 865, 438 N.W.2d 494, 496 (1989), "Stiles thus had the burden of proving his contract of employment with Skylark Meats and that Skylark Meats breached that contract . . . ." See *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 204, 313 N.W.2d 645, 647 (1981) ("the evidence introduced . . . raises a legitimate fact question as to the liability of the defendant corporation which should have been submitted to the jury for its resolution"). See, also, NJI2d Civ. 15.01.

Although defendant's answer did not present an affirmative defense against plaintiff's breach of contract claim, the trial court's order stated that another fact dispute was "whether the hospital was justified in its suspicion that the plaintiff had made some of the bomb threat calls." That fact would have to be pled and proved by defendant, if the fact finder determined that the "at-will" contract had been modified. See *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992).

The district court's order granting the hospital's motion for

summary judgment was in error. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PROPERTIES INVESTMENT GROUP OF MID-AMERICA, A NEBRASKA PARTNERSHIP, ET AL., APPELLEES, V. APPLIED COMMUNICATIONS, INC., A NEBRASKA CORPORATION, APPELLANT.

495 N.W.2d 483

Filed February 19, 1993. No. S-90-550.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989) is sui generis. Whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the 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.
3. **Declaratory Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusions independent from the conclusions reached by the trial court with regard to these questions.
4. **Contracts: Parties.** A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and the promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed, and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability.
5. **Contracts: Intent.** A written contract expressed in unambiguous terms is not subject to interpretation or construction, and the intention of the parties to such a contract must be determined from its contents.
6. _____: _____. Recitals as a general rule are not strictly any part of a contract, although they may be looked to in determining the proper construction of the contract or the intention of the parties.
7. **Contracts.** Instruments made in reference to and as a part of a transaction

should be considered and construed together.

8. _____. In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Thomas J. Culhane, Linda W. Rohman, and Ruth Beyerhelm, of Erickson & Sederstrom, P.C., for appellant.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellees.

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

FAHRNBRUCH, J.

Applied Communications, Inc. (ACI), appeals a trial court's holding that as a guarantor, ACI owes the appellees $294,733.71 for payments required under a lease that its subsidiary, JBA, Inc., failed to make for the rental of a commercial warehouse.

We affirm the judgment of the district court for Douglas County in favor of the appellees, Properties Investment Group of Mid-America (PIGOMA), a Nebraska partnership, and its owners, Dennis Jorgensen, Bruce W. Bisson, Charles L. Smith, Gary Tiller, and Craig A. Hergott (Individual Appellees).

FACTS

In 1984, the Individual Appellees were the shareholders who owned all of the stock in JBA, Inc. (Old JBA). That corporation's principal business was the construction of housing for automatic teller machines. These same shareholders were also partners in PIGOMA, through which they purchased an Omaha commercial building. Commencing January 1, 1984, the building was leased to Old JBA for a 15-year period.

On or about April 3, 1984, Old JBA entered into an "Agreement for Sale and Purchase of Assets" (Agreement) with EFT, Inc., a subsidiary of ACI. Pursuant to § 2.4 of the

Agreement, EFT agreed to "assume, pay, perform and discharge the Liabilities" of Old JBA except for certain specified liabilities for such items as unpaid taxes, contingent liabilities, and liabilities owed by Old JBA to its shareholders, officers, and directors. The term "liabilities" is defined in the Agreement as "any indebtedness, obligation, contract, guaranty, endorsement, and liability of [Old JBA's] existing at the Closing Date."

Several additional documents were also dated April 3, 1984, including Old JBA's assignment of the lease to EFT, which was conditioned upon PIGOMA's consent and the release of Old JBA from further liability on the lease. The assignment contained a further condition that EFT would expressly assume all liability on the lease from and after the date of the assignment. PIGOMA signed a "Consent to Assignment and Release" in which it consented to Old JBA's assignment of the lease upon the condition that EFT "shall assume and agree to perform and to make all payments under and upon said Lease from and after April 1, 1984." EFT executed an "Acceptance of Assignment and Assumption" in which it agreed to make all payments under the lease "due and to become due from and after April 1, 1984." These documents dated April 3, 1984, along with a copy of the lease, were included at tab 10 of a large bound volume entitled "Purchase of Assets of JBA, Inc. by EFT, Inc." (exhibit 1).

Also executed on April 3, 1984, and included in exhibit 1 was a "Guaranty Agreement" in which ACI guaranteed to Old JBA *and its shareholders* "the full, prompt and satisfactory payment and performance of the Agreement and all other agreements and promissory notes required under the Agreement to be paid and performed by [EFT] in accordance with their respective terms and conditions." The Guaranty Agreement provided that "[t]he liability and obligation of Guarantor [ACI] under this Guaranty Agreement shall be absolute and unconditional and shall remain in full force and effect until [EFT's] liability to [Old JBA] and/or Shareholders has been completely discharged."

EFT subsequently changed its name to JBA, Inc. JBA, Inc., performed under the lease until October 1987. By letter dated

October 27, 1987, JBA, Inc., gave notice to PIGOMA that it intended to vacate the property. Thereafter, JBA, Inc., made no payments under the lease. On August 25, 1988, the district court for Douglas County entered a declaratory judgment that JBA, Inc., was in breach of the lease. On December 20, 1988, the court entered a partial summary judgment in favor of PIGOMA and against JBA, Inc., in the amount of $124,248.23, representing damages for rent, maintenance, and utility bills that had accrued under the lease through September 30, 1988. No appeal was taken from either of those partial summary judgments, and they became final. See *Properties Inv. Group v. JBA, Inc., ante* p. 439, 495 N.W.2d 624 (1993).

On January 12, 1990, in a third partial summary judgment, the trial court awarded PIGOMA $141,308.87, representing damages that had accrued between September 30, 1988, and September 30, 1989. The trial court again retained jurisdiction to ascertain and enter judgment for any damages accruing after September 30, 1989. The third partial summary judgment has been affirmed on appeal to this court. See *id.*

The lawsuit involved here against ACI was filed January 25, 1989. In it, in their first cause of action, PIGOMA and the Individual Appellees requested that judgment be entered declaring PIGOMA to be a third-party beneficiary of the Guaranty Agreement and therefore entitled to enforce and receive the benefits of its provisions. The appellees also requested that judgment be entered "on behalf of [PIGOMA] in the amount of its damages resulting from the breach of [the lease] and [the Acceptance of Assignment and Assumption] by ACI's wholly owned subsidiary [JBA, Inc.]."

In their second cause of action, the appellees requested the court to enter judgment declaring that the Individual Appellees, individually and collectively, are entitled to enforce and require ACI to perform under the Guaranty Agreement and to make payment to PIGOMA in the amount of its damages resulting from the breach by JBA, Inc., of the lease and the Acceptance of Assignment and Assumption.

After a bench trial, the district court entered a declaratory judgment finding, in part, that (1) EFT expressly agreed to

assume Old JBA's obligation under the lease through the assignment, consent, and acceptance documents found at tab 10 of exhibit 1; (2) ACI guaranteed " 'all agreements . . . required or contemplated by said agreement to be paid or performed by [EFT]' " (emphasis in original); (3) ACI has a vested interest and an economic concern in regard to the performance of all the parties; (4) the terms of the Guaranty Agreement are unambiguous when read in conjunction with the Agreement, tab 10, and the lease; (5) the language in the recitals of the Guaranty Agreement is "strong evidence of the parties['] intent when the promissory language is ambiguous"; (6) although PIGOMA and the Individual Appellees were not parties to the Guaranty Agreement, they are third-party beneficiaries of the contract; (7) the parties intended for the lease payments to be guaranteed by ACI; and (8) ACI is obligated to PIGOMA and the Individual Appellees on the Guaranty Agreement in regard to the lease in the amount of $294,733.71.

ASSIGNMENTS OF ERROR

Condensed, ACI's assignments of error claim that the district court erred in concluding that (1) PIGOMA and the Individual Appellees could sue to enforce the terms of the Guaranty Agreement, (2) ACI is obligated under the lease through the Guaranty Agreement, (3) the several documents executed by the parties constituted one agreement, (4) the PIGOMA lease was assigned to and assumed by EFT by the terms of the Agreement, and (5) the Guaranty Agreement had not expired by its terms by the time EFT had defaulted on the lease. ACI also complains that the judgment of the trial court is not supported by the evidence and is contrary to law. Appellant has made no complaint as to the amount of the judgment.

STANDARD OF REVIEW

An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989) is sui generis. Whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The essence of the dispute before us sounds in contract. That being so, the action is to be treated as one at law. *Perry v. Esch*, 240

Neb. 289, 481 N.W.2d 431 (1992).

In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh the 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. *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.* When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusions independent from the conclusions reached by the trial court with regard to these questions. See *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992).

STANDING

The Guaranty Agreement was signed by George Haddix, president of ACI; Jorgensen as president of Old JBA; the Individual Appellees as shareholders of Old JBA; and by Neal Hansen, who had been given an ownership position in Old JBA immediately prior to the closing as compensation for "bringing some of the transaction together." The identical signatures are present on the Agreement.

ACI argues that (1) PIGOMA, as a partnership, is an entity separate from the individual partners; (2) Old JBA and PIGOMA were separate entities, despite sharing some common partners or shareholders; and (3) the individual partners signed the Agreement and the Guaranty Agreement as officers and shareholders of Old JBA, not as partners of PIGOMA. ACI claims that for these reasons, PIGOMA and the Individual Appellees were not parties to the Agreement or the Guaranty Agreement and may not sue to enforce the agreements' terms.

The district court agreed that "[PIGOMA and the Individual Appellees] are not parties to the guaranty." However, the court held that "[t]he creditor beneficiary contract arises when another person (promisor-ACI) promises the debtor (promisee-Old JBA, EFT etc[.]) to pay the debtors['] debt to the creditor (PIGOMA)."

In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). We have stated that

> " '[a] third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. . . .' "

Osmond State Bank v. Uecker Grain, 227 Neb. 636, 639, 419 N.W.2d 518, 520 (1988).

The documents received in evidence reflect, by reasonable intendment, that the rights and interests of PIGOMA and the Individual Appellees were contemplated in the Guaranty Agreement and that provision was made for them. Such a conclusion is inherent in the trial court's judgment in favor of the appellees. The Guaranty Agreement provides that ACI guarantees, in part, the payment and performance of the Agreement "*and all other agreements and promissory notes required under the Agreement to be paid and performed by [EFT]*." (Emphasis supplied.) The Agreement, in turn, requires EFT to assume and pay, among other things, any obligation, contract, or liability of Old JBA's existing at the closing date. It also states that Old JBA is not a party to any written or oral lease "[e]xcept as listed and described in Schedule 5.18" of the Agreement. Included in Schedule 5.18 is a copy of the lease between PIGOMA and Old JBA. Section 12.13 of the Agreement provides that "[a]ll Exhibits and Schedules referred to herein are intended to be and hereby are specifically made a part of this Agreement."

ACI contends that the trial court erroneously relied on

language contained in the "Recitals" portion of the Guaranty Agreement. This portion of the Guaranty Agreement provides that

> a. EFT . . . was formed for the express purpose of acquiring all of the assets of [Old JBA] and, accordingly, [ACI] has a financial interest in [EFT] and is willing to give this Guaranty Agreement in order to induce [Old JBA] and Shareholders to enter into an Agreement for the Sale and Purchase of Assets with [EFT] contemporaneously with this Guaranty.
>
> b. [Old JBA] and Shareholders will execute and deliver the Agreement only if the payment thereunder and the performance thereof, including the payment and performance of all agreements and promissory notes required by said Agreement to be executed, delivered, paid and performed by [EFT], shall have been guaranteed by [ACI].
>
> c. [ACI] is willing to guarantee to [Old JBA] and Shareholders the full, prompt and satisfactory performance by [EFT] under the Agreement and all agreements and promissory notes required or contemplated by said Agreement to be paid or performed by [EFT].

Citing *McKinnon v. Baker*, 220 Neb. 314, 370 N.W.2d 492 (1985), the trial court's order states that the "recitals [in the Guaranty Agreement] are to be used as strong evidence of the parties['] intent *when the promissory language is ambiguous, as at least arguably claimed by [ACI]*." (Emphasis supplied.) In our latest pronouncement on recitals, *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986), without reference to ambiguity, but quoting *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 149 N.W.2d 344 (1967), we stated, "*Recitals*, however, *may be looked to 'in determining* the proper construction of the contract or *the intention of the parties*.' " (Emphasis supplied.) 221 Neb. at 797, 381 N.W.2d at 113. In *Strickland*, we declared that "[a] written contract expressed in unambiguous terms is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents." 181 Neb. at 484, 149

N.W.2d at 351. We further held that "[r]ecitals as a general rule are not strictly any part of a contract although *they may be looked to in determining* the proper construction of the contract or *the intention of the parties*." (Emphasis supplied.) *Id.*

The trial court was not clearly wrong in finding that ACI intended to guarantee EFT's performance under the Agreement and any other agreement required by the Agreement in order to induce Old JBA to enter the Agreement. In this case, whether considered with or without the recitals, the Guaranty Agreement and other relevant documents clearly set forth the intent of ACI to guarantee EFT's performance under the Agreement and under any other agreement required by the Agreement in order to induce Old JBA to enter into the Agreement. The lease between PIGOMA and Old JBA was a part of the Agreement, and the documents at tab 10 were agreements required by the Agreement. The liability of ACI under the lease affirmatively appears from the language of the Guaranty Agreement.

Nevertheless, ACI argues that certain language contained in the Agreement indicates that it was not the parties' intent to benefit PIGOMA. Section 12.11 provides that "[t]he representations, warranties, covenants and agreements contained in this Agreement are for the sole benefit of the parties hereto and their successors and assigns, and they shall not be construed as conferring and are not intended to confer any rights on any other persons." This argument is without merit. The trial court was not clearly wrong in finding that although not signatories to the Agreement, as third-party beneficiaries, PIGOMA and the Individual Appellees are parties within the meaning of § 12.11 of the Agreement. As previously stated, the Individual Appellees signed the Agreement as shareholders of Old JBA, and in addition, Jorgensen executed the Agreement as Old JBA's president. In *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983), we construed the terms of an agreement which required minority shareholders to offer their stock in equal shares to majority shareholders Davis and Lauritzen. Paragraph 6 of that agreement stated that its provisions were " 'binding upon and

shall inure to the benefit of the executors, administrators, personal representatives, heirs or successors of the parties to this agreement. . . .' " *Id.* at 555, 335 N.W.2d at 525. We stated that although Davis and Lauritzen were not signatories to the agreement, "they were unquestionably 'parties' to the agreement. It seems clear beyond argument that Davis and Lauritzen were . . . parties within its meaning in paragraph 6 of the . . . agreement." *Id.* at 557, 335 N.W.2d at 526. PIGOMA and the Individual Appellees had a right, as third-party beneficiaries of the Guaranty Agreement, to sue ACI when JBA, Inc., abandoned the warehouse property and refused to fulfill its obligations under the lease.

ACI objects to the admission into evidence of ACI's annual reports for the years 1984 and 1985. Both reports state that "*ACI leases a facility from former owners of JBA, who are now employees of ACI.*" (Emphasis supplied.) The reports also relate the amount of monthly rental on the lease and the length of the remaining lease term. At trial, Jorgensen testified that the facility referred to in the reports was the property involved in the PIGOMA lease. Even without these statements against the interest of ACI, the evidence is more than sufficient for a fact finder to hold that ACI intended to, and did in fact, guarantee the lease payments required of JBA, Inc. Therefore, admission of the reports was, at most, harmless error.

CONSTRUCTION OF DOCUMENTS

ACI maintains that "the lease was assumed by EFT as the result of a separate series of agreements, found under Tab 10 of Exhibit 1, which were neither referred to nor incorporated into the Agreement." Brief for appellant at 15-16. At trial, Jorgensen, one of the signatories to the Guaranty Agreement and the Agreement, testified that all of the documents dated April 3, 1984, were signed on that date in the conference room of the attorneys representing ACI. He stated that "they were all laid out on a conference room table and we had kind of a signing ceremony. We went through the line and signed them all as a part of the purchase." According to Jorgensen, the instruments were subsequently bound into a volume (exhibit 1) at the direction of attorneys of the law firm of Erickson &

Sederstrom, P.C., which, it appears, represented the purchaser. In the present proceedings, the law firm of Erickson & Sederstrom represents ACI, the parent company of EFT, the name of which was changed to JBA, Inc.

The documents contained at tab 10 of exhibit 1 refer to the PIGOMA lease, which was incorporated into the Agreement through Schedule 5.18. Instruments made in reference to and as a part of a transaction should be considered and construed together. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992).

In *Kearney Centre Inv. v. Thomas*, 229 Neb. 21, 424 N.W.2d 620 (1988), a lessor sued to collect damages for breach of a lease from the alleged guarantors of the lease. During the course of the trial, there was a dispute in the evidence surrounding the execution of the lease and guaranty, the effect of the guaranty, and whether the lessor was the real party in interest. This court stated that

> there is sufficient evidence for the trial court to have found that this instrument was physically attached to the lease between [the original lessor and the lessee] at the time that it was executed by the lessee. As such, it became a part of the lease. The fact that the name of the lessee did not appear in the body of the guaranty is of no material consequence. By reading both documents as one instrument, there could be no question that the guaranty was given by [the alleged guarantors] to guarantee the performance of [the lessee]. Moreover, there is sufficient evidence for the trial court to have found that the lease and guaranty were executed in the course of the same transaction, and at the same time.

Id. at 26, 424 N.W.2d at 623. Similarly, in the case under consideration, the Guaranty Agreement; the documents at tab 10; and the Agreement, which included a copy of the PIGOMA lease, although not bound together at the time of the execution, were subsequently caused to be bound together by the purchaser's attorneys. In addition, the assignment, consent, and acceptance documents regarding the lease, Agreement, and Guaranty Agreement were all executed in the course of the same transaction and at the same time. The trial court was not clearly

wrong in holding that all of the documents were a part of one transaction. There is no merit to ACI's contention that the various documents should be construed separately. See, also, *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 380 N.W.2d 631 (1986) (guaranty agreement which was attached with Scotch tape to sales agreement by guarantors or their attorney was part of the sales agreement).

Finally, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. *Kearney Centre Inv. v. Thomas, supra*. The Agreement and the Guaranty Agreement were both executed by the identical parties, including Haddix as president of ACI. The Acceptance of Assignment and Assumption, in which EFT agreed to perform under the PIGOMA lease, was executed by Haddix as president of EFT, a wholly owned subsidiary of ACI. These instruments were executed in the course of the same transaction on April 3, 1984, for the purpose of selling the assets of Old JBA to EFT, which subsequently changed its name to JBA, Inc. The trial court was not clearly wrong in construing the documents together.

ACI argues that the trial court erred in concluding that the PIGOMA lease was assigned to, and assumed by, EFT by the terms of the Agreement. ACI asserts that the lease was not a "liability" as defined by § 1.7 of the Agreement because the word "lease" did not appear in the definition. ACI claims that although a lease is a "specie of 'contract,' " brief for appellant at 16, its omission from the definition of liabilities is significant because the word "lease" appears elsewhere in the document. According to ACI, "the logical conclusion . . . is that the parties intended to treat leases differently than general liabilities assumed under . . . the Agreement." Brief for appellant at 17. We disagree. The Agreement clearly specifies that *any* contract of Old JBA's which existed at the closing date was a liability and that EFT would assume, pay, perform, and discharge the liabilities.

ACI argues that the lease was not an obligation of Old JBA's

"existing at the Closing Date" because the closing date of the Agreement and the Guaranty Agreement was April 3, 1984, and the documents appearing at tab 10 which relate to the assignment and assumption of the lease were expressly made retroactive to April 1, 1984. Therefore, according to ACI, Old JBA "had no existing obligation or liability for the lease and the lease could not have been a 'liability' as that term was used in [the Agreement]." Brief for appellant at 17. This argument has no merit. Jorgensen testified that the closing was originally scheduled to take place on April 1, but that the paperwork was not completed at that time. He said that the closing date was moved back to April 2 and then finally to April 3. The documents appearing at tab 10 were not signed until April 3. Because the documents were not signed until the closing on April 3, Old JBA was still liable under the lease at the time of the closing, despite the documents' being made retroactive to April 1.

For support of its position, ACI relies upon § 11.4 of the Agreement, which provides that "[t]o the extent that the assignment of any . . . lease . . . to be assigned to [EFT] shall require the consent of the other party thereto, this Agreement shall not constitute an agreement to assign the same if an attempted assignment would constitute a breach thereof." ACI claims that an attempted assignment of the lease by Old JBA without first obtaining the written consent of PIGOMA would constitute a breach of the lease agreement and that therefore the Agreement did not constitute an assignment of the lease to EFT. However, during the signing of all of the documents, PIGOMA did execute a consent to the assignment of the lease to EFT. Its consent, in writing, is found with the group of documents located at tab 10 in exhibit 1.

DURATION OF GUARANTY AGREEMENT

Paragraph 2 of the Guaranty Agreement states that "[t]he liability and obligation of [ACI] under this Guaranty Agreement shall be absolute and unconditional and shall remain in full force and effect *until* [*EFT's*] *liability to* [*Old JBA*] *and/or Shareholders* has been completely discharged." (Emphasis supplied.) ACI argues (1) that the only liabilities

created by the agreements running from EFT to Old JBA were the commitments to assume the lease and to indemnify Old JBA for any liability and (2) that these liabilities of EFT's ran to PIGOMA, not to Old JBA. Therefore, according to ACI, EFT fulfilled its commitment to Old JBA when it executed the assumption agreement on April 3, 1984. Because PIGOMA also released Old JBA from liability on the lease and has never pursued Old JBA for payment, ACI claims that EFT's liability to Old JBA has been completely discharged and that the Guaranty Agreement has expired by its own terms.

In the Acceptance of Assignment and Assumption, located at tab 10, EFT agreed as part of the consideration for the assignment of the PIGOMA lease to "assume and agree to make all payments due and to become due from and after April 1, 1984 and to perform all of the covenants and conditions of the [PIGOMA] Lease." By the clear terms of this document, EFT's liability to Old JBA and its shareholders is not discharged until the lease term expires. ACI's obligations under the Guaranty Agreement regarding the lease were not discharged with execution of the assumption agreement. This assignment of error by ACI is without merit.

SUFFICIENCY OF EVIDENCE

ACI's claim that the judgment of the trial court is not supported by the evidence and is contrary to law also has no merit. The evidence clearly reflects that the parties intended that the lease payments be guaranteed by ACI. The trial court's factual findings were not clearly erroneous and will not be set aside.

The trial court was correct in construing the documents together and in finding that PIGOMA and the Individual Appellees have standing as third-party beneficiaries to enforce the terms of the Agreement and Guaranty Agreement. The judgment of the trial court must be affirmed.

AFFIRMED.

WHITE, J., not participating.