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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 28, 1994 and MAY 26, 1994

IN THE

Supreme Court of Nebraska

VOLUME CCXLV

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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DALE E. FAHRNBRUCH, Associate Justice
DAVID J. LANPHIER, Associate Justice
JOHN F. WRIGHT, Associate Justice[1]

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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WILLIAM M. CONNOLLY, Associate Judge
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge
WESLEY C. MUES, Associate Judge[2]

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

[1]Appointed January 27, 1994
[2]Appointed April 22, 1994

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
		James M. Murphy	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
		Gerald E. Moran	Omaha
		Michael W. Amdor	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 Darvid D. Quist Maurice Redmond	Fremont Blair Dakota City
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 and Hall	John P. Icenogle James Livingston	Kearney 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	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
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	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
		Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn	Neligh
		Philip R. Riley	Creighton
		Richard W. Krepela	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philp M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
		Jack Robert Ott	Hastings
		Daniel Bryan, Jr.	Geneva
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C. G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Colleen R. Buckley	Omaha
	Douglas F. Johnson	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Ben Novicoff	Lincoln
Paul E. LeClair	Omaha
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Joseph S. Ramirez	Lincoln
Ronald L. Brown	Lincoln

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No. S-92-564: **Lowe v. Lowe.** Reversed. Hastings, C.J.

No. S-92-1017: **Sick v. Sick.** Affirmed. Wright, J. Fahrnbruch, J., dissenting.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-91-875: **Hampton v. State.** Stipulation allowed; appeal dismissed.

No. S-91-876: **Hampton v. State.** Stipulation allowed; appeal dismissed.

No. S-91-1172: **Nebraska State Hist. Soc. v. Pawnee Tribe of Okla.** Stipulation allowed; appeal dismissed.

No. S-91-1247: **Morgan v. Morgan.** Stipulation considered; appeal to Nebraska Supreme Court dismissed.

No. S-92-291: **McMaster Grain Co. v. Mid-America Steel Structures.** Stipulation allowed; appeal dismissed.

No. S-92-707: **In re Estate of Beaman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-92-827: **Johnson v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. S-92-926: **State on behalf of Green v. Wolf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-92-1006: **Tyler v. Nebraska Commissioner of Labor.** Stipulation allowed; appeal dismissed.

No. S-92-1045: **Coastal Mart, Inc. v. City of Omaha.** Stipulation allowed; appeal dismissed at cost of appellant.

No. S-92-1046: **Coastal Mart, Inc. v. City of Omaha.** Stipulation allowed; appeal dismissed at cost of appellant.

No. S-92-1047: **Coastal Mart, Inc. v. City of Omaha.** Stipulation allowed; appeal dismissed at cost of appellant.

No. S-92-1152: **Hairston v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. S-93-589: **State ex rel. NSBA v. Wechsler.** Judgment of disbarment.

No. S-93-703: **Gra-Gar, Inc. v. Sarpy Cty. Bd. of Equal.** Appeal dismissed. See Rule 7A(2) and *John Day Co. v. Douglas Cty. Bd. of Equal.*, 243 Neb. 24, 497 N.W.2d 65 (1993).

No. S-93-707: **Helvey v. Dawson Cty. Bd. of Equal.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-765: **Russell v. Rohrs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-93-979: **Werner Enterprises v. Sarpy Cty. Bd. of Equal.** Motion of appellee for summary dismissal sustained for want of jurisdiction. See *John Day Co. v. Douglas Cty. Bd. of Equal.*, 243 Neb. 24, 497 N.W.2d 65 (1993).

No. S-93-989: **State v. Hall.** By order of the court, appeal dismissed for failure to file briefs.

No. S-94-122: **State v. Otey.** Stipulation filed April 8, 1994, allowed; appeal dismissed.

No. S-94-171: **State ex rel. NSBA v. Woodard.** Judgment of suspension.

No. S-94-219: **State ex rel. NSBA v. Mehmken.** Judgment of suspension.

No. S-94-265: **State ex rel. NSBA v. Blackstone.** Judgment of suspension.

No. S-94-326: **State ex rel. NSBA v. Peartree.** Cause having not been shown, respondent suspended from the practice of law until further order of the court.

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-88-523: **State v. King**, 94 NCA No. 2. Petition of appellant for further review overruled on March 16, 1994.

No. A-91-930: **Amick v. Welsh**, 94 NCA No. 8. Petition of appellant for further review overruled on April 13, 1994.

No. A-91-1171: **Smith v. Smith.** Petition of appellant for further review overruled on February 10, 1994.

No. S-91-1207: **Long v. Hacker**, 93 NCA No. 42. Petition of appellant for further review sustained on January 26, 1994.

No. A-91-1229: **State v. Thompson**, 93 NCA No. 50. Petition of appellant for further review overruled on February 16, 1994.

No. A-91-1239: **State v. Harper**, 2 Neb. App. 220 (1993). Petition of appellant for further review overruled on January 26, 1994.

No. A-91-1239: **State v. Harper**, 2 Neb. App. 220 (1993). Petition of appellee for further review overruled on January 26, 1994.

No. A-92-055: **Leu v. Littell**, 2 Neb. App. 323 (1993). Petition of appellant for further review overruled on February 16, 1994.

No. A-92-055: **Leu v. Littell**, 2 Neb. App. 323 (1993). Petition of appellee for further review overruled on February 16, 1994.

No. A-92-090: **Houston v. Nebraska Liquor Control Comm.**, 94 NCA No. 10. Petition of appellant for further review overruled on April 27, 1994.

No. A-92-096: **Luster v. Lancaster Cty.**, 93 NCA No. 47. Petition of appellant for further review overruled on March 2, 1994.

No. A-92-097: **Central Ice Machine Co. v. Cole**, 2 Neb. App. 282 (1993). Petition of appellant for further review overruled on February 10, 1994.

No. S-92-204: **Boyles v. Hausmann**, 2 Neb. App. 388 (1993). Petition of appellees for further review sustained on February 16, 1994.

No. S-92-209: **Berumen v. Casady**, 93 NCA No. 49. Petition of appellant for further review sustained on January 26, 1994.

No. A-92-257: **Nucor Steel v. Balka**, 2 Neb. App. 138 (1993). Petition of appellant for further review overruled on March 30, 1994.

No. A-92-265: **Phelps County v. Anderson**, 2 Neb. App. 236 (1993). Petition of appellant for further review overruled on March 23, 1994.

No. A-92-281: **Thorne v. Omaha Pub. Power Dist.**, 2 Neb. App. 437 (1994). Petition of appellee Fuel Economy Contracting Co. for further review overruled on March 23, 1994.

No. A-92-281: **Thorne v. Omaha Pub. Power Dist.**, 2 Neb. App. 437 (1994). Petition of appellee Omaha Public Power District for further review overruled on March 23, 1994.

No. A-92-293: **Barthel v. Liermann**, 2 Neb. App. 347 (1993). Petition of appellee for further review overruled on March 23, 1994.

No. A-92-295: **Bode v. Monahan, Inc.**, 94 NCA No. 7. Petition of appellant for further review overruled on March 30, 1994.

No. S-92-317: **Trailblazer Pipeline Co. v. Balka**, 93 NCA No. 49. Petition of appellants for further review sustained on March 16, 1994.

No. A-92-339: **Empire Fire & Marine Ins. Co. v. Michigan Mut. Ins. Co.**, 93 NCA No. 52. Petition of appellant for further review overruled on February 10, 1994.

No. S-92-470: **State v. Keith**, 4 NCA 313 (1993). Petition of appellee for further review dismissed on March 16, 1994, as having been improvidently granted. See S-92-470, *State v. Keith*, vol. 244, Cumulative List of Cases on Petition for Further Review.

No. A-92-471: **Zyburo v. Board of Education**, 94 NCA No. 9. Petition of appellant for further review overruled on April 13, 1994.

No. S-92-534: **In re Estate of Hannan**, 2 Neb. App. 636 (1994). Petition of appellee for further review sustained on May 11, 1994.

No. A-92-537: **Hood v. Cerny**, 93 NCA No. 47. Petition of appellant for further review overruled on February 10, 1994.

No. A-92-544: **State v. Nazeck.** Petition of appellant for further review overruled on January 20, 1994.

No. A-92-592: **Metco, Inc. v. Huffman**, 2 Neb. App. 506 (1994). Petition of appellee for further review overruled on April 20, 1994.

No. A-92-695: **State v. Cullen**, 94 NCA No. 6. Petition of appellant for further review overruled on April 27, 1994.

No. A-92-716: **Pierce v. Shera**, 94 NCA No. 10. Petition of appellant for further review overruled on March 30, 1994.

No. A-92-818: **Hood v. Cerny.** Petition of appellant for further review overruled as moot on February 10, 1994.

No. S-92-954: **State v. Edwards**, 2 Neb. App. 149 (1993). Petition of appellee for further review dismissed on May 4, 1994, as having been improvidently granted. See S-92-954, *State v. Edwards*, vol. 244, Cumulative List of Cases on Petition for Further Review.

No. A-92-956: **In re Interest of D.H.**, 94 NCA No. 7. Petition of appellant for further review overruled on April 27, 1994, as filed out of time.

No. S-92-1039: **State v. Roche, Inc.**, 2 Neb. App. 445 (1994). Petition of appellant for further review sustained on March 30, 1994.

No. S-92-1039: **State v. Roche, Inc.**, 2 Neb. App. 445 (1994). Petition of appellee for further review sustained on March 30, 1994.

No. S-92-1095: **State v. Woods**, 94 NCA No. 8. Petition of appellant for further review sustained on April 27, 1994.

No. A-92-1126: **State v. Bundy**, 94 NCA No. 1. Petition of appellant for further review overruled on February 24, 1994.

No. A-92-1136: **State v. Moore**, 2 Neb. App. 206 (1993). Petition of appellant for further review overruled on March 23, 1994.

No. A-92-1172: **State v. McGee.** Petition of appellant for further review overruled on February 16, 1994.

No. S-92-1180: **State v. Fahlk**, 2 Neb. App. 421 (1993). Petition of appellant for further review sustained on April 20, 1994.

No. A-93-057: **State v. Rodgers**, 2 Neb. App. 360 (1993). Petition of appellant for further review overruled on February 10, 1994.

No. A-93-066: **Eichorn v. Eichorn Trucking.** Petition of appellee Eichorn Trucking for further review overruled on February 16, 1994.

No. A-93-066: **Eichorn v. Eichorn Trucking.** Petition of appellee Second Injury Fund for further review overruled on February 16, 1994.

No. S-93-114: **Kelly v. Kelly**, 2 Neb. App. 399 (1993). Petition of appellant for further review sustained on February 10, 1994.

No. A-93-206: **State v. Richmond**, 93 NCA No. 50. Petition of appellant for further review overruled on February 10, 1994.

No. A-93-219: **State v. Harris**, 2 Neb. App. 692 (1994). Petition of appellant for further review overruled on May 11, 1994.

No. A-93-268: **Uhing v. Heimes.** Petition of appellant for further review overruled on February 24, 1994.

No. A-93-291: **Behrens v. American Stores Packing Co.**, 94 NCA No. 9. Petition of appellant for further review overruled on April 20, 1994.

Nos. A-93-298, A-93-299: **State v. Rath**, 94 NCA No. 6. Petition of appellant for further review overruled on March 30, 1994.

No. A-93-309: **In re Interest of Ammons.** Petition of appellant for further review overruled on March 16, 1994.

No. A-93-374: **State v. Grotzky.** Petition of appellant for further review overruled on January 20, 1994.

No. A-93-376: **Fieldgrove v. Donscheski.** Petition of appellant for further review overruled on March 23, 1994.

No. A-93-385: **State v. Trackwell**, 94 NCA No. 5. Petition of appellant for further review overruled on March 30, 1994.

No. A-93-386: **Jacob v. Columbia Ins. Group**, 2 Neb. App. 473 (1994). Petition of appellee for further review overruled on April 20, 1994.

No. A-93-387: **State v. Cross**, 94 NCA No. 10. Petition of appellant for further review overruled on April 20, 1994.

No. S-93-396: **State v. Dawn.** Petition of appellant for further review sustained on March 30, 1994.

No. A-93-406: **State v. Scaglione**, 94 NCA No. 4. Petition of appellant for further review overruled on March 2, 1994.

No. A-93-419: **State v. Kolar.** Petition of appellant for further review overruled on March 30, 1994.

No. A-93-436: **Bartunek v. Geo. A. Hormel & Co.**, 2 Neb. App. 598 (1994). Petition of appellant for further review overruled on April 20, 1994.

No. A-93-512: **State v. Schmidt**, 94 NCA No. 6. Petition of appellant for further review overruled on March 23, 1994.

No. A-93-531: **State v. Edwards.** Petition of appellant for further review overruled on March 16, 1994.

No. A-93-540: **McLaughlin v. Swift-Eckrich, Inc.**, 94 NCA No. 4. Petition of appellant for further review overruled on March 30, 1994.

No. S-93-549: **State v. Long.** Petition of appellant for further review dismissed on April 13, 1994, as having been improvidently granted. See S-93-549, *State v. Long*, vol. 244, Cumulative List of Cases on Petition for Further Review.

No. A-93-553: **In re Interest of Dickey.** Petition of appellant for further review overruled on January 20, 1994.

No. A-93-571: **State v. Carman**, 94 NCA No. 6. Petition of appellee for further review overruled on March 30, 1994.

No. A-93-588: **State v. Picket Pin**, 94 NCA No. 10. Petition of appellant for further review overruled on April 27, 1994.

No. A-93-656: **Pearson v. Lincoln Telephone Co.**, 2 Neb. App. 703 (1994). Petition of appellee for further review overruled on May 11, 1994.

No. S-93-666: **State v. Reynolds**, 94 NCA No. 11. Petition of appellant for further review sustained on May 11, 1994.

No. A-93-688: **State v. Brewer.** Petition of appellant for further review overruled on February 16, 1994.

No. A-93-689: **State v. Brewer.** Petition of appellant for further review overruled on February 16, 1994.

No. A-93-786: **Cole v. McCall.** Petition of appellant for further review overruled on February 16, 1994.

No. A-93-843: **In re Interest of Dickson.** Petition of appellant for further review overruled on May 11, 1994.

No. A-93-959: **Northern Bank v. Dowd.** Petition of appellant for further review overruled on February 10, 1994.

No. A-94-025: **Tomlin v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 2, 1994.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JAMES P. HEALY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF SHERRY L. HEALY, AND JAMES P. HEALY, INDIVIDUALLY, APPELLANT, V. ROBERT M. LANGDON, M.D., APPELLEE.

511 N.W.2d 498

Filed January 28, 1994. No. S-91-1206.

1. **Summary Judgment.** Summary judgment is proper 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. _____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. _____: _____. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
5. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
6. **Malpractice: Limitations of Actions.** In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.
7. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.

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

Jeffrey A. Silver for appellant.

Joseph F. Bataillon, of Sodoro, Daly & Sodoro, for appellee.

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

WHITE, J.

Appellant, James P. Healy, filed a wrongful death action against appellee, Dr. Robert M. Langdon. James Healy alleged that Dr. Langdon had negligently failed to warn the decedent, Sherry L. Healy, of the potential side effects of her chemotherapy regimen. The district court granted Dr. Langdon's motion for summary judgment, finding that the action was barred by the statute of limitations. We reverse the decision of the district court and remand the cause for further proceedings.

In September 1987, after a diagnosis of cancer and the surgical removal of a tumor, Sherry Healy began chemotherapy under the care of Dr. Langdon. The chemotherapy was to include a scheduled nine doses of the drug bleomycin.

On November 25, Sherry Healy received the seventh dose. On December 4, when she was to receive the eighth dose, Sherry Healy told Dr. Langdon that she was experiencing a tight chest and shortness of breath. Dr. Langdon suspected that she might be suffering from an inflammation of the lungs caused by the bleomycin. Dr. Langdon withheld the eighth dose of bleomycin and began monitoring Sherry Healy's lung condition.

Despite Dr. Langdon's efforts, Sherry Healy's lung condition worsened. On December 29, her right lung collapsed and she was admitted to the hospital.

Sherry Healy died on January 22, 1988. According to Dr. Langdon, the autopsy revealed no sign of active cancer, but did reveal scarring of the lung tissue. In Dr. Langdon's opinion, Sherry Healy's death was caused by "bleomycin lung."

James Healy, Sherry Healy's husband, filed this wrongful death action pursuant to Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 1989) on January 19, 1990. Dr. Langdon filed an answer denying any negligence and alleging that the action was time-barred. Dr. Langdon then moved for summary judgment.

Dr. Langdon contended that the action was barred by the professional malpractice statute of limitations found in the

Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2828 (Reissue 1988). James Healy contended that the action was allowed by the wrongful death statute of limitations, § 30-810. Although both statutes provide for a 2-year limitation period, the professional malpractice limitation period begins to run at the time of the malpractice, while the wrongful death limitation period begins to run at the date of death. §§ 30-810 and 44-2828.

The district court found that the action was governed by the professional malpractice statute of limitations. The district court also found that the action did not fall within the continuing treatment exception to the professional malpractice statute of limitations. The district court determined that the statute of limitations began to run on the date of Sherry Healy's final bleomycin treatment, November 25, 1987. The district court thus concluded that the action was time-barred.

James Healy appeals from the district court's order granting summary judgment to Dr. Langdon. He asserts that the district court erred (1) in failing to apply the wrongful death statute of limitations and (2) in failing to apply the continuing treatment exception to the professional malpractice statute of limitations.

Summary judgment is proper 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. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993); *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

" 'On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.' " *Quality Equip. Co. v. Transamerica Ins. Co.*, 243 Neb. 786, 789-90, 502 N.W.2d 488, 491 (1993). Accord *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Transamerica Commercial Fin. Corp. v. Rochford*, 244 Neb.

802, 509 N.W.2d 214 (1993); *VonSeggern, supra*. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Transamerica Commercial Fin. Corp., supra*; *VonSeggern, supra*.

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *VonSeggern, supra*; *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993).

Dr. Langdon argues that he is entitled to summary judgment because the present action is barred by the professional malpractice statute of limitations. We disagree.

In the professional malpractice context, Nebraska generally follows the occurrence rule. *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). That is, a professional malpractice cause of action accrues and the statute of limitations begins to run when the allegedly wrongful act or omission occurs. § 44-2828. See, also, Neb. Rev. Stat. § 25-208 (Reissue 1989). In 1941, however, we carved out an exception to the occurrence rule: the continuing treatment exception. See *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941). See, also, *Tiwald, supra*; *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983). Under the continuing treatment exception, the statute of limitations does not begin to run "until the act complained of, *and any resulting subsequent treatment therefor*, is completed." (Emphasis supplied.) *Smith*, 214 Neb. at 609-10, 335 N.W.2d at 533.

This court recognized the continuing treatment exception because the exception aided both patients and physicians:

> [I]t is just to the physician and surgeon that he may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and treatment necessary

> and to correct the ordinary and usual mistakes incident to even skilled surgery. The [continuing treatment exception] is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased.

Williams, 140 Neb. at 662-63, 1 N.W.2d at 124. We have continued to recognize both the exception and the benefits it provides. See *Smith, supra*.

More recently, this court has merged the continuing treatment exception into the occurrence rule and has enunciated the following general rule: In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed. *Ourada v. Cochran*, 234 Neb. 63, 449 N.W.2d 211 (1989); *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986).

This case presents us with our first opportunity to apply the above-stated general rule to a failure-to-warn claim. We are guided, however, by two earlier failure-to-warn cases in which we considered the continuing treatment exception: *Smith, supra*, and *Tiwald, supra*. The facts of these two cases are strikingly similar. Both patients sought treatment for allergies, both patients were not warned that the treatments could lead to cancer, and both patients later developed cancer, allegedly as a result of the unwarned treatments. See, *Tiwald, supra*; *Smith, supra*.

In *Smith*, the patient received a series of allergy treatments which included injecting x-ray radiation particles into the patient's chest. The final such treatment occurred in 1970. The patient was subsequently examined by the physician in 1972. The patient filed suit in 1981, and the physician demurred. We sustained the demurrer because the petition failed to allege that the 1972 examination was related to the prior treatment. However, we stated that if the 1972 examination "was a followup to or a continuation of" the x-ray treatments, then the examination would constitute continuing treatment and the

patient's claim would not be barred by the 10-year statute of repose. *Smith*, 214 Neb. at 611, 335 N.W.2d at 534.

In *Tiwald*, the patient received a series of allergy treatments which included exposing the patient's chest, neck, and head to x rays. The final such treatment occurred in 1969. The patient, still under the care of the same physician, subsequently received drug and extract therapies for the allergies. The patient was last examined by the physician in 1974. The patient filed suit in 1983. The district court granted the physician's motion for summary judgment. We affirmed, finding that the drug and extract therapies did not constitute continuing treatment and that the patient's claim was barred by the statute of repose.

Smith and *Tiwald* both involved patients who allegedly were not warned about the dangers of the medical treatments they received. The crucial difference between these two cases is the nature of the treatment which followed the unwarned treatments. If the subsequent treatment *related to the unwarned treatment*, then the statute of limitations did not begin to run until the completion of the subsequent treatment. See *Smith, supra*. However, if the subsequent treatment *related to the original malady*, then the statute of limitations began to run at the completion of the unwarned treatment. See *Tiwald, supra*.

In the present case, Dr. Langdon allegedly failed to warn Sherry Healy that the chemotherapy could cause death. When she developed complications, a lung condition, Dr. Langdon discontinued the chemotherapy but continued to treat her for the complications. The treatment for these complications was not related to the original malady, but, rather, was related to the unwarned treatment. In the language of our general rule, the treatment for Sherry Healy's complications was treatment after and relating to the allegedly wrongful act or omission. Therefore, the professional malpractice statute of limitations did not begin to run until the treatment for Sherry Healy's complications concluded.

The record does not definitively establish the date on which the treatment for Sherry Healy's complications concluded. The record reflects that Dr. Langdon began monitoring Sherry Healy's lung condition on December 4, 1987. The record also

reflects that, in Dr. Langdon's opinion, Sherry Healy's lung condition caused her death. James Healy alleged in his petition that Dr. Langdon treated Sherry Healy until January 22, 1988, the date of her death. Dr. Langdon generally denied every allegation in the petition. Other than this general denial, Dr. Langdon has offered no evidence as to when his treatment concluded.

The petition alleges and the evidence suggests that Dr. Langdon continued treating Sherry Healy's complications until the date of her death. The petition was filed within 2 years of the date of death. We are unable to say, as a matter of law, that the petition was untimely filed. A genuine issue of material fact exists as to the date on which Dr. Langdon's treatment of Sherry Healy's complications concluded. Therefore, summary judgment was improper. Based on the record currently before us, we hold that this action is not barred by the professional malpractice statute of limitations.

In view of our holding on the statute of limitations issue, it is clear that the case may go forward under either the professional malpractice or wrongful death statute of limitations. It is unnecessary to decide which of the two statutes of limitations should control when the two conflict. But see *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

The trial court disposed of the case on the basis of the statute of limitations and never reached the additional issues raised by Dr. Langdon's summary judgment motion. However, a proper result will not be reversed merely because it was reached for the wrong reasons. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991) (affirming, on different grounds, a district court's order granting summary judgment); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985) (affirming, on different grounds, a district court's order granting summary judgment). The parties presented the trial court with evidence regarding a standard of care and a possible breach of that standard. We now consider whether this evidence is sufficient to justify the district court's order granting summary judgment.

Dr. Langdon argues that he is entitled to summary judgment

because James Healy has failed to raise a genuine issue of material fact regarding the standard of care and the breach of that standard. We disagree.

In support of his motion for summary judgment, Dr. Langdon offered his own affidavit which states that he has reviewed the case, that he is familiar with the standard of care for physicians treating conditions similar to Sherry Healy's, and that in his opinion he did not violate the standard of care. Dr. Langdon also offered several excerpts from his deposition testimony. In one excerpt, Dr. Langdon stated that he would have deviated from the standard of care if he had failed to inform Sherry Healy that death was a potential side effect of the chemotherapy. In a second excerpt, Dr. Langdon stated that he told both Sherry and James Healy that death was a possible side effect of the chemotherapy. In a third excerpt, Dr. Langdon stated that he spoke to Sherry Healy immediately before her final chemotherapy treatment and told her that she could have a bad reaction to the drug and die. According to Dr. Langdon, James Healy was not present during this conversation.

The evidence presented by Dr. Langdon establishes a prima facie showing that Dr. Langdon did not fail to warn Sherry Healy of the potential side effects of bleomycin. See, *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987) (where a doctor presents an affidavit stating that the doctor met the applicable standard of care, the doctor establishes a prima facie case of lack of negligence for purposes of summary judgment); *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984). The burden now shifts to James Healy, as the party opposing the motion, to rebut this evidence and establish the existence of a genuine issue of material fact.

In opposition to the summary judgment motion, James Healy presented evidence of the standard of care and of the breach of that standard. To establish the standard of care, James Healy offered Dr. Langdon's deposition testimony, noted above, that it would have been a deviation from the standard if the physician had failed to inform Sherry Healy that death was a potential side effect of the chemotherapy. To establish a breach of that standard, James Healy offered his own affidavit, which states that he was present at all times when

Dr. Langdon discussed the potential side effects of the chemotherapy. The affidavit further states that "at no time prior to or during the course of the chemotherapy treatment" did Dr. Langdon inform Sherry Healy that death was a potential side effect of the chemotherapy.

The record also contains a form entitled "Consent to Chemotherapy." The form is signed by Sherry Healy and is dated September 22, 1987. The form provides, in relevant part, that "[t]he purpose of the treatment, its side effects and possible complications have been explained to me and are understood by me. Specific side effects and complications which might occur include . . . ." The form goes on to list 29 conditions, some of which have checkmarks next to them and others which do not have checkmarks. We note that although "Scarring (fibrosis) of the lung" is listed and checked, death is not on the list.

For purposes of summary judgment, the affidavit presented by James Healy raises the question that Sherry Healy herself was never warned that death could result from the chemotherapy. See *Atkins v. Tri-Cities Steel*, 166 Ga. App. 349, 304 S.E.2d 409 (1983) (where tenant's affidavit stated that landlords had failed to warn her to stay out of a certain building, affidavit raised inference that landlords had similarly failed to warn tenant's husband). The consent form raises a similar inference. These inferences directly conflict with the evidence presented by Dr. Langdon. Such a conflict signals the presence of a genuine issue of material fact; the relative credibility of James Healy and Dr. Langdon is a question which can only be resolved by a jury. We therefore hold that summary judgment was improper.

We conclude that this wrongful death action is not barred by the professional malpractice statute of limitations and that a genuine issue of material fact exists as to whether a duty was breached. We reverse the order of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., Retired, concurs.

ELIA SCHERBAK, APPELLANT, V. BEVERLY KISSLER/KISSLER CASH REGISTER COMPANY, APPELLEE.

510 N.W.2d 318

Filed January 28, 1994. No. S-92-125.

1. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court.
2. _____. Parties cannot confer subject matter jurisdiction on a court by acquiescence or consent; neither may subject matter jurisdiction be created by waiver, estoppel, or conduct of the parties.
3. **Actions: Pleadings.** The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings.
4. **Equity: Courts: Jurisdiction.** Small claims courts may only acquire equity jurisdiction through specific legislative action.
5. _____: _____: _____. The language setting forth the jurisdiction of small claims courts, "in all civil actions of any type," fails to vest the small claims courts with general equitable jurisdiction.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Elia Scherbak, pro se.

Roy A. Sheaff for appellee.

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

WHITE, J.

Elia Scherbak appeals from a judgment of the Lancaster County District Court entered in favor of appellee, Beverly Kissler/Kissler Cash Register Company (Kissler), regarding ownership of certain real property. The action in district court arose from Scherbak's appeal from an order of the small claims department of the Lancaster County Court. We reverse the judgment of the district court because the small claims department of the county court lacked jurisdiction to hear Scherbak's claim.

Scherbak maintains that he is the legal owner of a parcel of land, identified as the north 52 feet of Lot 11, Block 14, Cahn,

Metcalf & Falwell's subdivision of Lincoln (North 52). On December 28, 1979, the North 52 was conveyed, by survivorship warranty deed, to Beverly Kissler.

On July 29, 1953, the south 90 feet of Lot 11, Block 14, Cahn, Metcalf & Falwell's subdivision of Lincoln (South 90) was conveyed, by warranty deed, to Scherbak. In addition to receiving the South 90, Scherbak also received, by the same deed, a right to maintain a sewer over the North 52.

Scherbak filed a complaint in the small claims department of the county court and alleged that the North 52 is his property. In his complaint, Scherbak requested that Kissler "pay the sum of $1,800" or "return the property valued at $10,000." After the county court dismissed Scherbak's complaint, he appealed to the district court. The district court held a trial de novo and then found in favor of Kissler. Scherbak appeals from that judgment. Kissler requested that this court award sanctions against Scherbak for maintaining a frivolous claim pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1989).

As stated above, we find that the small claims department of county court lacked subject matter jurisdiction to adjudicate Scherbak's claim. Lack of subject matter jurisdiction may be raised sua sponte by a court. *Anderson v. HMO Nebraska*, 244 Neb. 237, 505 N.W.2d 700 (1993); *Armstrong v. Higgins*, 241 Neb. 833, 491 N.W.2d 331 (1992). Moreover, parties cannot confer subject matter jurisdiction on a court by acquiescence or consent; neither may subject matter jurisdiction be created by waiver, estoppel, or conduct of the parties. *Anderson, supra*; *Mid-America Pipeline Co. v. Boehm*, 244 Neb. 220, 506 N.W.2d 41 (1993); *JEMCO, Inc. v. Board of Equal. of Box Butte Cty.*, 242 Neb. 361, 495 N.W.2d 44 (1993).

Scherbak's claim in small claims court requests that the court award money damages or the return of real property. More specifically, Scherbak's claim rests on his assertion that he, not Kissler, owns the North 52. In Scherbak's description of his claim, he states that he owns the North 52 and that he wants Kissler not to use the North 52 for any purpose.

We initially consider whether Scherbak's claim is one in equity or law. This is important because the small claims court is not vested with any general equity jurisdiction. The essential

character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings. *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982); *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980). After a review of Scherbak's claim, we conclude that the essential nature of his claim is equitable. It is based on theories and principles closely resembling an action to quiet title and an action seeking to permanently enjoin Kissler from using the North 52. See *Morse v. Cochran*, 131 Neb. 424, 268 N.W.2d 307 (1936).

Now that we have determined that the essential nature of the claim is one sounding in equity, it becomes necessary to determine whether the small claims court had jurisdiction to adjudicate the claim.

Small claims court is a department of the county court. Neb. Rev. Stat. § 25-2801 (Reissue 1989). County courts may only acquire equity jurisdiction through legislative action. *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991); *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982).

The statute setting forth the jurisdiction of small claims courts states: "The Small Claims Court shall have subject matter jurisdiction in all civil actions of any type when the amount of money or damages or the value of the personal property claimed does not exceed one thousand five hundred dollars, exclusive of interest and costs." Neb. Rev. Stat. § 25-2802(1) (Reissue 1989). The Nebraska Supreme Court has increased the amount in controversy to $1,800. See Neb. Ct. Misc. R. (rev. 1990) (small claims court form). Neb. Const. art. V, § 9, provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ."

The Legislature has granted some equity authority to county courts. The Nebraska Probate Code grants county courts the power to partition or sell real estate belonging to a decedent's estate. Another statute grants county courts the authority to issue temporary restraining orders if a district court judge is not present in the county. Neb. Rev. Stat. §§ 30-24,109 (Reissue 1989) and 25-1064(4) (Cum. Supp. 1992). See *Iodence, supra*. If

the Legislature should choose to grant equity jurisdiction to county courts or to small claims courts, it will do so in a specific mandate.

The language setting forth the jurisdiction of small claims courts, "in all civil actions of any type," fails to vest the small claims courts with general equitable jurisdiction. In *Iodence*, this court held that the same language describing the jurisdiction of county courts similarly failed to indicate that the Legislature had granted county courts general equity jurisdiction.

Scherbak's claim necessarily involves an equity action; the small claims court has no general equitable jurisdiction; and thus, the small claims court lacked subject matter jurisdiction to determine Scherbak's claim. Cf. *Miller, supra* (stating that county court had no jurisdiction to hear the claim for money because the action was an equity action based on constructive trust or conversion theories). The district court lacked jurisdiction to consider Scherbak's appeal from the order of the small claims court because the small claims court lacked jurisdiction to determine the claim. We therefore lack jurisdiction to address the merits of the appeal.

We reverse the orders of the district court and small claims court and remand the cause with directions to dismiss the claim for lack of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLANT, V. MARIO ESCAMILLA, APPELLEE.
511 N.W.2d 58

Filed January 28, 1994. No. S-92-347.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** In order to secure postconviction relief on the basis of ineffective counsel, a defendant must show

that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.

3. **Pleas: Effectiveness of Counsel.** A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.
4. **Effectiveness of Counsel.** In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
5. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
6. **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.
7. **Evidence.** Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case.
8. **Sexual Assault: Self-Defense: Rules of Evidence.** A victim's homosexuality, without some evidence that the defendant was resisting a homosexual assault, is not material and therefore not relevant.
9. **Homicide: Self-Defense: Rules of Evidence: Other Acts: Proof.** Although in a homicide case a defendant may show the dangerous and turbulent character of the victim, this may be done only after laying a foundation by evidence tending to show self-defense.
10. **Self-Defense: Rules of Evidence: Other Acts: Proof.** Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. Neb. Rev. Stat. § 27-404 (Reissue 1989).
11. **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 (Reissue 1989).
12. **Homicide: Self-Defense: Rules of Evidence: Other Acts.** Where a defendant claims that the act of killing a victim was the result of a violent and overriding reaction to a homosexual approach by the victim, evidence of the victim's prior similar homosexual activities may be admissible under certain circumstances as corroborative of the defendant's claim that there was a lack of deliberation or premeditated malice on his or her part necessary to convict of first degree murder.

13. **Attorney and Client: Pleas.** When a defendant pleads guilty on advice of counsel, the defendant's attorney has the duty to advise the defendant of the available options and possible consequences.
14. **Confessions: Miranda Rights.** Although an admission made by a suspect who is in custody and without the benefit of the *Miranda* warnings must be suppressed, the admissibility of any statements made after the *Miranda* warnings have been given must depend upon the circumstances and a determination of whether the statements were knowingly and voluntarily made.
15. **Due Process: Identification Procedures.** Suggestiveness alone in a courtroom identification does not violate due process so long as the identification possesses sufficient aspects of reliability.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Gary E. Lacey, Lancaster County Attorney, and Joseph P. Kelly for appellant.

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, and LANPHIER, JJ.

HASTINGS, C.J.

The State of Nebraska appeals an order of the Lancaster County District Court which granted defendant Mario Escamilla's motion for postconviction relief, set aside his conviction of murder in the first degree, and permitted him to withdraw his plea of guilty. The issue tried before the district court was whether Escamilla pled guilty to first degree murder because of ineffective assistance of counsel.

On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993); *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992).

FACTS

Shortly after 9 a.m. on July 3, 1986, the male victim was found dead in his home at 3035 Vine Street in Lincoln. It was later determined that the cause of death was hemorrhaging from multiple stab wounds.

Later that morning, Officer Steven Standley of the Lincoln Police Department noticed Mario Escamilla at the intersection of 70th and Fremont Streets in Lincoln. Standley had heard an earlier radio transmission describing a suspect of an investigation of a crime in the area of 30th and Vine and contacted Escamilla because he matched that description. Escamilla told the officer his name and address and that he was on parole because he had stabbed a man in Scottsbluff as a result of a sexual assault that had occurred when he was a child. Standley called Sgt. Kenney Schacht at the crime scene at Vine Street to tell him about Escamilla. Standley told Schacht that he was a friend of the person Escamilla was living with and that he believed Escamilla could be contacted later if necessary. Schacht then advised him that Escamilla could be released.

However, after learning that Escamilla was on parole for a stabbing that appeared to be sexually motivated, Schacht asked Standley to recontact Escamilla and ask him to come to 30th and Vine to be interviewed. Standley and Officer Mark Johnson contacted Escamilla at his residence and asked him to go to 30th and Vine, and he agreed to do so. Escamilla was patted down before being placed in the police vehicle. He was interviewed by Lt. Lee Wagner at the crime scene, and he then agreed to go to police headquarters for further questioning.

After arriving at police headquarters, Escamilla was interviewed by Standley, and later by Sgt. Tim Domgard. Escamilla initially denied involvement with the homicide, but later admitted that he "did it." At that point, he was advised of his *Miranda* rights and was asked to give a tape-recorded statement, which he agreed to do.

According to his statement, Escamilla was walking by the victim's house when the man spoke to him and said that he looked like he was lost. Escamilla then asked if he could use a telephone, and the man agreed that he could. While Escamilla was using the phone, he heard the man shut and lock the door, and then the man came up behind him, rubbed up against him, and tried to touch his scrotum. Escamilla stated that he reacted by picking up a knife that he saw on the kitchen counter and stabbing the man in the neck, and the victim fell to the floor. Escamilla recalled being raped when he was 6 years old, which

recollection caused him to become more aggressive with the victim. He stated that the victim enjoyed being called a "faggot" and told him that he would do anything Escamilla wanted and that he loved him. Escamilla said that he got more aggressive and told the victim to take down his pants. The victim told him that he, Escamilla, did not have to stab him and that he would do anything Escamilla wanted. Escamilla then took the victim's pants down a little bit, "Didn't really want to do it because that's not my thing, but to push off the aggressiveness, to make him feel hurt before I did." Escamilla further stated that he "just got on top get [sic] rubbed against him but, uh, didn't not have no anal sex or nothing like that." However, Escamilla admitted that he took his own pants down a little bit, and "I put a little [Vaseline] on there . . . on his anal [sic]." Escamilla said that he continued to stab the victim and that then, regaining his "senses," he unlocked the door and ran. At the time of Escamilla's plea, the county attorney, in reciting a factual basis for the plea, stated that Jody Toledo, at whose home Escamilla was visiting the night before the killing and the early morning of the day of the killing, would say that she had two steak knives that she had obtained in Arizona. At the scene of the murder, the police found a knife that matched a knife found in Toledo's apartment.

The murder victim was found nude from the waist down except for blue socks on each foot and a pair of boxer shorts around the left ankle. A dark brown pubic hair was found on his bare posterior. Laboratory examination disclosed the hair possessed characteristics similar to the known pubic hairs of Escamilla. A jar of Vaseline was found floating in the stool in the bathroom. However, the autopsy report disclosed no Vaseline on the victim's body.

Escamilla was charged with first degree murder and use of a deadly weapon to commit a felony. In July 1986, two attorneys from the public defender's office were assigned to represent him. At his arraignment on April 27, 1987, he pled not guilty to both counts.

Early in the case, Escamilla's lead counsel spoke with the deputy county attorney in regard to a plea bargain. The deputy county attorney had agreed that he would not offer any

evidence in aggravation if Escamilla would plead guilty to first degree murder. However, at that point, Escamilla's counsel were concerned that the judge of the district court to whom the case was assigned would impose a death sentence even if the county attorney did not offer evidence in aggravation. Counsel also discussed with Escamilla the possibility of a plea bargain involving second degree murder with other charges. Escamilla told his counsel that he was unwilling to plead guilty to second degree murder plus sexual assault or robbery because he "absolutely did not sexually assault" and "absolutely did not rob" the victim.

In June 1987, counsel recommended that Escamilla accept the county attorney's offer regarding first degree murder and informed Escamilla that they needed to act quickly. Because of certain circumstances, including the temporary disability of the district court judge to whom the case had been assigned, counsel hoped that by pleading guilty at that time, Escamilla would be able to plead in front of a different judge whom they believed would be less likely to impose the death penalty.

On June 24, 1987, Escamilla pled guilty to first degree murder before Judge Jeffre Cheuvront. In exchange for the guilty plea, the State agreed to the following: (1) The defendant would be charged under the single theory of premeditated murder, (2) no evidence of aggravating circumstances would be offered at the penalty phase of the case, (3) the State would not argue for the death penalty, (4) count II of the information (use of weapon) would be dismissed, (5) no other charges arising from this incident would be filed, and (6) copies of all police reports would be furnished to the defendant. The court interrogated Escamilla to determine that the plea was being made knowingly, intelligently, and voluntarily, and as Escamilla said, "I was aware that I was stabbing him, and I was aware I could have stopped." A factual basis for the plea was given, including the results of the autopsy, which disclosed that the victim had been stabbed a total of nine times. The court accepted the plea, and on August 3, Judge Cheuvront sentenced Escamilla to life imprisonment.

In his petition for postconviction relief, Escamilla alleged that he had received ineffective assistance of counsel in the

following respects: (1) Counsel failed to investigate the records and allegations of the victim's past criminal behavior and failed to adequately inform Escamilla of those allegations; (2) Escamilla's confession was obtained in violation of his constitutional right against self-incrimination and was obtained by promises, threats, and coercion by the police officer who interrogated him, and counsel failed to move to suppress the confession; and (3) Escamilla was identified by a witness under circumstances which were unduly suggestive and violated his constitutional rights, and counsel failed to move to suppress the tainted identification.

EVIDENCE OF THE VICTIM'S CHARACTER

At the hearing on the motion for postconviction relief, counsel testified that in preparing for trial, their theory of the case was that the victim was attempting to sexually assault Escamilla and that Escamilla had stabbed the victim in self-defense. Lead counsel testified that they were looking into the victim's history of molesting children. A law clerk was assigned to interview witnesses, and she spoke with the principal of Hartley Elementary School and to a number of children who had some knowledge of the victim. Counsel learned that there had been complaints about the victim over the years and that children at the school had been told to avoid his house. Some of the children stated that the victim attempted to entice children into his home. This was consistent with counsel's inspection of the crime scene, where they found that the victim had a number of toys. Counsel stated that they had received phone calls from several different people who volunteered information in regard to the victim. One of the callers told them that the victim gave candy and his name and address to children who rode the "Glad Tidings" bus and that he "was barred" from the bus. The caller gave counsel the name of a nun at Sacred Heart School who told children not to go near the man's house. She also gave them the name of a pastor, the Glad Tidings busdriver, teachers, and others who evidently had knowledge of the victim's past behavior. Another caller told them that the victim was "an old man who was always luring children into his house and once he got them in his house, he

tried to fool around with them." Counsel testified that his file did not indicate that any further investigation was undertaken because of these calls.

On August 14, 1986, Escamilla reported to his counsel that he heard that the victim had a homosexual lover who had been at the victim's residence the morning of the killing. Lead counsel testified that he did not recall doing any followup on that report. In March 1987, Escamilla also told his counsel that he had received information that the victim's son was in the regional center and that the son had been the victim of a sexual assault by his father. Counsel stated that it was likely he had not pursued that allegation.

Counsel had also received a police report from the county attorney's office which dealt with the victim's inviting young girls into his home and lying on the bed with them. Lead counsel testified that he had hoped to find that the victim had criminal convictions. He stated:

> There weren't any of those. I mentioned the one incident. It was like we had these leads but they weren't taking us as far as to the point where I thought there was anything we could use as similar acts-type of evidence with respect to the victim. I mean, I thought that his behavior was somewhat consistent with our defense but we were struggling with how to get it into evidence.

When lead counsel was asked if he had failed to inform his client about this area of investigation, he responded: "I'm trying to recall specifically. I guess specifically I can't recall any conversations that we had about it. I was thinking that we had talked about it but I can't specifically recall that we had."

In *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990), this court held that in order to secure postconviction relief on the basis of ineffective counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A plea of guilty will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.

State v. Domingus, supra.

In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990); *State v. Domingus, supra.*

In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *Id.*

The issue as to the failure to investigate the allegations of homosexuality on the part of the victim as argued by Escamilla is two-pronged in nature. On the one hand is the argument that such evidence would have supported Escamilla's claim of self-defense. The other argument, and the one on which the trial court seemed more solidly to rely, was that evidence of the victim's aggressive sexual advances toward young people would have been highly relevant to Escamilla's state of mind, and "while not providing a defense absolving him of all criminal culpability, such evidence certainly could have persuaded a jury to convict him of a lesser degree of murder."

We must then address the probable admissibility of this type of evidence. We have confronted this issue only obliquely in *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). In that case, the defendant claimed that the murder victim had assaulted him while he, the defendant, was asleep and that in self-defense, the defendant had struck the man with a large flashlight. Although we stated that "[e]vidence of a murder victim's homosexuality may be admissible as corroborative of a defendant's claim of self-defense from a homosexual assault, provided such evidence as tendered is probative of that defense," *id.* at 183, 505 N.W.2d at 669, we found that the evidence tendered fell far short of being probative of that issue.

The court in *Williamson v. State*, 692 P.2d 965 (Alaska App. 1984), held that testimony of a proffered witness who would testify as to a homosexual experience he had with the victim should have been admitted, as it would tend to corroborate the defendant's claim that he, the defendant, was acting in self-defense.

In the case at bar, the only evidence of the assault resulting in the victim's death came from Escamilla himself in his statement to the police officer (Escamilla did not testify during the postconviction proceedings in the district court). In his description of the events which resulted in the victim's death, there was nothing that suggested Escamilla was trying to ward off an aggressive homosexual assault. Without any evidence of self-defense coming from Escamilla or someone or something in his behalf, the fact, if such be the case, of the victim's homosexuality would not be material and therefore not be relevant. 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. *State v. Lowe, supra.* Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. *Id.* A victim's homosexuality, without some evidence that the defendant was resisting a homosexual assault, is not material and therefore not relevant.

In *State v. Escamilla*, 195 Neb. 558, 239 N.W.2d 270 (1976), this court held that although in a homicide case a defendant may show the dangerous and turbulent character of the victim, this may be done only after laying a foundation by evidence tending to show self-defense. See, *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977); *Dupree v. State*, 615 So. 2d 713 (Fla. App. 1993). No such evidence appears in the record.

Would such evidence have been admissible on the issue of the absence of premeditation on Escamilla's part so as possibly to persuade the "jury to convict him of a lesser degree of murder," as found by the trial court in its order? Neb. Rev. Stat. § 27-404 (Reissue 1989) provides:

> (1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character

> trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. . . .
>
> . . . .
>
> (2) 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.

Several cases are cited in *State v. Lowe, supra*, of which some support and some oppose the introduction of evidence of a victim's homosexuality in corroboration of a defendant's claim of self-defense. It could be supposed that one should be permitted to advance the same theory in support of the presence or absence of premeditation.

Escamilla cites us to *Kagebein v. State*, 254 Ark. 904, 496 S.W.2d 435 (1973) (Fogleman, J., dissenting). In that case, the defendant, Kagebein, was charged with first degree murder. He attempted to call witnesses to testify as to prior homosexual acts by the victim, which attempts were rebuffed by the trial court. The defense which Kagebein tried to establish is revealed by the following statements from the court's opinion:

> The appellant's defense, even though he was being tried as an accessory before-the-fact to a charge of first degree murder, was that the death of Wampler came about not as a part of a pre-arranged plan to rob and kill him, as argued by the State, but out of resistance to his homosexual advances. Appellant does not argue that the evidence of homosexuality justifies homicide but does insist that he should have been permitted to introduce evidence tending to corroborate the claim that homosexual activities preceded the killing. He urges this was important at least to the jury's consideration of the degree of homicide committed.

Id. at 909, 496 S.W.2d at 439.

The judgment of conviction in *Kagebein* was reversed, and the cause remanded for a new trial specifically because of a violation of the defendant's right to remain silent; however, the

court considered the claimed error as to evidence of homosexuality because, in the words of the opinion, "[s]ome of the appellant's other points for reversal should be mentioned, for they may arise upon a retrial." *Id.* The Arkansas court then went on to address the question before us, and it cites with favor the following from *Evans v. United States*, 277 F.2d 354 (D.C. Cir. 1960):

> " 'We think that, in the circumstances of this case, almost any evidence showing what kind of man the decedent was would be highly relevant in helping the jury to determine whether appellant's story of a sexual assault was truthful, and would therefore serve the interests of justice. . . .
>
> " 'Finally, but equally important, even if it convincingly appeared that the excluded testimony could not induce the jury to acquit, evidence suggesting that [the victim] was the aggressor might well have induced the jury to convict appellant for the lesser included offense of manslaughter, instead of second-degree murder.' "

Kagebein v. State, 254 Ark. at 910-11, 496 S.W.2d at 440.

In a separate opinion in *Parisie v. Greer*, 705 F.2d 882, 893 (7th Cir. 1983) (en banc), *cert. denied* 464 U.S. 950, 104 S. Ct. 366, 78 L. Ed. 2d 326, Judge Richard Posner wrote:

> Parisie wants the evidence [testimony of three witnesses] admitted in order to bolster his defense of "homosexual panic," which is the idea that a latent homosexual—and manifest "homophobe"—can be so upset by a homosexual's advances to him that he becomes temporarily insane, in which state he may kill the homosexual. It is no business of mine whether the State of Illinois chooses to recognize a defense of "homosexual panic" as a subcategory of the insanity defense, but I cannot believe that the Constitution of the United States requires a state to allow defense counsel in a murder case to defame the murderer's victim as a homosexual without satisfying the normal prerequisite to admitting evidence of reputation—that the evidence " 'be based upon *contact with the subject's neighbors and associates rather than upon the personal opinion of the witness*.' "

(Emphasis supplied.) See *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). Nebraska does not specifically allow the defense of "homosexual panic," and there is no evidence in the record to support a finding that such a diagnosis was or could be made.

Expressing a view of some judges comprising the minority of the *Parisie* en banc court, Judge Luther Swygert wrote:

> There is no consensus even in the medical and psychiatric communities whether homosexuality is a character trait (which would generally be provable under Illinois law only by evidence of reputation . . .) or a medical condition (which would surely be directly provable by evidence of symptoms). In either case, however, evidence of Jackson's homosexuality would be relevant under the Illinois standard of relevancy . . . (relevant evidence is that "which tend[s] to make the proposition at issue more or less probable") . . . because his homosexuality made it likelier that he made a homosexual advance toward Parisie.

Parisie v. Greer, 705 F.2d at 900-01. Again, Judge Swygert seems to be addressing a claim of self-defense.

In *Evans v. United States*, 277 F.2d 354 (D.C. Cir. 1960), the appellant's conviction of second degree murder was reversed because the trial court refused the proffer of testimony by the deceased's wife that the deceased was mentally ill and that when he was drinking, he would become psychotic and would act in a belligerent manner. This evidence was intended to bolster the appellant's claim that she was assaulted by the victim, who shouted obscenities at her, grabbed her, and ripped some of her clothing. In addition to holding that the rejection of the proffered evidence was prejudicial error, the court went on to say:

> Finally, but equally important, even if it convincingly appeared that the excluded testimony could not induce the jury to acquit, evidence suggesting that he was the aggressor might well have induced the jury to convict appellant for the lesser included offense of manslaughter, instead of second-degree murder.

Id. at 356.

In the dissenting opinion, Judge Charles Fahy stated:

> The defense offered was the need to kill deceased in resisting a sexual assault. In my view the proffered testimony was too tenuous in corroborative relationship to this particular defense to justify reversal because of rejection of the proffer, especially when all the evidence as to the manner in which the homicide occurred is considered. It follows from this view that I attach no significance to the circumstance that the jury could convict of manslaughter.

Id.

Based on the foregoing authorities and logic, we hold that where a defendant claims that the act of killing a victim was the result of a violent and overriding reaction to a homosexual approach by the victim, evidence of the victim's prior *similar* homosexual activities may be admissible under certain circumstances as corroborative of the defendant's claim that there was a lack of deliberation or premeditated malice on his or her part necessary to convict of first degree murder.

In this case, with two exceptions, the only evidence suggested to exist is that the victim was a pedophile. We fail to see any relevancy between pedophilic behavior and Escamilla's claim that he received a homosexual proposal. There was no scientific testimony offered by Escamilla which supported his claim of "homosexual panic."

In an unsuccessful first attempt at postconviction relief pro se, Escamilla appeared before the trial court on September 21, 1990, and during a colloquy with the court in answering a question by the court, Escamilla said:

> [T]o me, I told him [the legal aid assistant] if the lawyer was insufficient in not relating to me that the deceased had a record for pedophilic behavior which if I would have known, I wouldn't have pled guilty, and I told him that, and I stayed on that, and he didn't write that down.

However, there is no sworn testimony in the record to this effect, by Escamilla or anyone on his behalf, and his petition for postconviction relief makes no allegation that had he known of the victim's background, he would not have pled guilty, thereby making his plea neither voluntary nor informed.

It is true that when a defendant pleads guilty on advice of counsel, the defendant's attorney has the duty to advise the defendant of the available options and possible consequences. *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981); *People v. Riley*, 187 Colo. 262, 529 P.2d 1312 (1975); *People v Russell*, 47 Mich. App. 320, 209 N.W.2d 476 (1973).

We consider the admitted knowledge of Escamilla of the alleged character of the victim and the information along that line possessed by his counsel, but also recognize that counsel were primarily concerned with avoiding the death penalty for their client, which was a real possibility considering Escamilla's confession and the brutal facts of this killing. Under the facts of the case, there is no reasonable probability that a jury would not have returned a verdict of guilty of first degree murder. Counsel's decision to proceed with dispatch to pursue the result they sought cannot be said to have been unreasonable, applying the heavy measure of deference to counsel's judgment. See *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990). We hold that the findings of the district court in this regard were clearly erroneous.

However, Escamilla has raised two other issues. He first claims that the trial court failed to find that counsel's neglect to file a motion to suppress his statement given to the police was erroneous so as to support a claim of ineffective assistance of counsel. He also claims that the in-court identification of Escamilla was unduly suggestive and that his counsel were deficient in convincing him to plead guilty without attempting to suppress the suggestive identification.

CIRCUMSTANCES OF ESCAMILLA'S CONFESSION

As we have previously stated, after arriving at police headquarters, Escamilla was taken to an interview room by Officer Standley. Standley testified that he had a conversation with Escamilla and that it was not questioning or interrogating. Standley stated that Escamilla was not in custody and that Escamilla indicated that he understood he was there voluntarily, although Standley did not recall ever telling him that he was free to go.

Sergeant Domgard arrived at the interview room and began

questioning Escamilla at approximately 1:20 p.m. Domgard was aware that Escamilla had previously been convicted of stabbing a man who had sexually assaulted him as a youth. Domgard was also told that Escamilla appeared to have bloodstains on his pants.

Domgard testified that Escamilla was not afraid or nervous, but did appear to be concerned. After they spoke for some time about where Escamilla had been that morning and the evening before, Domgard told Escamilla that a neighbor of the victim's had observed someone matching Escamilla's description running away from the victim's residence that morning. He also told Escamilla that the victim was much like the person that had victimized Escamilla in Scottsbluff and suggested that Escamilla may have had a flashback and "stuck" the victim. He suggested that Escamilla was himself being victimized, and informed him that the police department had received numerous reports about the victim's possibly enticing young people into his home. Domgard told Escamilla that there was quite a bit of evidence at the victim's residence that would be able to tie him into the case if he were involved and that Escamilla should tell him the truth because later he might not have the opportunity. At that point, Escamilla admitted his involvement. Escamilla had not yet received any *Miranda* warnings. Domgard testified that Escamilla was not in custody prior to his confession, despite the fact that Escamilla had previously been involved in a similar stabbing incident, had bloodstains on his clothing, and might have been in the vicinity of the crime that morning. However, Domgard did not tell Escamilla that he was free to go.

The statement with which we are concerned is the formal taped confession which it is admitted was not taken until after Escamilla had received the *Miranda* warnings. However, it is Escamilla's position that any statement given following the unwarned statement is "fruit of the poisonous tree" and must be suppressed. Therefore, the statement would not have been available for use in any trial had Escamilla pled not guilty.

On this issue we agree with the conclusion of the trial court, which found that "the totality of the circumstances do not support a finding of undue force or coercion on the part of the

police [and that] it cannot be reasonably argued that Escamilla's subsequent confession was involuntary and thus inadmissible."

The trial court cited extensively from *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985): "Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Oregon v. Elstad*, 470 U.S. at 309.

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ." *Oregon v. Elstad*, 470 U.S. at 312.

CIRCUMSTANCES OF IDENTIFICATION

Finally, we determine that the record supports the conclusion of the trial court that the in-court identification of Escamilla by a witness was not unduly suggestive.

On the day of the homicide, Officer David Goehring interviewed a neighbor, Wilmer Davidson, who lived across the street from the victim. Davidson stated that he saw a man leaving the victim's residence that morning between 7 and 7:30, going northwest toward 30th Street at a "good, fast trot." He described the man as standing 5 feet 10 inches or 5 feet 11 inches tall, weighing about 160 pounds, and being clean-shaven with dark hair down over his ears. He described the man's complexion as

> kind of a real heavy tan, kind of a yellowish color, like a [sic] I can see it in my mind, kind of like a [sic] oriental. Like I said before, I kind of hate to say this, kind of like a

> half-breed color, black and white or yellow and white, what I'm trying to say.

He also stated that the man was wearing blue pants, a white butcher's-type apron that covered the front of his pants, and no shirt. When Escamilla was first contacted the day of the homicide, he was wearing tan pants and a red sweatshirt around his shoulders. He weighed approximately 130 pounds and was about 5 feet 4 inches tall. Escamilla's counsel recalled that Escamilla had a beard at the time of his arrest.

Prior to the preliminary hearing, Escamilla agreed to appear in a lineup. However, no lineup took place, and no photo array was shown to Davidson. At the preliminary hearing, Escamilla sat at the defense table with his counsel. Davidson testified at the hearing that the person he saw leaving the victim's residence was a member of the Hispanic race, and identified Escamilla as that person. One of Escamilla's counsel could recall only two members of any minority race, other than his client, who were present in the courtroom during the preliminary hearing; these were two females who were seated in the audience. That same attorney agreed that it would have been difficult for Davidson to fail to identify Escamilla under those circumstances. Counsel could not recall discussing with his client the possibility of a motion to suppress.

On this point, we could do no better than to quote from the trial judge's order:

> While it is quite clear that the courtroom identification was suggestive, it is well-established that suggestiveness alone does not violate due process so long as the identification possesses sufficient aspects of reliability. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988). . . .
>
> . . . The court [in *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980)] held, however, that in order to establish ineffective assistance of counsel, it must be shown that counsel's inaction resulted in an actual prejudice to the defendant. Consequently, since the evidence was "so overwhelming that the imposition of the death penalty would be a certainty" if the defendant went to trial, the court concluded that "if competent counsel,

after investigation[,] considers a point worthless, the fact that he is court-appointed does not require him to pursue it. . . . [T]he right to counsel . . . does not include the right to . . . advance a totally frivolous claim . . . ." *Id.* at 320, 287 N.W.2d at 675.

. . . Here, even if Escamilla's counsel had pursued and succeeded in suppressing the identification as unduly suggestive, the defendant's post-*Miranda* confession would have, in all likelihood, been sufficient to prove his guilt. Consequently, as in *Holtan*, counsel's failure to suppress the identification would not have prejudiced the defendant in any material way. This allegation is without merit.

CONCLUSION

The holdings of the trial court relating to Escamilla's statement and the in-court identification were correct and are affirmed. However, the judgment relating to the investigation issue on which the trial court granted postconviction relief is reversed, and the cause is remanded with directions to dismiss the action.

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

SHANAHAN and FAHRNBRUCH, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. DANIEL ORLIN HIRSCH, SR., APPELLANT.

511 N.W.2d 69

Filed January 28, 1994. No. S-92-611.

1. **Legislature: Limitations of Actions.** The Legislature has the authority to change statutes prescribing the period of limitations to actions.
2. **Criminal Law: Limitations of Actions.** Once an offense becomes barred, a later statute extending the period of limitations cannot revive the offense.
3. **Constitutional Law: Criminal Law: Statutes.** An ex post facto law is one which alters the situation to the disadvantage of an accused.
4. **Constitutional Law: Criminal Law: Limitations of Actions.** Application of a

statute of limitations to revive a barred prosecution would disadvantage the accused who has acquired a vested right to be free from suit and, therefore, violates the constitutional prohibition against ex post facto legislation.

5. _____: _____: _____. Extending a statute of limitations which has not yet run does not violate the ex post facto clauses.
6. **Time.** The period of time within which an act is to be done in any action or proceeding is to be computed by excluding the day of the act, event, or default after which the designated time begins to run.
7. **Time: Words and Phrases.** The word "year" means calendar year.
8. **Limitations of Actions.** An amendment to a statute of limitations enlarging the unexpired period of time within which an action can be brought is not retroactive legislation, but, rather, is prospective in its operation.
9. **Statutes.** Retrospective laws are those laws which take away or impair a right acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability with respect to transactions or considerations already past.
10. **Limitations of Actions.** A statute of limitations does not impair existing substantive rights but merely affects the procedure by which such rights may be enforced.
11. _____. Statutes of limitations generally apply to all proceedings commenced after the statute becomes effective, whether rights accrued before or after such date.
12. **Criminal Law: Limitations of Actions.** Statutes of limitations are to be liberally construed in favor of the defendant in a criminal case.
13. **Limitations of Actions.** One has no vested right in the running of a statute of limitations unless it has completely run and barred the action before the new limitation becomes effective.
14. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when 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 probative value, that a finding of guilt based on such evidence cannot be sustained.
15. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
16. _____. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
17. **Convictions: Appeal and Error.** In reviewing a criminal conviction, 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 a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
18. **Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for a directed verdict at the close of the State's case and proceeds with trial

waives any error in the ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction.

19. **Criminal Law: Directed Verdict: Appeal and Error.** When a criminal defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained.
20. **Sexual Assault: Proof: Words and Phrases.** The slightest intrusion into the genital opening is sufficient to constitute penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence.
21. **Sexual Assault: Words and Phrases.** In order for sexual penetration to have occurred, it is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.
22. **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 on appeal.
23. **Evidence.** In order to qualify as newly discovered, the evidence may not be something which could have been uncovered and produced at trial with reasonable diligence.
24. **Motions for New Trial: Evidence: Proof.** One moving for a new trial on the ground of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.
25. **Evidence.** Evidence is not newly discovered if diligence before the trial would have produced notice or knowledge of the alleged recently uncovered evidence.
26. **New Trial: Evidence.** Forgetfulness is inconsistent with the diligence required in presenting the evidence during the trial, and such lack of due diligence does not warrant a new trial on the basis of newly discovered evidence.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, HANNON, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, STEPHEN A. DAVIS, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Glenn A. Shapiro, of Gallup, Schaefer, Riha, Dornan, Jabenis & Shapiro, for appellant.

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

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

CAPORALE, J.

I. STATEMENT OF CASE

Following the overruling of the demurrer filed by the defendant-appellant, Daniel Orlin Hirsch, Sr., on the ground that the charge was time barred, the district court, pursuant to verdict, adjudged Hirsch guilty of committing first degree sexual assault on his daughter, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989). Hirsch appealed to the Nebraska Court of Appeals and assigned as errors the district court's failure to (1) sustain his demurrer, (2) grant his motion for a directed verdict, and (3) order a new trial because of the discovery of new evidence. The Court of Appeals determined that the district court had indeed erred in failing to sustain Hirsch's demurrer, vacated the judgment of the district court, and remanded the cause with the direction that it be dismissed. The plaintiff-appellee State then successfully petitioned this court for further review. We reverse the judgment of the Court of Appeals and remand the cause with the direction that the judgment of the district court be reinstated.

II. FACTS

Hirsch, who was born on February 27, 1948, married in 1973. The marriage produced two children, a son and a daughter who was born August 27, 1977. At his wife's request, Hirsch left the family home prior to the time of the alleged assaults and was living with a friend. The wife petitioned for dissolution of the marriage, and the court granted Hirsch overnight visitations, which took place at Hirsch's residence. Although Hirsch testified that he, his son, and his daughter all slept in separate rooms, the daughter testified that the son slept in Hirsch's room and that she and Hirsch slept in the guest room. The son testified that sometimes Hirsch and the daughter would sleep in the same room, one of them on the air mattress and the other in the bed.

The daughter testified that during one of her overnight visits, just before she entered Lutheran General Hospital in July 1986, she was lying on the air mattress, and Hirsch asked her if she wanted to come sleep with him. When she refused, Hirsch told her "to take off all [her] clothes and get into bed with him."

She testified that she got into bed with Hirsch because he had told her that if she did not, "he'd spank [her], and if [she] ever told anybody what he had [her] do that he'd kill [her]," her mother, or her brother. She stated that Hirsch touched her vagina with his finger and it started to hurt a little bit.

Dr. Roger Parolini admitted the daughter to the hospital for suicidal tendencies on July 28, 1986, and concluded she was having an adjustment disorder with a depressed mood. In the history prepared for the daughter's hospitalization, Parolini referred to a previous episode of suicidal ideation the daughter had suffered approximately a year earlier.

According to the daughter, a second incident of abuse occurred just before she was hospitalized a second time, on November 26, 1986. Again, Hirsch asked her if she wanted to sleep with him and she refused. Hirsch then told her to sleep with him and take off all her clothes. The daughter testified that the same thing that had happened the first time happened again. Hirsch started touching her with his finger and then got on top of her with his legs around her. She started to feel a "really bad pain" that was "up inside [her]," in her vagina. The daughter described an "egg yolk feeling" that she felt between her legs. Hirsch again threatened that if she ever told anybody, he would kill her or her mother or brother.

The daughter testified that around Christmas, Hirsch again asked her if she wanted to sleep with him. When she refused, he told her to come sleep with him and take off all her clothes, threatening to spank her if she did not do it and threatening to kill her, her brother, or her mother if she told anybody. The daughter complied. Hirsch started touching her with his hands and got on top of her again. The daughter testified she "hurt and . . . hurt . . . hurt inside" and then she got away, first running into her brother's room and then sleeping all night in the bathroom.

The daughter also testified that she and Hirsch took showers together while she was in the first through third grades. Hirsch would wash her in the shower, but she did not have to wash him. Erma Ballenger, the daughter's social worker and primary therapist at Charter Hospital, where the daughter was admitted a third time on July 8, 1987, reported that the daughter said that

Hirsch had had her wash his private parts. Latisha LaRock Mullen, a nurse and member of the sexual abuse clinic, interviewed the daughter after Ballenger reported the sexual abuse and also testified that the daughter said she had been forced to wash Hirsch's genital area.

The wife testified that she caught the daughter and Hirsch coming out of the shower and had made "a big deal out of it" because she thought the daughter was too old to be taking showers with Hirsch. Hirsch admitted showering with his daughter but said that it had only happened once when she was in kindergarten, when they had gotten out of the swimming pool and were going out somewhere, and that he had his bathing suit on at the time.

The wife first became suspicious during an overnight mother-daughter camp that her daughter might have been sexually abused. The daughter would not join the circle of campers and was standing off by herself. When the wife asked the daughter to join the other campers, the daughter answered that she did not want to because she was "different" and felt "dirty."

The wife also stated that for a period of about 2 years, Hirsch slept in the daughter's bed quite often, which concerned her. When interviewed by Mullen, the daughter told her that Hirsch would fondle her private area during those incidents. Hirsch testified that he slept with his daughter when she was 2 or 3 years old because she was a bed wetter and he would have to wake her at midnight or 1 a.m. He stated he was fully clothed and would return to his own bed after he got her up and returned her to bed.

On January 6, 1987, the daughter began "spotting, bleeding vaginally," and the wife took her to Dr. Mary Lou Flearl, a pediatrician. Flearl testified that she was told this had occurred four or five times, and the daughter complained of a little pain with urination. Flearl noticed that there was redness between the daughter's vagina and rectum which was inflamed and abraded looking, and determined that it was recent, occurring between December 31 and the date of her examination. Flearl could not be specific as to the causes of the spotting, but was sure that the daughter was not bleeding internally.

There was no evidence presented that the daughter had ever fallen or had suffered a straddle injury to her genital area, and both the wife and daughter denied the daughter ever incurred such an injury.

Both the daughter and the wife testified that during the divorce and specifically the fall and winter of 1986, the daughter did not want to visit Hirsch but went because the wife made her go. The wife also testified that immediately before she had the daughter hospitalized the first time, the daughter had returned home from a weekend visitation with Hirsch and began crying and threatening to kill herself.

Hirsch denies ever touching his daughter in a sexual way or attempting to penetrate her. He testified that during the divorce, he had attempted to get custody of both children, and tried again in April 1987, when he was refused visitation with his daughter. Prior to the wife's filing for divorce, she had asked Parolini and another counselor if they would report charges against Hirsch for child abuse. And when the custody and visitation disputes were ongoing, the wife, through her attorney, told Hirsch that she would not pursue criminal prosecution against him if he would not visit his children until they graduated from high school.

Part of the treatment during the daughter's hospital stays was aimed at her attention-seeking and manipulation of others to get her way. On cross-examination, the wife testified that the school psychologist had told her the daughter, as early as 1985, was having trouble with attention-seeking behavior. However, Ballenger testified she did not have a sense that the daughter's claims of sexual abuse were an attempt at manipulation, nor was there any evidence that the daughter was hallucinating or fantasizing.

The testimony also disclosed several instances of sexual behavior on the part of the daughter. The wife described an instance during which the daughter had her shorts off and placed a pencil between her legs. In another, the daughter had been told to get dressed because Hirsch was coming to pick her up for visitation. When Hirsch arrived, the daughter lay down on the couch and, wearing nothing else, "pulled her nightgown up above her waist . . . spread her legs, started playing with

herself and said, 'I love you, Daddy.' " In a third instance, the daughter had tried to get a "little" male friend "to lay down on the bed with her." An entry in the records of the daughter's first stay in the hospital described her as asking the male staff for much attention and being directed to "keep her legs together and her skirt pulled down." During this hospital visit, the daughter was described as "a bit more flirtatious, a bit more sexually oriented" than would be expected for her age.

Dr. William C. Bruns, who performed initial examinations for her first and second hospital visits, testified that the daughter's "hypersexual behavior" is compatible with an abuse experience. In addition, Dr. James Monteleone, who examined the daughter in November 1987 as the result of the hospital's call reporting child abuse, testified that public masturbation is a strong indicator of a need for anxiety release—a call for help and an indication of previous sexual stimulation.

Hirsch points to the fact that the daughter's genital examinations at the hospital prior to her being admitted were reported as normal. However, according to the hospital's examining physician, those examinations are not of the type one would think of in terms of a female genital examination.

Monteleone, on the other hand, found abnormalities indicating that the daughter had been vaginally penetrated, although he could not tell what had penetrated her. He was fairly certain, however, that the penetration was not caused by any type of impaling injury. Further, Monteleone was unable to put a date on when the penetration occurred, but testified the injury could have been up to 2, 3, or 4 years ago. It was his expert opinion that the daughter had been sexually abused.

Hirsch testified that when he visited his daughter during her visits to the hospital, she was ecstatic to see him. He also produced drawings made by the daughter while in the hospital which displayed words like "I love you, Daddy." The daughter testified that she was not really sure if she wanted to see him or not but knew that she was safe at the hospital.

III. ANALYSIS

With that factual background, we turn our attention to the legal analysis of the issues presented.

1. DEMURRER

In the first assignment of error, Hirsch asserts that the district court mistakenly failed to sustain his demurrer on the ground that the prosecution was time barred.

(a) Period of Limitations

The State filed its information against Hirsch on February 27, 1991, and alleged that he had sexually penetrated his daughter "on or about the 25th day of August, 1986 through the 31st day of December, 1986 . . . ." Prior to August 25, 1989, the crime was subject to a 3-year period of limitations. See Neb. Rev. Stat. § 29-110 (Reissue 1985). Through 1989 Neb. Laws, L.B. 211, codified as § 29-110 (Reissue 1989), the Legislature increased the period of limitations to 5 years, but said nothing about retroactive application. As the Legislature did not declare an emergency and adjourned on May 24, 1989, the new 5-year period of limitations became effective August 25, 1989. See Neb. Const. art. III, § 27.

While we have not heretofore established a rule regarding the application of an extended statute of limitations in a criminal case, we have consistently held that the Legislature has the authority to change statutes prescribing the period of limitations to actions. See, *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). However, once an offense becomes barred, a later statute extending the period of limitations cannot revive the offense.

> For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.

Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1928), *cert. denied* 277 U.S. 590, 48 S. Ct. 528, 72 L. Ed. 1003. See, *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981); *Givens, supra*; *United States v. Reina*, 242 F.2d 302 (2d Cir.

1957), *cert. denied sub nom., Moccio v. United States*, 354 U.S. 913, 77 S. Ct. 1294, 1 L. Ed. 2d 1427, *reh'g denied* 355 U.S. 852, 78 S. Ct. 9, 2 L. Ed. 2d 61; *Grand Island School Dist. #2, supra*; *Educational Service Unit No. 3, supra*; *Com. v. Guimento*, 341 Pa. Super. 95, 491 A.2d 166 (1985).

The rationale behind the rule is grounded upon the prohibition of ex post facto laws. See, U.S. Const. art. I, § 10; Neb. Const. art. I, § 16; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987).

An ex post facto law is one which alters the situation to the disadvantage of an accused. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *In re Estate of Rogers*, 147 Neb. 1, 22 N.W.2d 297 (1946); *State v. McCoy*, 87 Neb. 385, 127 N.W. 137 (1910); *Marion v. State*, 20 Neb. 233, 29 N.W. 911 (1886). Application of a statute of limitations to revive a barred prosecution would disadvantage the accused who has acquired a vested right to be free from suit and, therefore, violates the constitutional prohibition against ex post facto legislation. *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. 1993).

However, extending a statute of limitations which has not yet run does not violate the ex post facto clause. *State v. Creekpaum*, 753 P.2d 1139 (Alaska 1988); *Commonwealth v. Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988); *State v. Parker*, 119 Or. App. 105, 849 P.2d 1157 (1993), *review denied* 317 Or. 584, 859 P.2d 541 (1993); *State v. Dufort*, 111 Or. App. 515, 827 P.2d 192 (1992); *State v. Casaretto*, 818 S.W.2d 313 (Mo. App. 1991); *People v Russo*, 185 Mich. App. 422, 463 N.W.2d 138 (1990), *aff'd in part, rev'd in part* 439 Mich. 584, 487 N.W.2d 698 (1992); *Scharfschwerdt v. Kanarek*, 553 So. 2d 218 (Fla. App. 1989), *review denied* 563 So. 2d 633 (Fla. 1990); *State v. Nagle*, 226 N.J. Super. 513, 545 A.2d 182 (1988).

Thus, the question is whether the prosecution of the sexual assaults alleged to have taken place between August 25 and December 31, 1986, was barred before the new 5-year period of limitations became effective.

The period of time within which an act is to be done in any action or proceeding is to be computed by excluding the day of

the act, event, or default after which the designated time begins to run. Neb. Rev. Stat. § 25-2221 (Reissue 1989); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). The word "year" has been legislatively defined to mean calendar year. Neb. Rev. Stat. § 49-801 (Reissue 1988).

Considering the 3-year period of limitations as a period of 3 calendar years, and excluding the first day of the assaults alleged to have taken place sometime from August 25 to December 31, 1986, the statute of limitations expired at the earliest on August 25, 1989, the same day as the amendment extending the period of limitations to 5 years became effective, and at the latest on December 31, 1989. See *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976) (excluding September 5, 1969, the last day on which work was done, the last day of the 4-year period of limitations was September 5, 1973).

(b) Application of Period of Limitations

In *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N.W. 624 (1896), *aff'd* 170 U.S. 57, 18 S. Ct. 513, 42 L. Ed. 948 (1898), the railroad challenged a charter provision authorizing the city to require railroad companies to construct and keep in repair viaducts over streets crossed by their tracks. The railroad argued that the provision had a prospective operation only and did not apply to viaducts in existence at the time the provision took effect. We rejected the railroad's definition of a retrospective law, ruling that a statute does not operate retroactively from the mere fact that it relates to antecedent events. We defined a retrospective law as "one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence." *Id.* at 564, 66 N.W. at 627. We thus held that the language employed in the statute included such viaducts as were then in existence.

Other jurisdictions have held that an amendment to a statute of limitations enlarging the unexpired period of time within which an action can be brought is not retroactive legislation, but, rather, is considered prospective in its operation. See, *Doe*

v. Roman Catholic Diocese, supra (retrospective laws are those laws which take away or impair a right acquired under existing laws or create new obligation, impose new duty, or attach new disability with respect to transactions or considerations already past); *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990) (to find otherwise would require the court to hold that the violation of a statute by an individual conferred upon that individual, at the time of the violation of statute, a bundle of rights which included the then statute of limitations, which rights were vested at the time of the violation of the statute and could not be altered or amended by the legislature); *Nichols v. Wilbur*, 256 Or. 418, 473 P.2d 1022 (1970) (not retrospective in application but merely an extension of the right to bring the action); *Clements v. United States*, 266 F.2d 397 (9th Cir. 1959), *cert. denied* 359 U.S. 985, 79 S. Ct. 943, 3 L. Ed. 2d 934 (amendment extending statute of limitations not retroactive in substance or effect); *Bear Lake Irrigation Co. v. Garland*, 164 U.S. 1, 17 S. Ct. 7, 41 L. Ed. 327 (1896) (quoted in dicta in *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979): provision enlarging time in which to commence action to foreclose lien is not retroactive). See, also, *Brookins v. Sargent Industries, Inc.*, 717 F.2d 1201 (8th Cir. 1983) (general rule in Nebraska is that statutes are not to be given retroactive effect unless Legislature has clearly expressed contrary intention; however, exceptions are recognized for procedural legislation); *State v. Dufort*, 111 Or. App. 515, 827 P.2d 192 (1992); *People v Russo*, 185 Mich. App. 422, 463 N.W.2d 138 (1990), *aff'd in part, rev'd in part* 439 Mich. 584, 487 N.W.2d 698 (1992); *People v Chesebro*, 185 Mich. App. 412, 463 N.W.2d 134 (1990) (exception to general rule that statutes are presumed to operate only prospectively unless the contrary intent is shown by the legislature exists when a statute is remedial or procedural in nature). Contra, *State v. Hersch*, 445 N.W.2d 626 (N.D. 1989), *appeal after remand* 467 N.W.2d 463 (N.D. App. 1991); *State v. Tidwell*, 775 S.W.2d 379 (Tenn. Crim. App. 1989).

We have consistently held that a statute of limitations does not impair existing substantive rights but merely affects the procedure by which such rights may be enforced. *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986), *appeal*

after remand 237 Neb. 326, 466 N.W.2d 442 (1991); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981). Statutes of limitations generally apply to all proceedings commenced after the statute becomes effective, whether rights accrued before or after such date. *Cedars Corp. v. Swoboda, supra*; *Denver Wood Products Co., supra*; *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). See, also, *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979) (applicable statute of limitations is the one in force at the time the suit is brought).

Thus, because the extension of a statute of limitations to offenses not barred by a previous period of limitations does not affect a defendant's existing rights or defenses, the application of the extended statute to existing causes of action is not a retroactive law.

We are not unmindful that, as the Court of Appeals noted, statutes of limitations are to be liberally construed in favor of the defendant in a criminal case. *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990); *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951); *Hogoboom v. State*, 120 Neb. 525, 234 N.W. 422 (1931).

However, in the instant case, applying the extended period of limitations to Hirsch's cause of action does not impair any vested right nor deprive him of a defense available according to law at the time when the act was committed; there is no change in legal consequences. See *Denver Wood Products Co., supra* (person has no vested right in the running of a statute of limitations unless it has completely run and barred the action before the new limitation becomes effective). The crime for which Hirsch was indicted, the punishment prescribed, and the quantity or degree of proof necessary to establish guilt all remain unaffected by the extended statute. *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), *reh'g denied* 434 U.S. 882, 98 S. Ct. 246, 54 L. Ed. 2d 166. See, *People v Russo, supra*; *Com. v. Guimento*, 341 Pa. Super. 95, 491 A.2d 166 (1985); *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928), *cert. denied* 277 U.S. 590, 48 S. Ct. 528, 72 L. Ed. 1003

(defendant's right to rely upon statute of limitations as it existed when alleged crime was committed applies only when it has vested). See, also, *Grand Island School Dist. #2, supra* (completed bar is a substantive, vested right which the Legislature cannot abrogate); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981) (defendant's vested right to rely on statutes as a defense if cause of action has become barred).

(c) Procedural Nature of Statutes of Limitations

Although not germane to the adjudication of this appeal, we take the opportunity to address the Court of Appeals' incorrect suggestion that in a criminal case, the statute of limitations may be considered substantive in nature. The Court of Appeals appears to have reached that conclusion in an effort to harmonize our decisions holding that statutes of limitations are procedural in nature with its holding that the Hirsch charge was time barred. However, the fact that the procedural rules applied are those in effect at the time of the proceeding does not preclude a finding that, under appropriate circumstances, an action has been time barred by a prior statute. In *Tyson, supra*, the court considered which of two successive statutes of limitations should be applied. Prior to the case then before the court, it had held that the statute in effect at the time of the commencement of the action should apply rather than the statute in effect at the time the cause of action arose. The *Tyson* court, however, clearly distinguished cases where the later period of limitations had been enacted before the action was time barred. Under both a vested-right defense in its state's constitution and the prohibition against ex post facto laws, the *Tyson* court found that the action was barred by the statute of limitations in existence at the time of the commencement of the action. See, also, *State v. Noah*, 246 Kan. 291, 788 P.2d 257 (1990) (criminal statute of limitations is procedural, and amendment of the statute may be applied to criminal acts occurring prior to the date of the amendment if the crimes charged have not been barred prior to that date); *State v. Casaretto*, 818 S.W.2d 313 (Mo. App. 1991) (new statute of limitations passed after events criminal defendant was charged

with allegedly occurred but before old limitations period had run was procedural and, thus, permissibly extended the statutory period).

(d) District Court Ruling

Because the period of limitations had not yet barred the crime as alleged in the information, the district court did not err in overruling Hirsch's demurrer.

2. Denial of Directed Verdict

In view of our determination that the prosecution is not time barred, we, in the interest of judicial economy, address as well the assignments of error the Court of Appeals did not find it necessary to reach, rather than remanding the cause in order that the Court of Appeals might first consider those matters.

As first noted in part I, Hirsch, in the second assignment of error, complains of the district court's failure to direct a verdict in his favor.

(a) Scope of Review

In a criminal case, a court can direct a verdict only when 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 probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). That is to say, a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993).

If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law. *Id.*; *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993); *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991).

Moreover, in reviewing a criminal conviction, 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 a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993); *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. Davis*, 240 Neb. 631, 483 N.W.2d 554 (1992).

(b) Availability of Claim

At this point, we must address the State's contention that Hirsch has improperly assigned error because he adduced evidence after his motion for a directed verdict at the close of the State's evidence was overruled. In support of this position, the State cites *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992), which does indeed hold that a defendant who moves for a directed verdict at the close of the State's case and proceeds with trial waives any error in the ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction. A distinction must be made, however, between that situation and one wherein a second motion for directed verdict is made at the conclusion of all the evidence. When a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained. See, *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). In the instant case, Hirsch renewed his motion for directed verdict at the end of trial, and it was proper for him to assign the overruling of that motion as error.

(c) Evidence of Crime

Section 28-319 prohibits, among other things, one who, like Hirsch, is 19 years of age or over from sexually penetrating one who, like the daughter, is less than 16 years of age. Neb. Rev. Stat. § 28-318 (Reissue 1989) defines sexual penetration as including any intrusion, however slight, of any part of the actor's body into the genital or anal openings of the victim's body. The emission of semen is not required.

Consistent with the statutory language, we have held that the

slightest intrusion into the genital opening is sufficient to constitute penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985); *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976); *State v. Atkinson*, 190 Neb. 473, 209 N.W.2d 154 (1973). It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient. *Atkinson, supra.*

Hirsch argues that the only evidence about actual sexual penetration occurred when the daughter testified that the pain was "like up inside me." But as detailed in part II, the record reveals more than sufficient evidence of penetration given by several witnesses. The daughter herself testified to several instances of penetration by Hirsch during the period encompassed by the information. She testified that during the November 26, 1986, incident, Hirsch started touching her with his finger and then got on top of her with his legs around her. The daughter then started to feel a "really bad pain" that was "up inside [her]," in her vagina. In the third incident on or about December 25, 1986, the daughter testified Hirsch started touching her with his hands and got on top of her again; this time she "hurt and . . . hurt . . . hurt inside."

Although the daughter did not use the word penetration, her testimony was nonetheless sufficient to show that penetration occurred. In *Brown, supra*, we sustained the conviction of a defendant charged with first degree sexual assault on a 9-year-old victim. We refused to require that a youthful victim testify about an act of cunnilingus in vocabulary used by a gynecologist or provide the type of detailed description which might otherwise be found in some sordid novel.

Hirsch argues that the daughter's testimony is contradicted by her interview with Mullen in which the daughter stated that Hirsch put "his private against her private and that it hurt a lot." Mullen, however, testified that although she had difficulty understanding if Hirsch actually penetrated or not, the daughter did describe that it hurt a lot. Mullen further elaborated that "it's difficult for [children] to say penetration or

not. They can say exactly what happened and they can say it hurt a lot, but . . . they may not be aware if it was inside their body, or outside their body or partially inside their body . . . ." When Mullen was asked if the daughter had told her that she (the daughter) did not know if Hirsch had ever penetrated her or not, Mullen responded that she did not remember the daughter denying penetration. What Mullen did recall is the very common description of putting "the penis against the private opening" and it hurting. Mullen testified that when she asked the daughter if Hirsch had penetrated her, the daughter replied that it hurt, but she did not know. She could describe the pressure, but she did not answer specifically that Hirsch had or had not penetrated her.

Moreover, Hirsch ignores Monteleone's testimony. Monteleone found abnormalities indicating that the daughter had been vaginally penetrated, although he could not tell what had penetrated her or when she had been penetrated. He described a distortion in the opening and a vaginal or hymenal tag in one corner of the daughter's hymen, along with synechiae associated with irritation of the vagina. Monteleone testified that these injuries could have transpired 2, 3, or 4 years ago. In addition, Ballenger testified that while the medical records did not mention penetration and that the daughter had never mentioned penetration during her disclosures in her third stay at the hospital, she had, at that point, only disclosed the showering incidents that had occurred with Hirsch.

Instead, Hirsch argues that the daughter had a history of sticking foreign objects into her vagina. There was some testimony that the wife had told several witnesses that the daughter had inserted an object into her vagina. However, the wife denied telling anyone that the pencil had been inserted. She described observing the daughter when the daughter was about 2 years old with a pencil in between her legs, but the pencil was never inserted. The daughter testified that she did not recall ever sticking any foreign object into her vagina.

Hirsch also relies on the testimony of Flearl, who examined the daughter when spots of blood were found on her underwear. Flearl could not be specific as to the causes of the spotting but was sure that the daughter was not bleeding from the inside.

Despite this diagnosis, Flearl stated it was a question in her mind where the blood came from. It was Monteleone's view that Flearl had made a mistake in not examining the cause of blood.

(d) District Court's Ruling

Thus, the evidence is such that the jury reasonably could have found that Hirsch sexually penetrated the daughter on two occasions during the period of time specified in the information: on November 26, 1986, and again around Christmas, i.e., on or about December 25, 1986. Given that in light of Hirsch's conviction the evidence must be construed most favorably to the State, see *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990), it therefore cannot be said that the district court erred in overruling Hirsch's motion for directed verdict made at the close of all the evidence.

3. Denial of New Trial

In the third and last assignment of error, Hirsch asserts the district court incorrectly refused to grant him a new trial because of newly discovered evidence.

(a) Scope of Review

"A new trial, after a verdict of conviction, may be granted . . . for any of the following reasons affecting materially his substantial rights . . . (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial . . . ." Neb. Rev. Stat. § 29-2101 (Reissue 1989).

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 on appeal. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993); *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

(b) Evidence Claimed to Be Newly Discovered

Hirsch argues that a videotape taken during Christmas 1987 constitutes newly discovered evidence supportive of a new trial. The videotape depicts the daughter interacting with Hirsch

during the exchanging of Christmas presents. More specifically, it shows the daughter sitting with Hirsch, allowing him to touch and hug her, smiling and laughing with him. Hirsch represents that a psychotherapist would testify that based on the tape, the daughter was not being truthful when she testified that Hirsch sexually abused her.

Hirsch urges that as the videotape was in the possession of his brother, as he had no intent to videotape the Christmas festivities, and as no one individual did the actual videotaping, it is unreasonable to expect him to have remembered it when he was charged with a crime years later.

Assuming, without deciding, that the evidence was otherwise admissible, it simply does not qualify as being newly discovered. In order to qualify as such, the evidence may not be something which could have been uncovered and produced at trial with reasonable diligence. See, *Boppre, supra*; *Jensen, supra*. In *Pence v. Liermann*, 191 Neb. 614, 216 N.W.2d 746 (1974), we wrote that one moving for a new trial on the ground of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. Evidence is not newly discovered if diligence before the trial would have produced notice or knowledge of the alleged recently uncovered evidence. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

This court has defined reasonable diligence as appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful. *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979).

In *The People v. Williams*, 242 Ill. 197, 89 N.E. 1030 (1909), a defendant made application for a new trial on the basis of the affidavit of his wife's physician establishing that the defendant was at home on the day the larceny occurred. The court denied the application, finding it difficult to believe with so serious a charge as this made against the defendant that he never inquired of the physician and nurse as to their recollection of his whereabouts.

In the instant case, the videotape could have been uncovered

by the exercise of diligence prior to trial. Even assuming as true that no one person did the taping, Hirsch was aware of and remembered that the taping was being done that day; in fact, it was Hirsch's video camera that was used. Not knowing the tape still existed and not recalling or having forgotten the tape do not excuse failing to discover its existence when Hirsch offers no evidence of any previous attempts to locate the tape either through his brother, who had possession of it, or any of the other at least five adults present during the visitation and taping.

As early as in *Upton v. Levy*, 39 Neb. 331, 58 N.W. 95 (1894), we refused to grant a new trial on the ground of newly discovered evidence when it appeared that such evidence was not produced at trial because the litigant had forgotten its existence. We stated that if courts should grant litigants new trials in order to enable them to produce evidence which they had forgotten exists, there would be few final judgments. See *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990) (trial court did not abuse its discretion in denying defendant's motion for new trial made on grounds of newly discovered evidence which consisted of defendant's sudden recollection after listening to tape recording of his drug sale, where tape was in his possession far in advance of trial and defendant failed to act with reasonable diligence by neglecting to review tape and refresh his memory until after trial).

Other jurisdictions have also held that forgetfulness is inconsistent with the diligence required in presenting the evidence during the trial, and such lack of due diligence does not warrant a new trial on the basis of newly discovered evidence. See, *United States v. Leyba*, 504 F.2d 441 (10th Cir. 1974), *cert. denied* 420 U.S. 934, 95 S. Ct. 1139, 43 L. Ed. 2d 408 (1975) (application for new trial to introduce testimony of witnesses known to, but forgotten by, party at time of trial denied); *State v. Daymus*, 93 Ariz. 332, 380 P.2d 996 (1963) (facts or evidence not introduced or otherwise made use of at trial because they were forgotten until after the trial do not constitute newly discovered evidence); *Com. v. Duest*, 30 Mass. App. 623, 572 N.E.2d 572 (1991), *review denied* 410 Mass. 1103, 577 N.E.2d 309 (recollection of fact after trial does not

constitute newly discovered evidence justifying new trial, since such recollection pertains to known rather than unknown, to which concept of discovery applies; by due attention fact might have been remembered); *Lewis v. State*, 367 So. 2d 542 (Ala. Crim. App. 1978), *writ denied* 367 So. 2d 547 (Ala. 1979) (new trial denied where defendant, who could not remember last name of potential defense witness, did subsequently remember name of witness, since this was not newly discovered evidence, but, rather, newly disclosed evidence). But cf. *Archer v. Whitten*, 120 Minn. 433, 139 N.W. 815 (1913) (newly discovered evidence consisting of letter claimed to be admission of plaintiff and of which defendant had no recollection and which he had discovered accidentally was grounds for new trial).

(c) District Court's Ruling

As the district court cogently noted, the videotape was not newly discovered evidence, it was merely "newly remembered" evidence. Accordingly, the district court did not err in refusing to grant a new trial.

IV. JUDGMENT

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the cause remanded with the direction that the judgment of the district court be reinstated.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. SCOTT A. RISTAU, APPELLANT.

511 N.W.2d 83

Filed January 28, 1994. No. S-93-020.

1. **Courts: Appeal and Error.** In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court.
2. **Appeal and Error.** An appellate court may at its option consider plain error not assigned.
3. _____. Plain error is error plainly evident from the record and of such a nature

that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

4. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions.
5. _____: _____. The State cannot meet its burden to prove a prior conviction in an enhancement proceeding with a judgment that would have been invalid to support a sentence of imprisonment in the first instance.
6. **Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel.
7. **Prior Convictions: Right to Counsel: Waiver: Records: Proof.** A transcript of judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction.
8. **Right to Counsel: Records: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.
9. **Prior Convictions: Right to Counsel: Waiver: Records: Proof.** There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver, the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel.
10. **Drunk Driving: Prior Convictions: Right to Counsel: Waiver: Records: Proof.** Although proof of prior convictions to establish second- or third-offense charges of driving while under the influence of alcohol may be waived by the voluntary and intelligent admission of the defendant, there must nevertheless be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right. Absent such proof on the record, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence.
11. **Drunk Driving: Prior Convictions: Records: Proof.** When a defendant is charged with driving while under the influence of alcohol, second offense, regardless of whether the State introduces evidence to prove a prior conviction or whether the defendant admits a prior conviction, the trial court must advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction.
12. **Constitutional Law: Due Process: Judicial Notice.** The Due Process Clause of the U.S. Constitution requires that a defendant be informed when a court judicially notices facts.

Appeal from the District Court for Dakota County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Dakota County, RODNEY R. SMITH, Judge. Sentence vacated, and cause remanded for resentencing.

Martin G. Cahill, Dakota County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

FAHRNBRUCH, J.

Because the record fails to show he had counsel, or waived counsel, during a prior conviction for driving while under the influence of alcohol, Scott A. Ristau claims his sentence for second-offense driving while under the influence of alcohol is invalid.

We vacate the second-offense sentence and remand the cause to the district court for Dakota County with direction to remand it to the Dakota County Court with direction to resentence Ristau in accordance with the law.

FACTS

On September 29, 1992, pursuant to a plea agreement, Ristau pled guilty to (1) driving under the influence of alcohol, second offense, and (2) resisting arrest. In return for the pleas, the State dismissed several other charges.

At Ristau's plea hearing in the county court, the State summarized the facts supporting the charges to which Ristau entered pleas of guilty. In reciting those facts, the prosecutor stated that "the defendant has a previous conviction for driving under the influence of alcohol in proceeding [sic] in this court concluding on Jan- — June 4, 1990, said offense having occurred on March 16, 1990. Based on those facts, the defendant was charged with driving under the influence of alcohol, second offense." The same information was contained in the complaint charging Ristau with driving under the influence of alcohol, second offense.

The county judge asked Ristau whether the facts as stated by the prosecutor were correct, and Ristau answered, "Yes, Your Honor." The judge did not ask Ristau whether he had been represented by counsel or whether he had waived counsel during his prior conviction. No certified copy of the prior

conviction was offered or received into evidence.

The county judge found a factual basis for accepting Ristau's guilty pleas and found him guilty on both charges. For driving while under the influence of alcohol, second offense, the court sentenced Ristau to 30 days in jail, fined him $500 plus court costs, and revoked his driver's license for 1 year. Ristau also was sentenced to 90 days in jail for resisting arrest. His jail sentences were ordered to run concurrently. On appeal to the district court for Dakota County, Ristau's convictions and sentences were affirmed. Ristau timely appealed.

ASSIGNMENT OF ERROR

Ristau's sole assignment of error on appeal to this court claims that the district court erred in finding that the lower court found a valid second offense (of driving while under the influence of alcohol).

ANALYSIS

We first address the State's contention that this court need not consider Ristau's assignment of error because it was not properly raised. The State contends that Ristau failed to file a timely statement of errors on appeal from the Dakota County Court in accordance with Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992). Included in the record before this court is a certificate of transcript from the district court which establishes that Ristau timely filed a statement of errors on October 28, 1992. The State concedes this fact in its brief.

Thus, the State's real contention seems to be that this court cannot consider Ristau's assignment of error because the record before us does not contain an actual copy of the statement of error filed by Ristau in the district court.

In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court. See, *State v. Gerstner*, 244 Neb. 508, 507 N.W.2d 490 (1993); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

Because the record before us does not contain a copy of Ristau's statement of error filed in the district court, we cannot determine whether he assigned the same error on appeal to the

district court as he has on appeal to this court. However, an appellate court may at its option also consider plain error not assigned. See, also, Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.* We elect to review Ristau's appeal for plain error.

In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991); *State v. Ellis*, 216 Neb. 699, 345 N.W.2d 323 (1984); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). The State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). We have stated repeatedly that under *Baldasar*, when using a prior conviction to enhance a sentence, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. See, e.g., *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992); *State v. Anderson*, 232 Neb. 349, 440 N.W.2d 257 (1989); *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987).

Usually, the State will prove a defendant's prior convictions by introducing certified copies of the prior convictions or transcripts of the prior judgments. See, e.g., *id.*; *Smith, supra*. However, a transcript of judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction. *Nowicki, supra*. Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected. See *Smith, supra*.

This court also has held:

> "There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel."

State v. Smyth, 217 Neb. 153, 155-56, 347 N.W.2d 859, 861 (1984). Accord *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

Therefore, although proof of prior convictions to establish second- or third-offense charges of driving while under the influence of alcohol may be waived by the voluntary and intelligent admission of the defendant, there must nevertheless be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right. See *State v. Tichota*, 218 Neb. 444, 356 N.W.2d 85 (1984). Absent such proof on the record, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence. See, e.g., *State v. McPherson*, 235 Neb. 107, 453 N.W.2d 745 (1990); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

When a defendant is charged with driving while under the influence of alcohol, second offense, regardless of whether the State introduces evidence to prove a prior conviction or whether the defendant admits a prior conviction, the trial court must advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction as provided in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990). *Ziemba, supra*.

In this case, the prosecutor produced no certified copies or other evidence of Ristau's prior conviction for driving while under the influence of alcohol, nor did the prosecutor produce any evidence that Ristau had or waived counsel at the time of his prior conviction.

The prosecutor did recite a prior conviction as one of the facts supporting the charge of second-offense driving while under the influence of alcohol, and the county court judge asked Ristau whether those facts were correct. Ristau answered affirmatively. The record fails to show that the county judge ever ascertained whether Ristau was represented by counsel or waived his right to counsel at the time of the earlier conviction or whether the county judge advised Ristau of his rights under § 39-669.07.

The State argues that the county court was not wrong in sentencing Ristau for a second offense because it could take judicial notice of Ristau's prior conviction record and its validity. This argument is without merit.

Neb. Rev. Stat. § 27-201(5) (Reissue 1989) states in part that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." In discussing Fed. R. Evid. 201, which is identical to § 27-201, Wright and Graham state that implicit in subsection (5) of the rule is a requirement that the judge "notify the parties that he is taking judicial notice of an adjudicative fact." 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5107 at 507 (1977). Moreover, the Due Process Clause of the U.S. Constitution requires that a defendant be informed when a court judicially notices facts. See *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961).

The record in this case contains nothing to suggest that the county judge took judicial notice of this or any other fact. Yet the State asks us to infer that the county judge took judicial notice, not only that the record of Ristau's prior conviction exists, but also that the record would show he was represented by counsel or waived counsel in that prior conviction. This we cannot do.

CONCLUSION

Therefore, we find plain error as to the enhancement of Ristau's sentence for driving while under the influence of alcohol because the record contains no proof that Ristau was represented by or waived counsel in a prior conviction of driving while under the influence of alcohol. We vacate Ristau's sentence for driving while under the influence of alcohol, second offense, and remand the cause to the district court with direction to remand it to the county court with direction to resentence Ristau in accordance with the law. In all other respects, we affirm the judgment of the district court.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

132ND STREET LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLEE, V. GARY FELLMAN, DOING BUSINESS AS FELLMAN PUBLICATIONS, INC., APPELLANT.

511 N.W.2d 88

Filed January 28, 1994. No. S-93-104.

1. **Actions: Courts: Statutes.** All provisions in the code of civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and relating to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.
2. **Motions for New Trial: Courts: Time: Appeal and Error.** The filing of a notice of appeal and a deposit of a docket fee within 30 days after an order overruling a motion for new trial timely filed in a county court perfects an appeal to the district court from the final order of the county court.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Douglas County, JOHN E. CLARK, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Douglas E. Quinn, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Jeffrey A. Silver for appellee.

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

BOSLAUGH, J.

This is an action which originated in the Douglas County Court for rents due under a written lease agreement. The plaintiff is 132nd Street Ltd., a Nebraska limited partnership, and the defendant is Gary Fellman, doing business as Fellman Publications, Inc.

The parties each filed motions for summary judgment. On October 27, 1992, the county court sustained the plaintiff's motion for summary judgment and overruled the defendant's motion for summary judgment. On October 30, 1992, the defendant filed a motion for new trial, and that motion was denied on November 19, 1992. On December 8, 1992, the

defendant filed in the district court a notice of appeal from the order denying his motion for new trial.

Relying on *Edward Frank Rozman Co. v. Keillor*, 195 Neb. 587, 239 N.W.2d 779 (1976), the plaintiff filed a motion to dismiss the appeal on the basis of lack of jurisdiction, asserting that the defendant's notice of appeal was untimely filed. On January 14, 1993, the district court granted the plaintiff's motion to dismiss the appeal.

On January 29, 1993, the defendant appealed to the Nebraska Court of Appeals. Thereafter, the plaintiff filed a motion for summary affirmance pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1992) for lack of jurisdiction. On June 4, 1993, the Court of Appeals sustained the plaintiff's motion and summarily affirmed the judgment.

The defendant's petition for further review by this court was granted. The defendant asserts that the Court of Appeals erred in granting the plaintiff's motion for summary affirmance.

Neb. Rev. Stat. § 25-2701 (Reissue 1989) provides:

> All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.

Neb. Rev. Stat. § 25-2729 (Reissue 1989) provides the procedure for perfecting appeals from the county court. It states in part:

> (1) In order to perfect an appeal from the county court, the appealing party shall within thirty days after the rendition of the judgment or making of the final order complained of:
>
> (a) File with the clerk of the county court a notice of appeal; and
>
> (b) Deposit with the clerk of the county court a docket fee in the amount of the filing fee in district court.

There are no statutory provisions applicable to county courts providing for motions for new trial; however, there are provisions for motions for new trial applicable to proceedings

in the district court which are not in conflict with statutes applicable to county court proceedings, and according to § 25-2701, these provisions for motions for new trial applicable in the district court shall apply in the county court.

Neb. Rev. Stat. § 25-1315.03 (Cum. Supp. 1992) provides that an order on a motion for new trial is a final order for purposes of appeal, and the time and manner for perfecting an appeal therefrom are the same as in an appeal from a judgment, decree, or final order of the district court in a civil action.

Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) provides the procedure for perfecting an appeal from the district court to the Court of Appeals or this court. An appellant is given 30 days from rendition of judgment, decree, or final order to file a notice of appeal and deposit his or her docket fee. § 25-1912(1). Section 25-1912(2) states in part:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143 if such motion is filed by any party within ten days after the verdict, report, or decision was rendered or (b) by a motion to set aside the verdict or judgment under section 25-1315.02 if such motion is filed by any party within ten days after the receipt of a verdict, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) or (b) of this subsection.

In *Edward Frank Rozman Co. v. Keillor*, 195 Neb. 587, 239 N.W.2d 779 (1976), this court held: "On appeal from a county or municipal court to the District Court, notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be prolonged by filing a motion for new trial." (Syllabus of the court.)

Keillor was decided prior to enactment of § 25-2729, which provides "thirty days after the rendition of the judgment or making of the final order complained of" within which a notice of appeal and docket fee must be filed in the county court.

In *Henry v. Reeves*, 234 Neb. 794, 452 N.W.2d 750 (1990), this court dismissed an appeal from the district court which affirmed the judgment of the county court in favor of the

plaintiff. The facts were as follows:

> The county court *judgment* was entered on December 22, 1987. A motion for a new trial was filed on December 31, 1987, and was overruled on January 12, 1988. The notice of appeal was filed in county court on February 12, 1988. This, of course, was 31 days after the entry of the *final order* of which complaint was made.

(Emphasis supplied.) (Emphasis omitted.) *Id.* at 795, 452 N.W.2d at 750-51.

In the *Reeves* case, the final order of which complaint was made was the county court's overruling of the defendant's motion for new trial, and it was obviously filed after the 30-day filing period provided in § 25-2729.

In the present case, the defendant filed his motion for new trial within 10 days of the county court's order granting summary judgment in favor of the plaintiff and overruling the defendant's motion for summary judgment. The county court's order denying the defendant's motion for new trial was issued on November 19, 1992. The defendant's notice of appeal from that order was filed within 30 days of November 19, on December 8, 1992, and was timely according to § 25-2729 and *Reeves*.

The Court of Appeals erred in summarily affirming this appeal for lack of jurisdiction. The judgment is reversed, and the cause is remanded to the Court of Appeals with directions to remand the cause to the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. ELIZABETH E. WOOD, APPELLANT.

511 N.W.2d 90

Filed January 28, 1994. No. S-93-126.

1. **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.
2. **Right to Counsel: Probation and Parole: Attorney Fees.** When a defendant is appointed counsel after a finding of indigence, a determination that the defendant is no longer indigent is necessary before the court can require reimbursement of fees for the court-appointed attorney as a condition of probation.
3. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed upon appeal in the absence of an abuse of discretion by the trial court.
5. **Sentences: Probation and Parole: Restitution: Attorney Fees.** A trial court is given the authority to attach broad conditions to probation, in order to rehabilitate a defendant, including conditioning probation on the restitution of fees for the court-appointed attorney.
6. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
7. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
8. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
9. **Rules of Evidence: Other Acts: Proof.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary rule which permits the use of relevant prior bad 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.
10. _____: _____: _____. Evidence of prior bad acts is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
11. **Rules of Evidence: Other Acts: Appeal and Error.** In reviewing the admission of evidence of prior bad acts, 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.

12. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion.
13. **Rules of Evidence: Words and Phrases.** Relevant evidence means any 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.
14. **Evidence.** To be relevant, evidence must be rationally related to the issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided.
15. **Rules of Evidence: Words and Phrases.** Most evidence a party offers is prejudicial to the opposing party, and it is only unfair prejudice if it tends to suggest a decision on an improper basis.

Appeal from the District Court for Pierce County: ROBERT B. ENSZ, Judge. Affirmed as modified.

David R. Uher for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

LANPHIER, J.

Elizabeth E. Wood appeals her conviction and sentence for possession of marijuana with intent to deliver. Before trial, the court determined that Wood was indigent and appointed an attorney for her. At trial, the district court admitted testimony, over Wood's objections, of her prior misconduct. After conviction, the district court sentenced Wood to 36 months' probation and ordered her to reimburse the county for her court-appointed attorney's fees as a condition of probation. This court granted her petition to bypass review by the Nebraska Court of Appeals. We affirm as modified.

STATEMENT OF FACTS

On June 8, 1992, during a routine traffic stop, Wood consented to a search of her vehicle by Nebraska State Trooper Duff Jensen. For his own safety, Jensen asked Wood and another passenger, Wood's son, to step out of the vehicle while he conducted the search. Again for safety reasons, he then

asked Wood if she had anything in the pockets of the jacket she was wearing. Wood reluctantly removed a small cloth pouch from her pocket and showed it to Jensen. When Jensen asked her what the contents of the bag were, she responded by opening the bag far enough for him to see some plastic baggies containing a green leafy substance. Believing the substance to be marijuana, Jensen asked Wood to give him the pouch. In the pouch Jensen discovered five plastic bags of marijuana, an empty bag, a pipe made from a deer antler, two packs of rolling papers, a small pair of scissors, and $182.25 in cash. A search of the vehicle produced a marijuana pipe and a pair of forceps.

After being informed of her rights, Wood later admitted to the investigating officer, Galen Svoboda, that the marijuana belonged to her. An attorney was appointed to represent Wood after a finding of indigence. At trial, Wood testified on her own behalf that she was a marijuana user and that the marijuana found in the pouch was for her own personal use. Carl Schultz, a witness for the prosecution, testified he had seen Wood with marijuana on approximately four or five prior occasions. One of those occasions occurred when Wood came to Schultz' home and asked Schultz if he wanted to "get high." Schultz accepted Wood's offer and testified that Wood "rolled" a marijuana cigarette and gave it to him to smoke. Wood's objections to the testimony were overruled. The trial court advised the jury that Schultz' testimony was only for the purpose of assisting them in deciding whether or not Wood had intended to commit the offense charged, possessing marijuana with the intent to deliver. The court repeated this instruction at the end of Schultz' testimony.

Wood was convicted, and on January 11, 1993, she was sentenced to a term of probation of 36 months. One of the conditions of her probation required Wood to reimburse Pierce County for fees paid to her court-appointed attorney. Wood raised no objections to this condition of probation at the time of sentencing.

Wood asserts the trial court erred in conditioning her probation on her reimbursing Pierce County for her court-appointed attorney's fees, without making a determination that she was no longer indigent. In the

alternative, she claims that if the statutory scheme authorizes recoupment of attorney fees absent a reconsideration of continued indigence, then the statutory scheme violates her constitutional right to counsel. Wood also claims the court erred in admitting the testimony of Schultz regarding Wood's prior bad acts.

CONDITION OF PROBATION

PRESERVATION OF ISSUE

At Wood's sentencing hearing, the trial court sentenced Wood to a term of 36 months' probation. As a condition of probation, the court ordered Wood to reimburse the county for the expenses incurred in providing a court-appointed attorney for her after an earlier finding of indigence. After imposing the sentence, the trial court asked Wood if she had any objection to this sentence. Wood replied in the negative. The amount of fees had not been predetermined. She now claims the court went beyond its power in imposing the reimbursement of attorney fees as a condition of probation without first determining that she was no longer indigent.

The State asserts we cannot hear the sentencing issue because Wood did not raise an objection at trial. 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. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992). However, since it is the sentence which is the judgment, Wood's objection to her sentence was through the appeal procedure as set forth in Neb. Rev. Stat. § 25-1911 et seq. (Reissue 1989 & Cum. Supp. 1992). See, *State v. Beverlin*, 244 Neb. 615, 508 N.W.2d 271 (1993); *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). As such, this matter is properly before us.

STATUTORY AUTHORITY TO IMPOSE SENTENCE

Wood claims there is no statutory authorization for the condition of requiring payment of fees of the court-appointed attorney, without the court's first making a determination that she was no longer indigent. In the alternative, she claims that if

this court finds there is statutory authorization for the imposition of such a condition of probation, then such a statutory scheme denies Wood her constitutional right to counsel.

We find the statutes of this state require that when a defendant is appointed counsel after a finding of indigence, a determination that the defendant is no longer indigent is necessary before the court can require reimbursement of fees for the court-appointed attorney as a condition of probation. We do not address Wood's constitutional claim, since its determination is not necessary for the proper disposition of the question. See *State v. Wenzel*, 215 Neb. 395, 338 N.W.2d 772 (1983).

When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991).

A sentence imposed within the statutory limits will not be disturbed upon appeal in the absence of an abuse of discretion by the trial court. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993).

The Nebraska Probation Administration Act, Neb. Rev. Stat. § 29-2246 et seq. (Reissue 1989 & Cum. Supp. 1992), authorizes a court, when sentencing an offender to probation, to impose reasonable conditions it deems "necessary or likely to insure that the offender will lead a law-abiding life." § 29-2262(1). Section 29-2262(2)(q) further provides that the court as a condition of probation may require an offender "[t]o satisfy any other conditions reasonably related to the rehabilitation of the offender."

Although no mention of restitution is made in § 29-2262, the trial court is given the authority to attach broad conditions to probation, in order to rehabilitate a defendant. See *State v. Escamilla, supra*. The condition of restitution of fees for the court-appointed attorney was well within the court's authority.

However, the court's authority to impose restitution of fees for court-appointed attorneys is limited by Neb. Rev. Stat. § 29-3908 (Cum. Supp. 1992), formerly § 29-1804.10 (Reissue 1989).

Section 29-3908 authorizes recoupment of court-appointed

attorney fees under certain circumstances:

> Whenever any court finds subsequent to its appointment of the public defender or other counsel to represent a felony defendant that its initial determination of indigency was incorrect or that during the course of representation by appointed counsel the felony defendant has become no longer indigent, the court may order such felony defendant to reimburse the county for all or part of the reasonable cost of providing such representation.

We have stated that " 'special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. . . .' " *State v. Escamilla*, 237 Neb. at 651, 467 N.W.2d at 62. Since § 29-3908 specifically addresses recoupment of fees for court-appointed attorneys, its provisions regarding recoupment will prevail over the provisions of § 29-2262. In this case, prior to trial, the court had made a determination that Wood was indigent and had appointed counsel for her. Thus, at the time of sentencing, the court could have properly conditioned probation on the reimbursement of expenses, but it could only have done so after making a determination that Wood was no longer indigent. This was not done. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). There is no evidence in the record which would indicate that the court made a determination that Wood was no longer indigent before imposing the reimbursement of the court-appointed attorney's fees as a condition for probation. Without such a determination, it was an abuse of discretion for the lower court to require Wood to reimburse the county for her court-appointed attorney's fees as a condition of her probation.

ADMISSION OF TESTIMONY

We now turn to Wood's claim that the testimony of Schultz concerning her prior bad acts was inadmissible. Schultz testified he had known Wood for approximately 2 years. He had seen Wood approximately 12 times over those 2 years, and

on 4 or 5 of those occasions, she had marijuana in her possession. He also testified, over Wood's objections, that she had provided him with marijuana on one of those four or five occasions.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

The statutes on which Wood relies are Neb. Rev. Stat. §§ 27-404(2) and 27-403 (Reissue 1989). We have stated that § 27-404(2) is an inclusionary rule which permits the use of relevant prior bad 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. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). The statute sets forth the circumstances under which evidence of prior bad acts is admissible: as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

However, evidence which is otherwise admissible under § 27-404(2) may be excluded under § 27-403 if its probative value is substantially outweighed by other considerations.

Accordingly, we review the admission of evidence of other acts by considering (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. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1993).

It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

Relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1989). To be relevant, evidence must be rationally related to the issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided. *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992).

The testimony provided by Schultz was relevant and proper to establish Wood's intent to deliver the marijuana. Wood was charged with possession of marijuana with intent to deliver. See Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992). Although Wood admitted she owned the marijuana found on her, the State was required to show that she intended to deliver it. Schultz testified that when Wood came to his house and gave him and others marijuana to smoke, she carried marijuana, rolling papers, and scissors in the same pouch as the one she carried on the day she was arrested. He also testified that she offered him the substance for his use and that when he accepted, she "rolled" him a marijuana cigarette. His testimony served to prove that the marijuana Wood carried in the pouch was intended not merely for her own personal use, but for the use of others as well.

In determining whether the probative value of testimony outweighs its potential for unfair prejudice, we have stated that most evidence a party offers is prejudicial to the opposing party, and it is only unfair prejudice if it tends to suggest a decision on an improper basis. *State v. Styskal, supra*. Wood cites nothing in the record which would support the contention that the testimony was unfairly prejudicial to her. We have found nothing which would show that the jury's decision to convict her was made on an improper basis. The evidence showed that Wood admitted to owning the marijuana contained in the pouch. The sole question was whether she intended to deliver the marijuana or consume it herself. The testimony of Schultz was properly admitted to show intent to deliver. In this instance, any prejudice resulting from the testimony was not unfair and did not outweigh the testimony's probative value.

Furthermore, the fourth prong of the test to determine admissibility of evidence of other acts is satisfied because the trial court, on its own motion, instructed the jury that the

testimony regarding Wood's prior bad acts was received for the limited purpose of helping them decide whether Wood had the intent to deliver the marijuana. He admonished them to consider the evidence for that purpose alone and gave the same instruction immediately after Schultz' testimony. On these facts, we find there was no abuse of discretion in admitting the evidence of Wood's prior bad acts.

CONCLUSION

We find that the trial court properly admitted the testimony concerning the prior bad acts of Wood. In addition, we find the court was authorized to condition probation on Wood reimbursing the county for her court-appointed attorney's fees. However, because we find the sentencing court abused its discretion in making the condition without first determining that Wood was no longer indigent, we vacate that portion of Wood's sentence requiring her to reimburse the county for her court-appointed attorney's fees.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GLENN A. RANSON, APPELLANT.

511 N.W.2d 97

Filed January 28, 1994. No. S-93-314.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. _____: _____. 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 it observed the witnesses.
3. **Arrests: Search and Seizure.** The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself.
4. **Arrests: Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The validity of a warrantless arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists.

5. **Arrests: Police Officers and Sheriffs: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justify a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
6. **Arrests: Search and Seizure: Probable Cause.** A search incident to arrest can be made prior to an arrest as long as probable cause for the arrest exists prior to the search.
7. **Arrests: Police Officers and Sheriffs: Misdemeanors: Probable Cause.** Neb. Rev. Stat. § 29-404.02 (Reissue 1989) authorizes a peace officer to make a warrantless arrest when there is probable cause to believe that a misdemeanor is being committed in the presence of the officer.
8. **Arrests: Search and Seizure: Police Officers and Sheriffs: Weapons: Evidence.** A search incident to arrest is not limited to searching the arrested person for weapons only; an officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence.

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

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

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

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

LANPHIER, J.

After being charged with possession of a controlled substance, defendant, Glenn A. Ranson, moved to suppress all evidence arising from an allegedly unlawful search. The motion was denied, and after a bench trial on stipulated facts, defendant was found guilty. He appeals the lower court's decision to overrule the motion to suppress, arguing that the search of his person violated the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. We hold that the search was valid as incident to a lawful arrest. Accordingly, we affirm the judgment of the district court.

BACKGROUND

On the evening of Friday, September 25, 1992, Omaha police

officer Curtis Atkinson observed defendant walking westbound on R Street near 30th Street in Omaha. Atkinson was in a marked police cruiser being driven by Officer Jeff Saalfeld. As they drove toward defendant, Atkinson saw that defendant was holding a beer can. After Atkinson saw defendant place the beer can on the sidewalk, Atkinson stepped out of the cruiser and asked defendant for identification. Defendant responded that he did not have identification, and he turned and walked away. Defendant continued to walk away when Atkinson asked him to stop.

Atkinson noticed that defendant discarded several paper items from his shirt pocket as he walked away. Atkinson testified to what happened next:

> I got ahold of him and turned him around physically to face me near the building — that — I believe it's a bakery, turned him around to face me. And then I made him, you know keep his hands down at his sides while I went into the shirt pocket myself.

Atkinson did not believe the pocket contained a weapon. Atkinson had not seen any contraband or paraphernalia either. The search produced a rock of crack cocaine. After the illegal substance was found, defendant ran from the officer, but was quickly apprehended.

Prior to trial, defendant moved to suppress the illegal substance. The trial court overruled the motion, holding that the search was conducted after defendant had been lawfully stopped upon a reasonable and articulated suspicion of criminal activity and that the search was necessary for the officer's safety. At trial, defendant's objections to the introduction of the substance were overruled.

ASSIGNMENT OF ERROR

Defendant asserts that the trial court erred in overruling his motion to suppress and otherwise permitting the introduction at trial of evidence which was the fruit of the search of his person.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State*

v. DeGroat, 244 Neb. 764, 508 N.W.2d 861 (1993). 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 it observed the witnesses. *Id.*

DISCUSSION

Defendant's sole argument is that Atkinson, in searching defendant's shirt pocket, violated the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution and that, therefore, the rock of crack cocaine found in defendant's pocket should have been excluded from evidence.

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). The 4th and 14th Amendments and the Nebraska Constitution do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

In this case, we are confronted with not merely a pat-down search, but, rather, with a full search of defendant's person. It is clear from the record that Atkinson did not merely frisk defendant, but immediately searched inside defendant's pocket. In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court held that in the case of a lawful custodial arrest, a full search of a person is not only an exception to the Fourth Amendment's warrant requirement, but is also a reasonable search under that amendment.

This court has also held that a search incident to a lawful arrest is a reasonable search under article I, § 7, of the Nebraska Constitution. *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). Of course, the validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself. *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992). The validity of a warrantless arrest and the

permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists. *State v. Roach, supra.* When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justify a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 113, 126 L. Ed. 2d 78. Also, a search incident to arrest can be made prior to an arrest as long as probable cause for the arrest exists prior to the search. *State v. Roach, supra.*

In the present case, the search of defendant's pocket took place after the arresting officer observed defendant, who was carrying a can of beer while walking along the sidewalk, place the beer on the curb and after the arresting officer witnessed defendant take several paper items from his shirt pocket and dispose of them on the ground.

Neb. Rev. Stat. § 29-404.02 (Reissue 1989) authorizes a peace officer to make a warrantless arrest when there is probable cause to believe that a misdemeanor is being committed in the presence of the officer. It is a misdemeanor to litter on public or private property. Neb. Rev. Stat. § 28-523 (Reissue 1989). Atkinson, the arresting officer, observed conduct of defendant which established probable cause to believe he was witnessing the commission of a misdemeanor. He had knowledge, based on information reasonably trustworthy under the circumstances, which justified his prudent belief that the suspect was committing a crime.

The State also asserts that probable cause to arrest existed for defendant's possession of alcohol in public. Neb. Rev. Stat. §§ 53-186 and 53-1,100 (Reissue 1988) provide that consumption of liquor on public property, unless authorized by the governing body having jurisdiction over such property, is a misdemeanor. However, we need not decide whether probable cause to arrest for this offense existed, since the trial court did not rule on this issue and since it is only necessary to find that probable cause existed to arrest for some crime.

Since Atkinson had probable cause to arrest for littering

prior to searching defendant, the arrest was proper. Pursuant to the lawful arrest, Atkinson had authority to conduct a full search of defendant without a search warrant. See, *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992). A search incident to arrest is not limited to searching the arrested person for weapons only; an officer may search for and seize any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence. *Id.*

Neb. Rev. Stat. § 29-422 (Reissue 1989) not only provides that citations may be issued in lieu of arrest for misdemeanors such as littering, but it also makes clear that it is the "policy of the State of Nebraska to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law and the protection of the public." It would appear that the issuance of a citation, rather than arrest, for littering would be consistent with the State's policy. Arrest was appropriate, since defendant failed to identify himself and since no citation can be issued without the name and address of the person to be cited. Neb. Rev. Stat. § 29-424 (Reissue 1989).

We affirm the judgment of the district court.

AFFIRMED.

B & R STORES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS B & R IGA, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

B & R STORES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS SUPER SAVER II, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

511 N.W.2d 101

Filed February 4, 1994. Nos. S-91-1106, S-91-1107.

Governmental Subdivisions: Sales: Liquor Licenses: Appeal and Error. Where the action of a city council in denying an application for the sale of alcoholic

liquor pursuant to Neb. Rev. Stat. § 53-132 (Cum. Supp. 1990) is not supported by the record, it will be reversed upon a petition in error.

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

William F. Austin, Lincoln City Attorney, and Dana W. Roper for appellant.

Paul J. Peter, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee.

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

BOSLAUGH, J.

Pursuant to separate applications, the appellee, B & R Stores, Inc. (B & R), sought class D liquor licenses for grocery stores located at 2662 Cornhusker Highway and 1709 Washington Street in Lincoln. Proceeding under Neb. Rev. Stat. § 53-132 (Cum. Supp. 1990), the city council of the City of Lincoln conducted a hearing on the applications on October 2, 1989, and by separate resolutions disapproved the applications. B & R then sought a review of the city council's denial of its applications by filing petitions in error in the district court in accordance with § 53-132 and Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1989). The district court reversed the city's denial of the liquor licenses and separately ordered the issuance of the licenses to B & R. The City of Lincoln now appeals from those orders.

The district court based its decisions in these cases upon Neb. Rev. Stat. § 53-134 (Cum. Supp. 1990). That section, as amended by 1989 Neb. Laws, L.B. 781, was determined to be unconstitutional in *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993). Consequently, we determine these consolidated appeals on the basis of § 53-132 (Reissue 1984). See, *American Drug Stores v. City of Lincoln*, 243 Neb. 548, 501 N.W.2d 278 (1993); *Contemporary Indus. v. Nebraska Liq. Control Comm.*, 243 Neb. 345, 500 N.W.2d 525 (1993). Although the district court reviewed B & R's liquor license applications by an error proceeding, we now treat the cases as appeals and review the applications de novo on the record. See,

American Drug Stores v. City of Lincoln, supra; *Kwik Shop v. City of Lincoln, supra*. See, also, *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992).

We first note that B & R presently holds, and did hold at the time of filing its applications for the licenses at issue here, liquor licenses at locations directly abutting the two grocery store locations involved in this appeal. These liquor establishments are operated as separate businesses from the grocery stores. Initially, B & R sought merely to expand the defined locations covered by the liquor licenses which it now holds to include the grocery stores. This would allow grocery customers to access the liquor stores during the course of their grocery shopping and to purchase beer and alcoholic liquor through the grocery checkout counters rather than purchasing only groceries, then reentering the abutting liquor establishments and purchasing beer and alcoholic liquor separately. However, the city denied B & R's requests to expand the areas covered by its existing licenses, so in order to obtain the desired expansion of the areas covered by the licenses, B & R was left only with the option of applying for new licenses. See, *City of Lincoln v. Nebraska Liquor Control Comm.*, 208 Neb. 630, 304 N.W.2d 922 (1981); *City of Lincoln v. Nebraska Liquor Control Commission*, 181 Neb. 277, 147 N.W.2d 803 (1967). Nevertheless, we point out that in reality, the effect of approving B & R's applications would only be to expand the areas covered by the two existing class D liquor licenses presently held by B & R, and not to increase the number of outstanding liquor licenses.

Section 53-132 (Reissue 1984) states in relevant part:

> (2) A retail license . . . shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city . . . where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements,

rules, and regulations provided for in the Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.

(3) In making its determination pursuant to subsection (2) of this section the commission shall consider:

(a) The recommendation of the local governing body;

(b) The existence of a citizens' protest made in accordance with section 53-133;

(c) The existing population of the city . . . and its projected growth;

(d) The nature of the neighborhood or community of the location of the proposed licensed premises;

(e) The existence or absence of other retail licenses or bottle club licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises;

(f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

(i) The sanitation or sanitary conditions on or about the proposed licensed premises; and

(j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.

Our review of the record shows that with respect to each application at issue here, B & R has met the license issuance criteria set forth in § 53-132 (Reissue 1984). Nevertheless, in separate but similarly worded resolutions, the Lincoln City Council disapproved the applications and enumerated the reasons for its decisions. Those resolutions state:

5. The City Council determined that the type of business or activity proposed to be operated or presently operated in conjunction with the proposed license would not be consistent with the public interest as the application and evidence presented indicated that the business would not comply with Lincoln Municipal Code § 6.08.100 pertaining to separate and distinct business activity. . . .

. . . .

7. The City Council determined that the applicant had failed to demonstrate compliance with present municipal ordinances specifically § 6.08.100 of the Lincoln Municipal Code.

In reversing the Lincoln City Council's disapproval of each of B & R's applications, the district court stated:

> A predominant reason for denying the application was the conclusion of the Lincoln City Council that the applications would not comply with Lincoln Municipal Code §6.08.100 pertaining to separate and distinct business activity. That section was found to be unconstitutional by the District Court of Lancaster County, Nebraska in the case of Gas 'N Shop v. City of Lincoln, et al., Docket 435, Page 76. The ordinance has since been repealed by the City.

In these appeals, the City of Lincoln acknowledges that its "separate and distinct" ordinance has been declared unconstitutional and does not assert that the ordinance provides sufficient grounds for denying the licenses sought by B & R.

Also listed in the Lincoln City Council's resolutions as a basis for denying B & R's license applications was the recommendation by Lincoln chief of police Allen Curtis. However, that recommendation was premised upon Curtis' opinion of the merits of Lincoln's "separate and distinct" ordinance and was not otherwise supported by competent evidence. Consequently, the police chief's recommendation fails to support the city's disapproval of B & R's license applications. See *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993) (City of Lincoln's reliance upon its "separate and distinct" ordinance to deny liquor license applications was inappropriate).

The Lincoln City Council's resolutions also list a number of additional reasons for disapproving the B & R applications, including the absence of adequate law enforcement services in the areas; the existence of a sufficient number of liquor licenses to serve the areas; inadequate security in sales and display areas of the grocery stores where liquor was to be sold; and

inconsistency with the promotion of the health, safety, and welfare of Lincoln residents. Such findings are unsupported by the record and are particularly fallacious in light of the existence of liquor licenses now held by B & R for contiguously located establishments. In these cases, the denial of B & R's applications would accomplish nothing more than to prevent consumers from more conveniently purchasing beer, wine, and alcoholic liquor from existing liquor outlets.

Because B & R has met the license issuance criteria set forth in § 53-132 (Reissue 1984), the decisions of the district court ordering the approval and issuance of the licenses sought by B & R are affirmed.

AFFIRMED.

IN RE APPLICATION OF JANTZEN.
HENRY AND VERN JANTZEN, APPELLEES, V. DILLER TELEPHONE COMPANY, APPELLANT.

511 N.W.2d 504

Filed February 4, 1994. No. S-92-038.

1. **Public Service Commission: Appeal and Error.** In an appeal from the Public Service Commission, an appellate court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary.
2. _____: _____. In reviewing a decision of the Public Service Commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.
3. **Administrative Law: Evidence: Words and Phrases.** For purposes of reviewing an order of an administrative agency, competent evidence means evidence which tends to establish the fact in issue.
4. **Rules of Evidence: Words and Phrases.** Relevant evidence is 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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 court below.

6. **Administrative Law: Statutes: Appeal and Error.** An appellate court determines the meaning of a statute independently of the determination made by an administrative agency.
7. **Administrative Law: Appeal and Error.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
8. **Administrative Law: Judicial Notice: Appeal and Error.** It is an established principle of appellate practice that, as a general rule, a reviewing court will not take judicial notice of the internal operating rules of administrative agencies.
9. **Administrative Law: Waiver.** Whether an administrative agency may waive an internal rule or regulation depends upon whether the rule or regulation was intended to (1) require the agency to exercise its independent discretion, (2) confer a procedural benefit on a class to which complainant belongs, or (3) be a mere aid to guide the exercise of agency discretion. If the rule or regulation is such an aid, then a further determination must be made as to whether the complainant has been substantially prejudiced.
10. **Statutes: Legislature: Intent.** In construing 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.
11. _____: _____: _____. It is a court's duty, if possible, to discover the Legislature's intent from the language of the statute itself.
12. **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.
13. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.
14. **Trial: Witnesses: Testimony.** The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
15. **Public Service Commission: Appeal and Error.** Determinations by the Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
16. **Public Service Commission.** The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission.
17. **Administrative Law: Words and Phrases.** Arbitrary action, with reference to

administrative agencies, is action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

18. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome.
19. **Administrative Law.** An agency's judgment must be based on a factual foundation and must give due consideration to all the essential elements involved.
20. **Public Service Commission: Appeal and Error.** If there is evidence to sustain the findings of the Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, MILLER-LERMAN, and WRIGHT, Judges, on appeal thereto from the Nebraska Public Service Commission. Judgment of Court of Appeals affirmed as modified.

Jack L. Shultz and Gregory D. Barton, of Harding & Ogborn, for appellant.

Henry and Vern Jantzen, pro se.

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

CAPORALE, J.

I. STATEMENT OF CASE

The protestant-appellant, Diller Telephone Company, challenges the third and last order of the Public Service Commission (PSC), which granted the request of the applicants-appellees, Henry Jantzen and Vern Jantzen, father and son, to receive telephone service from Lincoln Telephone and Telegraph Company rather than from Diller Telephone, and ordered the Jantzens to pay Diller Telephone $338.91 to cover the latter's loss of investment. On appeal to the Nebraska Court of Appeals, Diller Telephone assigned as errors, in summary, (1) the PSC's consideration of certain evidence in concluding that the Jantzens are not receiving and would not within a reasonable time receive reasonably adequate telephone service, and (2) the arbitrary and capricious nature of its third order.

The Court of Appeals determined that Diller Telephone's failure to timely file its protest waived its opposition to the application and that it was thus precluded from participating in the proceedings before the PSC. Accordingly, the Court of Appeals, without reaching Diller Telephone's summarized assignments of error, directed the PSC to reinstate its first order, which had granted the application upon the payment of Diller Telephone's loss of investment of $97.21 and a connection charge to Lincoln Telephone.

Diller Telephone thereafter successfully petitioned this court for further review. We affirm the judgment of the Court of Appeals, as modified.

II. SCOPES OF REVIEW

In an appeal from the PSC, an appellate court examines the record to determine whether the PSC acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary. *Fecht v. Quality Processing*, 244 Neb. 522, 508 N.W.2d 236 (1993); *Fecht v. The Bunnell Co.*, 243 Neb. 1, 497 N.W.2d 50 (1993); *In re Application of George Farm Co.*, 233 Neb. 23, 443 N.W.2d 285 (1989).

Moreover, in reviewing a decision of the PSC, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. *In re Application of Kilthau*, 236 Neb. 811, 464 N.W.2d 162 (1991); *In re Application of Slack*, 234 Neb. 704, 452 N.W.2d 538 (1990); *In re Application of Overland Armored Exp.*, 229 Neb. 524, 428 N.W.2d 166 (1988). Of course, the evidence must be competent and relevant. See, *Hoesly v. State*, 243 Neb. 304, 498 N.W.2d 571 (1993); *Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991); *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991); *Chicago & N. W. Ry. Co. v. City of Norfolk*, 157 Neb. 594, 60 N.W.2d 662 (1953).

For purposes of reviewing an order of an administrative agency, competent evidence means evidence which tends to establish the fact in issue. *Wagner v. City of Omaha, supra*;

Shepherd v. City of Omaha, 194 Neb. 813, 235 N.W.2d 873 (1975), *overruled on other grounds, Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1989); *State v. Wood, ante* p. 63, 511 N.W.2d 90 (1994); *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

Applications to obtain telephone service furnished in an adjacent exchange are governed by Neb. Rev. Stat. § 75-613 (Reissue 1990):

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

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

As the foregoing statute controls the adjudication of this matter, the appeal in part presents issues of statutory interpretation, which are questions 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 court below. See, *Fecht v. Quality Processing, supra*; *Rigel Corp. v. Cutchall, post* p. 118, 511 N.W.2d 519 (1994). And of course, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

However, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 416 N.W.2d 222 (1987); *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984).

III. FACTS

The father had, in 1974, 1975, and 1976, unsuccessfully attempted to have the service changed to Lincoln Telephone. The Jantzens filed the application presently under consideration on December 18, 1990. Notice of the filing was published on December 20, 1990. Diller Telephone filed its protest on January 23, 1991.

The evidence developed at that hearing establishes that the father lives 2 miles east and 2 miles south of Plymouth, where he has farmed since 1953. This home farm receives telephone service through Lincoln Telephone's Plymouth exchange. In 1974, the father purchased a second farm which is separated from the home farm by a "mile of ground or a mile of road" and is located 1 mile south and 1 mile east of the home farm. Notwithstanding that the second farm has a Plymouth address, is in the Plymouth fire district, and is located closer to Plymouth than to Diller, it is served by Diller Telephone's

Harbine exchange at Diller. A Lincoln Telephone cable is buried 108 feet north of the telephone service entrance to the second farm, while Diller Telephone has a cable 324 feet east of the service entrance.

The father testified that in 1988, the son moved into the house on the second farm and that he and the son began farming together. The numerous problems and expenses associated with conducting a single farm operation through two separate telephone companies caused this most recent application for a change in telephone service. Because of the expense of communicating between the two farms, calls are made on only a minimal basis for either business or pleasure. The father testified that as the son assumes more management responsibility, the two will need to communicate more.

The son testified that his primary reason for filing the application is to avoid toll calls. He further testified that his primary community of interest is with the Plymouth exchange. He pointed out that there is no bank, machinery dealer, county government office, veterinary clinic, or medical care service available to call in the Diller and Harbine exchanges. He also indicated that he carries on transactions with every business located in Plymouth. Of the 128 members in the son's church, 125 are Lincoln Telephone customers, while only two other than himself are customers of Diller Telephone.

William Sandman, Diller Telephone's manager, testified that Diller Telephone would suffer a $1,261.21 loss of investment if the application is granted, pointing out that Diller Telephone has upgraded the service it renders since the issue was last litigated before the PSC in 1976.

Diller Telephone opposes the application because it cannot afford to lose any customers. Sandman explained that because Diller Telephone is small and has a limited customer base for growth purposes, each customer is important; the departure of any customer could have a significant revenue impact made up by remaining customers.

The PSC then entered its first order, finding that the Jantzens were not receiving and would not, in a reasonable time, receive reasonably adequate telephone service from Diller Telephone and that the change in service would not create a duplication of

facilities, would not impair the capability of Diller Telephone, and was economically sound. In addition to requiring the Jantzens to pay Diller Telephone's loss of investment, the PSC required them to pay Lincoln Telephone the construction charge of $1,460 to connect the facilities.

The PSC next granted Diller Telephone's motion for rehearing. At the hearing on the motion, the son testified that he wants to call people on the Plymouth exchange without being assessed a toll charge and to be able to make unlimited calls to the Beatrice exchange of Lincoln Telephone for a small monthly fee; both services would be available if he switched to Lincoln Telephone. He elaborated that the operation he conducts with his father is served by the Plymouth exchange of Lincoln Telephone, while his brother, with whom he is also a partner in a separate farming business, receives service from the Beatrice exchange of Lincoln Telephone.

He also explained that in addition to his church, medical services, and neighborhood ties to the Plymouth exchange, he is an alumnus of the Tri-County school and a member of its booster organization. He is one of only two members of that organization receiving Diller Telephone service; the remainder are serviced by Lincoln Telephone.

The son added that his telephone number does not appear in the Plymouth exchange, that sometimes people have difficulty finding him because he is listed in the Harbine exchange, and that even if they do locate him, they do not call him because it is a long-distance call.

The son also testified that the primary reason for his application had changed from the time of the first hearing, in which he stated his sole purpose was to avoid toll charges. He now explained that his primary reasons for applying for this change in service are to integrate the farm operation with his father and be able to communicate better and to avoid the problems that exist with people not being able to find him.

Sandman feared that the loss of 1 customer might lead to a loss of 10 customers, and a loss of 10 customers would be critical to the company; Diller Telephone has approximately 870 subscribers, 120 served by the Harbine exchange. He conceded, however, that the basic rate for service would not

change simply because one customer left its service.

Arnold White, an accountant, testified that in calculating Diller Telephone's loss of investment at $1,261.21, he applied a depreciation value to the plant investments of the central office equipment and building, the span lines between the host and remote office, and the buried telephone cable route that serves one subscriber. That total was then divided by the number of subscribers served by the Harbine exchange to get a cost per individual subscriber. White then added a cost for retirement of the plant.

White testified that granting this application would not be economically sound and that eventually, future revenues lost by the departure of the Jantzens and a series of other such subscribers could result in increased rates.

Norm Osland, president of the Nebraska Telephone Association, testified on behalf of Diller Telephone that both his organization and the Rural Electrification Administration are committed to maintaining franchise boundary integrity. The administration's loans to Diller Telephone and other small telephone companies are based partly on those boundaries.

The PSC then entered its second order, which denied the application, finding that it had initially miscalculated Diller Telephone's investment loss and, further, that the Jantzens had failed to meet the statutory requirements for a change in service.

The Jantzens thereupon filed a motion for rehearing, which resulted in the PSC's third order, as described in part I above.

IV. ANALYSIS OF COURT OF APPEALS' RULING

Our first task is to determine whether the Court of Appeals was correct in ruling that Diller Telephone had waived its opposition and was thus precluded from participating in the proceedings before the PSC.

1. Rules Not of Record

The opinion of the Court of Appeals sets forth certain PSC rules of procedure which are not part of the record. We have held that because establishing the existence and contents of a particular administrative rule or regulation at any given time is often a difficult and uncertain process, it is an established

principle of appellate practice that, as a general rule, a reviewing court will not take judicial notice of the internal operating rules of administrative agencies. See, *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991); *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988); *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987); *Nevels v. State*, 205 Neb. 642, 289 N.W.2d 511 (1980).

2. RULE OF RECORD

However, because the record does include the PSC's statement of its rule of procedure requiring "protests to be filed within thirty days of the date of publication of notice," we are able to consider whether Diller Telephone's protest, filed on the 31st day after notice of the application was published, enabled Diller Telephone to participate in the proceedings.

(a) General Considerations

In certain circumstances, administrative agencies are permitted to depart from their own regulations. *Sun Oil Company v. Federal Power Commission*, 256 F.2d 233 (5th Cir. 1958), *cert. denied* 358 U.S. 872, 79 S. Ct. 111, 3 L. Ed. 2d 103 (administrative agency not slave to own rules). See, *United States v. Caceres*, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979); *Modern Plastics Corporation v. McCulloch*, 400 F.2d 14 (6th Cir. 1968); *National Labor Relations Bd. v. Monsanto Chemical Co.*, 205 F.2d 763 (8th Cir. 1953). It has been held that it is within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. *American Farm Lines v. Black Ball*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970); *Aeronautical Radio, Inc. v. F. C. C.*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied* 451 U.S. 920, 101 S. Ct. 1998, 68 L. Ed. 2d 311 (1981); *City of Groton v. Federal Energy Reg. Com'n*, 584 F.2d 1067 (D.C. Cir. 1978).

Most courts which have allowed departures from agency rules have found that the violated regulations were intended to govern agency procedures rather than to protect any interest of the objecting party. See, *American Farm Lines v. Black Ball, supra*; *National Labor Relations Bd. v. Monsanto Chemical*

Co., supra.

Where the rules of an agency require certain information to be filed before a matter or rate can be considered, the agency's discretion to waive the information will not be reviewed. In *American Farm Lines*, a motor carrier's request for temporary operating authority with the Interstate Commerce Commission was granted despite the argument of competing carriers that the filing violated commission requirements. The U.S. Supreme Court ruled that the commission's decision to relax its filing requirements was not reviewable; the rules were promulgated for the purpose of providing the necessary information for the commission to reach an informed and equitable decision and were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion.

Likewise, the U.S. Court of Appeals for the District of Columbia Circuit refused to review the waiver of the rules requiring a carrier to supply the Federal Communications Commission with information necessary to determine whether the investigation and suspension of proposed rate increases should be ordered in *Associated Press v. F. C. C.*, 448 F.2d 1095 (D.C. Cir. 1971). The court determined the rules were " 'mere aids to the exercise of the agency's independent discretion' " and in the absence of substantial prejudice to the complaining party would not be reviewed. *Id.* at 1104. See, *Union Texas Products Corp. v. F.E.R.C.*, 899 F.2d 432 (5th Cir. 1990) (overruling commission's $1.8 million penalty on seller for its failure to file required one-page form giving advance notice of proposed rate increase); *Neighborhood TV Co., Inc. v. F.C.C.*, 742 F.2d 629 (D.C. Cir. 1984) (where rule governs the information agency requires before it will consider a filing by one it regulates, courts have been especially apt to allow agencies much leeway in granting waivers to own rules); *Superior Oil Co. v. Federal Energy Reg. Com'n*, 667 F.2d 1180 (5th Cir. 1982) (commission's punctilious insistence that failure to follow its directions in minor respect should result in such disproportionately heavy penalty works manifest injustice and constitutes abuse of discretion); *Aeronautical Radio, Inc. v. F.C.C., supra* (agency's determination as to what data it

requires in making discretionary decision cannot provide basis for that court to mandate rejection of tariff filing made without supporting economic data); *Municipal Elec. Util. Ass'n of Ala. v. Federal Power Com'n*, 485 F.2d 967, 973 n.23 (D.C. Cir. 1973) (filing rules are " 'mere aids to the exercise of the agency's independent discretion' " and in both language and purpose leave room for doctrine of substantial or reasonable compliance); *National Labor Rel. Bd. v. National Container Corp.*, 211 F.2d 525 (2d Cir. 1954). Contra *New Mexico Navajo Ranchers Ass'n v. I.C.C.*, 702 F.2d 227 (D.C. Cir. 1983), *appeal after remand* 850 F.2d 729 (D.C. Cir. 1988) (failure of commission to insist on strict compliance with regulations affords basis for invalidation of its approval of rail line).

The applicability of an agency's discretion in waiving a regulation turns on whether it was intended to aid the agency or, instead, to benefit outside parties. *City of Fredericksburg, VA. v. F.E.R.C.*, 876 F.2d 1109 (4th Cir. 1989). Agency violations of regulations which have been promulgated to benefit a party, by entitling the party to a substantive benefit or exemption or to a procedural safeguard, have been invalidated by courts. See, *Montilla v. I.N.S.*, 926 F.2d 162 (2d Cir. 1991) (alien claiming that service failed to adhere to own regulations regarding right to counsel in deportation hearing not required to make showing of prejudice before being entitled to relief); *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959) (discharge from government employment vacated); *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954) (Court vacated deportation order because procedure leading to order did not conform to relevant regulations of Board of Immigration Appeals).

Many courts will review a waived rule or regulation only upon a showing of substantial prejudice to the complaining party. See, *Onslow County, N.C. v. U.S. Dept. of Labor*, 774 F.2d 607 (4th Cir. 1985) (agency regulations not mandated by federal law are not entitled to degree of judicial deference and enforcement due those promulgated under compulsion of law); *Mississippi Valley Gas Co. v. F. E. R. C.*, 659 F.2d 488 (5th Cir. 1981) (natural gas pipeline's rate filing not in compliance with commission regulations not patently defective in absence of

prejudice to complaining party); *E. E. O. C. v. Raymond Metal Products Co.*, 530 F.2d 590 (4th Cir. 1976); *Equal Employment Op. Com'n v. Laclede Gas Co.*, 530 F.2d 281 (8th Cir. 1976); *Equal Employment Op. Com'n v. Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975), *cert. denied* 423 U.S. 994, 96 S. Ct. 420, 46 L. Ed. 2d 368 (when agency neglects to follow procedural rule but failure inflicts no substantial injury on party entitled to observance of rule, error does not prevent further administrative or judicial action; instead, error should be considered harmless). Contra *Equal Employment Op. Com'n v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974) (cannot conclude employer not prejudiced by commission's relaxation of rule requiring commission to notify employer when it intends to cease administrative efforts and resort to courts).

Procedural challenges to the filing of late petitions and motions in violation of an agency's rules have, for the most part, failed. In *Dana Corp. v. I.C.C.*, 703 F.2d 1297 (D.C. Cir. 1983), the commission's acceptance of a petition for stay that was filed late and its issuance of a stay after the board's decision had become effective were challenged as contrary to the commission's regulations. In holding that neither challenge was valid, the court interpreted the timing requirements as provisions designed to facilitate the commission's orderly transaction of its business and not designed primarily to safeguard private rights. In light of the commission's overriding responsibility to protect the public interest, the court did not think it necessary to imply either an absolute requirement for dismissal of late-filed petitions or an inability to stay erroneous determinations after their effective date.

However, in remanding for further proceedings a $500 attorney fee award granted in violation of the agency's own regulations requiring a complete statement of the extent and character of work done, the same federal circuit court stated that in the absence of a reasoned determination that in a given case the ends of justice require a departure from an agency's regulations, they must be observed. *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975). In a footnote to that decision, the court appears to confirm that the ability to waive an agency

regulation depends on whether the regulation is merely a procedural rule for the orderly transaction of agency business or confers an important procedural benefit.

Courts have also upheld the discretion of agencies to accept applications filed past the submission deadline. In *National Labor Relations Bd. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953), the court rejected the argument that having set a deadline, the agency was without power to waive it: "The bald argument on behalf of respondents is that the Board is powerless in the public interest to relax the time provisions of its procedural rules in any case before it. This contention is not worthy of serious consideration." See *Health Systems Agency of Okl., Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978) (where deadline for submission of application for designation as health systems agency was not statutory but was wholly arbitrary one, the Department of Health, Education and Welfare was not without discretion to accept late applications, and submission deadline was not jurisdictional).

In *Montship Lines, Limited v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961), the court ruled that the maritime board's consideration of motions for reconsideration filed after the 30-day period provided by its rules constituted a waiver of the board's own limitation period. In so ruling, the *Montship Lines, Limited* court distinguished between the consideration of an untimely motion for rehearing or reconsideration in violation of a limitation period fixed by Congress and a time limitation imposed by an agency itself. See, also, *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595 (D.C. Cir. 1981).

A framework for the review of an agency's deviation from its own regulations was given in *American Farm Lines v. Black Ball*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970). The analysis requires that a determination must be made as to whether the internal regulation was intended to (1) require the agency to exercise its independent discretion, (2) confer a procedural benefit on a class to which complainant belongs, or (3) be a "mere aid" to guide the exercise of agency discretion. If the regulation is such an aid, then a further determination must be made as to whether the complainant has been substantially prejudiced. See, *American Farm Lines v. Black Ball, supra*;

Port of Jacksonville v. U.S. Coast Guard, 788 F.2d 705 (11th Cir. 1986); *Alamo Express, Inc. v. United States*, 613 F.2d 96 (5th Cir. 1980).

(b) Nebraska Precedent

Although we have not heretofore determined whether the failure to file a timely protest waives the right of the protestant to participate in an agency proceeding, the Court of Appeals mistakenly cites *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979), as controlling. In *Parks*, former county employees appealed from the termination of their employment to the Joint Merit System Council of Nebraska. The Joint Merit System Council denied the appeals because they were filed out of time, but a year later reversed its decision and granted the appeal hearing. In holding that the Joint Merit System Council had no authority to waive its own rules as to the time for filing an appeal, we wrote:

> Generally, rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them as well as upon the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force. This is true even though the adoption of the rule was a discretionary function, and plenary powers, or powers resting in the absolute discretion of an agency, may thus be rendered subject to procedural limitations. To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.

Id. at 572, 284 N.W.2d at 11-12.

In so holding, we rejected the appellants' argument that the Joint Merit System Council could waive its own rules with regard to filing for an appeal and hear such cases as it desired. We found no authority for such a rule, nor any reason to consider that the rule setting the time for appeal was not

applicable, particularly where the unexcused delay was for more than 3 months at the very least. See, also, *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989) (agency regulations properly adopted and filed with Secretary of State have effect of statutory law).

Similarly, in *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988), we affirmed the Nebraska Commission of Industrial Relations and held that the county was not entitled to file a counterclaim to the county health department association's petition beyond the time period prescribed by the commission's rules for filing an answer.

The decision in *Parks* refusing to uphold the agency's waiver of its own rule follows from the fundamental rights which the rule protected. The agency's rule therein prescribed the time of filing of an appeal. Such time limits are jurisdictional. See, *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986). Failure to appeal within the statutory requirements removes the jurisdiction of the case from the court. See, *State v. Flying Hawk, supra*; *Smith v. Smith*, 225 Neb. 93, 402 N.W.2d 688 (1987). Therefore, in *Parks*, the Joint Merit System Council had no jurisdiction to hear the appeals; that is a different matter than is presented by rules relating to filing deadlines, which are mere aids to the conduct of an agency's business. While it is true that in *Douglas Cty. Health Dept. Emp. Assn.*, we upheld the commission's decision not to waive its filing deadline, it does not follow that we would have reversed the commission had it decided to waive its rule. An agency must have sufficient latitude in its operations and in matters under its jurisdiction to exercise that jurisdiction fairly. *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

The PSC's discretion to allow Diller Telephone to participate in the hearings can be compared to a trial court's discretion extending the time in which to file an untimely answer or reply. See, *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990); *Greenwood v. Cobbey*, 24 Neb. 648, 39 N.W. 833 (1888). While the determination of whether a party in default may be permitted to answer rests largely within the discretion of the trial court, *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99

N.W.2d 615 (1959), and *Mason State Bank v. Sekutera, supra*, we have held that where it is apparent that the party in default has a meritorious defense to an action, the court must permit the answer to be filed despite the fact that the time to answer has passed, *Anest v. Chester B. Brown Co., supra.*

Under Neb. Rev. Stat. § 75-612 (Reissue 1990) and § 75-613, the Jantzens were required, irrespective of whether Diller Telephone participated, to present evidence to establish their case. See *In re Application of George Farm Co.*, 233 Neb. 23, 443 N.W.2d 285 (1989). Therefore, the PSC's rule in question was but an aid to help the PSC in its decision; it did not confer a procedural benefit upon a party.

Indeed, if Diller Telephone's evidence had not been admitted, there would have been no information regarding its "loss of investment," as required by § 75-613(4). Thus, not only was there no prejudice to the Jantzens in allowing Diller Telephone to participate, Diller Telephone's participation helped the Jantzens make the necessary record.

Adopting and applying the analytical framework set forth in *American Farm Lines v. Black Ball*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970), and considering the deference given an agency's interpretation of its own rules and regulations (see part II above), we cannot say that the PSC's failure to insist on strict compliance with its own filing deadlines constituted an abuse of discretion.

Thus, the Court of Appeals erred in ruling that Diller Telephone had waived any objection it had to the Jantzens' application and forfeited any right to participate in the proceedings.

V. ANALYSIS OF DILLER TELEPHONE'S SUMMARIZED ASSIGNMENTS OF ERROR

In the interest of judicial economy, we will review Diller Telephone's summarized assignments of error rather than remanding the cause to the Court of Appeals.

1. Evidence Considered

In the first summarized assignment of error, Diller Telephone urges that in connection with the "adequacy of service" issue, the PSC erred in considering certain evidence, including the

testimony that those calling the son must pay toll charges. More specifically, Diller Telephone urges that § 75-613(1) precludes consideration of any toll charges in determining whether service is adequate. This is simply not so.

The statute clearly precludes the PSC from considering the applicants' toll charges for long-distance calls they make. But there is no mention in the statute prohibiting the PSC from taking into consideration that members of an applicant's community of interest are reluctant to call the applicant because of toll charges they would incur.

In construing 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. *Fecht v. The Bunnell Co.*, 243 Neb. 1, 497 N.W.2d 50 (1993); *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). It is a court's duty, if possible, to discover the Legislature's intent from the language of the statute itself. *Fecht v. The Bunnell Co., supra*; *Curry v. State ex rel. Stenberg, supra*; *In re Interest of M.J.B., supra*. 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. *Fecht v. The Bunnell Co., supra*; *Curry v. State ex rel. Stenberg, supra*; *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *In re Interest of M.J.B., supra*.

The plain meaning of the statutory language allows the PSC to consider, in determining the adequacy of the service the applicants receive, the evidence that toll charges deter others in the son's community of interest from calling him. The issue is not, as Diller Telephone asserts, that it is accountable for toll charges which persons in adjacent telephone service areas are required to pay, but, rather, that the service as operated curtails calls to the son from those in his community of interest.

In view of this determination and the conclusion which follows, we need not, and therefore do not, concern ourselves with whether the PSC properly received the other evidence before it.

2. NATURE OF PSC'S DECISION

In its second and last summarized assignment of error, Diller Telephone claims the PSC's order is arbitrary and capricious. In this regard, Diller Telephone asserts that there is no competent evidence to support the PSC's conclusions (a) that the son does not receive calls because of the toll charges, (b) that Diller Telephone does not provide adequate telephone service to the son's community of interest, and (c) as to the amount of Diller Telephone's loss of investment.

(a) Toll Charges

As noted earlier, in determining that the son receives inadequate service, the PSC relied in part on the son's testimony that members of his community of interest do not call him because of the toll charges they would incur.

Diller Telephone urges that the evidence on this issue was purely speculative and, as such, does not support the PSC's findings.

One difficulty with Diller Telephone's contention is that it did not object to the son's testimony in this regard. Whatever may be the PSC's "relaxed rules" of evidence, *In re Application of Overland Armored Exp.*, 229 Neb. 524, 530, 428 N.W.2d 166, 170 (1988), if, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence, *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992), and *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

Thus, the question is merely one of credibility of the witnesses and the weight it should be given. The credibility of witnesses and the weight to be given their testimony were for the PSC as the trier of fact. See, *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *City of Omaha v. Omaha Police Union Local 101*, 222 Neb. 197, 382 N.W.2d 613 (1986). It must be kept in mind that

determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. *In re Application of Northwestern Bell Tel. Co.*, 218 Neb. 563, 357 N.W.2d 443 (1984); *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 330 N.W.2d 123 (1983). The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the PSC. *Id.*

Where the question is one of the competency of evidence, see part II above, the issue on appeal is whether the PSC's decision was arbitrary and capricious. Arbitrary action has been defined by this court, with reference to administrative agencies, as action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991). See, *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *Percival v. Department of Correctional Servs.*, 233 Neb. 508, 446 N.W.2d 211 (1989). The record on its face must reflect an adequate basis from which the PSC can base its decision. See *In re Application of Northwestern Bell Tel. Co., supra.*

A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome. *In re Application A-16642, supra.*

An agency's judgment must be based on a factual foundation and must give due consideration to all the essential elements involved. *Godden v. Department of Public Welfare*, 193 Neb. 269, 226 N.W.2d 627 (1975). If there is evidence to sustain the findings of the PSC, an appellate court cannot substitute its judgment for that of the commission. *In re Application of Northwestern Bell Tel. Co., supra*; *In re Application of ATS Mobile Telephone, supra.*

The evidence, as detailed in part III above, is overwhelming that the son's community of interest is in Plymouth. Despite the

conditional wording of the PSC's finding that "[i]f [members of an applicant's community of interest] do not call because of the toll charges, then the service received by the applicant is not adequate," the fair import of the finding is that calls to the son are hampered because of the toll charges.

(b) Adequacy of Service Provided

Diller Telephone next asserts that the PSC's finding that adequate service is not provided to the son's community of interest is not supported by competent evidence.

Diller Telephone argues that the PSC's reliance on *In re Application of George Farm Co.*, 233 Neb. 23, 443 N.W.2d 285 (1989), in this regard is misplaced and that, in any event, the case was wrongly decided. Diller Telephone is wrong on both counts.

In *In re Application of George Farm Co.*, the applicant farm corporation applied to have its property removed from Northeast Nebraska Telephone Company's service area and placed within Northwestern Bell Telephone Company's service area. Three residences were located on the corporation's property, which was divided approximately in half by the boundary line separating the two telephone companies. The president of the corporation and an employee lived in houses located within one-fourth of a mile of Northwestern Bell's boundary line, but were served by Northeast Nebraska Telephone. A trailer home on the property was served by Northwestern Bell. The corporation did virtually all of its business within Northwestern Bell's service area, and its business and social contacts were in Northwestern Bell's service area as well. Because the applicant subscribed to a flat-rate foreign-exchange service, it was not charged for long-distance calls made to Northwestern Bell's service area.

Based on the corporation president's statement that the existing telephone service was " 'okay,' " *id.* at 25, 443 N.W.2d at 287, the PSC denied the application. On appeal, we reversed and ordered that the service be changed as the corporation requested. We reasoned that it made no sense for half of the farm property to be within one exchange and the other half to be within another. We also concluded that forcing the

corporation to bear the burden of paying for two telephone services for the same property so that the occupants might have adequate service to the general area constituting their community of interest was arbitrary and unreasonable. The order appealed was thus arbitrary and capricious.

Diller Telephone argues first that the *In re Application of George Farm Co.* record did not support our conclusion that the farm corporation was forced to pay for two telephone services for the same property; rather, that was a choice made by the corporation in order to avoid long-distance toll charges. It also urges that because the foreign-exchange charge was essentially a discounted monthly toll charge for long-distance calls, the PSC could not have considered the service inadequate.

However, the overriding consideration was that because the farm corporation's property was served by two telephone companies, the corporation could obtain adequate service to its community of interest only by paying for foreign-exchange service. Yet, the corporation's only contact with Northeast Nebraska Telephone was the fact that part of the corporation's property fell within Northeast Nebraska Telephone's service area. Thus, the entire record demonstrated that the denial of the corporation's request was arbitrary and capricious.

Nonetheless, Diller Telephone argues that *In re Application of George Farm Co.* is not applicable to the case at hand because, whereas in *In re Application of George Farm Co.*, a single party owned one continuous piece of property bisected by two telephone companies, here there are two pieces of property separated by a mile of ground or road.

But what makes *In re Application of George Farm Co.* applicable is the fact that both properties involved here are owned by the same individual, the father, and constitute but a single farm operation. Both the father and son testified to the recurring problems caused by having to deal with two telephone companies. The impact of multiple telephone service is the same whether a farm operation is conducted on one piece of land or on two nearby pieces. The important consideration is that the Jantzens can obtain adequate service to their community of interest only by having both parts of their operation serviced by one telephone company.

(c) Loss of Investment

The difference between the investment loss of $338.91 found by the PSC and the $1,261.21 claimed by Diller Telephone rests on the PSC's refusal to include in its computation the costs of physically disconnecting the Jantzens' line, the costs Diller Telephone foresaw in keeping a record of the Jantzens' removal from its service, and Diller Telephone's investment in its plant.

In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977), we rejected Glenwood's theory that the subscriber who succeeded in changing his service would have to pay investment costs for sections other than the one that served him. We found reasonable the PSC's calculation, which included the depreciated investment cost per subscriber on the section serving the successful subscriber and connection costs for that section, plus the cost of removing the drop line to the subscriber's residence.

The PSC's computation of Diller Telephone's investment loss as consisting of the depreciated value of the items connecting the second farm to the service provided by Diller Telephone is not arbitrary and capricious, but reasonable.

VI. JUDGMENT

For the foregoing reasons, the judgment of the Court of Appeals is affirmed but modified by the direction that it reinstate the third order of the PSC.

AFFIRMED AS MODIFIED.

JOHN PATRICK BARATTA, APPELLANT, V. JOELINE MARIE BARATTA, APPELLEE.

511 N.W.2d 104

Filed February 4, 1994. No. S-92-294.

1. **Alimony: Child Support: Appeal and Error.** The ultimate test in determining the appropriateness of awards of alimony and child support is reasonableness as determined by the facts of each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Appeal and Error.** An appellate court is required to conduct a de novo

review of dissolution cases and when the evidence is in conflict, may 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.

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

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed as modified.

Michael F. Pistillo, of Steier, Rogers & Pistillo, P.C., for appellant.

Thomas R. Hickey for appellee.

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

HASTINGS, C.J.

Petitioner, John Patrick Baratta, appeals from the decree of dissolution of his marriage to respondent, Joeline Marie Baratta, assigning generally as error the awards against him for child support, alimony, and child-care expenses and the mandatory nature of the order relating to child visitations.

The parties were married on July 4, 1987, and have two children as a result of that marriage, Kylie Debra, born July 19, 1988, and Jaimee Katherine Louise, born October 6, 1990. Petitioner has four other children, born of a prior marriage and ranging in age from 17 to 11, for whom he is currently under court order to pay child support of $500 per month, of which $125 is to apply on an arrearage of "$30,000, something like that."

The trial court's decree granted the dissolution and awarded custody of the two children to respondent. The court ordered petitioner to pay the sum of $400 per month for the support of the two children, to be reduced to $235 if only one child is a subject of that award; 68 percent of the children's unreimbursed medical expense; $200 per month in alimony for 36 months; and $800 in attorney fees for respondent, payable $100 per month for 8 months. In addition, the court set forth a detailed and liberal visitation schedule for petitioner which was "not

optional with the Petitioner."

It is difficult to determine just what the trial court found with reference to petitioner's income, but by combining the findings made and the evidence submitted by way of affidavit in the preliminary-order stage of these proceedings, along with the record from the hearing on final dissolution, the district court's award, as far as child support is concerned, can be divined. At this point, we take the opportunity to suggest that when using the Nebraska Child Support Guidelines, it would be extremely helpful to the reviewing court if the trial judge somehow would incorporate into the record his or her worksheet which was employed in arriving at a child support amount.

Petitioner is a 42-year-old man who has fathered six children and is in excess of $30,000 behind on payments previously ordered in his first dissolution. He now would have this court believe that his income will justify no award for alimony and no more than $235 per month for two children.

At the time of the hearing on temporary allowances, petitioner's affidavit dated September 3, 1991, recited that he had a total monthly income of $1,516.66 less $231.83 for income taxes, $117 for Federal Insurance Contributions Act (FICA) deductions, and $500 for child support from a previous marriage, leaving him a $667.83 net income. That amount, when combined with what he claimed the respondent earned, $570 per month, made a combined income for child support guidelines purposes of $1,237.83, of which his income contributed 54 percent.

During the trial on the merits, petitioner testified that he was the manager of the Stockade Restaurant, located at 13325 Millard Avenue in Omaha. He stated that he was paid wages of $350 per week, plus Blue Cross/Blue Shield insurance. Petitioner claimed that as of January 1992, at least, his employers, who for all practical purposes are his father and mother, began to charge him $400-per-month rental for the apartment which he and respondent formerly had rent free.

On cross-examination, petitioner admitted that he continued to play golf as often as he could, sometimes as many as five times per week. After having stated that respondent took almost everything out of their apartment, he admitted that she

had left the washer and dryer, the microwave oven, the refrigerator, the stove, the bedroom set, the kitchen table and chairs, a couch and chair, and a television set, all of which he claimed belonged to his mother and father, and that they had only let them use those articles. Petitioner also claims that he used to have the free use of a motor vehicle owned by his parents, but that he now has to buy his own car. This arrangement was changed by his father some 2 or 3 months after the order on temporary allowances without any explanation by his father. Although at the time of the temporary-allowance hearing petitioner was receiving free food from his parents for himself and his family, he now claims to eat only 50 dollars' worth of food per month—"I don't eat every day." Petitioner contends that he was not paid in cash for any of his work in 1987 through 1990, but that "my father would give us, once in awhile, some money to go to the show or some money to do things, yes." In addition, it is apparent from the record that his father was paying the $500-per-month child support ordered by the court in another dissolution action. Although petitioner admitted that he received some money on the side from the Stockade, he denied that he was receiving $200 per month, as testified to by respondent. Although admitting that he was the manager of the Stockade, he denied having any knowledge as to how much money was received from the game machines.

Respondent testified that while the parties were married, they lived in the apartment above the Stockade rent free, paid no utilities, had full use of the company vehicle, and were paid at least $200 per month from the game machines. She formerly worked as a waitress at the Stockade, but now works for an insurance company, where her gross monthly wage is $852, and she has expenses of approximately $1,800 per month.

Again, it is difficult to determine from the record just what figures the trial judge utilized in arriving at an alimony award. He only stated:

> I have worked through the income figures and accepting the father's statement that he has monthly expenses of $1,135 he is going to have enough income to supplement the mother while she's getting into the workforce, and I

would incorporate an alimony award of $200 a month for a period of 36 months.

It is quite apparent from the record that the trial court simply did not lend much credence to the claim of petitioner that his father had suddenly changed petitioner's wages by substantially reducing them shortly after the court had entered its temporary allowances.

The record supports a finding that petitioner earned a gross monthly income of approximately $2,166. This is arrived at by taking the cash salary of $1,516 and adding to it the $400 for rent, $200 from game-machine income, and $50 for food. His deductions for FICA and income taxes amount to $339.19, together with $375 for obligations arising out of current payment for child support from a previous marriage. This leaves a net of $1,451.81, which when added to respondent's admitted net monthly salary of $687, amounts to $2,138.81 for the purpose of determination of child support. According to the child support guidelines, a combined monthly income of that amount would result in a monthly payment for the support of one child of $405 and for two children of $629. Petitioner's proportionate share of those amounts would be 68 percent and would result in a child support obligation for him of $275 and $427, compared to $235 and $400 ordered by the trial court.

The ultimate test in determining the appropriateness of awards of alimony and child support is reasonableness as determined by the facts of each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990). We are required to conduct a de novo review of dissolution cases, and when the evidence is in conflict, we consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *McWha v. McWha*, 241 Neb. 355, 488 N.W.2d 357 (1992). In this case, when we review the record as a whole, it does not appear that the district court abused its discretion in attributing additional income to petitioner in awarding child support.

If alimony is to be justified in this case, we must look to the amount of income remaining to petitioner from which alimony

could be paid. Petitioner's net monthly salary after payment of FICA deductions, income taxes, $400-per-month child support ordered in this case, and $375-per-month child support ordered in a previous dissolution amounts to $1,051.81. He claims monthly expenses of $1,135, which figure includes $500 paid on previously ordered child support. Of that latter amount, $375 has been applied to reduce petitioner's net income as set forth above. There then remains $760 of monthly expenses, which when applied to the net income of $1,051.81, leaves him $291.81 per month to apply to alimony and attorney fees ordered to be paid.

The ultimate test in determining correctness in the amount of alimony awarded is reasonableness as determined by the facts of each case. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987).

Awards of alimony are initially entrusted to the discretion of the trial judge and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. *Dinovo v. Dinovo*, 238 Neb. 285, 470 N.W.2d 174 (1991).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or to refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

Considering respondent's claimed monthly living expenses of $1,824 and her net disposable income, including child support and wages, which totals $1,087 per month, she is far short of what she needs. Under all of the circumstances existing, it cannot be said that the trial court abused its discretion in entering the awards for child support, alimony, and attorney fees that it did.

As to the mandatory nature of the child visitations awarded petitioner, we would foresee nothing but further dispute each time petitioner, because of the requirements of his employment, was unable to meet this schedule. Consequently, we direct that petitioner may notify respondent at least 12 hours in advance of each scheduled visitation of which he is not going to be able to

take advantage. With that modification, we affirm the judgment of the district court.

AFFIRMED AS MODIFIED.

RITA ROSE SABATKA, APPELLEE, V. RALPH EDWARD SABATKA, APPELLANT.
511 N.W.2d 107

Filed February 4, 1994. No. S-92-307.

1. **Modification of Decree: Child Support: Appeal and Error.** The modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. _____: _____: _____. Where in a case seeking the modification of child support the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
6. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in an initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
7. **Divorce: Child Support.** A divorce decree does not freeze one obligated to make child support payments in one's present employment; such an obligor may in good faith make an occupational change even though that change may reduce the obligor's ability to meet the financial obligation to the obligor's children.

Appeal from the District Court for Saunders County: EVERETT O. INBODY, Judge. Affirmed.

John H. Sohl for appellant.

Tom Dawson, of Dawson & Brown, P.C., for appellee.

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

CAPORALE, J.

Claiming error in the failure to find a material change in circumstances, the respondent father, Ralph Edward Sabatka, appealed the district court's dismissal of his petition for a reduction of his child support obligation to the Nebraska Court of Appeals. Under the authority granted us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) to regulate our caseload and that of the Court of Appeals, we removed the cause to this court and now affirm the judgment of the district court.

The father and the petitioner-appellee mother, Rita Rose Sabatka, were married on June 25, 1977, and produced three children who now range in age from 16 to 11 years. The marriage was dissolved by a decree dated March 15, 1989, which awarded custody of the children to the mother and required the father to pay child support of $337.60 per month so long as all the children remain unemancipated. The decreed child support was based upon the Nebraska Child Support Guidelines, utilizing the father's then net monthly income of $922.08 and the mother's then net monthly income of $984.33.

At that time, the father was employed as a warehouse clerk for a floorcovering company. His duties included the rolling and unrolling of carpets, cutting them to length, rolling and unrolling vinyl rolls, loading and unloading trucks, and delivering goods to jobsites.

On June 7, 1989, the father sustained neck and back injuries in an automobile accident and was diagnosed as suffering from a thoracic back strain. The treating physician opined that by December 1990, the father had reached his maximum medical recovery and that he suffered a 25-percent disability, being limited in his ability to lift, bend, and push without pain.

After the accident, the father's employer tried to reduce the

father's workload on certain days by using three employees to lift heavier rolls of carpeting rather than two. Nonetheless, the father continued to experience chronic back pain and sleep loss due to the lifting involved in his job. In July 1991, 2 years after the automobile accident, the father decided that he could not continue to work at his job and voluntarily terminated his employment.

Rather than seeking another job, even one requiring no lifting, the father, although holding an associate degree in diesel technology, elected to pursue more education in order to get a better job. Thus, in August 1991, he enrolled at a state college to pursue a bachelor of science degree with an emphasis in power and transportation. While he continues to experience some back pain if he remains seated longer than half an hour, he is able to attend his classes and planned to attend four more semesters of classes beyond the spring of 1992 to complete his course of study.

It appears that his tuition is paid in full under the provisions of the Workers' Compensation Act, as are his textbooks. In addition, he receives $17 per week in disability benefits. He will receive these compensation benefits for the first 2 years of his education, but will not have this assistance in his final year of study. He also received a scholarship from a veterans' group which has paid, or will pay, him $500. He works up to 16 hours a week as a grocery store clerk, earning $294.66 gross per month, netting him $272.12 per month.

The sale of the marital residence following the entry of the dissolution decree produced $5,600 for the father, $5,000 of which remained in savings at the time of the modification hearing.

We begin our analysis by recalling that the modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994); *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). Where in such a case the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge

heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Reitz v. Ringer, supra*; *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

We have also held that a party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). See, also, *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991).

In *Phelps* and *Schmitt*, we held that the adoption of the Nebraska Child Support Guidelines in and of itself constituted a material change of circumstances sufficient to justify a reconsideration of previously ordered child support. We, in *Phelps v. Phelps*, 239 Neb. at 621, 477 N.W.2d at 555, wrote:

> In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. [Citations omitted.] The court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. [Citation omitted.] The primary interest in determining the level of child support payments is the best interests of the children.

See, also, *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992); *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991).

In explaining the material change of circumstances standard, we have written:

> Previously, this court has held that a "material change in circumstances" is a concept which eludes precise, concise definition. . . . There are certain factors, however, which the district court may consider in determining

> whether a material change has occurred or not. Among those factors are: changes in the financial position of the parent obligated to pay support; the needs of the children for whom support is paid; good or bad faith motive of the obligated parent in sustaining a reduction in income; and whether the change is temporary or permanent.

Dobbins v. Dobbins, 226 Neb. 465, 467, 411 N.W.2d 644, 645-46 (1987). Accord, *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985); *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984).

We must remember that the paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Dobbins v. Dobbins, supra*; *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

The father urges that a parent obligated to pay child support may make an occupational or career change which reduces his ability to provide support, and so long as it is made in good faith, the future child support obligation should be based on his present income and the Nebraska Child Support Guidelines. To support this proposition he relies on three cases: *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985); *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969); and *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985). However, each of these cases is distinguishable from the matter now at hand.

In *Cooper v. Cooper, supra*, the ex-husband, a physician who at the time of the dissolution earned approximately $134,000 per year, sought a modification of his alimony obligation of $2,200 per month. He left his general practice after the dissolution because of concerns about his competency in his area of practice and had taken full-time employment as an emergency room specialist at a salary of $58,000 per year, planning to become board certified as an emergency room physician. The ex-wife, who had not worked prior to the dissolution, had taken employment as a histology technician, earning in excess of $18,000 per year. She relied upon this income to save for her retirement and had accumulated

substantial savings over the years.

In reversing the trial court's denial of modification and ordering that the ex-husband's alimony obligation be reduced to $1,650 per month, we noted in *Cooper* that there was no showing that the ex-husband left his former employment for the purpose of evading his responsibility to his former wife and that there was evidence he was attempting to establish himself in employment with better prospects for the future. But *Cooper* did not involve child support; therefore, there was no balancing of the need of any children in the analysis. Furthermore, a reduction of alimony from $2,200 to $1,650 per month paid to an ex-wife earning $18,000 per year may have affected her standard of living and retirement plans, but did not impair her ability to provide the necessities of life for herself.

In *Fogel v. Fogel, supra*, we affirmed the trial court's reduction of child support for three children from $600 to $399 per month. The obligor had previously been employed in sales with earnings in excess of $20,000 annually. After his sales work and income declined due to managerial duties and his being unable to negotiate a satisfactory salary arrangement, he quit his employment. After a brief attempt at another sales position, he began a career in real estate sales; at the modification hearing, his income was estimated to be $10,000 per year.

In affirming the reduction, we stated:

> There is no willful misconduct or neglect involved in the present application. [Obligor] did not leave his former employment for the purpose of evading his responsibility but because of circumstances which eventually could have affected his income. The record would justify an inference that he made serious efforts to establish himself in employment with better prospects for the future. There is no question [obligor] is a capable individual with the energy, intelligence, and enterprise to be highly successful in sales work. His present occupation can be a lucrative one, but he must have an opportunity to make the necessary adjustments to realize his potential.
>
> A divorce decree does not freeze [an obligor] in his employment. One may in good faith make an occupational change even though that change may reduce

> his ability to meet his financial obligation to his children. [Obligee] ignores the fact that the judgment of what is fair includes not only a consideration of the circumstances of the children but of the [obligor] as well. Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the [obligor's] fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith.

Fogel v. Fogel, 184 Neb. at 427-28, 168 N.W.2d at 277.

Although the *Fogel* obligor was forced into a career change by diminished income at his prior position, he continued full-time employment, rather than choosing to pursue further education while employed part time. Moreover, we were there affirming the trial court's ordered reduction, whereas here, we are being asked to find that the district court abused its discretion in denying a reduction.

And it is true that in *Korf v. Korf*, 221 Neb. at 485-86, 378 N.W.2d at 174, we stated: "An award of custody to a parent should not be interpreted as a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a different career, be it job-related or matrimonial." However, *Korf* dealt with child custody issues, not with child support issues. See, also, *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

In at least two cases, we have held that a strict application of the Nebraska Child Support Guidelines would be inequitable where a parent's actual earning capacity exceeds present income. In *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991), we affirmed a trial court's child support order imputing income to the husband equal to the wife's gross income of $915 per month, although the husband's actual income was estimated at $615 per month. Because this was an initial child support decree in a dissolution action, there was no issue of good faith as a basis for modification. However, we did note that "for reasons not shown, the husband works, if at all, at jobs paying less than minimum wage, thus leaving the

support of his children primarily to his wife." *Id.* at 432, 470 N.W.2d at 801.

Likewise, in reversing the trial court's reduction in child support for three of the husband's children from $600 to $225 per month, we, in *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991), concluded that although the husband's income had decreased since the decree, his earning capacity had not, and that the reduction was attributable to his personal wishes rather than matters beyond his control.

In two cases which predate the child support guidelines, we affirmed denial of requested modification of child support awards on claims of decreased income. *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985) (holding equity will not act to give relief in child support obligation of one incarcerated for criminal act); *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984) (holding where needs of child remained same as when original decree entered and obligor implicitly had current capacity to repay family loan, obligor had ability to continue paying child support).

Although infrequently, other jurisdictions have also considered this issue and have generally held that, absent equities supporting the basis for reducing the ordered amount, a parent may and should be held responsible to support a child on the basis of potential income rather than a reduced present income.

In *Pattee v. Pattee*, 744 P.2d 658 (Alaska 1987), the Alaska Supreme Court reversed an initial child support order which considered only the ex-husband's income from a promissory note receivable on the sale of his business, which was held to be a fraudulent conveyance as to the ex-wife. The *Pattee* court recognized that a parent should not be " 'locked in' " to a certain career "when accepting a lower-paying position may ultimately result in personal or professional advancement." *Id.* at 662. However, it also noted that "the children of the marriage and the custodial parent should not be forced to finance the noncustodial parent's career change." *Id.* It reversed and remanded the cause for determination of child support on the basis of potential income based upon the equities. See, also, *Sansom v. Sansom*, 409 So. 2d 430, 432 (Ala. Civ. App. 1981)

(affirming trial court's denial of request to reduce child support for unemployed father who was attending law school, stating: "This court has previously held that the ability to earn, as opposed to actual earning, is a proper factor in determining the amount of child support to be awarded. . . . The lack of change in the needs of the children coupled with the [obligor's] ability to earn convinces this court that the trial court did not err"); *In re Marriage of Marshall*, 781 P.2d 177 (Colo. App. 1989), *cert. denied* 794 P.2d 1011 (Colo. 1990) (holding trial court, authorized by Colorado statute to consider parent's potential income, did not err in imputing income to husband, a licensed attorney and journeyman plumber, in excess of current income); *Moore and Moore*, 112 Or. App. 503, 829 P.2d 704 (1992) (remanding child support order in dissolution decree to apply statutory rebuttable presumption that parent is employable on full-time basis and child support should be based on such potential income if parent is unemployed or employed on less than full-time basis); *Marriage of Jonas*, 57 Wash. App. 339, 788 P.2d 12 (1990) (holding both husband, who was unemployed while attending school, and wife, who was capable of employment but chose to remain at home to care for children, were voluntarily unemployed and remanding matter to determine child support based upon earning capacity). But see *Coons v. Wilder*, 93 Ill. App. 3d 127, 416 N.E.2d 785 (1981) (holding so long as change in occupation made in good faith, child support must be based upon present ability to pay; trial court erred in refusing to reduce obligor's child support and allowing portion to be abated until education completed, whereupon support payments ordered increased to 1 1/2 times decreed amount until arrearages paid).

Although there is here no showing that the father's decision to return to college was not made in good faith, this is only one of the factors to be considered in determining whether there has been a material change in circumstances. Where, as in the situation before us, the needs of the children for whom support is paid will be seriously impaired if support diminishes below the ordered amount, it would be inequitable to reduce the child support in a circumstance where the father has the earning capacity required to continue to meet the present child support

order. There is here no showing that the father was unable to obtain any other suitable employment within the limits of his physical abilities, nor does the record support a contention that he will be assured employment which will not aggravate his ailment upon completion of his degree. Although the father should be free to pursue further education, he may not, under the circumstances presented here, finance it at the expense of his children.

As a result, we cannot say that the trial court abused its discretion in the denial of the father's request to modify child support.

Because of the relative novelty of the question presented by the father, the mother's motion for an attorney fee in this court is overruled.

AFFIRMED.

RIGEL CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. GREGORY S. CUTCHALL, APPELLANT.

511 N.W.2d 519

Filed February 4, 1994. No. S-92-336.

1. **Equity: Stock: Valuation.** A proceeding under the provisions of Neb. Rev. Stat. § 21-2080 (Reissue 1991) to determine the fair value of a dissenter's shares of stock is equitable in nature.
2. **Equity: Appeal and Error.** An appellate court reviews an equitable action de novo on the record and reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Contracts: Appeal and Error.** The construction of a contract 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 court below.
4. **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 court below.

5. **Contracts.** The terms of a contract are accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
6. **Stock: Valuation.** In the event of a merger, neither a minority discount nor a deduction for lack of marketability is to be given in determining the fair value of a dissenter's shares of stock under the provisions of Neb. Rev. Stat. § 21-2080 (Reissue 1991).

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

Timothy J. Pugh, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Frank F. Pospishil and Eric H. Lindquist, of Abrahams, Kaslow & Cassman, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to the provisions of Neb. Rev. Stat. § 21-2080 (Reissue 1991), the plaintiff-appellee, Rigel Corporation, instituted this action seeking a determination of the fair value, including interest, of the shares of common stock held by the defendant-appellant, Gregory S. Cutchall, in Rigel/Chix, Inc., a corporation which was merged into Rigel. The trial court determined the fair value of such shares to be $24,640 plus interest and gave Rigel credit for the $20,000 and $132.33 in interest it had previously paid Cutchall. Cutchall appealed to the Nebraska Court of Appeals and assigned as error, in summary, the trial court's determination (1) of the fair value of the said shares of stock and (2) that Rigel was entitled to credit for the interest it had paid. We removed the appeal to this court under the power granted us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) to regulate our caseload and that of the Court of Appeals; we now affirm the judgment of the trial court as modified herein.

II. STATUTORY PROVISIONS

Neb. Rev. Stat. § 21-2079 (Reissue 1991) provides, among other things, that if shareholders of a corporation have taken certain specified steps, they have the right, in the event of a

merger, with an exception not relevant here, to dissent "and obtain payment for their shares."

Section 21-2080(8)(a) provides that if such a dissenter's demand for payment is not settled, "the corporation shall file in an appropriate court a petition requesting that the fair value of the shares and interest thereon be determined by the court."

Fair value is defined in § 21-2080(1)(c) to mean the value of the shares "immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of such corporate action unless such exclusion would be inequitable."

Interest is defined in § 21-2080(1)(d) to mean "interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans, or, if none, at such rate as is fair and equitable under all the circumstances."

III. SCOPES OF REVIEW

While we have not previously addressed the scope of an appellate review of a trial court's determination of the fair value to be paid to a dissenting shareholder, the instant case was tried as an equitable matter.

Although a plethora of opinions in similar actions from other jurisdictions analyze the factors to be considered in arriving at the fair value to be paid dissenting shareholders, very few opinions analyze whether such a determination presents an action at law or one in equity. Furthermore, there is a split among those few jurisdictions which have passed upon the question.

The South Carolina Supreme Court held that such a matter is essentially an equitable proceeding. *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 239 S.E.2d 753 (1977). The Maine Supreme Judicial Court stated that "[t]he appraisal remedy has deep roots in equity." *In re McLoon Oil Co.*, 565 A.2d 997, 1004 (Me. 1989). In doing so, it cited 12B William M. Fletcher, Cyclopedia of the Law of Private Corporations § 5906.1 (rev. perm. ed. 1980).

However, the present edition of that treatise states: "In-court appraisal proceedings have been characterized as legal, as

opposed to equitable actions, because of their historical limitation of the dissenting shareholder to the legal remedy of damages, in the amount of the value of that shareholder's stock." 12B Fletcher, *supra*, § 5906.10 at 378 (rev. perm. ed. 1993). The treatise cites only one opinion for that proposition, a decision of the Georgia Supreme Court holding that it lacked jurisdiction for a direct appeal in a dissenting shareholder appraisal proceeding, as it was a legal action and not a case in equity. *Atlantic States Construction, Inc. v. Beavers*, 250 Ga. 828, 301 S.E.2d 635 (1983).

We have held that although rescission was originally an equitable concept, the remedy is now available in an action at law as well as in equity, and that an action seeking rescission under the Uniform Commercial Code is an action at law rather than one in equity. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 38, 302 N.W.2d 655, 660 (1981), declares:

> More important, however, it appears to be the general rule that where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. So, when jurisdiction has become concurrent through statutory enlargement of the legal remedy, a court of equity, although recognizing the existence of its jurisdiction, will generally decline to exercise it where the remedy at law is complete and adequate, and no special circumstances exist demanding the interference of equity.

Nonetheless, we have continued to recognize some actions as equitable, although now provided for by statute. These include foreclosure, *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993), and *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993), and injunctions, which are provided for by Neb. Rev. Stat. § 25-1062 et seq. (Reissue 1989), but are invariably reviewed as equitable actions. *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993), *modified on other grounds* 244 Neb. 936, 510 N.W.2d 312 (1994); *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

As noted in part II above, § 21-2080 provides that in

determining fair value, appreciation or depreciation occurring in anticipation of a merger is to be ignored unless it would be "inequitable" to do so, and interest shall be at such rate as is "fair and equitable."

We thus conclude that the Legislature intended a proceeding to determine fair value under § 21-2080 to be equitable in nature and to be reviewed as such; we thus so treat the matter. This determination brings into play the rule that an appellate court reviews an equitable action de novo on the record and reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Village of Brady v. Melcher, supra.*

At one juncture, however, we are obligated to construe a stock restriction agreement. (See part V1(a) below.) In that regard, we are bound by the rule that the construction of a contract is a matter of law, in connection with which we, as an appellate court, have an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

And of course, statutory interpretation is also 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 court below. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms, supra.*

IV. FACTS

Rigel operated a number of restaurants as a franchisee. Another of the three corporations involved in this matter, Chix, Inc., was the franchisee-operator of a number of restaurants for a different franchisor. Chix's owners decided to sell, and Rigel/Chix, Inc., was formed for the purpose of acquiring all of the issued and outstanding shares of Chix's common stock.

Cutchall, who served as Chix's executive vice president,

became Rigel/Chix's initial president; John Chisholm, who owned 47.1 percent of Rigel's shares, became Rigel/Chix's initial vice president; Vincent Morrissey, who also owned 47.1 percent of Rigel's shares, became Rigel/Chix's initial secretary; and Pat Kelley became Rigel/Chix's initial treasurer. (The remaining Rigel shares were owned by the Rigel Corporation Profit Sharing Plan.) Cutchall, Chisholm, and Morrissey comprised Rigel/Chix's initial board of directors.

Rigel/Chix authorized the issuance of 10,000 shares of common stock, with a par value of $1 per share. It also authorized the issuance of 15,000 shares of preferred stock at a par value of $1 per share. The preferred shares pay a dividend of $10 per year and have a redemption price of $100 per share.

Rigel purchased 8,000 of Rigel/Chix's common shares for $8,000, and Cutchall purchased the remaining 2,000 of such shares for $2,000. Rigel also purchased 8,000 shares of Rigel/Chix's preferred shares for $800,000. In order to capitalize the remainder of the purchase price, Rigel/Chix borrowed over $5.2 million from an outside lender and $200,000 from Chix.

A stock restriction agreement was executed simultaneously with the formation of Rigel/Chix and its acquisition of Chix. So far as is relevant to our review, the agreement provided that upon Cutchall's death, Rigel/Chix would purchase Cutchall's shares for the greater of $750,000 or 20 percent of the value of Rigel/Chix, as determined by an independent valuation or appraisal. Rigel/Chix was obligated to purchase and maintain a policy of life insurance on Cutchall's life

> with a death benefit of not less than $750,000 . . . to provide for payment of the value of the stock upon the death of Cutchall. Any excess of insurance proceeds over the value as determined herein shall be the sole and separate property of RIGEL/CHIX, to compensate the corporation for the loss of the skills and ability of Cutchall. It is mutually agreed that Cutchall, his personal representative, assigns or successors in interest shall have no claim to the proceeds of any policies of insurance except as set forth in this agreement.

After Rigel/Chix, through Chisholm and Morrissey,

terminated Cutchall's employment as its president and chief operating officer, it delivered Cutchall a notice of a special meeting of its shareholders to consider and vote upon a proposed plan to merge Rigel/Chix into Rigel. The plan of merger provided that the 10,000 shares of common stock in Rigel/Chix, including the 2,000 shares held by Cutchall, would be canceled and that the holders would receive payment of $10 per share. Cutchall dissented in writing to the merger and demanded that if the merger were approved, fair compensation be paid for his shares of stock.

The merger was subsequently approved at a special meeting of Rigel/Chix's shareholders. Rigel/Chix then delivered Cutchall notice of the adoption of the plan of merger, and the articles of merger were later filed with the Nebraska Secretary of State. Thereafter, Cutchall, responding to the notice that the merger had been approved, made his demand for payment of fair compensation. Rigel next notified Cutchall that his 2,000 shares of common stock had a value of $20,000 and remitted that amount to him, together with $132.33 for interest for the period which had elapsed from the effective date of the merger to the date of payment.

Cutchall then demanded payment of the claimed deficiency in Rigel's calculation of the fair value of his shares, asserting that the fair value should be $750,000.

While the parties stipulated that the value of Cutchall's shares was to be based upon Rigel/Chix's condition as of the end of its fiscal year immediately prior to the merger, they disagree as to what that value is. At trial, Cutchall's expert testified that as of the relevant date, the value of Cutchall's 2,000 shares of stock was $109,157.

Rigel's expert, on the other hand, opined that the 10,000 shares of common Rigel/Chix stock had a value of $160,000, making the value of Cutchall's 2,000 shares $32,000. However, the expert concluded that a 23-percent discount should be taken because Cutchall had but a 20-percent minority interest. In this witness' view, such a discount was necessary to account for the lack of a controlling ownership position which entitles a shareholder to set policy, appoint management, and determine dividends and compensation or to determine the sale,

liquidation, or recapitalization of the business. After applying the 23-percent minority-interest discount, the maximum value of Cutchall's shares became $24,640.

Rigel's expert then opined that a further discount of 40 percent must be applied because of the lack of marketability of the shares, it being more difficult to sell a minority interest than a controlling one in a closely held corporation. Applying that discount, he concluded that Cutchall's 2,000 shares had a maximum fair value of $14,784, which he would round to $15,000.

V. ANALYSIS

The policy behind statutes such as §§ 21-2079 and 21-2080 is well set out in *Voeller v. Neilston Co.*, 311 U.S. 531, 535 n.6, 61 S. Ct. 376, 85 L. Ed. 322 (1941):

> At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted.

With that perspective in mind, we turn our attention to the summarized assignments of error.

1. Fair Value of Shares

In the first summarized assignment of error, Cutchall challenges the trial court's determination of the fair value of his 2,000 shares of common Rigel/Chix stock. He does so on two grounds: (a) that the trial court mistakenly ignored the fact that Rigel/Chix was obligated to maintain $750,000 to fund the purchase of his stock in the event of his death and (b) that the trial court incorrectly discounted the real value of his stock. We consider each of these claims in turn.

(a) Insurance

The gist of Cutchall's argument with respect to the insurance aspect of the first summarized assignment of error is that as

under the stock restriction agreement he had a death benefit of $750,000 for which he did not have to pay, the single-premium present value of that benefit, $62,784, should have been taken into account in determining the fair value of his shares.

But the stock restriction agreement makes clear that the purpose of the insurance was to fund the Rigel/Chix purchase of Cutchall's shares in the event of his death, not to provide Cutchall's estate with a $750,000 death benefit. Indeed, the agreement expressly provides that any insurance proceeds in excess of those required to purchase Cutchall's shares would be the property of Rigel/Chix to compensate it for the loss of Cutchall's services. Moreover, the relevant provision of the stock restriction agreement contemplated that Cutchall would own the shares at the time of his death, a circumstance which obviously will not come to pass. See, *Pace Photographers (Rosen)*, 71 N.Y.2d 737, 525 N.E.2d 713, 530 N.Y.S.2d 67 (1988); *Hughes v. Sego Int'l Ltd.*, 192 N.J. Super. 60, 469 A.2d 74 (1983).

Thus, Cutchall seeks a reading of the agreement which the language will not permit. The terms of a contract are accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

(b) Discounts

We note at the outset of our review of the discount aspect of the first summarized assignment of error that while there is a wide disparity between the opinion of Rigel's expert concerning the value of Cutchall's shares and the opinion of Cutchall's expert, Cutchall has, except for the insurance issue just discussed, limited his attack on the trial court's valuation to the fact that it applied a discount because of Cutchall's minority position in Rigel/Chix. Accordingly, we too so limit our review of the trial court's determination of value.

We begin by noting that the statutes of the various jurisdictions have used a variety of terms in describing the payment to be made to dissenting shareholders. As observed in *Warren v. Balto. Transit Co.*, 220 Md. 478, 482-83, 154 A.2d

796, 798-99 (1959):

> In the years that have passed since appraisal statutes first came into the law (the Maryland statute passed in 1908 was one of the first), the rules governing the rights of dissenting stockholders have crystallized and are relatively uniform throughout the country. Whether the statute calls for the payment of value, fair value, or fair cash value, makes little difference since the terms are considered synonymous. *Burke v. Fidelity Trust Co.*, 202 Md. 178, 186[, 96 A.2d 254]. The real objective is to ascertain the actual worth of that which the dissenter loses because of his unwillingness to go along with the controlling stockholders, that is, to indemnify him. The textwriters and cases agree generally that this is to be determined by assuming that the corporation will continue as a going concern—not that it is being liquidated—and on this assumption by appraising all material factors and elements that affect value, giving to each the weight indicated by the circumstances, including the nature of the business and its operations, its assets and liabilities, its earning capacity, the investment value of its stock, the market value of the stock, the price of stocks of like character, the size of the surplus, the amount and regularity of dividends, future prospects of the industry and of the company, and good will, if any.

The Delaware Supreme Court, in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983), wrote:

> "The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. . . ."

In a later case, when confronted with the question of whether to apply a "minority or marketability discount," the Delaware

Supreme Court said:

> [T]he Vice Chancellor concluded that the objective of a [dissenter's statute appraisal] is "to value the *corporation* itself, as distinguished from a specific fraction of its *shares* as they may exist in the hands of a particular shareholder" [emphasis in original]. We believe this to be a valid distinction.
>
> . . . .
>
> The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a "going concern." Cavalier's argument, that the only way Harnett would have received value for his 1.5% stock interest was to sell his stock, subject to market treatment of its minority status, misperceives the nature of the appraisal remedy. Where there is no objective market data available, the appraisal process is not intended to reconstruct a *pro forma* sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.

Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144-45 (Del. 1989).

Under a similar rationale, a number of other courts have rejected both minority and marketability discounts. *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609 (R.I. 1991); *In re McLoon Oil Co.*, 565 A.2d 997 (Me. 1989); *Woodward v. Quigley*, 257 Iowa 1077, 133 N.W.2d 38 (1965), *on reh'g* 257 Iowa 1077, 136 N.W.2d 280; *Hunter v. Mitek Industries*, 721 F. Supp. 1102 (E.D. Mo. 1989) (applying Missouri law). See, also, *Richardson v. Palmer Broadcasting Co.*, 353 N.W.2d 374 (Iowa 1984) (which directly discusses only the minority discount).

Several other courts have rejected the minority discount without extensively discussing the propriety of applying a discount characterized as one either for lack of marketability or because of lack of a controlling interest. *MT Properties v. CMC Real Estate Corp.*, 481 N.W.2d 383, 388 (Minn. App. 1992) (stating that "[i]t is evident this issue involves highly conflicting policy considerations. Either resolution of the issue risks unduly enlarging the value of some shares, either those of the remaining shareholders or those of the dissenter," and holding that the dissenting shareholder statute's aim is to protect the dissenting shareholder); *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988) (involving a dissent to liquidation, noting that discounting for lack of control would be even less appropriate upon liquidation); *Ronald v. 4-C's Electronic Packaging, Inc.*, 168 Cal. App. 3d 290, 214 Cal. Rptr. 225 (1985) (involving a valuation of a minority interest where the majority elected to buy out the minority to avoid involuntary dissolution versus a dissent to a merger or other action); *Brown v. Allied Corrugated Box Co.*, 91 Cal. App. 3d 477, 154 Cal. Rptr. 170 (1979). See, also, *Waite v. Old Tucson Development Co.*, 22 Ariz. App. 517, 519, 528 P.2d 1276, 1278 (1974) (relying upon statutory language for payment of the fair value of stock " 'based on its pro rata share of the fair value of the net assets of the corporation' ").

Still other courts, without specifically addressing a minority discount or a deduction for marketability, have held that the dissenting shareholder's shares are to be valued as a proportion of the entire corporation's value without giving any consideration to diminished marketability. *Sarrouf v. New England Patriots Football Club, Inc.*, 397 Mass. 542, 492 N.E.2d 1122 (1986); *BNE Massachusetts Corp. v. Sims*, 32 Mass. App. 190, 588 N.E.2d 14 (1992); *Dreiseszun v. FLM Industries, Inc.*, 577 S.W.2d 902 (Mo. App. 1979).

However, there is authority for allowing either a marketability deduction, a minority discount, or both. At least three courts have allowed a deduction for marketability. *Columbia Management Co. v. Wyss*, 94 Or. App. 195, 765 P.2d 207 (1988), *review denied* 307 Or. 571, 771 P.2d 1021 (1989) (allowing a marketability discount but holding a minority discount is not appropriate); *Mtr Blake v Blake Agency*, 107

A.D.2d 139, 486 N.Y.S.2d 341 (1985), *appeal denied* 65 N.Y.2d 609, 484 N.E.2d 671, 494 N.Y.S.2d 1028 (allowing a discount for marketability but not a minority discount); *Ford v. Courier-Journal Job Printing Co.*, 639 S.W.2d 553 (Ky. App. 1982). At least one decision allowed a minority discount without discussion of a marketability deduction. *Hernando Bank v. Huff*, 609 F. Supp. 1124 (N.D. Miss. 1985), *aff'd* 796 F.2d 803 (5th Cir. 1986) (construing a Mississippi dissenter's statute). And several jurisdictions have held that both a marketability discount and a minority discount may be made in calculating fair value. *Stanton v. Republic Bank*, 144 Ill. 2d 472, 581 N.E.2d 678 (1991) (resolving a prior apparent split in its courts of appeal, not expressly noted, as evidenced by *Institutional Equip. & Interiors v. Hughes*, 204 Ill. App. 3d 922, 562 N.E.2d 662 (1990); *Independence Tube Corp. v. Levine*, 179 Ill. App. 3d 911, 535 N.E.2d 927 (1989), *appeal denied* 127 Ill. 2d 617, 545 N.E.2d 111; and *Hickory Creek Nursery, Inc. v. Johnston*, 167 Ill. App. 3d 449, 521 N.E.2d 236 (1988)); *King v. F.T.J., Inc.*, 765 S.W.2d 301 (Mo. App. 1988); *Atlantic States Construction v. Beavers*, 169 Ga. App. 584, 589, 314 S.E.2d 245, 251 (1984) (emphasizing that "the trier of fact must apply any 'minority interest' factor with caution. In many cases, other factors, such as market value, may wholly or partially account for any relevant 'minority discount' "); *Moore v. New Ammest, Inc.*, 6 Kan. App. 2d 461, 630 P.2d 167 (1981); *Perlman v. Permonite Mfg. Co.*, 568 F. Supp. 222 (N.D. Ind. 1983), *aff'd* 734 F.2d 1283 (7th Cir. 1984) (applying Indiana law).

We are persuaded, however, that in the event of a merger, neither a minority discount nor a deduction for lack of marketability is to be given in determining the fair value of a dissenter's shares under the provisions of § 21-2080. Only by not doing so can the statutory policy of fully compensating a dissenting minority shareholder be achieved. Accordingly, the trial court erred in setting the fair value of Cutchall's shares at $24,640 rather than at $32,000.

2. Interest

With respect to the second and final summarized assignment of error, Cutchall does not challenge the 11.5-percent interest

figure used by the trial court, but correctly urges that Rigel should not have been given credit for the interest it had paid. This is so because $132.33 in interest accrued from the date the merger became effective to the date Rigel paid Cutchall the $20,000 it considered to be the fair value of his shares.

In view of the trial court's miscalculation of the fair value of Cutchall's shares, Rigel must now pay interest from the effective date of the merger at the rate of 11.5 percent per annum on the $12,000 difference between the $20,000 it paid and the $32,000 it should have paid.

VI. JUDGMENT

For the foregoing reasons, the judgment of the trial court is affirmed as modified in this opinion.

AFFIRMED AS MODIFIED.

HAWKINS CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. REIMAN CORP., A WYOMING CORPORATION, APPELLEE.

511 N.W.2d 113

Filed February 4, 1994. No. S-92-352.

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 drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Contracts.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
4. **Estoppel.** The doctrine of promissory estoppel does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.
5. _____. There is no requirement of "definiteness" in an action based upon promissory estoppel.

6. **Breach of Contract: Forbearance: Estoppel.** A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
7. **Estoppel.** Promissory estoppel requires that reliance be reasonable and foreseeable.
8. **Estoppel: Summary Judgment: Contractors and Subcontractors.** A general contractor's reliance that a subcontractor would perform given work, not only in accordance with the subcontractor's bid, but with additional and nonstandard terms not part of the bid would be unreasonable as a matter of law for purposes of granting summary judgment in a promissory estoppel action.

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

John W. Iliff, of Gross & Welch, P.C., for appellant.

E. James Burke, of Burke, Woodard & Bishop, P.C., and Thomas M. Houston, of Andersen, Berkshire, Lauritsen, Brower & Hadley, for appellee.

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

LANPHIER, J.

This is an appeal of a grant of summary judgment from the district court for Douglas County, Nebraska. The suit arises out of a bid made by Reiman Corp., appellee, as subcontractor to appellant, Hawkins Construction Company, acting as a general contractor. Appellant alleged in its petition that appellee refused to perform the work bid upon after appellant won the contract. Appellant alleged that the refusal entitled it to recover damages for breach of contract and promissory estoppel as a result of hiring someone else to complete the work at a higher cost. The district court for Douglas County sustained appellee's motion for summary judgment, finding that no contract existed and that material terms of the promise were disputed or remained to be negotiated, and dismissed the action. We affirm.

BACKGROUND

Appellant learned from an advertisement that Nebraska's Department of Roads was receiving bids on a paving project near North Platte, Nebraska. Prior to submitting its bid as a

general contractor, appellant solicited bids from others for portions of the work. On July 31, 1990, appellee submitted a bid to appellant. Appellee proposed to do work in four "groups" of the project.

On August 1, a representative of appellant phoned a representative of appellee. The details of that conversation are disputed. However, appellee, for the purposes of the motion before us on appeal, concedes that the conversation took place as alleged by appellant. Appellant asserts that appellee's bid was orally modified to include work on only three groups.

Appellant included as a part of its bid to the Department of Roads what it claims was appellee's modified bid. On August 14, appellant was awarded the project. On September 5, appellee received a subcontract from appellant which was not acceptable to it. The subcontract required the appellee to obtain five times the amount of umbrella liability insurance that was standard in the industry and to submit shop drawings within 2 weeks of receipt of the contract. Under the terms of the "Subcontract Agreement," appellee would "have no claim for damages due to delays for any delays not recovered from the Owner." Appellee also objected to requirements concerning billing and payment. Appellee sent the subcontract back that same day unsigned with a letter of explanation. In the letter, appellee outlined those provisions not previously part of the bid which were not agreeable to it. Appellee also wrote that unless the subcontract included all four groups in its bid, there would be no agreement.

The parties failed to resolve their dispute in a subsequent telephone conversation. Appellant filed its petition on October 30 and hired another subcontractor to do the work, but at a higher rate.

The trial court sustained appellee's motion for summary judgment. The court, in its order, stated:

> It is clear in the reading of the matters submitted that Hawkins, in many respects, varied the major terms of the bid and other material terms relevant to the contract were not resolved. Therefore, no contract was ever fully made by the parties. While the plaintiff urges the Court to hold that under the Doctrine of Promissory Estoppel the

> defendant should be held responsible, that doctrine presupposes that there is, in fact, fixed material terms of a promise which were relied upon by the general contractor. Material terms of the promise remained to be negotiated or were seriously disputed. As such, the Doctrine of Promissory Estoppel has no application.

ASSIGNMENTS OF ERROR

Appellant asserts that the trial court erred in (1) sustaining appellee's motion for summary judgment, (2) rendering a decision contrary to law, (3) overruling appellant's motion for new trial, (4) applying principles of basic contract law to a cause of action based on promissory estoppel, (5) concluding that the doctrine of promissory estoppel was not applicable to this case, and (6) failing to find that there were genuine issues of fact as to the existence of an option contract.

STANDARD OF REVIEW

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. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (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 drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

BREACH OF CONTRACT

Appellant claims that genuine issues of fact exist and that the trial court's grant of summary judgment was, therefore, improper. However, contrary to appellant's assertion, uncontroverted facts prove that the breach of contract action must fail as a matter of law.

A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991); *Zimmerman v. Martindale*, 221 Neb. 344, 377

N.W.2d 94 (1985); *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 316 N.W.2d 744 (1982); *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947). Undisputed facts reveal that the parties left for future arrangement elements of their agreement. Even after the purported oral modification of the bid, which we accept as true for the purposes of summary judgment, appellant sent appellee a 17-page document, with attachments, entitled "Subcontract Agreement." The subcontract agreement contained many provisions which were never addressed by the parties and which were not contained in the initial or modified bid, including liability insurance requirements, time for submission of shop drawings, billing and payment terms, and responsibility for a dewatering problem. Appellant's act of sending this document serves as a tacit admission that the parties left for future negotiation essential details of their arrangement. It is undisputed that appellee never agreed to the terms set forth in the subcontract agreement sent to it by appellant, but sent it back unsigned.

Appellant's assertion that the existence of a valid option contract should have precluded the trial court's grant of summary judgment must fail for the same reason. As discussed above, it is clear from the record that neither party ever considered the initial bid, nor the purportedly modified bid, to contain the embodiment of their agreement. Even if we found, as appellant urges, that the submission of the bid constituted an option contract, thus making the bid irrevocable, as was done in *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958), that would not save appellant from summary judgment. Summary judgment would still be appropriate, since, as evidenced by appellant's submission of the subcontract agreement, elements of the agreement were left to be decided at a later time. See, *Zimmerman v. Martindale, supra*; *Rybin Investment Co., Inc. v. Wade, supra*; *O'Brien v. Fricke, supra*. The court's grant of summary judgment on this cause of action was proper.

PROMISSORY ESTOPPEL

With respect to appellant's cause of action for promissory estoppel, the trial court stated:

> While the plaintiff urges the Court to hold that under the Doctrine of Promissory Estoppel the defendant should be held responsible, that doctrine presupposes that there is, in fact, fixed material terms of a promise which were relied upon by the general contractor. Material terms of the promise remained to be negotiated or were seriously disputed. As such, the Doctrine of Promissory Estoppel has no application.

As appellant asserts, it is the law in Nebraska that the doctrine of promissory estoppel does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). See, also, *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992). We have stated that " 'there is no requirement of "definiteness" in an action based upon promissory estoppel.' " *Id.* at 979, 485 N.W.2d at 582, quoting *Rosnick, supra.*

However, the general rule regarding the doctrine of promissory estoppel is that " '[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . .' " *Rosnick*, 235 Neb. at 748, 457 N.W.2d at 799, quoting the Restatement (Second) of Contracts § 90 (1981). See, also, *Whorley, supra.* Promissory estoppel requires that reliance be reasonable and foreseeable. *Rosnick, supra*; *Whorley, supra.*

As a matter of law there are insufficient facts to support a claim of promissory estoppel. Appellant's reliance that appellee would perform the work bid upon was not reasonable or foreseeable. The submission of the subcontract agreement by appellant to appellee discloses that appellant relied on appellee's expected acquiescence to certain nonstandard additional conditions which could be considered onerous. It was unreasonable for appellant to expect that appellee would have to agree to the many nonstandard provisions contained in the subcontract agreement. The subcontract agreement would have

required the appellee to obtain five times the amount of umbrella liability insurance as was standard in the industry. Also contrary to industry standards was the requirement that appellee submit shop drawings within 2 weeks of receipt of the contract. Under the terms of the subcontract agreement, appellee, as subcontractor, would "have no claim for damages due to delays for any delays not recovered from the Owner." This, according to the evidence, is also a nonstandard term. Other requirements concerning billing and payment were, according to the evidence, also not standard. Given the bid submitted, appellant could not reasonably rely on the fact that appellee would perform the work in compliance with the provisions contained in the 17-page subcontract agreement. Had appellee been aware at the time it submitted its bid of the many provisions contained in the subcontract agreement, and had appellant known that appellee was aware of the provisions, appellant's reliance would have been foreseeable and reasonable. Here it was not. The trial court's grant of summary judgment on this cause of action was, therefore, proper.

CONCLUSION

The district court properly granted summary judgment on the breach of contract action, since the parties clearly contemplated that in addition to the bid, even as purportedly modified, other essential elements would be required to establish a contract. Summary judgment was also proper with respect to the promissory estoppel action, since appellant's reliance was neither reasonable nor foreseeable.

AFFIRMED.

RICHARD D. MCGOWAN, APPELLANT, V. LOCKWOOD CORPORATION AND THE HARTFORD, A CORPORATION, APPELLEES.

511 N.W.2d 118

Filed February 4, 1994. No. S-92-634.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside if the record does not contain sufficient competent evidence to warrant the making of the order, judgment, or award.
3. _____: _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
4. **Statutes.** The proper construction and application of statutory terms is a question of law.
5. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
6. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
7. **Workers' Compensation.** All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1988), and amendments thereto, have reference to wages, percentages, and results as of the time of injury.
8. _____. A finding that a workers' compensation claimant currently maintains a minimum-wage job is not, in and of itself, sufficient to support a denial of vocational rehabilitation benefits.
9. _____. A determination as to whether an injured worker has had a loss of earning power and whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker, if any, are questions of fact to be determined by the Workers' Compensation Court.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

George P. Burke, of Burke & Wilson, for appellant.

Richard A. Douglas, of Nichols, Douglas and Kelly, P.C., for appellees.

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

FAHRNBRUCH, J.

Richard D. McGowan, who was injured in an accident during the course of his employment with defendant Lockwood Corporation, claims that a majority of the three-judge panel of the Workers' Compensation Court failed to award him all of the workers' compensation benefits to which he is entitled. Defendant The Hartford was Lockwood's insurance carrier at the time McGowan was injured.

The Nebraska Court of Appeals affirmed the Workers' Compensation Court's ruling on the issues raised in McGowan's petition for further review. We granted further review on those issues.

We reverse on the issue of vocational rehabilitation benefits and affirm in all other respects.

ASSIGNMENTS OF ERROR

Summarized and restated, McGowan, in his petition to this court for further review, assigns as error the Court of Appeals' affirmance of the Workers' Compensation Court's (1) sustainment of objections to his testimony and offers of proof regarding his employment contract and the hours he worked, (2) calculations of his average weekly wage, and (3) denial of his request for vocational rehabilitation.

As to McGowan's first restated assignment of error in this court, we note that the Workers' Compensation Court panel originally sustained objections to McGowan's testimony and offers of proof regarding his average weekly wage during the relevant period involved. However, before the hearing was concluded, the panel reversed its ruling and received into evidence McGowan's testimony on the subject. Thus, McGowan's first summarized and restated assignment of error in this court requires no further discussion because it has no merit.

STANDARD OF REVIEW

Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and

effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. *Hernandez v. Hawkins Constr. Co.*, 240 Neb. 129, 480 N.W.2d 424 (1992); *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

A judgment, order, or award of the compensation court may be modified, reversed, or set aside if the record does not contain sufficient competent evidence to warrant the making of the order, judgment, or award. *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Hernandez, supra*. The proper construction and application of statutory terms is a question of law. *Yager, supra*. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. See, *id.*; *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983).

FACTS

McGowan was hired by Lockwood in January 1990 and began working as a machinist in Lockwood's fabrication department. On April 4, during the course of his employment, McGowan turned to pick up a piece of iron and injured his right knee. He underwent arthroscopic knee surgery April 6, and returned to work April 24 or 25. On August 21, McGowan suffered a recurrence of his right-knee injury during the course of his employment while working with a 5- by 12-foot sheet of metal.

Because of the injury to his right knee, McGowan could not return to his previous duties. In mid-December 1990, Lockwood offered McGowan light-duty work. On December 17, McGowan was assigned the task of measuring certain distances in Lockwood's fabrication department. The personnel director expected that assignment to take 3 or 4 days. After McGowan finished the work in 1 1/2 to 2 hours, Lockwood's personnel director assigned McGowan to work as a clerk in the company's toolcrib. He worked there 4 hours on the afternoon of December 17, 7 hours on December 18, and 5 hours on December 19. McGowan was paid $5 per hour for the

measuring and toolcrib work. The evidence is in conflict as to whether the toolcrib work would be permanent.

As a Lockwood machinist, McGowan initially was paid $6 per hour plus a 25-cents-per-hour shift differential. Prior to the accident on April 4, McGowan had received a wage increase to $6.33 per hour. He continued to receive the 25-cents-per-hour shift differential. At the time of the recurrence of his knee injury on August 21, McGowan was earning $6.61 per hour plus a 25-cents-per-hour shift differential.

McGowan last worked for Lockwood on December 19, 1990. He left his toolcrib work early that day for an appointment with a counselor from the division of vocational rehabilitation services. This absence from work was approved by his supervisor.

As a result of McGowan's consultations with the vocational rehabilitation counselor, a plan was developed by which McGowan would study farm or ranch management at a community college, with the ultimate goal of becoming a feedlot or ranch manager. With financial aid from the division of vocational rehabilitation services, McGowan began attending Western Nebraska Community College in Scottsbluff in January 1991. He was in his third semester at the time of his hearing before the three-judge compensation court panel in March 1992. At the time of the hearing, McGowan, who was then 45 years old, was wearing a right knee brace which he had worn since September 1990.

About a month after McGowan started school, he began working part time at Banner Feed Company in a feedlot. He worked at this part-time job until the first part of June 1991, and earned $5 per hour. His job included riding a horse through the cattle pens and helping process cattle. McGowan testified that he left that job "because they were out of cattle down there. They didn't have any more part-time work."

In June 1991, McGowan worked for about 10 days swathing alfalfa for a local farmer. He worked 2 to 5 hours per day and was paid $6.50 per hour. Later, he helped his wife and two children take care of 63 cows and 8 horses that he and his wife purchased in the fall of 1991 with borrowed money.

After completion of a single-judge hearing, the

compensation court found that McGowan had suffered a 44-percent permanent disability of his right leg and that he was entitled to vocational rehabilitation services as well as compensation and other benefits. Following a rehearing, a majority of a three-judge compensation panel agreed with the single compensation judge's calculation of McGowan's average weekly wage of $302.24. Although awarding McGowan other benefits, the panel majority refused to award McGowan vocational rehabilitation services, stating that he "failed to prove that he is unable to return to work for which he has had prior training or experience . . . ." The panel majority found that McGowan could have continued as a toolcrib clerk and that he was working as a cowboy as well.

On appeal, the Court of Appeals affirmed the panel majority's ruling on all issues raised in McGowan's petition for further review. The Court of Appeals found sufficient evidence to support the panel majority's computations of McGowan's weekly wages. In addition, the Court of Appeals found that the toolcrib clerk position provided a salary comparable to McGowan's previous salary and that the clerk position required no vocational rehabilitation.

ANALYSIS

In regard to his second and third summarized and restated assignments of error in this court, McGowan argues that on rehearing, the panel majority of the Workers' Compensation Court and the Court of Appeals in its review failed to apply the correct statutory standards in determining his average weekly wage and in determining whether he is entitled to vocational rehabilitation.

WAGE CALCULATIONS

The record in this case reflects conflicting evidence relating to McGowan's average weekly wage for the relevant period. The Workers' Compensation Court panel majority found it to be $302.24. That finding was affirmed by the Court of Appeals. Apparently based upon McGowan's testimony and evidence adduced by him, the dissenting workers' compensation judge would have set McGowan's average weekly wage at $340.20.

In part, McGowan argues that the average weekly wage calculation was erroneous because it was based on his wages prior to April 4, rather than prior to August 21. Between April 4 and August 21, McGowan received an increase in his hourly wage.

In the single compensation judge's order, it was found that McGowan "suffered an accident on April 4, 1990[,] after which he had arthroscopic surgery and suffered but a recurrence of the same injury on August 21, 1990." The panel majority on rehearing similarly found that McGowan suffered but one accident. This finding of one accident with a recurrence of the injury was not assigned as error in McGowan's petition for further review in this court, and it, therefore, will not be reviewed by this court. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

Given that the compensation court panel majority found that McGowan suffered one compensable accident on April 4, with a recurrence of the same injury on August 21, it was not clearly wrong for the panel majority to compute McGowan's wages using his earnings as of April 4. All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1988), and amendments thereto, have reference to wages, percentages, and results *as of the time of injury*. *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). Neb. Rev. Stat. § 48-126 (Reissue 1988) defines the term "wages" as used in the Workers' Compensation Act to mean "the money rate at which the service rendered is recompensed *under the contract of hiring in force at the time of the accident*." (Emphasis supplied.)

Although we have been unable to find where this court has addressed the precise issue involved here, we have found that this court has considered other issues related to the recurrence of an injury. In one such case, where the worker suffered a recurrence of a compensable injury after his employer had changed insurance carriers, this court stated that if a worker's "second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier *at the time of the first injury*." (Emphasis

supplied.) *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 780, 408 N.W.2d 280, 286 (1987).

To support his contention that the Workers' Compensation Court panel majority erred in its calculation of his average weekly wage, McGowan basically relies upon his own testimony and evidence that he adduced as to the number of hours he worked. In his petition for further review, McGowan states that "[t]he defendants offered no contrary evidence." That statement overlooks the receipt into evidence of McGowan's employee ledger sheet. Kept by Lockwood as part of its records, the ledger sheet reflects the number of hours McGowan worked, his rate of pay, and amounts he was paid for his work. This evidence produced by Lockwood was in conflict with McGowan's testimony and evidence. Thus, there was a conflict in the evidence as to the underlying facts to be used in determining McGowan's average weekly wage. The evidence adduced from the records of McGowan's employer support the workers' compensation panel majority's determination of McGowan's average weekly wage. The evidence supporting a finding of fact must be considered in the light most favorable to the successful party. See *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). In regard to McGowan's average weekly wage, it is obvious that the majority of the workers' compensation panel accepted Lockwood's evidence rather than the evidence produced by McGowan. Under our standard of review, it cannot be said that the panel majority's finding as to McGowan's average weekly wage was clearly wrong. McGowan's assignment of error in regard to his average weekly wage is without merit.

McGowan's Right to Vocational Rehabilitation

Neb. Rev. Stat. § 48-162.01 (Reissue 1988) sets forth the situations in which the compensation court can award vocational rehabilitation benefits. Subsection (3) of that statute, at all times relevant to this action, stated in part:

> *When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience*, he or she shall be entitled to such vocational rehabilitation services, including retraining and job

> placement, *as may be reasonably necessary to restore him or her to suitable employment.*

(Emphasis supplied.)

Furthermore, subsection (6) of § 48-162.01 stated:

> Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated *to the extent that he or she . . . can . . . increase his or her earning capacity* . . . if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

(Emphasis supplied.)

In *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 549, 288 N.W.2d 482, 486 (1980), this court held that when read together, subsections (3) and (6) of § 48-162.01 meant that the "statute authorizes vocational rehabilitation training not only under the circumstances outlined in subsection (3), but also where the Workmen's Compensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity." Accord, *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987).

We are aware that subsection (6) of § 48-162.01 has recently been amended and no longer includes the language emphasized above. The amendments to § 48-162.01 became effective on January 1, 1994. The statute, as previously quoted, existed at the time of McGowan's accident, at the time of his rehearing, and at the time of the compensation court's award. Therefore, that language governs McGowan's claim for vocational rehabilitation. Cf. *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985).

We now turn to a review of the compensation court's

determination of whether McGowan is entitled to vocational rehabilitation. The compensation court panel majority found that McGowan failed to prove he could not perform work for which he had previous training or experience. Prior to his accident, McGowan had a high school education and had attended 1 year of college. Throughout his life, McGowan worked primarily as a physical laborer, holding jobs as a farm laborer, construction worker, janitor/custodian, and machinist, as well as other labor-intensive positions.

In determining that the workers' compensation panel majority was correct in denying McGowan vocational rehabilitation, the Court of Appeals recited, inter alia, (1) the various jobs McGowan undertook before and after his injury; (2) that McGowan performed well as a toolcrib clerk and apparently could have continued to perform such work without vocational rehabilitation; and (3) McGowan's ability to work at Banner Feed Company and to help care for cattle and horses owned by him and his wife, all of which indicated that McGowan would require no additional training to perform those types of work.

The fact that McGowan could have worked as a toolcrib clerk for $5 per hour or that he had held a job at Banner Feed Company for $5 per hour does not automatically disqualify him from receiving vocational rehabilitation benefits.

In *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991), this court stated that a finding that a workers' compensation claimant currently maintains a minimum-wage job is not, in and of itself, sufficient to support a denial of vocational rehabilitation benefits. In *Yager*, the court remanded the cause for further proceedings on the issue of whether Yager was entitled to vocational rehabilitation. Yager was earning $220 a week at the time of his injury, and had accepted a minimum-wage job paying $104 a week after his injury. The court stated that to ignore the proportionately large difference between Yager's wages before and after the injury would be to ignore the statutory goal of returning injured workers "to suitable, that is, comparable, employment." *Yager*, 236 Neb. at 897, 464 N.W.2d at 341. The court held that "accepting a job paying minimum wage does not automatically

'restore' a claimant to 'suitable' or 'gainful' employment pursuant to § 48-162.01, where the claimant's previous employment was at a significantly higher wage." *Id.* at 896, 464 N.W.2d at 340.

The reasoning in *Yager* is consistent with the governing language of subsection (6) of § 48-162.01 (Reissue 1988). At the relevant time involved here, that section authorized the compensation court to award McGowan vocational rehabilitation if it found that (1) McGowan suffered a reduction in earning power and (2) vocational rehabilitation would increase his earning capacity.

A determination as to whether an injured worker has had a loss of earning power and whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker, if any, are questions of fact to be determined by the Workers' Compensation Court. See *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). The compensation court in McGowan's case failed to make findings either way, although the record contains evidence relevant to these issues.

The workers' compensation panel majority's findings that McGowan's average weekly wage prior to his accident was $302.24 and that his anticipated weekly salary as a toolcrib clerk would have been $200 are relevant to whether McGowan suffered a reduction in earning power. The workers' compensation panel made no finding of fact in this regard. However, the Court of Appeals held that the two salaries were comparable. A change in salary from $302.24 to $200 per week constitutes an almost 34-percent reduction in weekly wages. The Court of Appeals' holding that the two salaries are comparable is clearly wrong as a matter of law.

As to the probability that vocational rehabilitation would reduce McGowan's loss of earning power, the evidence shows that McGowan's vocational rehabilitation counselor thought the proposed rehabilitation plan would indeed help McGowan secure employment at a wage comparable to what he had been earning before his injury. In a letter admitted into evidence, McGowan's vocational rehabilitation counselor stated:

Based upon the description of the duties of Mr.

> McGowan's position, I felt Mr. McGowan would not be able to perform the work for which he was employed at Lockwood. Furthermore, I felt his disability and associated limitations would result in his being either unemployed or, at best, underemployed — both in task performance and earnings. . . .
>
> . . . .
>
> The goal [of becoming a feedlot or ranch manager] was appropriate since it utilized Mr. McGowan's personal experiences as well as met his interests. Furthermore, attainment of that goal would help ensure Mr. McGowan would be better able to support his family at wage level fairly consistent to that received at the time of his injury.

There was additional evidence and testimony by the vocational rehabilitation counselor from which the workers' compensation panel could have and should have made a finding of fact as to whether vocational rehabilitation would decrease McGowan's loss of earning capacity.

CONCLUSION

In regard to the issue of whether McGowan is entitled to vocational rehabilitation benefits, we reverse the decision of the Court of Appeals upholding the denial of those benefits by the Workers' Compensation Court, and remand the cause to the Court of Appeals with direction to remand the cause to the Workers' Compensation Court with direction to reconsider the issue of vocational rehabilitation benefits in accord with this opinion. In all other respects, the decision of the Court of Appeals is affirmed.

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

RICHARD ALLEN, APPELLANT, V. SHERIFF OF LANCASTER COUNTY, NEBRASKA, TOM CASADY, AND ADMINISTRATOR OF LANCASTER COUNTY CORRECTIONS, APPELLEES.

511 N.W.2d 125

Filed February 4, 1994. No. S-93-196.

1. **Constitutional Law: Right to Counsel.** An indigent litigant has a right to appointed counsel when, as a result of the litigation, he may be deprived of his physical liberty.
2. **Right to Counsel.** The right of an indigent to court-appointed counsel may be found in either a civil or criminal context.
3. **Divorce: Contempt: Debtors and Creditors.** A party may not be confined in prison for failure to pay a debt ordered to be paid in a dissolution action if it is not within the present ability of the person imprisoned to pay the obligation.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Beth Tallon, of Legal Services of Southeast Nebraska, for appellant.

John A. Colborn, Chief Deputy Lancaster County Attorney, and Thomas S. Jaudzemis, Deputy Lancaster County Attorney, for appellees.

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

BOSLAUGH, J.

On February 9, 1993, Richard Allen was jailed for contempt of court because he failed to pay a debt to Security Pacific Financial Services of Iowa, Inc., which he had been ordered to pay in a dissolution decree of March 22, 1991. A petition for writ of habeas corpus was filed on Richard's behalf in the district court on February 10, 1993. The petition was dismissed on February 12; however, Richard was ordered released from custody pending a review of the contempt proceedings.

Richard appealed the district court's dismissal of his petition for writ of habeas corpus to the Nebraska Court of Appeals. The Court of Appeals dismissed Richard's appeal as moot, and

this court granted his petition for further review.

In September 1992, Richard's ex-wife, Monika Allen, filed a motion to cite Richard for contempt for failure to comply with the dissolution decree, which required him to pay the parties' debt of approximately $1,900 to Security Pacific and also required him to hold Monika harmless on that debt.

In October 1992, a different district judge commenced an action on his own motion against Richard for contempt in the dissolution case for failure to pay child support.

Richard was appointed an attorney in the child support contempt action; however, despite his request for counsel and assertion of indigency, he was not appointed an attorney in the contempt action for nonpayment of the debt to Security Pacific.

On October 7, 1992, a judgment was entered in the county court against both Richard and Monika on the debt due Security Pacific. Security Pacific filed garnishments against both Richard and Monika.

Richard was found in contempt for failing to pay the debt to Security Pacific. In the child support contempt proceeding, when he had the services of an appointed attorney, Richard was found not in contempt.

On December 11, 1992, Richard was sentenced to 30 days in jail, but the sentence was stayed until February 9, 1993. Allowance was made for Richard to purge himself by the payment of all amounts due to Security Pacific, as well as reimbursement to Monika of all amounts garnished by Security Pacific, at which time the sentence or any remaining portion of the sentence would be vacated. Richard did not comply with the plan to purge himself of the contempt, and he was jailed on February 9.

In this court, Richard assigns as error (1) the Court of Appeals' dismissal of his appeal for mootness, (2) the failure of the district court to appoint an attorney to represent him in the contempt proceeding, and (3) the district court's order of imprisonment for his failure to pay the debt upon which there was a civil judgment in the county court.

In *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied* 474 U.S. 1061, 106 S. Ct. 805, 88 L. Ed. 2d 781 (1986),

the U.S. Court of Appeals for the 10th Circuit, in reviewing the district court's denial of a petition for habeas corpus, was presented with the issue of whether an indigent person facing incarceration in a civil contempt action for nonsupport is entitled to have appointed counsel and also whether the case was moot because the petitioner had served his contempt sentence. The court of appeals not only held that the petitioner was entitled to court-appointed counsel in the contempt proceeding, but that the case was not moot despite the petitioner's release from confinement. The court of appeals found that "although petitioner has been released, the contempt order has never been vacated. Since petitioner may suffer collateral consequences flowing from his contempt conviction, his case is not moot." 768 F.2d at 1183.

Although Richard was released from custody after his petition for habeas corpus was dismissed, the sentence for contempt has not been vacated. The possibility remains that Richard may be jailed again for contempt of court.

Since the sanction for Richard's contempt was coercive, he could only attack it collaterally by habeas corpus. See *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). If the district court determines to incarcerate Richard, the only recourse he will have is by another habeas corpus action.

Because of the collateral consequences flowing from Richard's contempt conviction, his appeal from the district court's dismissal of his habeas corpus action is not moot, and the Court of Appeals erred in dismissing his appeal.

Next we consider Richard's assignments of error concerning the actions of the district court. First, Richard contends he was wrongfully jailed because the district court failed to appoint an attorney to represent him in the civil contempt proceedings for failure to pay the debt to Security Pacific.

This court has held that under the U.S. Constitution, an indigent litigant has a right to appointed counsel when, as a result of the litigation, he may be deprived of his physical liberty. *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989). This "right of an indigent to court-appointed counsel may be found in *either* a civil or criminal context." 228 Neb. at

571, 423 N.W.2d at 763.

In this case, the record shows that Richard is indigent. Deprivation of his physical liberty was the consequence of his losing the contempt action against him, and the district court erred in failing to appoint an attorney to represent him in the civil contempt proceedings for failure to pay the debt to Security Pacific.

Finally, Richard argues that the district court erred in imprisoning him for failure to pay a civil debt. Richard contends that since Nebraska's Constitution prohibits imprisonment for a debt in any civil action, he was wrongfully jailed for failure to purge himself of the civil contempt which arose out of the nonpayment of the parties' debt to Security Pacific, which under article I, § 20, of Nebraska's Constitution would be unable to have him jailed for failure to pay the debt.

At the contempt proceedings, Richard, without representation by an attorney, was found in contempt. He was told he could purge himself by paying the balance of the indebtedness, including any amounts that had already been garnished from Monika's wages, and by causing Monika to be dismissed from Security Pacific's action in the county court.

Security Pacific would not voluntarily dismiss Monika from its action in county court and continued to pursue collection of the judgment. The amount owed on the debt was approximately $1,900. Because Richard was unable to pay the debt, the district court's purge plan was unreasonable under *Maddux v. Maddux, supra*.

In *Maddux*, this court held that to be reasonable, the amount of money that a person is required to pay in order to purge himself of contempt must be within the person's ability to pay. The trial court must take into consideration the assets and financial condition of the contemnor and his ability to raise money. *Id.*

At the time of the contempt hearing, Richard was unemployed and had not been employed for more than 6 months previous, despite efforts to find employment. His only source of income at that time was from his present wife's Supplemental Security Income benefits.

The district court erred in ordering Richard to be jailed

unless he purged himself because the purge plan was unreasonable, since the amount Richard was ordered to pay is not within his ability to pay considering Richard's financial condition and his lack of assets.

Because Richard was held in contempt and jailed without the assistance of counsel in violation of his constitutional rights, the judgment of the district court dismissing Richard's petition for writ of habeas corpus is reversed, and the cause is remanded to the Court of Appeals with direction to remand the cause to the district court with direction to discharge Richard from confinement and vacate the order finding him in contempt.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MARK E. BAKER, APPELLANT.

511 N.W.2d 757

Filed February 4, 1994. No. S-93-488.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence.
2. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
3. **Constitutional Law: Due Process.** When an individual claims he is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
4. **Constitutional Law: Prisoners: Mental Health.** Prisoners or pretrial detainees have a protectable liberty interest in avoiding unwanted medication with antipsychotic drugs.
5. **Due Process: Prisoners: Mental Health.** The Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

R. Bradley Dawson, of Clough, Dawson & Piccolo, and Patrick B. Hays for appellant.

Kent D. Turnbull, Lincoln County Attorney, for appellee.

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

LANPHIER, J.

Defendant-appellant, Mark E. Baker, was charged with first degree murder. Subsequently, his counsel, after meeting with appellant, determined there were doubts as to appellant's competency to stand trial. A competency hearing was held prior to the preliminary hearing, and appellant was determined to be incompetent to stand trial.

After a subsequent hearing to determine treatment, the district court ordered that appellant be treated with antipsychotic drugs under specific conditions with a view to render appellant competent to stand trial. Appellant appeals the order of the district court requiring him to undergo involuntary treatment. We affirm the order of the district court.

FACTS

After appellant was charged with first degree murder, appellant's counsel filed a motion to determine competency of appellant. On June 2, 1992, the district court entered an order requiring a competency evaluation of appellant. After the order was entered, the district court was advised that appellant would not cooperate with the evaluation.

On August 5, 1992, the district court, upon its own motion, found that appellant would not cooperate with the evaluation. It ordered the evaluation to proceed. The evaluator was instructed to give the district court his or her best opinion based on the information available about appellant. The evaluation was conducted by Dr. Louis C. Martin, a psychiatrist working at the Lincoln Regional Center.

On November 30, 1992, a hearing was held to determine

whether appellant was competent to stand trial. Appellant's evaluation was admitted into evidence without objection. The evaluation found that appellant was incompetent to stand trial because he suffered from "Schizophrenia, Paranoid Type, chronic, with acute exacerbation." The district court found appellant incompetent to stand trial. The district court then granted the State's motion to bifurcate the proceedings to determine the treatment for appellant.

On February 24, 1993, at the hearing to determine treatment, Dr. Martin testified that appellant was amenable to treatment involving antipsychotic drugs. Dr. Martin also stated that appellant would not improve without the use of the medication, that there were no less restrictive alternatives, that appellant would not otherwise be able to communicate with his attorney, and that appellant had responded to this medication in previous treatments.

On May 3, 1993, the district court ordered appellant to undergo treatment, such treatment to be administered only if the treatment could comply with certain safeguards issued by the court.

On appeal, appellant claims the district court erred in allowing the testimony of Dr. Martin because the State failed to provide proper and sufficient foundation for the doctor's opinion. Appellant's remaining assignments of error combine to assert that the order requiring him to undergo treatment with antipsychotic medication violated his due process rights.

PSYCHIATRIC TESTIMONY

Appellant claims that Dr. Martin's testimony was improperly admitted because it lacked sufficient foundation. In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

The State argues that appellant did not properly raise the issue during the hearing to determine treatment because only a

general foundational objection was made to Dr. Martin's testimony regarding appellant's condition. "If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose." *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 867, 468 N.W.2d 105, 114 (1991). However, after appellant's objection to Dr. Martin's testimony was overruled, defense counsel stated: "There has been no proper foundation laid for this opinion. We don't know when Dr. Martin met with Mr. Baker this morning; we don't know the conditions of the visit or anything of that nature."

This statement was sufficient to raise the question of sufficiency of foundation for Dr. Martin's opinion on the course of treatment for appellant.

Although the issue was properly preserved for appellate review, appellant's assignment of error is without merit. Foundation for Dr. Martin's testimony was sufficiently laid. Appellant claims that because the record is devoid of any dates, times, or duration of the contact between Dr. Martin and appellant, insufficient foundation was laid to support Dr. Martin's testimony regarding treatment. Appellant has overlooked Dr. Martin's forensic evaluation of appellant. In addition to interviewing appellant, Dr. Martin used several sources which provided information on appellant's earlier life history and previous psychiatric history. The evaluation contained a section listing the results of the mental status examination and stated the psychiatric conclusions based on the entire data reviewed by Dr. Martin.

Furthermore, on the day of the hearing, Dr. Martin once again spoke to appellant. Dr. Martin stated that he did not see anything that would change his earlier diagnoses. He also stated that it was highly unlikely to see improvement in a patient suffering from the same condition as appellant, without medication. He also testified that appellant's history indicated that he responded well to medication for treatment of his mental condition. On these facts, we find there was sufficient foundation laid to admit the testimony of Dr. Martin.

INVOLUNTARY TREATMENT

Appellant also claims that the district court's order denied him due process by improperly ordering him to undergo involuntary treatment with antipsychotic medication. When an individual claims he is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due. See *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). See, also, *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990).

LIBERTY INTEREST

In two recent U.S. Supreme Court cases, the Court acknowledged that individuals, whether they are convicted prisoners or pretrial detainees, have a protectable liberty interest in avoiding unwanted medication with antipsychotic drugs. See, *Riggins v. Nevada*, ____ U.S. ____, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992); *Washington v. Harper, supra.*

PROCEDURAL PROTECTIONS REQUIRED

We now turn to the second stage of the analysis, which requires a determination of what procedural protections are required.

The Supreme Court addressed this question in *Washington v. Harper, supra. Harper* involved an inmate who refused to take prescribed antipsychotic drugs. Pursuant to a policy of the department, his treating physician sought to medicate the defendant over his objections. Applying a reasonableness standard, the Supreme Court stated that the policy comported with the Due Process Clause because the standards it set forth recognized the prisoner's medical interests and the State's interests. "[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.*, 494 U.S. at 227.

The subsequent case of *Riggins v. Nevada, supra*, addressed the issue of involuntary medical treatment of pretrial detainees. The court in *Riggins* held that a pretrial detainee has an interest in avoiding involuntary administration of antipsychotic drugs that is protected under the Due Process Clause. See *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). In *Riggins*, the Court held that under *Harper*, due process is satisfied in connection with the administration of antipsychotic drugs to defendants during trial if the medication was medically appropriate and, considering less intrusive means, essential for the sake of defendants' own safety or the safety of others.

APPLICATION OF PROCEDURAL REQUIREMENTS

The evidence presented at the hearing satisfies the Due Process Clause requirements set forth in *Harper* and *Riggins*. A forensic evaluation was made by Dr. Martin on October 19, 1992. In it, Dr. Martin stated that appellant suffered from "Schizophrenia, Paranoid Type, in exacerbation." The evaluation also stated that appellant was dangerous. Although 4 months had passed since Dr. Martin made his evaluation, the doctor stated at the hearing on February 24, 1993, that typically, people in appellant's condition do not improve without medication. At that hearing, Dr. Martin stated he had seen appellant in the morning, and his diagnosis, as stated in the evaluation, had not changed.

The use of medication was also medically appropriate. Dr. Martin testified that appellant would be amenable to treatment with antipsychotic drugs. Dr. Martin also stated that although there are side effects to the antipsychotic drugs, their use on the whole was safe, since the incidence of serious side effects from the medication is small and those drugs with a high incidence of side effects could be controlled by the dosage administered. In addition, Dr. Martin stated that appellant had responded well to antipsychotic medication in the past. Dr. Martin testified that the fact that appellant had been treated with the antipsychotic medication in the past was the best prognosticator of whether the drug would work in the future.

In regard to the least restrictive alternatives, Dr. Martin stated that although other therapeutic approaches were

available, the likelihood that they would improve appellant's condition was not very high.

SAFEGUARDS

The above facts alone establish that appellant was afforded the protections of the Due Process Clause under *Harper* and *Riggins*. However, the trial court made it clear that it was very reluctant to order the involuntary treatment. The order stated:

> Antipsychotic medications alter that mysterious area of existence that we call being. These medications have the potential to fundamentally change the thought pattern and behavioral pattern of the individual to whom they are administered. It is impossible to say whether the true individual is the one presenting the symptomatology described as psychosis, or the individual that is manifested after the treatment of psychosis. The very essence of humanity, the foundation of individuality is potentially affected by the administration of antipsychotic drugs.

This reluctance prompted the trial court to issue several safeguards to restrict the intrusion to appellant's liberty to a minimum. The safeguards included provisions which ordered that the treatment be discontinued in the event any side effects became apparent, that the dosage be kept to a minimum, and that the medication only be administered with the goal of removing the psychosis, not sedating appellant. The trial court also permitted appellant to request any additional appropriate safeguards within 5 days of the order. The record does not reflect that such requests were made by appellant. Given these precautions, it is evident that the lower court properly ordered the involuntary treatment.

TREATMENT FOR TRIAL

Appellant argues that if he is found to be mentally ill and a danger to others, then civil commitment is appropriate, rather than involuntary treatment with antipsychotic medications to render him competent for trial. However, the Supreme Court in *Riggins v. Nevada*, ____ U.S. ____, 112 S. Ct. 1810, 1815, 118 L. Ed. 2d 479 (1992), also offered an alternative theory under which the State "might [be] able to justify" administering medication to an unwilling pretrial detainee. Treatment might

be justifiable if the treatment was medically appropriate, and if the State could establish that "it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means. *Id.* "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Illinois v. Allen*, 397 U.S. 337, 347, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring). Dr. Martin testified that appellant would be unable to cooperate with his attorney in the preparation of his case without treatment with the antipsychotic medication. Under this standard, appellant could be forced to undergo treatment if the State showed that the medication would enable him to stand trial.

We note that Justice Anthony Kennedy, the author of *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), wrote a concurring opinion in *Riggins* where he expressed his concern over permitting the treatment of defendants with antipsychotic drugs for the sole purpose of rendering them competent to stand trial.

> If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process.

Riggins, 112 S. Ct. at 1820.

Although there may be situations where we might agree with Justice Kennedy that civil commitment would be proper, the present case is not such a situation. The trial court correctly noted that civil commitment was not an appropriate option because appellant was serving a sentence from a prior conviction. The delay caused by waiting for appellant to complete his sentence before beginning civil commitment proceedings would be unreasonable given that treatment with antipsychotic drugs had shown to improve appellant's condition in the past.

CONCLUSION

The district court correctly admitted the testimony of Dr. Martin. In addition, the evidence demonstrated that appellant was mentally ill and dangerous and that the treatment was necessary for the protection of himself as well as others. Therefore, the district court was correct in ordering the treatment of appellant with antipsychotic drugs. We affirm the judgment of the district court.

AFFIRMED.

RENEE AKEN, APPELLANT, V. NEBRASKA METHODIST HOSPITAL, APPELLEE.

511 N.W.2d 762

Filed February 11, 1994. No. S-92-079.

1. **Workers' Compensation.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** Factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
4. _____: _____. Neb. Rev. Stat. § 48-185 (Cum. Supp. 1992) precludes an appellate court's substitution of its view of the facts for that of the Nebraska Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
5. **Workers' Compensation.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
6. **Appeal and Error: Case Overruled.** On the issue of the scope of appellate review, *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970), and *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 420 N.W.2d 273 (1988), are overruled.
7. **Workers' Compensation: Expert Witnesses.** Triers of fact, including the Nebraska Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding.

8. **Workers' Compensation: Evidence: Videotapes: Appeal and Error.** The admission of videotape evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination with regard to the admission of such evidence will not be reversed on appeal absent a showing of abuse of that discretion.
9. **Trial: Evidence: Videotapes: Appeal and Error.** The weight to be given videotaped evidence, admitted in evidence, is to be determined by the trier of fact, not the appellate court.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Virginia L. Cullan and Daniel B. Cullan, of Cullan & Cullan, for appellant.

Kirk S. Blecha, Carol C. Knoepfler, and R.J. (Randy) Stevenson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

GRANT, J., Retired.

Plaintiff Renee Aken filed her petition in the Workers' Compensation Court on June 13, 1989, seeking compensation from her employer, defendant Nebraska Methodist Hospital (Methodist), for injuries she received on January 5, 1987, while engaged in her employment. On November 30, 1989, the parties stipulated that Methodist had paid temporary total disability benefits and all medical expenses associated with Aken's injury up to that time and that Methodist would continue to pay such expenses and to pay temporary total disability of $180 per week until the compensation court modified or terminated Methodist's obligation. A single judge of the compensation court approved the parties' stipulation and entered an order awarding Aken the benefits, subject to either party's seeking modification of the order.

On May 8, 1990, Aken filed an application requesting pain management treatment for her injuries. On November 29, 1990, Methodist filed its motion, alleging that Aken was not

then totally disabled and was self-employed as a child-care provider in her home. Methodist sought an order terminating its obligation to pay temporary total disability payments to Aken. On December 21, 1990, a hearing was held before a single judge of the compensation court on the parties' respective motions. On March 11, 1991, an order was entered denying Aken's motion, sustaining Methodist's motion to terminate payments, and dismissing Aken's petition of June 13, 1989.

Aken timely sought rehearing of this order before a panel of the Workers' Compensation Court. On January 2, 1992, after rehearing before the panel on June 3, 1991, the single-judge order of dismissal was affirmed by the panel, with one judge concurring with the findings of the majority as to the termination of temporary total disability and dissenting, in part, on the question of Aken's "permanent partial disability, if any." Aken timely appealed to the Nebraska Court of Appeals. On March 2, 1993, the Court of Appeals reversed the compensation court's decision and remanded the cause for further proceedings. This court then granted Methodist's petition for further review. We reverse the judgment of the Court of Appeals and direct that the cause be remanded to the Court of Appeals, where an order shall be entered affirming the order of dismissal entered by the Workers' Compensation Court.

The record shows that Aken was a registered nurse who injured her foot on January 5, 1987, while working for Methodist. As set out above, Methodist paid temporary total disability benefits and medical expenses from January 5, 1987, to March 2, 1991, when the compensation court granted Methodist's motion to terminate all payments and dismissed Aken's petition.

The record of the hearing before the panel shows that Aken had been a floor nurse for Methodist for 9 years prior to her injury. She developed bunions on both feet. On October 29, 1986, a bunionectomy was performed on her left foot. Aken had no postoperative complications from this operation. On November 14, 1986, a bunionectomy was performed on her right foot.

On January 5, 1987, Aken returned to work at Methodist as a registered nurse and on that day, while engaged in the duties of her employment, sustained a stress fracture in her right foot at the site of the operation of November 14, 1986. Doctors later determined that a nerve had been impinged in Aken's right foot and that a tendon had been ruptured. Aken underwent four further surgical operations in 1987, followed by many sessions of physical therapy, a "TENS unit" prescription, two caudal blocks, cortisone injections in her knees, and psychiatric treatments. All of these procedures were attempts to control the pain Aken described to her doctors and to alleviate Aken's depression. The conclusion of Dr. Jack Stark, psychiatric counselor; Dr. David Cornell, podiatrist; and Dr. Timothy Fitzgibbons, orthopedic surgeon, was that Aken was suffering symptoms of a reflex sympathetic dystrophy. Dr. Richard G. Belatti, Jr., an anesthesiologist and director of the Pain Control Center, St. Joseph Hospital, Creighton University Medical Center in Omaha, examined Aken on May 2, 1991, and reported to Dr. Fitzgibbons on May 7, 1991, as follows:

> Ms. Aken certainly does give a history which is at least partially suggestive of a reflex sympathetic dystrophy. . . . Interestingly, in the many cases of reflex sympathetic dystrophy I have encountered, after several years of sympathetic dystrophy, the affected extremity is generally grossly atrophic. I would have expected to see severe muscle wasting, bone deformity, nailbed changes, and skin changes. Fortunately, Ms. Aken shows the presence of none of these signs. In essence, the foot appeared to be identical in conformation and muscle mass to the unaffected foot.
>
> To summarize, Ms. Aken has a history which is partially consistent with the diagnosis of reflex sympathetic dystrophy. The physical signs which I would expect to be present at this point do not appear to be so, however. This does speak against a diagnosis of sympathetic dystrophy. Also speaking against the diagnosis of a sympathetic dystrophy is the patient's reluctance to receive any type of medical treatment at this point. My experience with patients with sympathetic

dystrophy has been their overwhelming wish to "try anything" (even amputation) in order to try to attain pain relief. Ms. Aken's reluctance does not fit this usual pattern. At this time, I would like to defer my final diagnosis until Ms. Aken can return for photographs of her discolored extremity, further cutaneous temperature mapping, and/or sympathetic nerve blockage.

Dr. Stark testified in his deposition on May 30, 1991, that he thought Aken could benefit from treatment in a pain management center. In that regard, he testified:

> This is something we discussed. I think it's worth trying. I'll be very candid with you. I don't know what to do with this lady. I've had other cases—other sympathetic reflex dystrophy cases. And I talked with Dr. Belatti about it because we're writing a book together. And we both kind of look at each other and say, "Boy, these are the toughest cases to work with." Now, again, not saying that she absolutely does have that.
>
> But in referring her to him - I know Dr. Fitzgibbons - he's one of the best orthopedic surgeons around. And I discussed it informally with him a couple of times. And he's saying, "Geez, I don't know what to do" and looking at me and I'm saying, "I don't know what to do for sure." But I think it would be good to really get this checked out with Dr. Belatti before we try a Pain Clinic. . . .

Other evidence before the panel showed that Aken had cared for preschool children in her home beginning in April 1988. She had some help from her husband and her two school-age children. In 1988, she earned $815 in 9 months. She earned $2,267 in 1989, $6,118 in 1990, and $3,846 up to May 31, 1991.

In additional testimony, James Rogers, a vocational rehabilitation counselor who worked with Aken, concluded that in his opinion Aken could not resume work as a floor nurse, but that "she has the physical capacity to do other areas of employment within her experience." This witness also testified that in August 1989, he asked Aken about doing some work for him in the review of medical records. Aken did not think she could do such work at the time. He also testified that in May 1991, if Aken had expressed any interest in working for

him, he "absolutely" would have offered her some employment in a medical management company that was owned in part by the witness.

In the rehearing before the panel, Methodist did not adduce medical testimony, but offered a "Confidential Report" of a private investigator. The report described surreptitious visual and videotaped surveillance of Aken on October 2 through 7, 11, and 12 and November 17 and 20, 1990. At the rehearing, the parties agreed that exhibit 22, which was received in evidence without objection, was a "composite surveillance videotape of a much longer videotape" that counsel for both parties agreed could be made. Aken states in her brief before this court that Methodist conducted the surreptitious videotaping for more than 60 hours and that the total running time of exhibit 22 was about 32 minutes.

The videotape showed Aken doing various activities such as walking up and down her driveway, carrying a small child, and swinging in a porch swing with a small child on her lap. Approximately one-half of the composite videotape depicts Aken, on October 11, 1990, helping to load a pickup truck in the course of the Aken family's move to a new residence. Aken is shown carrying small boxes; small items of furniture, including a bookcase and two headboards; and other items. Aken is shown carrying the items from the house across a small porch and placing the items in the truck or handing them to her husband. Her gait, carriage, movement, posture, and demeanor, as demonstrated on the tape, are such that a finder of fact could conclude that her actions were done easily, without limping and without any apparent pain or difficulty.

Aken was present at the rehearing. She did not testify in person, nor did her second deposition, taken on November 20, 1990, make any reference to the videotape. Aken did testify that on her "good" days, she limped noticeably and that a layman could see the limp.

Aken's witnesses included Dr. Fitzgibbons, who saw the videotape. His notes of February 18, 1991, stated: "I don't see any definite limp, but I guess all of this probably is not significant to me, because I told her to go ahead and be as active as she can and go on with her life as best she can." Other of

Aken's witnesses viewed the videotape and stated that the video did not change their impression that Aken was totally disabled, because they felt Aken could not work full days and did have good days and bad days.

In its order, the compensation court panel found:

> The evidence presents a question of credibility. The Court received Exhibits 1-23 which included two video tapes showing plaintiff walking briskly and carrying boxes. This evidence is wholly inconsistent with plaintiff's assertions that she must walk on the sides of her feet to avoid pain and must avoid all carrying of groceries and that her pain has completely incapacitated her.

The panel went on to find that Aken "has failed to prove that she continues to suffer from any disability either temporary or permanent" and affirmed the single judge's dismissal of Aken's petition.

Aken then timely appealed to the Court of Appeals, where she assigned two errors, alleging that the compensation court "erred as a matter of law in failing to find that plaintiff remains temporarily totally disabled" and that the compensation court's "finding regarding the nature and extent of plaintiff's disability and need for pain management treatment is contrary to the evidence." The Court of Appeals stated that the record before the compensation court and before the Court of Appeals consisted of "depositions, medical records, medical summaries, and a videotape" and that "[w]here there are no live witnesses at trial, this court is not at a disadvantage in assessing the weight of any testimony or credibility of the witnesses." *Aken v. Nebraska Methodist Hosp.*, 2 NCA 660, 666 (1993). The Court of Appeals stated: "Based on our review of the record, we find that there is not sufficient competent evidence in the record to warrant the making of the compensation court's order . . . ." *Id.* The Court of Appeals reversed the judgment of the compensation court and remanded the cause for further proceedings.

Methodist timely filed a petition for further review of the order of the Court of Appeals, pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992). This petition was granted by this court. Additional briefs were filed, and the case was argued and

submitted.

In its petition for further review, Methodist alleges, in summary, that review is needed because the Court of Appeals used the wrong standard of review when it reweighed the factual findings of the compensation court and because the Court of Appeals failed to follow this court's precedent defining "total disability" in workers' compensation cases. Since we determine that the Court of Appeals did err in reweighing the evidence, we do not discuss the second allegation.

The law in Nebraska is settled, both by statute and by the decided cases, as to the manner in which an appellate court is to review decisions of the Workers' Compensation Court.

Neb. Rev. Stat. § 48-185 (Cum. Supp. 1992) provides in part: "The judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case."

The case law on this point is equally well settled. In *Foreman v. State*, 240 Neb. 716, 720, 483 N.W.2d 752, 755 (1992), quoting from *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991), and *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), we stated:

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

> Court is the sole judge of the credibility of witnesses and the weight to be given testimony." ' "

See, also, *Thilking v. Travelers Ins. Co.*, 240 Neb. 248, 482 N.W.2d 548 (1992).

In its decision, the Court of Appeals stated:

> There were no live witnesses, and although the single judge referred to a "question of credibility," no issues of live testimonial credibility were presented or resolved by the trial court. Where there are no live witnesses at trial, this court is not at a disadvantage in assessing the weight of any testimony or credibility of the witnesses.

2 NCA at 666.

That statement is incorrect and does not reflect Nebraska law. The proper standard of review is that set out above from *Foreman v. State, supra.*

In her brief before this court, at page 16, Aken contends that "because the facts in this case are written, undisputed, and uncontroverted, the Supreme Court may affirm the Court of Appeals' decision to reassess the credibility and weight of the evidence admitted at trial." Aken cited the case of *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970). In the *Budd* case, we stated, "If the evidence is entirely written and relates to matters as to which the trial court is in no better position to reach a correct solution than the appellate court, this court will be governed by its own conclusions as to the weight of the evidence." *Id.* at 345, 175 N.W.2d at 623. That statement is not a correct statement of the law, as was noted in *Crawford v. Ham*, 209 Neb. 802, 805, 311 N.W.2d 896, 898 (1981), where we said: "In any event, if the holding of *State Farm Mut. Auto. Ins. Co. v. Budd, supra*, was ever the law of this state, we would limit it to its specific facts. This court does not intend to change the standard of review in law actions."

We note, however, that in *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 731, 420 N.W.2d 273, 275 (1988), we again cited the *Budd* case and stated, "Since all of the facts were submitted by stipulation, we review this case as if trying it originally in order to determine whether the facts warranted the judgment." That statement is also incorrect.

We reiterate that the standard for appellate review in all

workers' compensation cases, and in all law cases, is that set out above in *Foreman v. State, supra*. Any holdings to the contrary, on the issue of the scope of appellate review, in *State Farm Mut. Auto. Ins. Co. v. Budd, supra*, and in *Dugdale of Nebraska v. First State Bank, supra*, are overruled. We do not, of course, change in any way a de novo appellate review, as required in equity cases or other statutorily required de novo reviews.

In reviewing the judgment of the Workers' Compensation Court before us and in using the standard of review set out above, we are guided by other general law. First of all, triers of fact, including the Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding. *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). Secondly, the admission of videotape evidence is within the discretion of the Workers' Compensation Court, whose determination with regard to the admission of such evidence will not be reversed on appeal absent a showing of abuse of that discretion. *Briggs v. Consolidated Freightways, supra*; *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989). Thirdly, the weight to be given such videotaped evidence, admitted in evidence, is to be determined by the trier of fact, not the appellate court. *Id.* See *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992).

There is no question as to the admissibility of the videotape since it was received in evidence without objection.

In consideration of the videotape evidence, the Court of Appeals stated that

> the 15 minutes of videotape [of the Akens' move] in which Aken is engaging in her highest level of activity can only support the conclusion that for 15 minutes out of 11 days of surveillance, Aken could walk and carry a couple dozen boxes of unknown weight out her front door to the tailgate of a waiting pickup truck.

Aken v. Nebraska Methodist Hosp., 2 NCA 660, 670-71 (1993). That conclusion is not warranted. Aken's brief states that the total videotape is approximately 60 hours long. Such a tape realistically could not be viewed in its entirety by a busy Workers' Compensation Court, or any court. Exhibit 22, the

videotape viewed by the court, was a composite, abbreviated tape, agreed to by counsel for both parties. It is a fair assumption that if Aken had been depicted as limping in any part of the videotape, such a segment would have been included in the composite at the demand of Aken's counsel. In addition, the confidential report shows that the moving operation occurred on October 11, 1990, between 1:09 and 1:34 p.m., when Aken and her husband left the residence in the loaded pickup truck, to return at 2:51 p.m., and that Aken helped in reloading the truck between 3:10 and 4:06 p.m., when Aken and her husband again left in the loaded pickup truck, to return at 5:45 p.m.

There was more than sufficient evidence in the record before the Workers' Compensation Court, if believed by the compensation court, to fully support that court's conclusion that the issue of credibility should be decided against Aken. There was sufficient evidence before the compensation court to support the determination in the court's award on rehearing that "plaintiff has failed to prove that she continues to suffer from any disability either temporary or permanent and that defendant's Motion requesting termination of its obligation to pay temporary total disability benefits should be granted."

The decision of the Court of Appeals is reversed, and the cause remanded to that court with directions to affirm the order on rehearing of the Workers' Compensation Court.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating in the decision.

CAPORALE, J., not participating.

NANCY CHARLENE KNAUB, APPELLEE AND CROSS-APPELLEE, V. MICHAEL RAY KNAUB, APPELLEE AND CROSS-APPELLANT, AND G. KIRK MEADE, APPELLANT.

512 N.W.2d 124

Filed February 11, 1994. No. S-92-092.

1. **Modification of Decree: Child Support: Proof.** A party is entitled to a modification of an award of child support if he proves a material change in circumstances which has occurred since the entry of the decree or a previous modification and if such change was not contemplated when the decree was entered.
2. **Motions to Dismiss: Proof.** In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
3. **Motions to Dismiss.** If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law.
4. _____. When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
5. **Equity: Modification of Decree: Child Support: Alimony.** The doctrine of unclean hands will operate to bar an application for modification of an award of child support or alimony when the party filing the application has not satisfied existing support obligations and that failure to pay is found to be willful.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Clark G. Nichols, of Nichols, Douglas and Kelly, P.C., for appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Nancy Knaub.

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, P.C., for appellee Michael Knaub.

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

WHITE, J.

This action arises from an action brought by respondent, Michael Ray Knaub, to modify a child support and alimony award. At trial, the district court dismissed the action for failure to present a prima facie case. The district court also assessed $13,000 in attorney fees against respondent and his attorney, G. Kirk Meade, because the court found that the action was frivolous. The Nebraska Court of Appeals affirmed the decision of the district court, but reduced the amount of the attorney fee award. *Knaub v. Knaub*, 4 NCA 638 (1993). We reverse the decision of the Court of Appeals and remand the cause with instructions to reverse the decision of the district court and remand the cause for further proceedings.

In an August 1990 divorce decree, respondent was ordered to pay child support and alimony. This order was derived from calculations based on the court's valuations of respondent's assets and his income. During the following year, respondent's assets were liquidated and conveyed, principally to his father and his father's corporation. Respondent subsequently filed an action to modify the divorce decree because of substantial changes in his financial circumstances.

At trial on the application to modify, respondent and his father testified that respondent no longer owned the assets underlying the divorce decree, that he used the proceeds from the sale of those assets to pay a property settlement to his ex-wife and business debts, that his father would no longer financially support respondent's farm business, that he was no longer able to acquire operating loans for his farm business, and that he earned approximately $1,000 per month as a truckdriver.

At the close of respondent's case, petitioner, Nancy Charlene Knaub, moved to dismiss the action, arguing that respondent failed to establish the necessary elements for a modification. The district court sustained the motion and dismissed the action. In dismissing the action, the court commented that this was the "clearest case of voluntary impoverishment the court has ever seen" and that respondent had failed to present any financial documents which would corroborate respondent's reasons for disposing of his assets. The court further found that

the action was frivolous and assessed attorney fees against respondent and his attorney.

Respondent and his attorney appealed the dismissal to the Court of Appeals and argued that the district court improperly weighed the evidence on the motion to dismiss. The Court of Appeals stated that even assuming that respondent's evidence is true, the trial court reasonably inferred that respondent voluntarily caused his substantial change in circumstances. The court affirmed the dismissal because (1) reasonable inferences drawn from the evidence did not support a modification and (2) respondent's claim for equitable relief was barred by the unclean hands doctrine.

The Court of Appeals also affirmed the assessment of attorney fees. The court found that respondent's modification action was based on his "voluntary impoverishment" and that therefore the action was "wholly without merit." *Knaub*, 4 NCA at 650, 651. The court also agreed that respondent and his attorney should be jointly and severally liable for those fees. The court, however, reduced the amount of those fees because it found that the time allegedly spent by petitioner's attorney on the case was not efficiently spent.

Respondent and his attorney filed a petition for further review with this court, and we granted the petition. They contend that the Court of Appeals erred in (1) applying the wrong standard to determine when an action should be dismissed for insufficient evidence; (2) applying the wrong standard of review on the question of whether an action was frivolous; and (3) assessing appellate attorney fees in violation of Neb. Ct. R. of Prac. 9F (rev. 1992), which requires a motion and affidavit justifying the amount requested.

At the outset, we note several procedural errors made by each of the parties on appeal. First, Neb. Ct. R. of Prac. 2G (rev. 1992) provides that if a petitioning party chooses to file a brief after this court has granted a petition for further review, that brief shall be filed within 20 days after the order for further review has been entered. Additionally, rule 2G requires that the briefs of all nonpetitioning parties be served and filed within 20 days after the petitioner has served and filed his brief.

Both Michael Knaub, a petitioner for further review, and

Nancy Knaub, the respondent to that petition, filed their briefs out of time. The petition for further review was granted on October 20, 1993. Michael Knaub did not file and serve a brief on further review until November 24—35 days after the petition was granted. Nancy Knaub filed her brief on December 21—27 days after Michael Knaub filed his brief. Both briefs on further review were filed out of time and therefore will not be considered on appeal. Our consideration of this appeal will be guided by the record, the parties' briefs filed in the appeal to the Court of Appeals, and the parties' memoranda filed in connection with the petition for further review.

Second, Neb. Ct. R. of Prac. 1C (rev. 1989) provided that the first party or parties to file a notice of appeal will be designated as appellant or appellants and that "any attempt to appeal thereafter made by any party to the action shall be filed in the existing case, and not separately docketed." Rule 1E stated that "[t]he proper filing of an appeal . . . shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by rule 9D(4)." Rule 9D(4) provides that an appellee filing a cross-appeal designate on the cover of such brief that it is a cross-appeal, that the appellee set forth the cross-appeal in a separate division of the brief, and that such separate division be titled "Brief on Cross-Appeal." The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief.

Respondent's attorney in the modification action, Meade, was the first party to file a notice of appeal to the Court of Appeals. Meade filed the notice of appeal on his own behalf, challenging the validity of the sanctions imposed upon him in the modification action. Thus, while Meade is the appellant, our appellate rules designate respondent as an appellee in the appeal. Subsequent to the filing of Meade's notice of appeal, respondent filed his own notice of appeal, and pursuant to rule 1C, his appeal was filed with Meade's appeal. Respondent, however, failed to designate his brief as a cross-appeal and failed to set forth a separate section within his brief titled "Brief on Cross-Appeal." Although this violates our rule regarding the presentation of a cross-appeal, the form and presentation of

respondent's assignments of error conform with the rules applicable to an appellant's brief. Therefore, we may consider respondent's arguments raised in his brief to the Court of Appeals. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

A party is entitled to a modification of an award of child support if he proves a material change in circumstances which has occurred since the entry of the decree or a previous modification and if such change was not contemplated when the decree was entered. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992); *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991); *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992); *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991); *Young v. Young*, 200 Neb. 787, 265 N.W.2d 666 (1978); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976). If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law. *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Bloomfield, supra.*

The Court of Appeals correctly stated these standards at the outset of its opinion. The court, however, disregarded the standards and conducted a lengthy assessment of the credibility of respondent's evidence. The court then concluded that respondent's evidence was not credible and affirmed the dismissal.

We agree with the dissent to the decision of the Court of

Appeals. It is improper for an appellate court to conduct a credibility assessment of the evidence when it reviews a decision reached on a motion to dismiss at the close of the plaintiff's evidence. The court should have assumed that all of the evidence presented by respondent was true; this necessarily includes believing all of the testimony given by respondent and his father, even when that evidence has been contradicted.

Applying the appropriate method of review, we must take as proven that respondent no longer owns the assets he held when the original divorce decree became final. Additionally, we must assume that respondent's father will no longer provide respondent with the favorable financial arrangements which previously allowed respondent to produce income as a farmer. Finally, we must assume that respondent's only current income is from truck driving and that such employment yields approximately $1,000 a month. The lack of additional evidence to corroborate this evidence is irrelevant to whether the district court should have sustained the motion to dismiss at the close of respondent's evidence.

Taking all respondent's evidence as true and granting him all favorable and reasonable inferences that may be drawn from such evidence, we find that respondent has presented a prima facie case for a modification. The motion to dismiss, therefore, should have been denied.

We note that the Court of Appeals affirmed the dismissal on an additional ground—the equitable doctrine of unclean hands. Although the doctrine is applicable in equity cases, its application is restricted by the procedural posture of the particular case. Once both parties have submitted their evidence and rested, the district court may consider the credibility of the witnesses and may weigh the evidence. However, when a district court considers a motion to dismiss at the close of the plaintiff's evidence, the court must assume all relevant evidence presented by the nonmoving party is true and grant the nonmoving party all favorable and reasonable inferences that may be drawn from the evidence; assessing the credibility of the evidence on such a motion is inappropriate.

The doctrine of unclean hands will operate to bar an application for modification of an award of child support or

alimony when the party filing the application has not satisfied existing support obligations and that failure to pay is found to be willful. *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), *appeal after remand* 219 Neb. 670, 365 N.W.2d 467 (1985).

In the present case, there is no direct evidence of intentional impoverishment. Moreover, on petitioner's motion to dismiss, respondent is entitled to all reasonable and favorable inferences deducible from the evidence he presented. Respondent's explanation for his disposition of assets and his inability to finance a farming business without his father's support may be reasonably inferred from the evidence. The conclusion reached by the Court of Appeals that respondent has intentionally caused his substantial change in financial circumstances was based on the court's credibility assessment of the evidence, which is improper on a motion to dismiss.

In light of the proper standard of review on a motion to dismiss, respondent has presented a prima facie case for modification, and there is not sufficient evidence to support the application of the unclean hands doctrine at this stage of the proceeding. We therefore reverse the decision of the Court of Appeals and remand the cause with instructions to reverse the decision of the district court and remand the cause for further proceedings. Because of our holding regarding the motion to dismiss, we find it unnecessary to address the additional assignments of error raised by the parties.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. SALOMON C. FLORES, APPELLANT.

512 N.W.2d 128

Filed February 11, 1994. No. S-93-373.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous.
2. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts.
3. **Search Warrants: Probable Cause: Words and Phrases.** In evaluating a showing of probable cause necessary to support issuance of a search warrant, only probability and not prima facie evidence of criminal activity is required. Probable cause is reasonable suspicion founded on articulable facts.
4. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In determining the sufficiency of an affidavit to show probable cause for the issuance of a search warrant, an appellate court looks to the totality of the circumstances. This means that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.
5. **Search Warrants: Affidavits: Probable Cause: Hearsay.** Probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge.
6. **Search and Seizure: Search Warrants: Presumptions.** A search pursuant to a warrant is presumed to be valid.
7. **Search and Seizure: Search Warrants: Proof.** If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
8. **Search Warrants: Affidavits: Probable Cause.** Generally, if there is no question as to the accuracy of the facts alleged in an affidavit for a search warrant, it is not necessary to specify the items that are missing in order for a defendant to challenge the affidavit as insufficient to establish probable cause.
9. **Search Warrants: Affidavits.** In order to determine the sufficiency of an affidavit used to obtain a search warrant, this jurisdiction has adopted the "totality of the circumstances" test as set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
10. **Search Warrants: Affidavits: Probable Cause.** The issuing magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
11. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the

search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.

12. **Search Warrants: Probable Cause.** It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant.
13. **Search Warrants: Affidavits.** Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
14. **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.
15. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
16. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance.
17. **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.
18. _____: _____: _____. 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.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

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

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

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

PER CURIAM.

The defendant, Salomon C. Flores, appeals his conviction of possession of a controlled substance with intent to distribute. He assigns as error that the district court erred in (1) overruling his motion to suppress, (2) admitting evidence concerning certain alleged sales of cocaine, and (3) admitting testimony contrary to Neb. Rev. Stat. § 29-2262.01 (Reissue 1989). We reverse and remand for further proceedings.

Pursuant to a search warrant, Investigator Chris Rea of the Hall County Sheriff's Department and Investigator Michael Riley of the Nebraska State Patrol searched apartment No. 317 of the Blackstone Apartments in Grand Island, Nebraska, on December 10, 1992. Present in the apartment at the time of the search were Lisa Hank and a male, later identified as Salomon Flores. During the search, Rea found a bag underneath a sink in that apartment, which appeared to contain about an ounce of cocaine. This substance was identified as exhibit 2. Chemist Randy Pendleton of the Nebraska State Patrol stated that he had tested exhibit 2 and found it to be 27.04 grams, slightly less than an ounce, of cocaine. Riley testified that one-eighth of an ounce of cocaine, normally referred to as an "eight-ball," would sell on the street for anywhere from $200 to $300.

Riley also testified that $830 in currency was found in the apartment. Some additional cash was taken from the right front pocket of the defendant; the remaining currency was found with the cocaine under the bathroom sink. Riley stated that $160 of the currency found in the apartment matched photostatic copies of currency which he had given to a confidential informant earlier on December 10 for the purchase of cocaine. Some of this currency—a $20 bill, which matched one of the $20 bills given by Riley to the confidential informant, and several $1 bills—was found on the defendant.

Flores was charged by information with violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992), possession of cocaine with intent to distribute. Prior to trial, the defense filed a motion to suppress the fruits of the search and seizure. The motion was overruled on February 26, 1993, and the defendant

was convicted of the charge following a jury trial on March 16, 1993, from which he appeals.

The defendant first contends that the search was conducted pursuant to an invalid warrant and a supporting affidavit which failed to establish probable cause, and that the court therefore erred in overruling the motion to suppress.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993).

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992); *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989).

In evaluating a showing of probable cause necessary to support issuance of a warrant, only probability and not prima facie evidence of criminal activity is required. Probable cause is reasonable suspicion founded on articulable facts. *Id.*

In determining the sufficiency of an affidavit to show probable cause for the issuance of a warrant, we must look to the totality of the circumstances. This means that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient. *Id.*

Probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

A search pursuant to a warrant is presumed to be valid. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977).

If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *State v. Vrtiska, supra.*

In his motion to suppress, the defendant moved the court to

suppress the fruits of the search and seizure for the reason that "the search and seizure were made without probable cause or without benefit of a warrant and were unreasonable within the meaning of the 4th Amendment to the United States Constitution and Article I, Section 7 of the Constitution of Nebraska."

The State first argues that the defendant was required in his motion to make an initial showing of sufficient facts regarding the alleged illegality, and contends that the defendant did not carry this burden in his "boilerplate" motion. Citing *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983), the State asserts that a defendant is required to demonstrate that problems with an affidavit are of a particular, specific nature. In *Williams*, the defendant challenged the validity of the supporting affidavit upon which the arrest warrant was issued. We noted that in *Franks v. Delaware, supra*, the Supreme Court held that

> a criminal defendant may challenge the validity of a search warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. *Id.* at 171. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.

Williams, 214 Neb. at 926, 336 N.W.2d at 607.

However, the defendant does not contend that the affidavit is untruthful or factually inaccurate, but, rather, that it is insufficient to support a finding of probable cause. The motion to suppress filed in *Franks* "alleged that the warrant on its face did not show probable cause and that the search and seizure were in violation of the Fourth and Fourteenth Amendments."

438 U.S. at 157-58. *Franks* suggests that "a magistrate's determination is presently subject to review before trial as to *sufficiency* without any undue interference with the dignity of the magistrate's function." (Emphasis in original.) 438 U.S. at 169-70. In other words, as we read *Franks*, even if there is no question as to the accuracy of the facts alleged, it is not necessary to specify the items that are missing in order for a defendant to challenge the affidavit as insufficient to establish probable cause.

In both *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), and *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), we addressed the sufficiency of an affidavit in establishing probable cause for issuance of a search warrant unrelated to the veracity of the *affiant* and therefore outside the scope of the *Franks* analysis. In *Groves*, the defendant alleged that "the affidavit was insufficient because the reliability of the informant was not established by the affidavit." 239 Neb. at 665, 477 N.W.2d at 794. In *Utterback*, the defendant argued that the search warrant was invalid because "the affidavit failed to establish the veracity of the confidential informant." 240 Neb. at 987, 485 N.W.2d at 768. In each of these cases, we noted that in order to determine the *sufficiency* of an affidavit used to obtain a search warrant, this jurisdiction has adopted the "totality of the circumstances" test as set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The issuing magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Utterback, supra*; *State v. Groves, supra*.

In addressing the sufficiency of the affidavit in this case, we note that it states that the affiant is Trooper M.T. Riley, an employee of the Nebraska State Patrol for 19 years, who has been trained in the identification of controlled substances and investigative techniques. The affidavit further states, in pertinent part:

Affiant has received numerous intelligence reports from the Grand Island Police Department and Hall County Sheriff's Office that a subject [known] as "Carpo" is heavily involved in the sale of cocaine. Intelligence information indicates this subject's true identify [sic] to be Salomon Flores residing at the Blackstone Apartments, #317, Grand Island, Nebraska. The address of the Blackstone Apartments is 319 South Walnut.

Ron York from the State Probation Office advised affiant Lisa Hanks [sic] resides at the Blackstone Apartments, #317, with an individual known as "Carpo". York advised affiant Lisa Hanks [sic] had stated "Carpo" sells cocaine from the apartment.

Affiant had cooperating individual make an undercover purchase of cocaine from the subject on December 5, 1992. The subject was kept under surveillance and followed to the Blackstone Apartments. Subject stated to CI he was obtaining it from "Carpo" who resided at the Blackstone Apartments. Subject delivered to the CI 1/8 ounce of cocaine. The cocaine was field tested by affiant, field tested positive for cocaine. On December 5, 1992, subject stated to CI he had seen test tubes and the subjects were bringing the cocaine from California.

On December 8, 1992, the CI contacted the subject again. Subject was kept under surveillance and followed to the Blackstone Apartments. Subject delivered to the CI 1/8 ounce of cocaine. The cocaine was field tested by affiant, field tested positive for cocaine. The subject told the CI larger quantities could be purchased if the CI desired.

On December 10, 1992, the CI contacted the subject to purchase 1/8 ounce of cocaine. The subject indicated he needed to go to the Blackstone. Affiant was assisted with surveillance by Tpr. A. J. Duis, Deputy Schultz and Deputy Rea. Visual contact was maintained of the subject from the time he departed the CI's vehicle until entering the Blackstone Apartments. At that time, Tpr. Duis

> maintained surveillance of the subject and observed the subject contact the subject known as "Carpo". The subject called the subject "Carpo" and they then entered apartment #317. Tpr. Duis maintained surveillance of this apartment until the subject left. Surveillance was then maintained until the subject contacted the CI. At this time, the subject deliver [sic] to the CI 1/8 ounce of cocaine. Affiant field tested the cocaine receiving a positive test result for cocaine.

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992).

It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991); *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989).

The affidavit at issue first states that the affiant has received numerous intelligence reports from other officers that a subject referred to as "Carpo" is involved in the sale of cocaine. The intelligence information also reveals the true identity of this person as Flores, the defendant, and indicates that he lives at No. 317 of the Blackstone Apartments.

The affidavit next reveals that an officer of the state probation office had advised the affiant that one of his probationers, Lisa Hank, resides with Carpo at that address and that Carpo sells cocaine from that address. It then goes on to state that the affiant had a cooperating individual purchase cocaine from "the subject" on December 5, 1992. Although "the subject" is not identified, it becomes clear in the remainder of the paragraph that "the subject" here does not refer to Carpo, but, rather, refers to a third party who was observed going to the Blackstone Apartments, who delivered cocaine to the cooperating individual, and who stated to the cooperating

individual that he obtained the cocaine from Carpo.

Continuing, the affidavit discloses that on December 8 the cooperating individual contacted "the subject" again. "The subject" was followed to the Blackstone Apartments and again delivered cocaine to the cooperating individual, stating that larger quantities could be purchased if so desired. Following both of these purchases, the substance was field tested by the affiant and tested positive for cocaine.

The cooperating individual contacted "the subject" for the purchase of cocaine yet a third time, on December 10. "The subject" indicated that he needed to go to the Blackstone Apartments and was kept under surveillance from the time that he departed the cooperating individual's vehicle until he entered the building, at which time another investigator maintained the surveillance and observed the third-party subject contact the subject known as Carpo and enter apartment No. 317. That same investigator maintained surveillance until the third party left the apartment, and the third party was observed until he contacted the cooperating individual and delivered one-eighth of an ounce of cocaine. This substance also field tested positive for cocaine.

In *State v. Utterback*, 240 Neb. at 988, 485 N.W.2d at 768, we stated:

> Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, see *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984); (2) the informant is a citizen informant, see *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987); (3) the informant has made a statement that is against his or her penal interest, see *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989); and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given, see *United States v. Stanert*, [762 F.2d 775 (9th Cir. 1985)].

In *Utterback*, we found that the affidavit in support of the search warrant had failed to establish the veracity and reliability

of the confidential informant under any of these methods. In regard to corroboration, we noted that the affidavit revealed only that the police had verified that the defendant lived at the described address, that the car in the driveway was registered to him, that the utilities at the house were registered to his wife, and that his physical description matched that given by the informant. We further stated:

> If the police had chosen to corroborate the information regarding any criminal activities of Utterback's rather than merely corroborating these innocent details of his life, see *U.S. v. Gibson*, 928 F.2d 250 (8th Cir. 1991), or had the affidavit contained other corroborative sources of information about the same alleged criminal activity of Utterback's, see *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985), the veracity of the informant might have been established in the affidavit. However, no such corroboration is reflected in the detective's affidavit used to obtain the search warrant in this case.

Utterback, 240 Neb. at 993, 485 N.W.2d at 771.

In the instant case, the affiant in no way indicated that any of the informants had a reputation for reliability, nor were they citizen informants, nor had any of them made a statement against their penal interest, nor are we told the nature or basis of the intelligence information supposedly obtained from fellow police officers which would have established reliability. Accordingly, we find that the affidavit was not sufficient to support the issuance of the search warrant and that the district court erred in not sustaining the defendant's motion to suppress.

As we have found that the search warrant was improperly issued, it is not necessary that we discuss the defendant's claim of error regarding the statements or testimony of Hank.

As his final assignment of error, the defendant states that the district court erred in admitting evidence of a sale of cocaine between Craig Christensen and a confidential informant.

Riley testified that he participated in surveillance of an individual, Craig Christensen, on December 10, 1992. Defense counsel objected to this testimony on the grounds of relevance, arguing that there had been no foundation laid as to how

Christensen related to Flores. The court, noting that the objection was continuing, overruled the objection, and questioning of Riley proceeded:

Q. Why were you watching Craig Christensen?

A. I had a confidential informant purchasing or attempting to purchase cocaine from Mr. Christensen on December 10th.

Q. Did you personally watch Mr. Christensen?

A. Yes.

Q. Where did you first start watching Mr. Christensen at?

A. At his residence on Shady Bend — excuse me. On East Bismark.

MR. PICCOLO: Your honor, I would object on the grounds of foundation and personal knowledge.

THE COURT: It's overruled. Go ahead, Mr. Young.

Q. (By Mr. Young) Where did you go from there?

A. The cooperating individual and Mr. Christensen drove to the west side of Pier Park here in Grand Island.

Q. What happened then?

A. I monitored the cooperating individual count $220 for the purchase of one-eighth ounce of cocaine to Mr. Christensen. I then observed Mr. Christensen leave the confidential informant's vehicle and walk north on Pine Street.

MR. PICCOLO: Your Honor, I'll renew my objection. I believe I have it continuing, for the record, on the grounds of relevance.

THE COURT: It is continuing. Your objection is overruled.

Q. (By Mr. Young) What happened then?

A. I informed Investigator Chris Rea with the Hall County Sheriff's Department and Investigator — or Trooper Duis of the Nebraska State Patrol of Mr. Christensen's clothing and direction of travel. They then continued surveillance —

MR. PICCOLO: Your Honor, I object on the grounds of personal knowledge.

THE COURT: That objection is sustained.

Trooper A.J. Duis of the Nebraska State Patrol testified that at approximately 3:45 p.m. on December 10, 1992, he went to the Blackstone Apartments building in Grand Island. He stated that he waited on the stairs on the north end of the third floor for about 5 minutes. Christensen then arrived by himself. Christensen attempted to walk by, but was stopped by an unidentified female and waited 2 to 3 minutes. Duis then saw the defendant arrive, and he observed the defendant as he and two other males, including Christensen, and two females entered a residence identified as apartment No. 317. About 5 minutes later, he saw Christensen leave the apartment.

The next observance of Christensen was again by Riley:

> Q. Trooper Riley, to back up, you have testified that early on the day of December 10, 1992, you had an individual named Craig Christensen under surveillance?
>
> A. Yes.
>
> Q. And that you then turned over the surveillance to Trooper Duis?
>
> A. Yes.
>
> Q. Did you see Craig Christensen again on December 10, 1992?
>
> A. Yes. At approximately 4:15 p.m., I observed Mr. Christensen walking south on Pine Street back to Pier Park where the confidential informant's vehicle was parked.
>
> Q. What happened then?
>
> A. Craig Christensen entered the vehicle and handed —
>
> MR. PICCOLO: Objection, Your Honor, on the grounds of personal knowledge and foundation as to personal knowledge.
>
> THE COURT: I'll sustain it at this point. Ask another question.
>
> MR. YOUNG: Thank you.
>
> Q. (By Mr. Young) Were you able to observe what was going on inside the vehicle?
>
> A. Other than the two occupants sitting in the vehicle, no.
>
> Q. Did you observe Craig Christensen leave that vehicle?

A. Subsequently, yes.

Q. Did you then have contact with the confidential informant?

A. Yes.

Q. Had the confidential informant been searched prior to this?

A. The confidential informant had been searched and the confidential informant's vehicle had been searched. I followed the confidential —

MR. PICCOLO: Your Honor, I'm going to object on the grounds of relevance and also object on the grounds that the answer is somewhat nonresponsive as well.

THE COURT: I'll overrule it. Ask another question, Mr. Young.

MR. YOUNG: Thank you.

Q. (By Mr. Young) When you made contact with the confidential informant after Craig Christensen left, what happened?

A. The confidential informant handed me a plastic baggy containing an off-white powder believed to be cocaine that Craig Christensen had given the confidential informant.

MR. PICCOLO: I would object, Your Honor, on the grounds of personal knowledge to the last part of that answer.

THE COURT: Your objection is sustained as to the last part and the jury will disregard his response as to the last part of that question.

MR. YOUNG: For the record, Your Honor, is the last part, that was given to him by Craig Christensen?

THE COURT: That's correct.

It is evident from the preceding testimony that Riley did not actually observe an exchange of cocaine between Christensen and the unnamed cooperating individual. Further, it is not established in the record that the off-white powder which was allegedly exchanged was, in fact, cocaine, nor was there any testimony in the record to demonstrate that Christensen himself did not have the baggie of off-white powder on his person before engaging in the transaction detailed above. (Although

the cooperating individual was searched before the beginning of this transaction, Christensen was not.) Riley had earlier testified that he "monitored the cooperating individual count $220 for the purchase of one-eighth ounce of cocaine to Mr. Christensen," but it is not clear how the monitoring was performed. Riley did not state that the cooperating individual was wired for sound, nor did he state that he was actually close enough to hear the conversation between the two or that he did hear a conversation between the two. At best, Riley saw the cooperating individual give Christensen $220. The implication that the cooperating individual gave Christensen the money for the purchase of cocaine is unsupported by testimony in the record. Neither Christensen nor the cooperating individual testified about the exchange of money or the exchange of cocaine. Although Riley testified that some of the money given to the cooperating individual was found in apartment No. 317 when it was searched, it would be improper to infer that this money was used to purchase cocaine, when the evidence in the record does not even establish that Christensen possessed cocaine.

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). Evidence which is not relevant is not admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989).

Here, the defendant was charged with possession of a controlled substance with intent to distribute. Therefore, only evidence which would tend to establish that the defendant possessed a controlled substance, or possessed a controlled substance with the intent to distribute, would be relevant. There is simply nothing in the record to establish whether Christensen possessed cocaine prior to going to apartment No. 317 and, therefore, whether he obtained cocaine from that apartment, and if he did, from which of the apartment's occupants or visitors. Other than by inference, Riley's testimony is insufficient to establish that Christensen gave a substance to the cooperating individual or that the substance was cocaine. In the

absence of evidence in the record that Christensen obtained cocaine from the defendant, any testimony in regard to his activities is irrelevant because it does not have any tendency to prove a fact at issue. The district court thus erred in admitting testimony in regard to Christensen's activities.

In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993).

Constructive possession of an illegal substance may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance. *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989); *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988).

Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

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. Thomas, supra*; *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

Disregarding the inadmissible evidence, the record here shows that Hank testified that she lived with the defendant in apartment No. 317 of the Blackstone Apartments building. Also, on December 10, 1992, that apartment was searched pursuant to a search warrant and investigators found a bag of cocaine, weighing slightly less than an ounce, and $854. The defendant and Hank were at the apartment when the search warrant was executed. One $20 bill and several $1 bills were found on the defendant. There was no evidence as to whether

the cocaine or the money found in the apartment belonged to Hank or to the defendant.

In *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992), Enzo Floridia appealed a district court order forfeiting to the State the vehicle he was driving when police stopped him and found cocaine in the pocket of his pants. The defendant argued that at the time of the vehicle's seizure, there was no indication regarding his intent to manufacture, distribute, deliver, dispense, export, or import the cocaine. One-eighth of an ounce of cocaine, or an "eight-ball," had been found on the defendant, and a search of the defendant's home had revealed an extensive collection of drug paraphernalia, as well as a note written by the defendant's fiancee and an unsigned note, which both indicated that the defendant was involved in the sale of cocaine. We found that from the evidence adduced by the State and the reasonable inferences which could be drawn from the evidence, a fact finder could find beyond a reasonable doubt that the defendant had cocaine in his possession while driving the vehicle and that he had the requisite intent to deliver the cocaine.

In *State v. Salas, supra*, the defendant argued that there was insufficient evidence to support his convictions for possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and delivery of cocaine. We noted that possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute. See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). We found in *Salas* that the amount of drugs found during the search of the premises where the defendant was residing, in addition to packaging material and a small scale commonly used for weighing drugs for sale, provided sufficient circumstantial evidence of possession with intent to deliver or distribute.

In the instant case there was no testimony in regard to paraphernalia or other evidence which would indicate that the cocaine had been divided or packaged for distribution. Although there was testimony as to the value of the cocaine which was found, there was no evidence which would indicate to the jury whether the amount of cocaine was or was not a

reasonable quantity for personal use. Only a small amount of money was found on the defendant himself.

Possession of a sufficiently large amount of a controlled substance, found in proximity to a large amount of money, may support an inference of possession with intent to deliver or distribute. Here, however, it cannot be said that the State has proved beyond a reasonable doubt that the quantity of cocaine and money was alone sufficient to establish that the defendant possessed the cocaine with the intent to distribute. The State has therefore failed to demonstrate that the error in admitting testimony in regard to Christensen's activities, which testimony implied that Christensen had obtained cocaine from the defendant, was harmless beyond a reasonable doubt.

The admission of the testimony of Riley over the objection of the defendant was prejudicial error, and the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., concurring.

I concur in the judgment of the court. However, I would have found the issuance of the search warrant to be proper. The supporting affidavit stated that the

> [a]ffiant has received numerous intelligence reports from the Grand Island Police Department and Hall County Sheriff's Office that a subject [known] as "Carpo" is heavily involved in the sale of cocaine. Intelligence information indicates this subject's true identify [sic] to be Salomon Flores residing at the Blackstone Apartments, #317, Grand Island, Nebraska.

Observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971).

In addition, the affidavit states that "Ron York from the State Probation Office advised affiant Lisa Hanks [sic] resides at the Blackstone Apartments, #317, with an individual known as 'Carpo'. York advised affiant Lisa Hanks (sic) had stated 'Carpo' sells cocaine from the apartment." One of the ways in

which reliability of an informant may be established is by showing in the affidavit that the informant has made a statement that is against his or her penal interest. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Neb. Rev. Stat. § 29-2262(2)(h) (Cum. Supp. 1992) provides that when a court sentences an offender to probation, a court may require the offender as a condition of probation "[t]o refrain from frequenting unlawful or disreputable places or consorting with disreputable persons." Knowingly living with a person whom the probationer believes to be unlawfully distributing drugs certainly qualifies as a violation of subsection (2)(h) above.

Nor was the information received by law enforcement officials from Lisa Hank inadmissible as being in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1989). Hank was indeed on probation at the time of these events. However, § 29-2262.01 prohibits the use of evidence obtained from a person on probation only while he or she was "acting as an undercover agent or employee of any law enforcement agency." Hank was neither.

In my view, the information set forth above was sufficient to support a "reasonable suspicion founded on articulable facts" within the meaning of *State v. Utterback*, 240 Neb. at 984, 485 N.W.2d at 766.

BOSLAUGH, J., and GRANT, J., Retired, join in this concurrence.

COUNTY OF DAKOTA, NEBRASKA, APPELLEE, V. WORLDWIDE TRUCK PARTS AND METALS, A CORPORATION, ET AL., APPELLANTS.

511 N.W.2d 769

Filed February 18, 1994. No. S-91-669.

1. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** 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, the appellate court considers and may

give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. However, with regard to questions of law, the appellate court is obligated to reach a conclusion independent from the trial court's conclusion.

3. **Ordinances.** Generally, an ordinance cannot be amended, repealed, or suspended by a resolution.
4. **Municipal Corporations: Ordinances: Zoning.** A city is exercising control and county zoning regulations are superseded if the city adopts an ordinance with respect to territory within the extraterritorial jurisdiction, and it is not necessary that the city designate each particular piece of property within that jurisdiction.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and dismissed.

Douglas E. Flom, of Corbett, Anderson, Corbett, Poulson, Flom & Vellinga, for appellants.

Brien P. O'Brien and, on brief, Kurt A. Hohenstein for appellee.

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

HASTINGS, C.J.

Following an action in equity brought by Dakota County, Worldwide Truck Parts and Metals, Jack P. Lemmon, and Marilyn J. Lemmon appealed an order of the district court enjoining them from using the premises as being in violation of the county zoning regulations. Worldwide and the Lemmons appeal, alleging a variety of errors, including the allegation that the county had no jurisdiction under the zoning laws existing over the premises in question. We have reviewed the entire record, the briefs, and the arguments of counsel, which we must do, but because we determine this appeal on the basis of jurisdiction, there is no need to discuss the other errors. We reverse the order and dismiss the cause.

An action for an injunction sounds in equity. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993); *Bauer v. Lancaster Cty. Sch. Dist. 001*, 243 Neb. 655, 501 N.W.2d 707 (1993).

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, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993); *Bauer v. Lancaster Cty. Sch. Dist. 001, supra*. However, with regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

The Dakota County zoning resolutions at issue in this case became effective on March 13, 1978. The property in question was zoned R-10 (residential, with 10,000 square feet minimum lot size). For many years prior to the effective date of the resolutions, the property had been operated as a used parts and salvage business by Gilbert VandeMheen. On two or three occasions, a private contractor came to the property with a portable smelter for processing accumulated aluminum.

In 1979, the property was purchased from VandeMheen by Quad States, Inc., and operated by Worldwide, a division of Quad States. Prior to the purchase, Quad States' president, Jack Lemmon, investigated the operation at that location and determined that the business included selling new or used trucks, selling used parts, and processing metals of all types. Lemmon testified that he did not check to determine whether there were any ordinances which would affect the use of the property. From 1979 to 1985, Worldwide did not engage in any smelting of metals. In 1985, Worldwide purchased a movable aluminum smelter and began smelting aluminum. Approximately 1 year later, a second smelter was purchased. Lemmon estimated that at maximum capacity, the operation could process 10,800 pounds a day. In 1987, Nebraska's Department of Environmental Control advised Worldwide that a permit was necessary for the smelter and that it would have to be operated in a controlled structure. Worldwide had a metal pole building constructed to house the smelting operation. In April 1988, a large amount of polyurethane caught fire and burned on the property. The Dakota County Attorney brought criminal charges against Lemmon for unauthorized open

burning and maintaining a nuisance. In March 1989, Lemmon pled no contest to the charges and entered into a nolo contendere plea agreement and order of abatement in which he agreed to take remedial steps to prevent future problems with stockpiled polyurethane. That agreement provided that "nothing contained herein shall prohibit the future smelting of aluminum . . . or incinerating of polyurethane foam provided the operations are conducted within the constraints of state and federal law, and any local ordinance or regulation."

In May 1989, the state Department of Environmental Control filed charges concerning air pollution caused by the April 1988 fire and opacity violations occurring in September 1988 and January 1989. Worldwide entered into a consent decree and paid a $12,556 fine. In August 1989, the Dakota County Attorney filed this action, alleging that the use of the property was a nonconforming and nonpermitted use under Dakota County zoning ordinances and in violation of Neb. Rev. Stat. § 14-406 (Reissue 1991). Worldwide answered and asserted as affirmative defenses that the county did not have authority to regulate the property in question because it was within 2 miles of the city limits of South Sioux City and that the county was barred under the doctrine of laches because of inexcusable delay in asserting its rights. At the conclusion of the trial, the district court found that the county was not estopped from enforcement of its zoning resolutions, that the zoning authority of South Sioux City was not mandatory, and that the use of the property was "an impermissible expansion of the non-conforming use."

The district court found that Dakota County had jurisdiction over the Worldwide property, noting that

> [t]he premises was zoned by the plaintiff in March, 1978 and has been so zoned since that time. While the City of South Sioux City may have had the statutory power to zone the premises, zoning was not mandatory and an agreement between the Plaintiff and the City as to that respective zoning is not prohibited. The Plaintiff has exercised a zoning jurisdiction over the premises, and the Defendant recognized that jurisdiction by applying for a building permit and later in seeking an application to

change the zoning, the application going to the Plaintiff.

The authority for a city of the first class, such as South Sioux City, to exercise extraterritorial jurisdiction is found in Neb. Rev. Stat. § 16-901 (Reissue 1991), which states in pertinent part:

> Any city of the first class may apply by ordinance any existing or future zoning regulations, property use regulations, building ordinances, electrical ordinances, plumbing ordinances, and ordinances authorized by section 16-240 to the unincorporated area two miles beyond and adjacent to its corporate boundaries with the same force and effect as if such outlying area were within the corporate limits of such city . . . .

Although the zoning authority granted by § 16-901 is not mandatory, South Sioux City chose to exercise its authority under this statute, as evidenced by ordinance No. 528, passed and approved on September 19, 1967. That ordinance states:

> That the zoning ordinances, property use regulations, building ordinances, electrical ordinances and plumbing ordinances as the same now exist or may hereafter be amended shall be and the same are hereby extended under the authority of the revised statutes of Nebraska, Section 16-901 and Section 16-902 as amended by LB 521, passed and approved by the 1967 Legislature of the State of Nebraska to an area two miles beyond and adjacent to the corporate boundaries of the City of South Sioux City, Nebraska with the same force and effect as if outlying area were within the corporate limits of said city . . . .

The record contains a certification by the city clerk of South Sioux City that ordinance No. 528 was in full force and effect as of May 15, 1990. The record also contains ordinance No. 82-15, passed and approved on July 20, 1982, and ordinance No. 89-18, passed and approved on August 15, 1989, annexing parcels of real estate located outside of the corporate limits of South Sioux City. Exhibit 7, a map prepared by Schieuer Surveying, shows the locations of the properties annexed by those ordinances. Surveyor Douglas Mordhorst testified that as to the property annexed by ordinance No. 82-15, the legal description did not "call out" whether the property line was to

be established from the centerline or the right-of-way line. As a result, he established two separate easterly points for that annexation, from which pie-shaped arcs were drawn to indicate the 2-mile extraterritorial jurisdiction of South Sioux City. One of those arcs encompasses the Worldwide property in its entirety, while the other includes most of the property, but intersects the smelter and incinerator building. The arc established by reference to the property annexed by ordinance No. 89-18 again encompasses almost all of Worldwide's property, including the smelter and incinerator building. Thus, exhibit 7 indicates that as of July 20, 1982, most or all of Worldwide's property was included within South Sioux City's extraterritorial jurisdiction, and as of the August 15, 1989, annexation, that part of the property which included the smelter and incinerator building was decisively within the 2-mile limit.

Randy Geeting, zoning official for South Sioux City, was asked if § 11-102 of the South Sioux City Code requires the city to take action to extend its zoning jurisdiction 2 miles in all directions. That section of the zoning chapter provides:

> The provisions of this Chapter and the Building Regulations Chapter shall apply within the corporate limits of the Municipality and within the territory beyond said corporate limits as now or hereafter fixed, for a distance of two (2) miles in all directions, as established on the two (2) maps entitled *"Use and Height District Map of South Sioux City,"* as the same may be amended by subsequent annexation.

Geeting replied:

> In the past they have had a pretty good working relationship with the county, also with the City of Dakota City in all directions, they would be overriding areas especially with Dakota City to the south and to the west have tried to work with the county in coming up with a defined line where you could see what was definitely on one side and what was definitely on the east.

Although § 11-102 of the city code also provides that all amendments which are authorized by ordinance are to be posted on the district maps immediately upon their effective

dates, Geeting stated that 2-mile projections from the annexations authorized by ordinances Nos. 82-15 and 89-18 were not posted on the zoning map because the city "[n]ever had the mapping as far as this type of mapping to go out that far."

While Geeting's testimony indicates that an informal agreement existed between the city and the county as to the jurisdictional demarcation, it is clear that the city did exercise its zoning authority within the extraterritorial jurisdiction. Geeting identified exhibit 49 as seven separate ordinances which rezoned areas within that jurisdiction to "modified industrial" to accommodate salvage operations. Thus, South Sioux City not only evidenced the intent to exercise extraterritorial zoning jurisdiction, by virtue of ordinance No. 528 and § 11-102 of the city's zoning regulations, but it exercised that authority in fact, as indicated by the ordinances contained in exhibit 49. However, that authority was evidently selectively exercised by agreement with the county, at least prior to November 1989.

On November 7, 1989, the city passed resolution No. Y-166, which established the westerly boundary of its extraterritorial jurisdiction approximately 2,000 feet to the east of the 2-mile limit. However, if that resolution was a prerequisite to Dakota County's authority, it came too late, since this action was filed on August 30, 1989.

Further, article 6 of the South Sioux City Code, entitled "Amending the Zoning Chapter," provides that the zoning chapter and the official map may be amended, but also that "[a] public hearing shall be held by the Governing Body before adoption of any proposed amendment to this Chapter." Geeting testified that no public hearings were held before the resolution was adopted, but stated that he did not believe they were necessary. The preamble to resolution No. Y-166 states that "the City of South Sioux City has by ordinance applied zoning and property use regulations to the unincorporated area two miles beyond and adjacent to its corporate boundaries" and goes on to state that "it is necessary and desirable to define the westerly boundary of said extraterritorial jurisdiction." Although the resolution could arguably be termed a

"clarification," it could also be considered an amendment requiring a public hearing, since it does in fact decrease the area of the city's jurisdiction as asserted in ordinance No. 528. Geeting admitted that no survey work was done to determine whether the line as established by resolution No. Y-166 was outside 2 miles or within 2 miles of the existing westerly boundary of South Sioux City. He also agreed that a distance of 2 miles from the westerly boundary of the annexed portion of the city would establish a line some distance west of the line established by that resolution. Thus it appears that the effect of resolution No. Y-166 was to change the city's zoning boundary, rather than to determine the location of the 2-mile boundary line. "[G]enerally, an ordinance cannot be amended, repealed, or suspended by a resolution." *Sommerfeld v. City of Seward*, 221 Neb. 76, 82, 375 N.W.2d 129, 133 (1985).

The county does not cite any authority to support the propositions that the city may selectively exercise authority over property within its extraterritorial jurisdiction or that the city has not exercised authority unless it acts to zone a particular piece of property. Neb. Rev. Stat. § 23-114 (Reissue 1991) provides in pertinent part:

> The county board shall have power to create a planning commission with the powers and duties set forth in sections 23-114 to 23-114.05 . . . ; make, adopt, amend, extend, and implement a county comprehensive development plan; and adopt a zoning resolution, which shall have the force and effect of law. The zoning resolution may regulate and restrict . . . the uses of land for agriculture, forestry, recreation, residence, industry, and trade . . . or other uses in the unincorporated area of the county. . . . *Provided,* the powers created by this section shall not be exercised within the limits of any incorporated city or village nor within the area over which a city or village has been granted zoning jurisdiction and is exercising such jurisdiction. At such time as a city or village exercises control over an unincorporated area by the adoption or amendment of a zoning ordinance, its regulations shall supersede those of the county.

This statute was addressed in *Deans v. West*, 189 Neb. 518,

203 N.W.2d 504 (1973), in which we examined whether zoning and subdivision regulations and an official zoning map were valid enactments and a valid exercise of the zoning power of Scotts Bluff County. We found that the exhibit identified as the official zoning map did not meet the requirements of an official zoning map for purposes of county zoning regulations and that "without the official zoning map it could not be ascertained from the zoning regulations what regulations and restrictions were prescribed or what uses were permitted for any given parcel of land in the zoning area." *Id.* at 524, 203 N.W.2d at 508. With regard to the insufficiency of the map, we also found:

> It cannot even be determined whether the defendants' property is inside or outside the 2-mile zoning jurisdiction of the City of Scottsbluff. Neither is there any affirmative evidence that the City of Scottsbluff is not exercising, or has not exercised, control over the 2-mile zoning area outside its city limits by the adoption or amendment of a zoning ordinance. *If the defendants' property is within the 2-mile zoning jurisdiction of the City of Scottsbluff and the city has adopted or amended a zoning ordinance with respect to the territory outside the corporate limits and inside its zoning jurisdiction, then the city is exercising control and any county zoning regulations are superseded.* See § 23-114, R. R. S. 1943.

(Emphasis supplied.) *Id.* at 523, 203 N.W.2d at 507. *West* indicates that a city is exercising control and county zoning regulations are superseded if the city adopts an ordinance with respect to *territory within the extraterritorial jurisdiction*, and it is not necessary that the city designate each particular piece of property within that jurisdiction. Thus, in regard to the instant case, South Sioux City exercised control by adopting ordinances with respect to territory within its extraterritorial jurisdiction, and on the date of the filing of the petition, Dakota County's regulations were superseded. Even if South Sioux City acquiesced to Dakota County's authority by adopting resolution No. Y-166 in November 1989, that resolution is invalid on its face, since it purported to amend the city's asserted zoning authority without a public hearing.

The County of Dakota having no zoning jurisdiction over

the premises, the order of the district court was incorrect and is reversed, and the cause of action is dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ORLANDO E. PARKS, APPELLANT.

511 N.W.2d 774

Filed February 18, 1994. No. S-93-313.

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 trier 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. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
3. **Criminal Law: Constitutional Law: Due Process: Jury Instructions: Proof.** A jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial.
4. **Criminal Law: Rules of Evidence: Jury Instructions: Presumptions.** Jury instructions as to presumptions in criminal cases must conform to the requirements of Neb. Evid. R. 303(3), Neb. Rev. Stat. § 27-303(3) (Reissue 1989).
5. **Criminal Law: Rules of Evidence: Jury Instructions: Presumptions: Evidence: Proof.** Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.
6. **Presumptions: Words and Phrases.** A presumption is a fact inferred from another proved or established fact or facts.
7. **Words and Phrases.** An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human reasoning.

8. **Trial.** An inference is a deduction the fact finder may in its discretion draw, but is not required to draw as a matter of law.
9. **Criminal Law: Constitutional Law: Due Process: Presumptions: Proof.** A presumption that relieves the State of its burden of proof beyond a reasonable doubt on any essential element of a crime violates a defendant's due process rights and is constitutionally impermissible.
10. **Statutes: Presumptions.** If a statutory presumption were treated as anything more than a permissible inference of fact, it would be unconstitutional.
11. **Presumptions.** References to "presumptions" in Neb. Rev. Stat. § 27-303 (Reissue 1989) necessarily include "inferences."
12. **Jury Instructions: Evidence: Proof.** When a trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must include that the jury may regard the basic facts as sufficient evidence of the inferred fact, but that the jury is not required to do so and that, in any event, the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for a new trial.

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

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

FAHRNBRUCH, J.

Orlando E. Parks appeals his jury conviction of theft by receiving stolen property having a value greater than $1,500, a violation of Neb. Rev. Stat. § 28-517 (Reissue 1989). The crime is a Class III felony, Neb. Rev. Stat. § 28-518(1) (Cum. Supp. 1992), carrying a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both, Neb. Rev. Stat. § 28-105 (Reissue 1989).

Because of a faulty jury instruction, we reverse Parks' conviction and remand the cause to the district court for Douglas County for a new trial.

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 trier 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. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

FACTS

Construing the facts most favorably to the State, the record reflects the following:

On July 30, 1992, Officer Anthony Ward of the Omaha Police Division observed a white Chevrolet Blazer parked in an area he was patrolling. The Blazer looked out of place for the area that Ward knew to be a "dumping ground" for stolen vehicles. Ward ran a check on the license plate and learned that the vehicle had, in fact, been reported stolen.

Ward noted that the outer shell of the steering column of the Blazer had been broken away on the left side, revealing the steering mechanism. A motor vehicle in this condition cannot be started by using an ignition key. However, it can be started by inserting a flat object such as a screwdriver behind a small switch and pulling up. Ward testified that there was a screwdriver in the door panel when the Blazer was recovered. The owner of the vehicle testified that the screwdriver did not belong to her and that she had not left a screwdriver in the vehicle prior to the time it was stolen.

Ward placed the Blazer under surveillance. After approximately 15 minutes, Ward saw Parks approach and enter the vehicle from the driver's side. After backup officers arrived, Ward placed Parks under arrest. Parks did not start or move the Blazer during Ward's surveillance. Upon his arrest, Parks claimed to have rented the vehicle "from a dude in the projects the night before."

Parks was charged by information with theft by receiving stolen property having a value greater than $1,500. His case was tried to a jury, during which trial Parks did not testify. Parks was convicted as charged and sentenced to not less than 48 nor more than 60 months' imprisonment. He was given credit for

228 days for time served. He timely appealed his conviction to this court.

ASSIGNMENTS OF ERROR

On appeal, Parks alleges that the trial court erred in (1) refusing to give a proposed instruction concerning unauthorized use of a propelled vehicle as a lesser-included offense of theft by receiving stolen property and (2) giving a jury instruction that authorized the jury to disregard the presumption of Parks' innocence and shifted to Parks the State's burden of proof on an essential element of the crime.

ANALYSIS

LESSER-INCLUDED OFFENSE

During an instruction conference, Parks requested an instruction on unauthorized operation of a propelled vehicle in violation of Neb. Rev. Stat. § 28-516 (Reissue 1989) as a lesser-included offense of theft by receiving stolen property. That request was denied by the trial court. Parks claims that under the cognate-evidence theory, he was entitled to such an instruction.

This court has recently rejected the cognate-evidence approach we adopted in *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). Instead, this court has readopted the statutory-element approach to determining whether a trial court is required to instruct on a lesser-included offense. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Accord *State v. Mitchell*, 244 Neb. 574, 508 N.W.2d 552 (1993).

> "[A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense."

Id. at 575-76, 508 N.W.2d at 553. Accord *State v. Williams, supra.*

For a jury to find Parks guilty of theft by receiving stolen property, the State was required to prove beyond a reasonable

doubt that Parks (1) received, retained, or disposed of (2) stolen movable property of another (3) knowing that it had been stolen, or believing it had been stolen (4) unless Parks received, retained, or disposed of the property with the intention to restore it to the owner. See § 28-517.

To convict Parks of the offense of unauthorized operation of a propelled vehicle, the State would have been required to prove beyond a reasonable doubt that Parks (1) intentionally (2) exerted unauthorized control (3) over another's propelled vehicle (4) *by operating the same* (5) without the owner's consent. See § 28-516(1).

The first step of the statutory-element analysis is dispositive of this issue. It is apparent from an examination of the elements of the two offenses that a person may commit theft by receiving stolen property without operating a propelled vehicle. Because it is possible to commit the greater offense without simultaneously committing the lesser offense, Parks was not entitled to a lesser-included offense instruction, and we need not proceed to the second step of the analysis. Parks' first assignment of error is without merit.

Inference Instruction

Parks next contends that the trial court erred in giving its jury instruction No. 9 over his objection. That instruction provides that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen."

Parks argues that the words "if not satisfactorily explained" authorized the jury to disregard the presumption of Parks' innocence and relieved the State of its burden to prove beyond a reasonable doubt the element of Parks' knowledge that the Blazer in which he was found sitting had been stolen, and impermissibly shifted to him the burden of going forward with defensive evidence on that essential element of the crime.

A jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a

defendant's due process right to a fair trial. See, *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

In objecting to the court's instruction No. 9, Parks' counsel argued to the trial court that "the instruction doesn't explain to the jury that *they have* [sic] *the option of not drawing that inference* . . . ." (Emphasis supplied.) Counsel did not submit a proposed instruction which directed the jury that it had the option not to draw the inference included in the instruction.

Instructions as to presumptions in criminal cases must conform to the requirements of Neb. Evid. R. 303(3), Neb. Rev. Stat. § 27-303(3) (Reissue 1989), which states:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge *shall* give an instruction that the law declares that *the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so*. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge *shall* instruct the jury that *its existence must, on all the evidence, be proved beyond a reasonable doubt*.

(Emphasis supplied.)

Because § 27-303 is entitled "Presumptions in criminal cases" and refers to "presumed facts," while the challenged instruction is based on a common-law inference, it is necessary to first determine whether § 27-303 applies to inferences. Thus, it is instructive to review the nature of presumptions in criminal cases.

A presumption is a fact inferred from another proved or established fact or facts. *State v. Jasper, supra*. " 'An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the usual course of human reasoning. . . . An inference is . . . a deduction the factfinder may in its discretion draw, but is not required to draw as a matter of law.' " *Id.* at 759, 467 N.W.2d at 859, quoting Michael H. Graham, Handbook of Federal Evidence § 301.7 at 103-04 (3d ed. 1991).

Although frequent reference is made to "presumptions" in criminal cases, a presumption that relieves the State of its

burden of proof beyond a reasonable doubt on any essential element of a crime violates a defendant's due process rights and is constitutionally impermissible. *State v. Jasper, supra.* In *Jasper*, again citing Graham, *supra*, we suggested that " '[c]larity would be fostered by reference to criminal instructed inferences rather than criminal presumptions.' " 237 Neb. at 758, 467 N.W.2d at 859. See, also, *State v. Hruza*, 223 Neb. 837, 394 N.W.2d 643 (1986) (stating that if a statutory presumption were treated as anything more than a permissible inference of fact, it would be unconstitutional).

Because presumptions in criminal cases are constitutionally infirm, and because a presumption that would relieve the State of its burden of proof on any essential element of a crime must be treated as no more than an inference, we conclude that references to "presumptions" in § 27-303 necessarily include "inferences" as well. That being the case, we now turn to the plain language of the statute to determine whether the court properly instructed the jury.

Section 27-303(3) is couched in mandatory terms. The instruction, as given in Parks' case, failed to inform the jury that it was not required to draw the stated inference. It also failed to instruct the jury that the fact of Parks' knowledge that the vehicle was stolen must "on all the evidence, be proved beyond a reasonable doubt," as required by § 27-303(3).

The trial court's failure to comply with the requirements of § 27-303(3) is grounds for reversal of a criminal conviction. See *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989). We find these omissions in the court's instruction No. 9 in Parks' case to be fatal to the constitutional validity of that instruction.

We hold that when a trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must include that the jury may regard the basic facts as sufficient evidence of the inferred fact, but that the jury is not required to do so and that, in any event, the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt. In Parks' case, the trial court's failure to include these requirements in its instruction No. 9 constitutes error entitling Parks to a reversal of his conviction.

CONCLUSION

Having found that the trial court failed to properly instruct the jury that it was not required to draw the inference contained in instruction No. 9 and that Parks' knowledge that the vehicle was stolen must on all the evidence be proved beyond a reasonable doubt, we reverse Parks' conviction and remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., concurring.

The instruction on inferences arising from other facts in evidence is both redundant and unnecessary. The standard instruction on the State's burden of proof and the instruction (NJI2d Crim. 5.0) defining direct and circumstantial evidence adequately deal with the permissible inferences.

CAPORALE, J., and GRANT, J., Retired, join in this concurrence.

LINDA ALVAREZ, APPELLEE, V. ABEL ALVAREZ, APPELLANT.
512 N.W.2d 140

Filed February 25, 1994. No. S-92-143.

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

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

Jeanelle S. Kleveland for appellee.

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

PER CURIAM.

In this appeal of a dissolution action, the respondent challenges the division of the debts and assets acquired during the marriage and challenges the amount of alimony awarded.

From our de novo review of the record, we conclude that the district court did not abuse its discretion in its division of the property or in the award of alimony.

The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MONTE K. MOWRY, APPELLANT.
512 N.W.2d 140

Filed February 25, 1994. No. S-92-231.

1. **Convictions: Circumstantial Evidence.** A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other.
2. **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.
3. **Convictions: Presumptions: Proof.** While the State need not disprove every hypothesis except that of guilt, an accused is presumed to be not guilty and cannot be convicted unless the State has proved the accused guilty beyond a reasonable doubt.
4. **Convictions.** A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, MILLER-LERMAN, and WRIGHT, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

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

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

LANPHIER, J.

Appellant, Monte K. Mowry, petitioned this court to review the decision of the Nebraska Court of Appeals which affirmed his convictions for possession of methamphetamine with intent to distribute and conspiracy to distribute methamphetamine. The Court of Appeals recited two rules for reviewing convictions based upon circumstantial evidence, which rules require an appellate court (1) to make every inference in favor of the State and (2) to make every inference in favor of the defendant. The Court of Appeals chose the former rule and affirmed Mowry's convictions. We granted further review to address Mowry's assertion that the Court of Appeals erred by using the wrong standard to review his claim that the circumstantial evidence used to convict him was insufficient. Although, as Mowry claims, the Court of Appeals applied the wrong standard, we affirm the Court of Appeals' decision, since under the proper standard the circumstantial evidence used to convict him was sufficient.

BACKGROUND

On February 13, 1991, a package, containing what was later determined to be methamphetamine, was mailed from Palm Desert, California, to the Rustic Bar & Grill in Morrill, Nebraska. Except for the name of the sender, Byron Green, the return address on the package had been torn off. En route, the package, because of its suspicious nature, was intercepted at the Denver airport by airline agents who called the Denver police. The Denver police, after informing the Scottsbluff Police Department, allowed the package to continue on its journey. The package was then flown to Scottsbluff, where police took possession of the package.

On February 15, 1991, a police officer, dressed as a United Parcel Service deliveryman, took the package to the Rustic Bar & Grill, where Nancy Kowalski received it. Kowalski was arrested, and police searched her apartment. In addition to finding drug paraphernalia and over $12,000 in cash, police found a receipt for a money order. Subsequent investigation

revealed that the money order, which originated at a Western Union office in Scottsbluff, was cashed in Palm Desert, California, by a man named "J.D. Painter."

Meanwhile, the investigation in California revealed that Byron Green, whose name was on the package, had a telephone billing address of 74611 Shadow Hills Road, Palm Desert, California. Police obtained a warrant to search this address and the current residents, Karen and Monte Mowry. Telephone bills addressed to Byron Green were found under a bed in the guestroom. These bills revealed that calls had been made to Kowalski's private phone and to the Rustic Bar & Grill. A calling card in the name of Byron Green was found in Monte Mowry's wallet. A notebook containing names of some Scottsbluff and Gering residents was found. Next to each name was a number which officers testified they thought stood for a quantity of drugs that each person was willing to buy. Two machines used to heat-seal plastic bags were recovered. A scale with methamphetamine residue was found. A Ziploc bag containing pure powder ephedrine, a controlled substance in California, was found. Additionally, a can of acetone, a jug of muriatic acid, and a large quantity of ephedrine tablets were discovered. While each of these items has a legitimate use, all can be used in the manufacture of methamphetamine. A "recipe" for manufacturing methamphetamine was also discovered in the Mowry home.

Police testified that they conducted an extensive search to determine whether Byron Green existed, but could find no such person. However, a witness for the defense, Bruce Taylor, testified by deposition that he had met Byron Green on two occasions, once at the Mowrys' apartment and once at a bar in Palm Desert, California. Taylor also testified that he tried to sell a lithograph to friends of the Mowrys. He further stated that J.D. Painter, on behalf of the Mowrys' friends, delivered $1,125 to him as part of a deposit on the lithograph. Robyn Cisneros, Karen Mowry's sister, testified that the notebook found in the Mowrys' apartment was hers and that the writing contained within was hers, too. She testified that she sold cocaine and that the names and numbers in the notebook concerned her dealings.

Monte Mowry, Karen Mowry, and Kowalski were arrested and tried together before a jury, which returned guilty verdicts on all counts. The appeals of Karen and Monte Mowry were consolidated. The Court of Appeals vacated and dismissed Karen Mowry's case, finding the evidence against her insufficient to sustain her convictions. The Court of Appeals affirmed the convictions of Monte Mowry (hereinafter Mowry), but remanded the case for resentencing.

STANDARD OF REVIEW

Despite Mowry's claim that the circumstantial evidence against him was insufficient to support the jury's guilty verdicts, his convictions were affirmed by the Court of Appeals. The Court of Appeals in its opinion stated there were two apparently conflicting rules for reviewing a conviction based on circumstantial evidence: to make every inference in favor of the State or to make every inference in favor of the accused. In affirming Mowry's convictions, the Court of Appeals applied the following standard of review: "In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor." *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 400, 488 N.W.2d 546, 548 (1992). Accord *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). See, also, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990); *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Mowry, however, asserts that the other standard of review referred to in the Court of Appeals opinion should have been used: In determining the sufficiency of circumstantial evidence, " ' " '[a]ny fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.' " ' " *State v. Ruiz*, 241 Neb. 693, 698, 489 N.W.2d 865, 867 (1992). See, also, *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992); *State v.*

Earlywine, 191 Neb. 533, 215 N.W.2d 895 (1974); *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967); *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949).

Recently, after the Court of Appeals decided this case, this court reconciled the two positions. In *State v. Covarrubias*, 244 Neb. 366, 374, 507 N.W.2d 248, 253 (1993), we explained that the rule enunciated in the *LaFreniere* line of cases

> requires a reasonable inference from circumstantial evidence to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other.

When there is direct evidence in addition to circumstantial evidence, all reasonable inferences deducible from the evidence are to be viewed in the light most favorable to the State. *Id.*

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. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993). It is undisputed that circumstantial evidence provides the only basis upon which to support each of Mowry's convictions. This case on appeal should have been reviewed for sufficiency of the evidence under the standard found in the line of cases beginning with *Reyes v. State, supra*, and ending with *State v. Ruiz, supra*. See *State v. Covarrubias, supra*.

While the State need not disprove every hypothesis except that of guilt, an accused is presumed to be not guilty and cannot be convicted unless the State has proved the accused guilty beyond a reasonable doubt. *State v. LaFreniere, supra*. Also, a conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. *State v. Ruiz, supra*.

SUFFICIENCY OF THE EVIDENCE

With respect to the charge of intentionally distributing

methamphetamine, the evidence linking Mowry to the package containing methamphetamine is circumstantial. Byron Green was the name on the package. Mowry had a calling card in the name of Byron Green. The phone at Mowry's residence was registered to Byron Green. Phone bills found at Mowry's residence showed that calls had been made to Kowalski's home and to the Rustic Bar & Grill. A baggie containing empty bindles was found in Mowry's residence. The package containing methamphetamine was sent from a location near Mowry's residence. Many of the ingredients required to manufacture methamphetamine were found at Mowry's residence along with a recipe for methamphetamine. A scale with methamphetamine residue was found at Mowry's residence. Police officers from Nebraska and California testified that after an extensive computer search, no person named Byron Green could be located in either state.

The reasonable inferences deducible from the circumstantial evidence presented supporting Mowry's conviction for intentional distribution of methamphetamine were that Mowry was acting under the alias of Byron Green and that Mowry sent the package to Kowalski.

The conspiracy charge was also based on circumstantial evidence. In addition to that evidence mentioned above in support of the conviction for distribution of methamphetamine, the record reflects that methamphetamine was sent from a location in Palm Desert, California, near Mowry's residence, to Kowalski in Nebraska. Methamphetamine divided into paper bindles was discovered in Kowalski's apartment along with large amounts of cash.

The reasonable inference supporting Mowry's conviction on this charge was that Mowry was conspiring with Kowalski to distribute methamphetamine in Nebraska.

There are no reasonable inferences of nonguilt as strong as the reasonable inferences supporting guilt which arise from the circumstantial evidence presented in this case. We are required to accept the inference most favorable to the accused only when there is a reasonable inference of nonguilt which is as strong as the reasonable inference supporting guilt. *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993). See, also, *State v.*

Hulshizer, post p. 244, 512 N.W.2d 372 (1994). The circumstantial evidence introduced by the State at trial is sufficient to support the reasonable inferences necessary to sustain the jury's guilty verdicts. We, therefore, affirm the judgment of the Court of Appeals.

AFFIRMED.

KARL HILLIE, APPELLANT, V. MUTUAL OF OMAHA INSURANCE COMPANY, A CORPORATION, APPELLEE.

512 N.W.2d 358

Filed February 25, 1994. No. S-92-236.

1. **Summary Judgment.** Summary judgment is proper 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. **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. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Employment Contracts.** An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations.
5. _____. When an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract.
6. _____. To become part of the employment contract, the language of an employee handbook must meet the requirements for formation of a unilateral contract. In other words, the language must constitute an offer definite in form which is communicated to the employee, and the offer must be accepted and consideration furnished for its enforceability.
7. **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.

8. **Employer and Employee.** The language in an employee handbook may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.
9. **Employment Contracts.** Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.
10. _____. An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect.

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

E. Terry Sibbernsen, P.C., for appellant.

Robert L. Lepp and Robert J. Kmiecik, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellee.

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

FAHRNBRUCH, J.

Karl Hillie appeals a summary judgment entered in favor of Mutual of Omaha Insurance Company (Mutual) on Hillie's breach of employment contract claim. Basically, Hillie claims that material issues of fact exist as to whether Mutual could terminate his employment for any or no reason.

We affirm the summary judgment entered by the district court for Douglas County.

STANDARD OF REVIEW

Summary judgment is proper 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. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). 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. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

FACTS

The record discloses the following uncontroverted facts:

In late 1989, Hillie, then a student at Winston-Salem State University in North Carolina, interviewed for a job as a programmer analyst at Mutual. He was interviewed first at his university and later in Omaha. During his interview in Omaha, Hillie filled out and signed an application for employment which stated, "I UNDERSTAND THAT IF I BECOME EMPLOYED, THIS EMPLOYMENT APPLICATION AND ANY OTHER COMPANY PERSONNEL MANUALS AND POLICY STATEMENTS ARE NOT CONTRACTS OF EMPLOYMENT AND THAT I MAY TERMINATE THE EMPLOYMENT WITH OR WITHOUT CAUSE AT ANY TIME AS MAY THE COMPANY."

In mid-December 1989, Mutual offered and Hillie accepted the job for which he applied. Mutual then sent Hillie a letter dated December 19, stating his salary and other details of his employment. The letter made no reference as to the duration of his employment.

Hillie began work January 2, 1990. Sometime during his first 2 weeks of employment, Hillie was given a copy of Mutual's employee handbook, "The Inside Story," along with various other company materials and documents. Hillie was to begin a 6-week training program January 15. However, on January 8 or 9 Hillie hit his head against a bookshelf in his work cubicle. In his deposition, Hillie testified that several days later, he began experiencing pain in his right eye, and that eventually he was diagnosed as having a detached retina. He underwent surgery January 15 and was dismissed from the hospital the next day.

On January 19, Hillie returned to work and began his training program. To help Hillie catch up with his class, Mutual had videotaped the two or three training sessions Hillie missed. On January 24, Hillie discovered he had an infection in his eye. He underwent a second surgery and, after a 10-day hospitalization, was dismissed from the hospital.

Hillie obtained a note from his doctor, which stated that he could return to work February 5. The note contained no restrictions on Hillie's ability to work. Hillie returned to work on February 5, but was unable to work full days.

After his second hospitalization, Mutual did not provide Hillie videotapes of the training sessions he missed. However, Mutual did extend by 3 weeks the deadline for Hillie to complete his training program. The company also offered Hillie the choice of continuing the program with his training class or receiving one-on-one tutoring. Hillie chose to continue with the class.

On or about February 13, Hillie met with Mutual personnel department officials to request additional help and discuss his employment situation. Mutual's development center manager told Hillie that he would have to either work full time or terminate his employment. Hillie testified in his deposition that he left early that day to consider his options and called Mutual later to say he would try to work full time.

Hillie returned to work February 14. He testified he went home for lunch that day, expecting to return, but because of pain in his eye, he stayed home. He did not call anyone at Mutual to advise the company of his decision not to return to work that afternoon. On February 15, Hillie called Mutual to say he had a doctor's appointment, but was informed that his employment had been terminated the previous day.

Hillie filed this action against Mutual, claiming that Mutual breached its employment contract with him by terminating his employment without good and sufficient cause and seeking $115,000 in damages. Mutual filed a motion for summary judgment. After a hearing on the motion, the district court granted summary judgment in favor of Mutual, and Hillie appeals.

ASSIGNMENTS OF ERROR

Hillie claims that the district court erred in granting summary judgment in favor of Mutual because there are material issues of fact as to (1) whether a unilateral contract of employment existed between the parties and (2) whether Mutual could discharge Hillie without following its internal policies and procedures.

Hillie also assigned as error that Mutual's discharge of Hillie violated public policy. During oral argument before this court, Hillie's attorney abandoned that claim, and we therefore do not consider it.

ANALYSIS

Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. See, *Blair v. Physicians Mut. Ins. Co.*, 242 Neb. 652, 496 N.W.2d 483 (1993); *Goodlett v. Blue Cross*, 234 Neb. 5, 449 N.W.2d 9 (1989); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). 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). See *Johnston, supra.*

Hillie does not dispute that his employment initially was indefinite and at will. He argues that his at-will status was modified and that Mutual's right to discharge him without cause was restricted by (1) policies and procedures set forth in Mutual's Personnel Manual (manual) and "The Inside Story" (employee handbook), which, Hillie claims, constituted a unilateral contract; and (2) oral assurances from Mutual representatives.

UNILATERAL CONTRACT

In his brief, Hillie cites two policies as being applicable to his case: a disciplinary action policy and an "absence due to illness" policy.

The disciplinary action policy appears in the manual, which is used by Mutual's managers and supervisors. The manual recommends a four-step disciplinary procedure consisting of (1) a verbal warning, (2) a written warning, (3) probation, and (4) involuntary termination. The employee handbook given to Mutual employees merely states that Mutual has a formal disciplinary action policy but does not describe it.

The absence due to illness policy cited by Hillie appears in the manual and states that if an absence is "authorized for a physical or mental disability, then reasonable accommodations must be considered in determining whether the employee can perform the original duties of the position." It also lists options that should be considered if an employee cannot return to his original position. The employee handbook advises employees

what they should do in case of illness and describes Mutual's "absence with pay" benefits. It does not refer to any company policy regarding employees who are absent due to illness for extended periods of time.

We have previously held that when an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract. See, *Goodlett, supra*; *Stratton v. Chevrolet Motor Div.*, 229 Neb. 771, 428 N.W.2d 910 (1988); *Johnston, supra*; *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). To become part of the employment contract, the language of an employee handbook must meet the requirements for formation of a unilateral contract. See, *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993); *Johnston, supra*. In other words, the language must constitute *an offer definite in form which is communicated to the employee*, and the offer must be accepted and consideration furnished for its enforceability. *Overmier, supra*; *Stratton, supra*; *Johnston, supra*.

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. *Overmier, supra*.

In this case, Hillie has failed to adduce any evidence that the language in either Mutual's manual or employee handbook became part of his employment contract with Mutual. Both the manual and the employee handbook state that the terms and policies therein create no contractual obligations between Mutual and its employees. The employee handbook further reserves to Mutual the right "to make final decisions concerning the interpretation and application of the policies and programs, and to change or discontinue them at any time." Similarly, the manual does not establish a mandatory procedure to be applied in every disciplinary case. The manual states that its managers "are not required to go through the entire four steps . . . but may begin at any step appropriate to the seriousness of the employee problem."

We have previously recognized that the language in an employee handbook may reserve discretion to the employer in

certain matters or reserve the right to amend or modify the handbook provisions. See *Stratton, supra*. Both the manual and the employee handbook unequivocally reserve to Mutual and its managers discretion in applying the company's policies and procedures. The language in Mutual's manual and handbook does not constitute a definite offer and could not have become part of Hillie's employment contract.

Moreover, Hillie does not even claim that he ever received a copy of the manual. The manual is given to managers and supervisors, but not to other employees such as Hillie. Only the employee handbook was received by Hillie. That merely stated that Mutual has a disciplinary action policy but did not describe it. There was no evidence that provisions in the manual were ever communicated to him. Therefore, no genuine issue of fact exists as to whether the manual or employee handbook provisions cited by Hillie met the requirements of a unilateral contract.

ORAL REPRESENTATIONS

As to Hillie's arguments regarding oral representations, we have ruled that oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. See *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988). In this case, Hillie testified in his deposition that he *expected* his job at Mutual to last as long as he wanted or until he "messed up." He stated that he *assumed* he could and would work at Mutual for at least 3 years. However, he conceded that no one from Mutual ever told him this. An employee's subjective understanding of "job security" is insufficient to establish an implied contract of employment to that effect. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). Cf. *Cimino v. W. A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987) (finding that an employee's subjective understanding that he had a right to an accrued salary account was insufficient to establish his entitlement to that account). Hillie failed to produce any evidence, other than his own subjective assumptions, to support his claim that Mutual officials made any oral representations or assurances regarding the duration of his

employment or the circumstances under which his employment could be terminated.

CONCLUSION

The parties are in agreement that Hillie was hired by Mutual as an at-will employee. Hillie claims that his at-will employment ripened into a unilateral employment contract through Mutual's manual and employee handbook and/or through oral representations by Mutual's personnel. The evidence is uncontroverted that neither the manual nor the employee handbook created any contractual obligation between Mutual and its employees. Hillie failed to produce any evidence, other than his own subjective assumptions, to support his claim that Mutual officials made any oral representations or assurance regarding the duration of his employment or the circumstances under which his employment could be terminated. As a matter of law, an employee's subjective understanding of "job security" is insufficient to establish an implied contract of employment to that effect.

There being no genuine issue of any material fact, the district court properly entered a summary judgment in favor of Mutual.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. EPIFANIO J. BARRIENTOS, APPELLANT.

512 N.W.2d 144

Filed February 25, 1994. No. S-92-241.

1. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.

2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Presentence Reports.** A defendant has a qualified right to review his presentence report, and the defendant may, with his attorney, examine the presentence report subject to the court's supervision.
4. **Postconviction.** An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.

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

Brian S. Munnelly and, on brief, Epifanio J. Barrientos for appellant.

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

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

BOSLAUGH, J.

The defendant, Epifanio J. Barrientos, appeals from the order of the district court which denied his petition for postconviction relief.

On July 17, 1990, the defendant pled guilty to unlawful possession of cocaine with intent to deliver. He was sentenced on October 15, 1990, to 10 to 12 years' imprisonment. He did not appeal from the conviction and sentence.

On February 28, 1991, the district court denied the defendant's request for reduction of sentence, finding that the request had not been timely filed.

On January 6, 1992, the defendant filed a motion for postconviction relief claiming that he had been sentenced without any meaningful opportunity to review the presentence investigation report and that he had been denied effective assistance of counsel because his trial counsel failed to familiarize himself with the presentence report and failed to make the substance of the report known to the defendant.

After examining the record, the district court found that an evidentiary hearing was not required. Declining to appoint counsel for the defendant, the district court denied the defendant's motion for postconviction relief, finding that the defendant had no constitutional right to personally review the presentence investigation report; that the defendant had never requested to personally review the presentence investigation report prior to sentencing; that the defendant's counsel reviewed the report and discussed its contents with the defendant and the court; that if the court was misinformed regarding the defendant's chemical abuse, the misinformation would not have had any bearing on the length of the defendant's sentence; that it was true that the defendant had committed murder; and that the defendant had received effective assistance of counsel.

The defendant claims the district court erred in (1) holding that the defendant's constitutional rights had not been violated, (2) holding that the defendant had no right to personally review the presentence investigation report, (3) finding that the defendant had not been denied effective assistance of counsel at the sentencing, (4) denying an evidentiary hearing on the defendant's motion for postconviction relief, and (5) denying appointment of counsel on the defendant's motion for postconviction relief.

The defendant's postconviction motion alleged that there was inaccurate information in his presentence investigation report, of which he was unaware at the time of sentencing, as he had not personally reviewed the report. The inaccurate information of which the defendant complains is the following statements in the report: (1) The defendant "emphatically stated [that] he does not have a problem with drugs and/or alcohol," (2) the defendant "did not indicate [that] he had any plans of changing or modifying his cocaine habit," and (3) a codefendant "stated several times that he was scared of [the defendant] because he had heard that [the defendant] has killed people who have snitched on him."

In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution,

causing the judgment against the defendant to be void or voidable. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991). A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *Id.*

The record shows that after the defendant pled guilty, the defendant's attorney, at the request of the defendant, asked for an expedited presentence. The defendant had initially told his attorney that he wanted to be sentenced without the preparation of a presentence report; however, his attorney advised against this as not being in his best interests.

At the sentencing, the defendant's counsel testified that he had reviewed the presentence report and discussed its contents with the defendant. The defendant's counsel attempted to clear up any misinformation about the defendant's drug abuse by telling the district court that the defendant did not have a $200-a-day cocaine habit. The district court gave the defendant the opportunity to make any statement to the court, and the defendant responded by asking the court for mercy. Nothing in the record indicates that the defendant ever requested to personally review the presentence report.

In *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990), this court held that a defendant has a qualified right to review his presentence report and that the defendant may, with his attorney, examine the presentence report subject to the court's supervision. In that case, the defendant claimed ineffective assistance of counsel because he was denied the opportunity to see and read his presentence report, including a letter which he claimed contained untrue information. This court stated the record showed that the defendant's attorney had explained the contents of the letter to the court at sentencing and that the district court had asked whether the defendant wished to make any statement. Notwithstanding the court's inquiry, the defendant never mentioned that he had not seen the letter. This court found that the defendant's conduct regarding the letter was a waiver of any later complaint that the defendant had not personally inspected the letter before sentence was imposed. *Id.*

In the present case, while the defendant had a qualified right to personally review his presentence report with his counsel,

subject to the district court's supervision, the defendant waived that right by not notifying the district court that he had not personally reviewed the report and that he wished to do so. Furthermore, the record is clear that the defendant's counsel reviewed the presentence report and discussed its contents with the defendant, as can be seen by counsel's clarifications to the court concerning the alleged misinformation in the report. The district court did not err in finding that the defendant's constitutional rights had not been violated and that the defendant had received effective assistance of counsel.

Next, the defendant contends that the district court erred in denying his postconviction motion without an evidentiary hearing. An evidentiary hearing may be denied on a motion for postconviction relief when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Keithley, supra.* In this case, the district court did not err in denying an evidentiary hearing, as all of the pertinent facts are found in the defendant's motion and the files and records of the case.

Finally, the defendant claims that the district court erred in refusing to appoint counsel to represent him on his motion for postconviction relief. This claim is also without merit.

> Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. See § 29-3004. In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error. *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990); *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). Furthermore, "[w]here the record fails to present a justiciable issue of law and fact to the court in a postconviction action, it is not an abuse of discretion to fail to appoint counsel . . . ." *State v. Rehbein, supra* at 545, 455 N.W.2d at 827. Accord *State v. Wiley, supra.*

State v. Keithley, 238 Neb. at 970, 473 N.W.2d at 132.

Because the defendant's claims are without merit, there was no justiciable issue of law or fact, and the trial court did not abuse its discretion in declining to appoint counsel for the

defendant.

The judgment of the district court is affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.
FAHRNBRUCH, J., concurs.

MARY J. DIKE, APPELLEE, V. ROBERT V. DIKE, APPELLANT.
512 N.W.2d 363

Filed February 25, 1994. No. S-92-361.

1. **Foreign Judgments: Child Support: Equity: Appeal and Error.** Fixing the amount of child support is equitable in nature, and, thus, such determinations under the Revised Uniform Reciprocal Enforcement of Support Act are reviewable in the same manner as are orders fixing child support in dissolution of marriage proceedings.
2. **Foreign Judgments: Child Support: Appeal and Error.** The decision whether to grant child support under the Revised Uniform Reciprocal Enforcement of Support Act is within the discretion of the trial court, and, although reviewed de novo on the record, the trial court's decision will be upheld absent an abuse of discretion.
3. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
4. _____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Foreign Judgments: Child Support.** In proceedings under the Revised Uniform Reciprocal Enforcement of Support Act, a trial court may fix a support payment at a different amount than that specified by a judgment rendered in the initiating state.
6. _____: _____. The Revised Uniform Reciprocal Enforcement of Support Act does not create a new duty to support a child.
7. _____: _____. Under the Revised Uniform Reciprocal Enforcement of Support Act, a responding court enforces the duty of support, as distinguished from the amount of the support decreed.
8. _____: _____. A support order made by a court of this state pursuant to the Revised Uniform Reciprocal Enforcement of Support Act 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. Amounts paid for a

particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

9. **Foreign Judgments.** The remedies provided in the Revised Uniform Reciprocal Enforcement of Support Act are in addition to and not in substitution for any other remedies.
10. **Child Support: Rules of the Supreme Court.** Generally, child support payments should be set according to the Nebraska Child Support Guidelines.

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

Clay B. Statmore for appellant.

Gary E. Lacey, Lancaster County Attorney, and Andrew Jacobsen for appellee.

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

FAHRNBRUCH, J.

Robert V. Dike appeals a district court order increasing his child support obligation for his son from $100 to $165 per month and requiring him to provide medical insurance for his son if it is available through Dike's employer. The court's order was entered pursuant to Nebraska's Revised Uniform Reciprocal Enforcement of Support Act (RURESA), Neb. Rev. Stat. §§ 42-762 to 42-7,104 (Reissue 1988 & Cum. Supp. 1992).

We affirm the order of the district court for Lancaster County.

STANDARD OF REVIEW

Fixing the amount of child support is equitable in nature, and, thus, such determinations under RURESA are reviewable in the same manner as are orders fixing child support in dissolution of marriage proceedings. See *Formanack v. Formanack*, 234 Neb. 325, 451 N.W.2d 250 (1990). The decision whether to grant child support under RURESA is therefore one within the discretion of the trial court, and, although reviewed de novo on the record, the trial court's decision will be upheld absent an abuse of discretion. *Id.*

Dike's brief contains no assignments of error. Although an

appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Hoch, supra.*

FACTS

On May 6, 1985, the district court for Madison County, Nebraska, entered a decree dissolving the marriage of Dike and his wife, Mary. Custody of their minor child was granted to the mother, and Dike was ordered to pay $100 per month in child support.

The mother later moved to Union County, Iowa. In 1991, the mother filed a petition in an Iowa court under that state's version of the Uniform Reciprocal Enforcement of Support Act, seeking enforcement of the Nebraska child support order, medical coverage, and collection of child support arrearages. The mother's petition in the Iowa court reflects that she was unemployed and that Dike was in arrears in his child support. At that time, the mother and the Dikes' child were receiving public assistance in Iowa monthly in the amount of $360 plus $195 in food stamps.

The Iowa court (the initiating court under RURESA) determined that Dike owed a duty of support for his son and that jurisdiction over Dike could be had in Lancaster County. The Iowa court thus determined that further proceedings were warranted and caused the mother's petition filed in Iowa to be forwarded for further proceedings to Lancaster County, where Dike resided. See *Formanack, supra.*

The Lancaster County Attorney, on behalf of the mother, filed a petition in the district court for Lancaster County (the responding court under RURESA) seeking enforcement of the then current support order and requesting that Dike be ordered to (1) pay child support within the parameters of the Nebraska Supreme Court's child support guidelines; (2) provide medical insurance coverage for the child; (3) pay child support

arrearage; and (4) pay costs of the action, including attorney fees.

Following a hearing before the district court's child support referee, at which hearing Dike appeared pro se and testified, the referee made findings of fact and forwarded recommendations to the district court. The referee found that Dike had paid $830 on February 4, 1991, leaving no child support arrearage. The referee recommended that the district court order Dike to pay $165 per month in child support effective March 1, 1992; that he be ordered to provide medical insurance coverage for his son if it were available to him through his employer; and that he be ordered to pay costs of the action. The referee recommended denial of (1) the registration of child support in arrearage, (2) repayment of birthing expenses, (3) genetic testing, and (4) attorney fees.

Following an evidentiary hearing at which Dike was represented by counsel, the district court, over Dike's objection, entered an order in accordance with the referee's recommendations. Dike timely appealed.

ANALYSIS

Although Dike's brief contains no assignments of error, he apparently is claiming that the district court for Lancaster County had no authority to increase his child support obligation under RURESA, since the district court for Madison County in its divorce decree had already ordered him to pay child support in the amount of $100 per month.

We first note that the district court for Lancaster County had jurisdiction of Dike, who resides in Lincoln, and therefore had jurisdiction of the mother's petition for enforcement of Dike's duty to support his child under RURESA. See, § 42-775; *Formanack v. Formanack*, 234 Neb. 325, 451 N.W.2d 250 (1990). See, also, *Thompson v. Thompson*, 93 So. 2d 90 (Fla. 1957) (finding that a court located where the father resided in Florida had jurisdiction of the proceedings even though the parents had been divorced in a different county in Florida and the mother had moved to Connecticut).

We have previously held that in RURESA proceedings, a trial court may fix a support payment at a different amount

than that specified by a judgment rendered in the initiating state. *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987); *Chisholm v. Chisholm*, 197 Neb. 828, 251 N.W.2d 171 (1977). In this case, the district court fixed a child support payment at a different amount from that specified by another court within this state, rather than within the initiating state. However, the same principle announced in *Joyce* applies under the facts of this case.

It is true that RURESA does not create a new duty to support a child. *State of Iowa ex rel. Petersen, supra*. Under RURESA, a responding court enforces the duty of support, as distinguished from the amount of the support decreed. See *Thompson, supra*.

The power of the responding trial court to enter its own prospective support order different in amount from that contained in the original divorce decree is also supported by two statutory provisions in RURESA and its predecessor acts. Section 42-792 states:

> A support order made by a court of this state pursuant to [RURESA] *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. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.

(Emphasis supplied.)

Section 42-764 states that "[t]he remedies provided in [RURESA] are in addition to and not in substitution for any other remedies."

In Dike's case, the district court for Lancaster County did not nullify, modify, or supersede the original support decree, but instead provided an additional, supplementary, or cumulative remedy. Under § 42-792, child support paid by Dike pursuant to the divorce decree will be credited against the

amounts owing under the new order.

Generally, child support payments should be set according to the Nebraska Child Support Guidelines. Neb. Rev. Stat. § 42-364.16 (Reissue 1988); *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). In this case, the court ordered the child support in accordance with the referee's recommendations. The referee based her recommendations upon the Nebraska Supreme Court's child support guidelines and in fact recommended a deviation downward because Dike had three dependent children living in his home.

Based upon a de novo review of the evidence and the record in this case, it cannot be said that the trial court abused its discretion in fixing Dike's child support obligations. Therefore, we find no plain error justifying reversal of the trial court's order. In all respects, the order of the district court for Lancaster County is affirmed.

AFFIRMED.

DELORIS J. MEHRENS, APPELLEE, V. DUANE L. MEHRENS, APPELLANT.

512 N.W.2d 367

Filed February 25, 1994. No. S-92-395.

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

David Geier, of Healey & Wieland Law Firm, for appellant.

Con M. Keating, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee.

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

PER CURIAM.

This appeal arises from a marriage dissolution action. The trial court dissolved the marriage, divided the property, and

awarded alimony for the support of the petitioner. The respondent appeals the order of the district court.

We conclude, from our de novo review of the record, that the district court did not abuse its discretion in its division of the property or in the award of alimony.

The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLAN L. ANDERSON, APPELLANT.
512 N.W.2d 367

Filed February 25, 1994. No. S-92-475.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Rules of Evidence: Hearsay.** A defendant's out-of-court statement is inadmissible hearsay unless it comes within one of the exceptions to the hearsay rule.
3. _____: _____. A statement must meet the following criteria to qualify as an excited utterance: (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. _____: _____. A statement is not hearsay if (1) the declarant testifies at the trial and is subject to cross-examination concerning the statement and (2) the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
5. **Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
6. _____. Judicial discretion is implicit in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), regarding exclusion of relevant evidence.
7. **Judgments: Appeal and Error.** A judgment will not be reversed because a lower court gave an incorrect reason for its decision if the result reached was correct.

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 Douglas County, JOHN E. CLARK, Judge. Judgment of Court of Appeals affirmed.

James Martin Davis for appellant.

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

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

FAHRNBRUCH, J.

By jury verdict, Allan L. Anderson was convicted of manslaughter and use of a firearm to commit a felony. He was sentenced to not less than 4 nor more than 6 years' imprisonment for the manslaughter conviction and to not less than 4 nor more than 6 years' imprisonment for the firearm conviction, the sentences to run consecutively.

The Nebraska Court of Appeals affirmed Anderson's convictions and sentences by the district court for Douglas County. See *State v. Anderson*, 1 Neb. App. 914, 511 N.W.2d 174 (1993). While we do not embrace its rationale, we affirm the decision of the Court of Appeals.

FACTS

The facts of this case, as relevant to the issue before the court, are as follows:

Anderson's killing of Virgil Cook shortly after midnight on October 27, 1991, was the culmination of a running feud between the Anderson family and a gang of young people known as the East Omaha Rats. For several weeks preceding the killing, the Anderson family was subjected to a pattern of harassment, apparently by two gang members and their friends, during which cars were driven by the Anderson home periodically and threatening telephone calls were made to the Andersons.

On October 26, Anderson went to a bar at approximately 11:15 p.m. While he was gone, yet another disturbance occurred at the Anderson residence at approximately 12:05 a.m. on October 27. Anderson's wife called her husband at the

bar. Anderson arrived home within 30 to 50 seconds after the disturbance ended. After a conversation with his wife, Anderson left in his pickup truck and was gone for several minutes. At some point, Anderson encountered a blue and white Chevelle which was being driven by Cook's girl friend.

The Anderson vehicle and the Chevelle eventually met and stopped at an intersection. A confrontation occurred between Cook, who had been a passenger in the Chevelle, and Anderson. Anderson testified that Cook began swinging at him with a baseball bat and in fact hit Anderson in the hand. Anderson, who was armed with a .45-caliber pistol, claims he began firing at the bat in self-defense. Cook died as the result of two bullet wounds to his chest.

Anderson returned home and notified police what had happened. He was taken into custody, and at 6:28 a.m., Anderson gave a taped statement to police officers. Anderson was charged by information with first degree murder and use of a firearm in the commission of a felony.

The State made a motion in limine to exclude Anderson's taped statement from evidence, which motion was sustained. During the trial, Anderson attempted to introduce the tape-recorded statement on two separate occasions. The State's objections to the statement's reception into evidence were sustained.

Anderson was convicted by a jury of manslaughter and use of a firearm to commit a felony. The Court of Appeals affirmed the convictions and sentences in all respects.

Anderson petitioned this court for further review, alleging that the Court of Appeals erred in affirming (1) the trial court's refusal to admit the tape-recorded statement made to police into evidence and (2) the trial court's failure to give separate jury instructions for voluntary and involuntary manslaughter. We granted Anderson's petition for further review, limited to the issue of whether Anderson's tape-recorded statement was admissible into evidence.

STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those

instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Accord *State v. Wood, ante* p. 63, 511 N.W.2d 90 (1994).

ANALYSIS

Preliminarily, we note that a defendant's out-of-court statement is inadmissible hearsay unless it comes within one of the exceptions to the hearsay rule. See *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977). Anderson argues that his tape-recorded statement was admissible to show his state of mind at the time he made the statement, as an excited utterance, and as a prior consistent statement. We disagree that the statement falls within any of these exceptions to the hearsay rule.

Anderson's statement is not admissible as a "statement of the declarant's then existing state of mind," Neb. Evid. R. 803(2), Neb. Rev. Stat. § 27-803(2) (Reissue 1989), unless his state of mind at the time the statement was made is a material element in the case. See *State v. Pelton, supra*.

Anderson argues that he was not thinking clearly when he made the taped statement due to a migraine headache, broken bones in his hand, and a lack of sleep, and that this affected his choice of words. While a defendant's state of mind at the time of making a statement may be relevant in some circumstances, we note that Anderson made a pretrial stipulation that his statement was subject to no constitutional infirmities and that the court found, pursuant to the stipulation, that Anderson had been properly advised of his *Miranda* rights.

That Anderson was tired and in pain at the time he made his statement is in no way relevant to the material elements of first degree murder or use of a firearm to commit a felony, the crimes with which he was charged. Therefore, the statement does not meet the requirements of *Pelton*, and it is not admissible under the state-of-mind exception.

For a statement to be admissible under rule 803(1), the "excited utterance" exception, it must be "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

A statement must meet the following criteria to qualify as an excited utterance: (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. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). The happenings of the evening which culminated in Anderson's shooting of Cook undoubtedly constituted a startling event, and Anderson's statement related to that event, thus satisfying the first two criteria.

However, Anderson's statement, which the record shows was made almost 6 1/2 hours after the shooting, does not satisfy the requirement that the statement be made while under the stress of the event. The time lapse between the startling event and the statement is not dispositive, the crucial consideration being whether there has been time for conscious reflection. See *State v. Plant, supra*.

It is not necessary for us to speculate whether Anderson had time for conscious reflection before he made his taped statement, as Anderson admitted as much on cross-examination. The record reflects that the prosecutor had established that Anderson had been placed in an interview room at the police station after he had been taken into custody. The following exchange then occurred: "[Prosecutor:] Did you think about the events that had just transpired in the last few hours while you were in that room? [Anderson:] Of course." Because Anderson admitted he had time for conscious reflection on the event in question before making his statement, the statement is inadmissible under the excited utterance exception to the hearsay rule.

Finally, we turn to the issue of whether Anderson's taped statement was admissible as a prior consistent statement. Neb. Evid. R. 801(4), Neb. Rev. Stat. § 27-801(4) (Reissue 1989), states that

> [a] statement is not hearsay if: (a) [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him [of] recent fabrication or improper influence or motive.

The record shows that Anderson had testified on direct examination that after he returned home from the bar in response to his wife's telephone call, a blue Chevelle had driven by his house. Anderson testified that he inquired of his wife whether the Chevelle had been involved in the altercation that evening, and she indicated that it had been. Police officers involved in the investigation of the shooting testified that neither Anderson nor his wife or stepson mentioned the involvement of the blue Chevelle during their initial interviews.

On cross-examination, the prosecutor questioned Anderson about why he had not mentioned the Chevelle to the police officer who initially arrived at the Anderson home to investigate the shooting. The prosecutor also questioned Anderson about the fact that his wife's and stepson's taped statements to police contained no reference to the blue Chevelle being involved in the earlier altercation at the Anderson home. The obvious implication of this line of questioning was that Anderson fabricated his testimony that he had been told that the Chevelle was involved in the earlier altercation.

Anderson argues that because the prosecution implied that he fabricated his testimony that a blue and white Chevelle was involved in the altercation at his home on the night of October 26, he was entitled to rebut that charge with his taped statement. Anderson's taped statement included the following: "I believe my son and my wife and there was a friend of my son's there and they said something about guns and this blue Chevelle with a white top came by and said that's one of 'em . . . ."

Anderson contends that the State's charge of recent fabrication made his tape-recorded statement admissible for rehabilitative purposes, because his statements about the Chevelle in the tape-recorded statement were consistent with his trial testimony. The State argues that the statement was inadmissible because it was given after Anderson already had a motive to fabricate and that the statement therefore had no rehabilitative value. The Court of Appeals held that the statement was inadmissible as a prior consistent statement because Anderson already had a motive to fabricate after Cook had been shot and Anderson had been arrested.

A review of the record reflects that, while the tape recording

itself was not admitted into evidence, Anderson was permitted to testify as to the contents of the recording during his case in chief. On redirect examination, after the prosecutor asked impeaching questions of Anderson, defense counsel questioned Anderson about his taped statement:

> Q. [Defense counsel:] You told [the police] *in that taped statement* when you sat down with them . . . that *your wife said or somebody there said or you asked them, Is [the blue Chevelle] one of them? And they said, Yes*, or something to that effect?
>
> A. [Anderson:] Yes.
>
> Q. You told them that in the earlier interview as well, didn't you?
>
> A. Yes.

(Emphasis supplied.)

This testimony was admitted into evidence with no objection from the State. At that time, evidence of Anderson's prior consistent statement was placed before the jury, and admission of the tape recording into evidence would have been cumulative. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). Cf. *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992) (holding that deposition testimony was inadmissible because it was cumulative to that already in the record).

Judicial discretion is implicit in rule 403 regarding exclusion of relevant evidence. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Accord *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). Because Anderson's tape-recorded statement would have been cumulative to Anderson's properly admitted trial testimony, exclusion of the taped statement from evidence did not constitute an abuse of discretion by the trial court. It was therefore unnecessary for the Court of Appeals to reach the issue of whether Anderson's taped statement was admissible as a prior consistent statement to rebut the State's charges of recent fabrication and improper motive.

Nonetheless, a judgment will not be reversed because a lower

court gave an incorrect reason for its decision if the result reached was correct. *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993). Although the Court of Appeals reached the right result, its discussion on the issue of prior consistent statements is mere dicta and should not be cited as precedent. The question of whether a declarant's prior consistent statement to rebut a charge of improper motive or recent fabrication may be admitted into evidence even though the prior statement is made after a motive to fabricate has arisen remains open for future determination.

CONCLUSION

There being no merit to Anderson's contention that his tape-recorded statement was erroneously excluded from evidence, the decision of the Court of Appeals affirming Anderson's convictions and sentences is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. HULSHIZER, APPELLANT.

512 N.W.2d 372

Filed February 25, 1994. No. S-93-277.

1. **Convictions: Circumstantial Evidence.** A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when the circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other.
2. **Convictions.** A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.

Appeal from the District Court for Brown County: WILLIAM CASSEL, Judge. Reversed and remanded with directions to dismiss.

Robert D. Coupland for appellant.

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

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

BOSLAUGH, J.

Following a trial to a jury, the defendant, William J. Hulshizer, was convicted of sexual abuse of a vulnerable adult. The defendant was sentenced to 4 years' probation, including 180 days in jail. In his appeal to this court, the defendant contends that the evidence was insufficient to support the conviction.

In August 1991, the defendant began working for Bethesda Care Center in Ainsworth, Nebraska. After completing his training, the defendant became a certified nurse's aide, taking care of elderly people. His duties included assisting the residents in using the toilet and cleaning them when they were incontinent.

On the afternoon of January 16, 1992, the defendant, together with other certified nurse's aides, was awakening residents from their afternoon naps and getting them ready for supper. Betty Grebenc, a certified nurse's aide, walked into a bathroom and found the defendant seated on the toilet with a female resident of the care facility sitting on the defendant's lap.

The elderly resident suffered from senile dementia and Parkinson's disease. She was wearing her briefs in place, but had her dress pulled up around her buttocks. Neither the defendant nor the resident had his or her genitalia exposed; however, Grebenc testified that she saw the defendant trying to zip up his pants.

Grebenc lifted the resident from the defendant's lap. The defendant did not offer an explanation, and Grebenc did not ask for one. They proceeded to continue to get the residents up from their afternoon naps.

Grebenc reported the incident to Bethesda's administrator. The defendant told the administrator that he had fallen onto the toilet with the resident on his lap when he tried to prevent

her from falling. He also told her that he was sure his pants were zipped, but if they were not, it was because of a faulty zipper.

Over objection, the State presented evidence that in September 1991, a nurse's aide had walked in on the defendant in a bathroom and observed another female resident on his lap. In that situation, the resident's genitalia were exposed. The defendant stated that the resident had lost her balance, and they had fallen. According to the "charge nurse," this explanation was considered reasonable and accepted as plausible at the time.

In order to convict the defendant of sexually abusing a vulnerable adult, the jury had to find that the defendant subjected the resident, who is a vulnerable adult, to sexual contact (1) by force or (2) knowing she was physically and mentally incapable of resisting his conduct. See Neb. Rev. Stat. §§ 28-351, 28-367, and 28-320 (Reissue 1989). Sexual contact is defined as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

Neb. Rev. Stat. § 28-318(5) (Reissue 1989).

The defendant contends the evidence is insufficient to establish the element of sexual contact. He argues there is no evidence of an intentional touching which can be reasonably construed as being for the purpose of sexual arousal or gratification.

Grebenc's testimony establishes that the resident's buttocks were touching the defendant's lap and that the defendant attempted to zip up his pants when Grebenc walked into the bathroom. Although the defendant's zipper was observed open, no other observations were made. Any evidence of sexual

arousal or gratification is entirely circumstantial.

A reasonable inference from circumstantial evidence is to be taken most favorably to the accused when the circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. *State v. Mowry, ante* p. 213, 512 N.W.2d 140 (1994); *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993).

The evidence in this case and the reasonable inferences that could be drawn from it do not support the jury's conviction of the defendant for sexual abuse of a vulnerable adult because the inference that the defendant sexually abused the resident is not stronger than the inference that the defendant fell backward onto the toilet and pulled her onto his lap to prevent her from falling onto the floor.

A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. *State v. Mowry, supra*; *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992).

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA EX REL. CREIGHTON UNIVERSITY, A NEBRASKA NONPROFIT CORPORATION, RELATOR, V. HONORABLE PAUL J. HICKMAN, JUDGE, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

512 N.W.2d 374

Filed February 25, 1994. No. S-93-489.

1. **Mandamus: Words and Phrases.** Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a

purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, 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 perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

2. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
3. **Attorney and Client: Judgments.** A court deciding a motion to disqualify counsel must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process.
4. **Attorney and Client: Conflict of Interest.** A law firm should be disqualified from representing its client when it hires as temporary clerical help a disbarred attorney who previously worked as an attorney on the same case for another firm which represents the opposing party, because such action has the appearance of impropriety.

Original action. Peremptory writ issued.

Joseph K. Meusey and Roger L. Shiffermiller, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for relator.

Don Stenberg, Attorney General, and Charles E. Lowe for respondent.

William A. Brewer III and John W. Bickel II, of Bickel & Brewer, and Gerald P. Laughlin, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amici curiae American Medical International, Inc., and AMISUB (Saint Joseph Hospital), Inc.

HASTINGS, C.J., BOSLAUGH, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired, and RONIN, D.J., Retired.

LANPHIER, J.

Relator, Creighton University (Creighton), in this original action seeks a writ of mandamus compelling respondent, the Honorable Paul J. Hickman, judge (now retired) of the district court for Douglas County, Nebraska, to enter an order disqualifying the law firm of Bickel & Brewer from

representing American Medical International, Inc. (AMI), and AMISUB (St. Joseph Hospital), Inc., defendants in a lawsuit before Judge Hickman brought by Creighton.

The question as to disqualification comes about because Bickel & Brewer retained, as temporary clerical help, a disbarred attorney who had previously worked as an attorney representing the opposing party, Creighton, on the matter now being litigated. Bickel & Brewer used this former attorney to assist in discovery against Creighton in the same proceeding. We hold that disqualification is proper under such circumstances and that the requested writ shall issue.

BACKGROUND

On March 20, 1992, Creighton, represented by the firm of McGrath, North, Mullin & Kratz (McGrath, North), filed an amended petition against AMI and AMISUB. The underlying action, Creighton University v. American Medical International, Inc. and AMISUB (St. Joseph Hospital), Inc., Douglas County District Court, docket 886, page 631, concerned the specific performance of AMI and AMISUB's obligations under an agreement in which AMISUB ultimately acquired St. Joseph Hospital and St. Joseph Center for Mental Health. AMI and AMISUB retained the law firm of Bickel & Brewer to represent them.

Bickel & Brewer, a Texas law firm, was admitted pro hac vice. Bickel & Brewer leased office space in Omaha and relocated several attorneys, secretaries, and other support staff there. As a result of discovery, millions of pages of documents were produced by the parties. Bickel & Brewer required temporary clerical assistance to index and file these documents. They contacted Celebrity Services, an agency which provides its employees on a temporary basis to others.

Celebrity Services sent several of its employees to Bickel & Brewer to be interviewed. One of those sent was Lesli Walzak. Walzak had been employed by McGrath, North in March 1987. She began work as a clerical employee while attending law school. She then became a law clerk. After her graduation from law school and admission to the bar in 1989, McGrath, North employed Walzak as an attorney until September 1990.

McGrath, North submitted timesheets, redacted except for the date, time, and attorney's initials, which showed that Walzak spent roughly 40 hours on the case. McGrath, North also submitted redacted memoranda written by Walzak on the case.

A Bickel & Brewer attorney, S.A. Khoshbin, interviewed Walzak. Another Bickel & Brewer employee was also present. Khoshbin began the interview by asking Walzak if she was aware of the case between Creighton and AMI and AMISUB. She said she was not. Khoshbin then asked Walzak if she had any connections, contact, or involvement with Creighton, AMI, or AMISUB. She replied that she did not. Although the resume Walzak provided to Khoshbin reflected employment at McGrath, North, it showed that she had been employed as an office manager, a legal secretary/law librarian, a paralegal, and as "administrative support." When questioned concerning her employment at McGrath, North, Walzak stated that she had had no contact with any matter concerning Creighton, AMI, or AMISUB. She stated that she did not perform law-related work or work on cases with lawyers. She said she did only administrative and clerical work. Bickel & Brewer hired Walzak without the knowledge or consent of McGrath, North or Creighton. No inquiries were made to McGrath, North to verify Walzak's statements.

On March 5, 1993, during the course of her employment at Bickel & Brewer, Walzak was in a McGrath, North conference room reviewing documents obtained from Creighton for purposes of discovery. While there, she was recognized by an attorney with McGrath, North, who asked her to leave. She complied. Bickel & Brewer terminated their relationship with Walzak immediately after being informed of Walzak's true history with McGrath, North.

Discovery between the parties proceeded throughout the rest of the month. However, on March 31, 1993, Creighton filed a motion to disqualify Bickel & Brewer. After an evidentiary hearing on May 12, 19, and 20, Judge Hickman overruled the motion.

ASSIGNMENT OF ERROR

Creighton submits that Judge Hickman erred in failing to

grant Creighton's motion to disqualify or revoke admission pro hac vice of Bickel & Brewer.

ANALYSIS

Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, 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 perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* See, also, *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990).

A court deciding a motion to disqualify counsel must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process. *State ex rel. FirsTier Bank v. Buckley, supra.*

Creighton likens this case to *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. at 993, 458 N.W.2d at 253, in which we held:

> [W]hen an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences,

> and the entire firm must be disqualified from further representation.

Judge Hickman, however, determined that *State ex rel. Freezer Servs., Inc.* was inapplicable. In denying Creighton's motion to disqualify Bickel & Brewer, Judge Hickman ruled that even if *State ex rel. Freezer Servs., Inc.* was applicable, Creighton failed to show that Walzak was "intimately involved" with the particular litigation.

Since *State ex rel. Freezer Servs., Inc.*, however, we have narrowed the scope of the controlling disqualification rule. We have held that intimate involvement with the litigation is no longer necessary. *State ex rel. FirsTier Bank v. Buckley, supra.* An attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm. *Id.* In *State ex rel. FirsTier Bank*, six attorneys moved from one firm to a second firm which opposed a client of the first firm in litigation. The transplanted attorneys all testified by affidavit that while at the first firm they performed no legal work for the client, they never discussed the client's cases or received information about the cases from any person associated with the first firm, and they had not seen any of the files. Despite this apparent lack of knowledge, we disqualified the second firm from representing, in the same or a substantially related matter, those parties opposing the first firm's client.

Although Walzak was not an attorney at the time she was employed by Bickel & Brewer, and although she may have performed only clerical tasks for Bickel & Brewer, the "bright line" rule announced in *State ex rel. FirsTier Bank* is applicable and requires disqualifying Bickel & Brewer from representing AMI and AMISUB in the underlying action.

We are not unmindful of the hardship this places upon AMI and AMISUB in the underlying action. However, this hardship is outweighed by the necessity of maintaining the confidentiality of Creighton's communications with McGrath, North and of avoiding the appearance of impropriety. See,

Canon 9 of the Code of Professional Responsibility; Neb Rev. Stat. § 7-105 (Reissue 1991). That Walzak is no longer an attorney and did not function as an attorney at Bickel & Brewer is of no consequence. As has been our policy with regard to lawyers switching sides, we refuse to entertain the notion that exchanges of confidences were not made by this nonlawyer. See, *State ex rel. FirsTier Bank v. Buckley, supra*; *State ex rel. Freezer Servs., Inc. v. Mullen, supra*. Regardless of whether the Code of Professional Responsibility applies to Walzak, it applies to Bickel & Brewer. Canon 9 requires an attorney to avoid even the appearance of impropriety. Employing, in any capacity, one who was an attorney on the other side of a case carries with it the appearance of impropriety.

Although we commend Bickel & Brewer for dismissing Walzak upon discovering that she had lied during her interview, such action cannot remove the taint which resulted from the firm's relationship with her.

CONCLUSION

In light of the resultant appearance of impropriety, we find that the respondent had no alternative but to disqualify Bickel & Brewer. Since this duty was imposed by law, existed at the time applied for, and was clear, the requested writ must issue. Therefore, we direct that a peremptory writ of mandamus issue, directing the presiding judge in the district court for Douglas County to disqualify Bickel & Brewer from further representation of AMI and AMISUB in the underlying action, Creighton University v. American Medical International, Inc. and AMISUB (St. Joseph Hospital), Inc., Douglas County District Court, docket 886, page 631.

PEREMPTORY WRIT ISSUED.

WHITE and CAPORALE, JJ., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES E. MCBRIDE, RESPONDENT.
512 N.W.2d 378

Filed February 25, 1994. No. S-94-123.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

In this disciplinary action, a complaint against James E. McBride was filed with the Counsel for Discipline of the Nebraska State Bar Association. On February 4, 1994, by a pleading filed with the Nebraska Supreme Court, McBride voluntarily surrendered his license to practice law. We accept McBride's surrender and order McBride disbarred.

On January 14, 1994, the Counsel for Discipline received a complaint alleging that McBride had been engaging in bank fraud, in violation of 18 U.S.C. § 1344 (Supp. IV 1992). According to the complaint, McBride was an executor of the estate of Emily Michael, which estate involved a bank account maintained at FirsTier Bank. The complaint alleges that McBride exercised unauthorized control over the account and that he engaged in a regular course of filtering funds through the FirsTier account and at least two other accounts located at other banks. In furtherance of this scheme, McBride forged the signatures of Emily Michael and Louella Gardner, the personal representative of the estate of Emily Michael.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1992), McBride voluntarily surrendered his license to practice law. In his pleading to surrender, McBride admits the allegations contained in the complaint and states that he does not wish to challenge the charges. McBride also admits that he has violated Canon 1, DR 1-102(A)(3) and (4), of the Code of Professional Responsibility. McBride waives his rights to notice and a hearing prior to an entry of this court's order.

We do not have the advantage of reviewing a thoroughly investigated account of McBride's misconduct because of his swift action to surrender his license. The allegations raised in

the complaint, together with McBride's admissions, sufficiently demonstrate to this court that McBride has been engaged in dishonest and fraudulent conduct which will not be tolerated. We thus accept McBride's surrender of his license and order him disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

LOWELL V. ZETTERMAN, APPELLANT, V. EDITH L. ZETTERMAN, APPELLEE.

512 N.W.2d 622

Filed March 4, 1994. No. S-92-044.

Courts: Jurisdiction: Divorce: Property Settlement Agreements: Child Support. A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Rick G. Wade, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

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

GRANT, J., Retired.

The marriage of Lowell V. Zetterman, petitioner and appellant, and Edith L. Zetterman, respondent, was dissolved by the district court for Dawson County on November 16, 1979. The decree of dissolution included the approval of a property settlement agreement between the Zettermans. That property settlement agreement provided, in part, for the

support of their two minor children, as follows:

> Petitioner will pay Respondent the sum of $225.00 per month per child, said child support to remain in effect for each child until age 19 or until said child becomes self-supporting, and as long thereafter as said child remains a full-time student in college, not to exceed, however, four years of college for each child.

The decree also ordered the same payments in substantially the same words.

On April 13, 1984, an order was entered by the district court for Dawson County terminating child support payments for the older child, who was born on May 9, 1962. There is no controversy as to those child support payments.

On January 30, 1988, the second minor child reached the age of majority. On May 18, 1991, the second child graduated from college, and a "Notice of Termination of obligation to pay child support was filed June 12, 1991 by Edith L. Zetterman, Respondent." The parties have agreed that after January 30, 1988, when the second child reached the age of majority, the "alleged arrearage accrued."

The record of the "Case Stated" filed in this court contains a "Certificate of Arrears," executed by the clerk of the district court for Dawson County, showing that "$3150.00 is due Edith Zetterman as principal child support arrearage as of October 9, 1991." The certificate also showed that appellant "has an obligation of $0.00/month for child (and Spousal) support."

On October 18, 1991, the county attorney of Dawson County filed in the district court for Dawson County a notice of intent to withhold income. The notice was sent to appellant, who was described in the notice as "Absent Parent (Payor)." The notice further stated that appellant was notified "Pursuant to the Income Withholding for Child Support Act, Nebraska Revised Statutes, 1986 Cumulative Supplement, Section 43-1701 to 1743" and advised appellant that he could contest the proposed income withholding for four specific reasons, one reason being that "the amount of delinquent support indicated on this notice is incorrect." See Neb. Rev. Stat. §§ 43-1701 to 43-1743 (Reissue 1988, Cum. Supp. 1992, & Supp. 1993).

The notice also provided space where the recipient of the

notice could contest the withholding based on one of the four reasons set out in the notice and advised the recipient how to request a hearing, including a possible telephone hearing, before the Nebraska Department of Social Services.

Appellant received the notice, but apparently did not avail himself of the procedures in § 43-1701 et seq. to question the amount he allegedly owed. On October 23, 1991, appellant filed in the district court for Dawson County, under the case number and title of the original divorce action, a "Motion to Quash Notice of Intent or in the Alternative Request for Hearing." This motion asked that the district court quash the notice of intent to withhold "insofar as post-minority and arrearage which is accumulated since majority is not an order of support issued by a court who [sic] retains competent jurisdiction after the child reaches the age of majority." This notice was not served on Edith Zetterman, but was served on the county attorney of Dawson County.

On December 6, 1991, the district court for Dawson County apparently held a hearing. The court entered an order on December 27. The order stated that the case came on "before the Court on the Motion to Quash filed by the Petitioner." The order stated that the court had an opportunity to review the letter briefs submitted by appellant. No appearance by Edith Zetterman or Dawson County is noted. Copies of the court order apparently were sent to appellant's counsel and to another attorney, whose relationship to the case or parties is not shown in the record before us.

The district court's order found that "Petitioner has agreed to make [child support] payments beyond the age of majority and cannot now be heard to claim that this Court has no jurisdiction to enforce that which he voluntarily entered into." The order concluded: "Therefore, the Court finds that the motion filed by the Petitioner should be overruled and that the amounts shown in arrears be collected."

Appellant timely appealed to the Nebraska Court of Appeals. This court, under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the case to this court as an aid in regulating the caseloads of the appellate courts. On appeal, appellant effectively assigns one error,

alleging that the district court erred in determining that it retained jurisdiction regarding child support payments in the dissolution action once the minor children reached the age of majority. Two other errors were assigned, one alleging that the court erred "in finding that the parties may confer jurisdiction upon the District Court," and the other alleging that the trial court erred "in finding that a separate contract action was not necessary to enforce a post-majority child support agreement. . . ." As to the last two alleged errors, the short answer is that the court was not requested to make such findings and did not make such findings. As to the assignment of error before us, we determine that it has no merit, and the court's order is affirmed.

We are initially faced with the problem that insofar as Edith Zetterman, respondent in the underlying dissolution action, is concerned, there has been no showing that she was given any notice of these proceedings. However, we note that in § 43-1704, specific provision is made that an "authorized attorney" means, in part, an attorney employed by the county or one employed by the Department of Social Services, and that in § 43-1718, it is provided that "[a] support order shall constitute and shall operate as an assignment, to the clerk of the district court . . . of that portion of an obligor's income as will be sufficient to pay the amount ordered for child . . . support. . . ." We further note that although the county attorney filed several pleadings, including the "Case Stated" on appeal, on behalf of Dawson County, described in the "Case Stated" as "Appellee," the county attorney also has referred specifically to Edith Zetterman as "Respondent/Appellee," and that the Attorney General, in his brief on appeal, has filed his brief as attorney for Edith Zetterman, appellee. We agree with the statements made by the Attorney General in his brief that appellant, in his actions, has circumvented the procedures set out in § 43-1701 et seq., which procedures provide for hearings before the Department of Social Services with a de novo review in the district court under the Administrative Procedure Act, and that if the statutory procedures had been followed, the caption of the case would be "Zetterman v. Department of Social Services." Nonetheless, pursuant to our practice, we will review the case on the theory which the parties have followed in

presenting the case to the district court. *Ingerslew v. Bartholomew*, 216 Neb. 836, 346 N.W.2d 258 (1984).

The sole question which we must answer is whether a district court has jurisdiction to enforce child support provisions in a property settlement agreement in a dissolution of marriage case, which provisions are also set out in the court's order, where the child support provisions provide for support, on certain conditions, beyond a child's age of majority. As indicated above, we determine only that the court has such jurisdiction. There has been no special appearance attacking the method in which Dawson County was brought into this action; there has been no attack on § 43-1701 et seq. on constitutional or procedural grounds; and the question of the binding effect of the order in this case on Edith Zetterman has not been addressed. We make no determination as to those issues.

On the issue of the jurisdiction of the Dawson County District Court, appellant relies solely on the proposition that a district court's only statutory authority "to deal with children in dissolution actions, including the payment of child support is that contained in *Neb. Rev. Stat.* §42-364 (1988 Reissue)." Brief for appellant at 4. To support that statement, appellant relies on our cases holding that the marriage dissolution statutes do not empower district courts to order a parent to contribute to the support of children beyond their majority. See, *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). We agree with that statement of the law—a district court in a dissolution action may not order child support beyond the age of the majority of a child over the objection of any parent.

That case is not the case presented to us. Appellant gives no weight to the fact that this marriage was dissolved after the parties entered into a formal settlement agreement, prepared by appellant's attorney, acknowledged by appellant before his attorney, and executed and acknowledged by Edith Zetterman before the clerk of the court. The settlement agreement provided, in detail, for an apparently approximately equal division of real and personal property. The agreement did not provide alimony in connection with this 19-year marriage. The

agreement also provided for child support of $225 per month for each of two children (17 and 10 years old at the time of dissolution) and provided that "said child support [is] to remain in effect for each child until age 19 or until said child becomes self-supporting, and as long thereafter as said child remains a full-time student in college, not to exceed, however, four years of college for each child."

Appellant appeared in person and with his attorney for the hearing on the dissolution and presented the dissolution decree and the property settlement agreement to the court. There is no showing that Edith Zetterman appeared.

The trial court dissolved the marriage, approved the property settlement agreement as fair and reasonable, incorporated the agreement into the decree, and specifically ordered that child support be paid in the same terms as set out in the settlement agreement. The fact that there was an executed agreement between the Zettermans is ignored by appellant.

In this case, appellant specifically agreed to make child support payments in certain circumstances after the children reached the age of majority. In *Campbell v. Campbell*, 202 Neb. 575, 578, 276 N.W.2d 220, 222 (1979), we approved an order requiring a respondent to continue child support to a blind child "until she becomes self-supporting." We noted that the respondent had made no complaint about the provision. This court discussed the *Campbell* case in *Meyers v. Meyers, supra*, relied on by appellant. The *Meyers* court, in explaining *Campbell*, stated:

> The [*Campbell*] opinion specifically notes that the father made no complaint concerning that requirement [of support beyond majority]. We know of nothing which prevents any parent from voluntarily supporting his or her adult offspring, handicapped or otherwise. The relevant point is that § 42-364 does not compel the direct support of an adult handicapped child.

222 Neb. at 376, 383 N.W.2d at 789.

Appellant's voluntary agreement in this case was in a formal settlement agreement formally presented, for approval, to a court. To allow him now to disavow his formal promise would be to permit appellant to commit fraud on respondent herein

and on the court before which he appeared.

The support agreement for extension of payments for college years may well have been an important part of the overall agreement. Edith Zetterman may well have not agreed to the settlement agreement had such a support provision not been made.

Property settlement agreements are governed by Neb. Rev. Stat. § 42-366 (Reissue 1988) and are favored in the law. *Paxton v. Paxton*, 201 Neb. 545, 270 N.W.2d 900 (1978). Section 42-366 provides that the parties may enter into a written agreement for "the support and custody of minor children." The statute does not state that the extension of such support, beyond majority, is forbidden. The subject of such an extension may often be a prime concern for caring parents. We also note that § 42-366(5) provides: "Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt."

We hold that a district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority.

We note in affirming the judgment that the amount in controversy in this case is $3,150, and that amount is apparently not contested as between the enforcing authorities in Dawson County and appellant. Unless Edith Zetterman has been notified, she may have a different idea. The time involved is between January 30, 1988 (when the second child reached majority), and May 18, 1991 (when the second child graduated), a period of approximately 39 months. The agreed support figure was $225 per month. Either appellant has made payments of child support to the court after the majority of the second child, or there has been some sort of mathematical mistake.

We affirm the judgment of the district court.

AFFIRMED.

ROY GOEKE AND PAT GOEKE, HUSBAND AND WIFE, ET AL., APPELLEES, V. NATIONAL FARMS, INC., A DELAWARE CORPORATION, DOING BUSINESS AS NATIONAL FARM PRODUCTS, AND O.N. CORPORATION, A NEBRASKA CORPORATION, APPELLANTS.

512 N.W.2d 626

Filed March 4, 1994. No. S-92-210.

1. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** 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, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Appeal and Error.** An appellate court has an obligation to reach its own independent conclusions as to questions of law.
4. **Nuisances: Injunction: Parties: Joinder.** Multiple plaintiffs may join in one suit to enjoin a nuisance so long as the alleged nuisance interferes with the rights of each plaintiff joined.
5. **Appeal and Error.** Absent prejudice of a party's substantial rights, an appellate court may disregard procedural errors committed by a trial court.
6. **Records: Proof: Appeal and Error.** Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice.
7. **Damages: Appeal and Error.** When questions of fact involve the assessment of money damages, an appellate court will not set aside such judgment if it is within the range of the evidence and is not arbitrary.
8. **Courts: Judgments: Judicial Notice.** When cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
9. **Nuisances.** To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities.
10. **Nuisances: Presumptions.** There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
11. **Equity: Jurisdiction.** When an equity court has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
12. **Verdicts: Appeal and Error.** A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.

13. **Motions for New Trial: Appeal and Error.** A district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion.

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

David A. Domina and Cletus W. Blakeman, of Domina & Copple, P.C., for appellants.

Steven D. Burns and Jeffrey S. Schmidt, of Burns & Associates, for appellees.

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

FAHRNBRUCH, J.

National Farms, Inc., and its wholly owned subsidiary, O.N. Corporation, appeal a district court's ruling that offensive odors from the appellants' swine-raising facility created a nuisance and that the plaintiffs were entitled to an injunction and monetary damages.

Although the plaintiffs-appellees were misjoined in their claim for monetary relief, the misjoinder did not prejudice the appellants.

We affirm the injunction and damage awards entered by the district court for Holt County.

ASSIGNMENTS OF ERROR

Summarized and restated, the appellants' assigned errors are that the district court erred in (1) allowing multiple plaintiffs to join in one suit; (2) finding the appellants' swine-raising facility to be a nuisance; (3) refusing to admit certain evidence, including testimony as to the economic and social benefits provided by the appellants' facility; (4) receiving evidence about the appellants' operations in Colorado; (5) rendering a judgment affected by the court's own prejudices; (6) granting an injunction and awarding monetary damages; (7) failing to apply a different standard and burden of proof in adjudicating the plaintiffs' claim for damages; (8) imposing excessive damages; (9) overruling the appellants' motion for new trial; and (10) refusing to set a supersedeas bond during appeal.

STANDARD OF REVIEW

An action for an injunction sounds in equity. *County of Dakota v. Worldwide Truck Parts & Metals, ante* p. 196, 511 N.W.2d 769 (1994). 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, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

An appellate court has an obligation to reach its own independent conclusions as to questions of law. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992).

FACTS

During the relevant times involved in this case, the appellants operated a swine-raising facility east of Atkinson which housed some 80,000 to 85,000 head of swine. After another couple sued the appellants because of offensive odors emanating from the swine-raising facility, Kaup v. National Farms Inc., and O.N. Corporation, Holt County District Court, case No. 18235, see *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994), the plaintiffs, three married couples and two widows, filed a petition seeking an injunction to prevent the appellants from continuing to produce the offensive odors. The plaintiffs were given leave to amend their petition to also request monetary damages.

One couple, Roy and Pat Goeke, lived about 3 1/2 miles north of the appellants' facility until they moved to Atkinson in April 1989. Roy Goeke testified at trial in the fall of 1991 that he was still working on or near his property. At the time of trial, the second couple, Donald and Angela Marcellus, still lived 3 1/2 to 4 miles northeast of the appellants' facility; Jayme N. and Connie J. Seger lived about 2 1/2 miles north of the facility; Helen L. Seger, Jayme's mother, lived half a mile north of her son and daughter-in-law; and Lavern A. Sicheneder lived 2 1/2

miles east of the facility.

In their petition, the above-named plaintiffs claimed that the appellants' waste-treatment system was inadequate to prevent offensive odors from interfering with the use and enjoyment of their property. The evidence reflects that the appellants' swine operation's waste-treatment system consisted of screening and separating solid from liquid waste, spreading the solid waste over adjacent fields owned by the appellants, and pumping the liquid waste into lagoons from which it was eventually disposed of through a center-pivot irrigation system on the appellants' surrounding ground.

The appellants demurred to the plaintiffs' second amended petition, claiming that the petition misjoined plaintiffs, misjoined causes of action, and failed to allege sufficient facts to constitute a cause of action. The district court overruled the appellants' demurrer.

After a trial, the district court found that the appellants' waste-treatment operation created a nuisance and enjoined the appellants from producing the offensive odors. The court directed the appellants either to cease operating their facility or to take prompt and reasonable steps to abate the odors. The trial court also awarded each couple $75,000 and each widow $37,500 in damages.

ANALYSIS

JOINDER

Neb. Rev. Stat. § 25-311 (Reissue 1989) provides that "[a]ll persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs . . . ." Thus, multiple plaintiffs may join in one suit to enjoin a nuisance so long as the alleged nuisance interferes with the rights of each plaintiff joined. See, *City of Le Mars v. Fisch*, 251 Iowa 149, 100 N.W.2d 14 (1959); *J. N. Griffith v. Jake Hurt*, 200 Tenn. 133, 291 S.W.2d 271 (1956); *Mutual Service Funeral Homes v. Fehler*, 257 Ala. 354, 58 So. 2d 770 (1952); *Bajorek v. Kurtz*, 335 Mich. 58, 55 N.W.2d 727 (1952). See, also, 58 Am. Jur. 2d *Nuisances* § 387 (1989); 66 C.J.S. *Nuisances* § 124 (1950).

In the case under consideration, each plaintiff possessed the

right to enjoy and use his or her own property free from offensive odors, and each plaintiff established at trial that the appellants' waste-treatment system had interfered with that right. Hence, all the plaintiffs had an interest in the subject of the action, i.e., the alleged nuisance created by the appellants' waste-treatment system. In addition, all the plaintiffs had an interest in obtaining the equitable relief demanded, that is, an injunction against the appellants' continued interference with their rights. Consequently, the plaintiffs were properly joined in an action against the appellants for an injunction.

In their second amended petition, the plaintiffs also sought monetary damages. It is in this aspect of the lawsuit that we find a misjoinder. Because any one plaintiff would have no interest in the monetary relief demanded by each of the others, as required by § 25-311, the plaintiffs were misjoined as to their demand for monetary damages. See, also, *Griffith, supra*; *Bajorek, supra.*

However, regardless of any joinder error, we decline to reverse the trial court because the appellants have not shown prejudicial error on that ground. Absent prejudice of a party's substantial rights, an appellate court may disregard procedural errors committed by a trial court. See, Neb. Rev. Stat. § 25-853 (Reissue 1989); *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986). Regarding procedural errors, prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice. *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976).

In the present case, the appellants claim that they were prejudiced by having to defend against multiple claims for damages in a single lawsuit. It is true that the plaintiffs lived different distances from the appellants' operation, and one couple moved away from their farm 2 years before trial. Although Roy Goeke testified that he continued to work on or near his property, his wife testified that she had not routinely visited the farm since they had moved to Atkinson. In addition, each plaintiff described varying degrees of physical discomfort caused by the odors emanating from the appellants' operation. Some plaintiffs complained only of headaches and stuffiness,

while others described feeling unable to breathe and nauseated.

We are mindful that the standard of review applicable in reviewing questions of fact is de novo. However, when questions of fact involve the assessment of money damages, an appellate court will not set aside such judgment if it is within the range of the evidence and is not arbitrary. See *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980). Here, the damage awards were within the range of the evidence presented. The appellants' assignment of error in regard to joinder has no merit because the appellants have not shown that they were prejudiced by the misjoinder of the plaintiffs in this action.

FINDING OF A NUISANCE

Having found that the appellants suffered no prejudice because of the misjoinder, we turn to the appellants' claim that the trial court erred in finding a nuisance and to those summarized and restated assignments of error related to that finding.

In a 1986 decision, Kaup v. National Farms, Inc., and O.N. Corporation, Holt County District Court, case No. 18235, the district court determined (1) that during the period from August 15, 1985, to September 18, 1986, an unreasonable amount of odor and flies came from the National Farms and O.N. swine-raising facility; (2) that during that same period of time, National Farms and O.N. were operating the facility with the knowledge that unreasonable odor and flies interfered with the use and enjoyment of some surrounding property; and (3) that during any period of time from August 15, 1985, to the date of the verdict in that case, National Farms and O.N. were legally responsible for any damage that any person received from unreasonable odor or flies coming from the swine-raising facility. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

Based on the Kaup decision, we determined in *Kopecky* that the doctrine of collateral estoppel precluded a relitigation in *Kopecky* as to the issue of whether the National Farms and O.N. operation created a nuisance. We held that National Farms and O.N. were bound as a matter of law by the district

court's prior determination on the issue of nuisance in Kaup. We further found that because there had been no substantial change in the National Farms and O.N. operation since the district court had decided Kaup, the issue of nuisance should not have been submitted to the jury in *Kopecky*.

When cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. See, *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991); *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991).

In our de novo review of the injunction proceedings in this case, we take judicial notice of our decision in *Kopecky* that the appellants are estopped from denying the existence of the nuisance involved in interwoven and interdependent cases. The present case and *Kopecky* are undeniably interwoven and interdependent. Both cases involve the same defendants-appellants and the same alleged nuisance, and the plaintiffs here and in *Kopecky* were similarly situated and affected by the National Farms and O.N. waste-treatment operation. That the appellants' waste-treatment system constituted a nuisance to surrounding property owners was established in Kaup and upheld as a matter of law in *Kopecky*, at least for the periods of time relevant in those cases.

Kopecky was tried in April 1991, while this case was tried approximately 6 months later. The evidence reflects no substantial change in the appellants' waste-treatment operation between the dates that *Kopecky* and this case were tried. Consequently, in the case at bar, we take judicial notice of the holding in *Kopecky* that the appellants' waste-treatment operation constituted a nuisance and affirm the district court's finding on the issue of nuisance. We therefore need not address the appellants' other assignments of error related to the district court's finding of a nuisance. That includes appellants' summarized and restated assignments of error Nos. 2 and 3.

In summarized and restated assignment of error No. 4, the appellants complain that the district court admitted testimony

regarding their operations in Colorado. In *Kopecky*, we held that admitting similar evidence was harmless, since liability was established in that case as a matter of law pursuant to the doctrine of collateral estoppel. The same rule applies in this case. Appellant's assignment of error No. 4 is meritless.

We next consider summarized and restated assignment of error No. 5 regarding judicial bias. Because of our de novo review, the trial court's judicial notice of the matters complained of by the appellants is of no consequence. The judicially noticed matters referred to by the appellants were in regard to whether the appellants created a nuisance. Since, as a matter of law, the appellants were estopped from denying that they created a nuisance, any error the trial court made in taking judicial notice of the matters complained of is harmless. Moreover, in our de novo review of the issue of whether a nuisance was created by the appellants, we have disregarded the trial court's judicially noticed matters of which the appellants complain.

GRANTING OF INJUNCTION AND DAMAGES

In taking judicial notice of *Kopecky*, we note that the plaintiffs in both Kaup and *Kopecky* sought only monetary damages at law and not an injunction in equity, as the plaintiffs have in this case. In *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989), this court indicated that different standards are applicable to awarding damages for a nuisance at law and to granting an injunction in equity.

We determined in *Hall* that although the standards have semantical distinctions, they are in reality consistent and essentially pertain to the same type of conduct. We also noted that the standard in law, adopted from the Restatement (Second) of Torts § 822 (1979), requires that the interference be unreasonable, while "for a nuisance in the context of an equity action, the invasion of or interference with another's private use and enjoyment of land need only be substantial." *Hall*, 231 Neb. at 278, 436 N.W.2d at 145.

We have not found that this court has ever attempted to define substantial interference in the context of a suit to enjoin or abate a nuisance. We have repeatedly stated that to justify the

abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities. *Flansburgh v. Coffey*, 220 Neb. 381, 370 N.W.2d 127 (1985); *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985); *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981).

The appellants produced no evidence that any of the plaintiffs were not of ordinary sensibilities, and all of the plaintiffs testified that the odors emanating from the appellants' waste-treatment operation had caused them to suffer actual physical discomfort. By their testimony, the plaintiffs established that they suffered damages as a proximate result of the nuisance caused by the appellants' waste-treatment operation. We, therefore, affirm the district court's granting an injunction prohibiting the appellants from producing offensive odors and ordering the appellants to abate the odors produced by their waste-treatment system or cease operating their facility.

When an equity court has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993); *Ogle v. Lincoln Real Estate, Inc.*, 209 Neb. 704, 310 N.W.2d 513 (1981). Therefore, the district court could properly award damages for injuries that the plaintiffs proved were proximately caused by the nuisance created by the appellants' waste-treatment system. See, e.g., *Flansburgh*, supra; *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980). Just because an action is equitable in nature, no different standards need be applied in adjudicating damages incidental to the main equitable relief sought. Summarized and restated assignments of error Nos. 6 and 7 are meritless.

DAMAGES

For damages suffered, each individual plaintiff was awarded $37,500, and each couple was jointly awarded $75,000. The appellants claim that these damages are excessive. With regard to allegedly excessive verdicts, we have held that a verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991). The appellants have failed to show that the damages awarded to the plaintiffs in this case are so clearly exorbitant as to indicate that they were the result of passion, prejudice, or mistake or that in fixing the awards of damage, the trial judge disregarded the evidence or rules of law. The appellants' summarized and restated assignment of error No. 8 has no merit.

MOTION FOR NEW TRIAL

A district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion. *Kopecky, supra*; *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Considering our de novo review and determination that the appellants' assignments of error are meritless, we find that the district court's denial of the appellants' motion for new trial was neither prejudicial nor an abuse of its discretion.

REQUEST FOR SUPERSEDEAS BOND

The appellants claim that the district court should have required the plaintiffs to post a supersedeas bond to protect the appellants against unnecessary expenditures in the event that we would reverse the injunction on appeal. Because we have affirmed the district court's injunctive order, we need not consider summarized and restated assignment of error No. 10.

CONCLUSION

We find that the plaintiffs were misjoined as to their claim for monetary relief. However, because the appellants have failed to show that they were prejudiced by the misjoinder and

because the appellants' other summarized and restated assignments of error are meritless, we affirm the district court's judgment in all respects.

AFFIRMED.

LINCOLN BRANCH, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

512 N.W.2d 379

Filed March 4, 1994. No. S-92-427.

1. **Eminent Domain: Damages: Testimony: Juries.** In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury.
2. **Eminent Domain: Damages: Juries.** The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury.
3. **Verdicts: Appeal and Error.** Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
4. _____: _____. In determining the sufficiency of the evidence to sustain a jury verdict in a condemnation case, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and that party is entitled to the benefit of any inferences reasonably deducible from it; a jury's verdict will not be disturbed unless it is clearly wrong.
5. **Eminent Domain: Damages.** The measure of compensation for land taken for public use is the fair market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
6. **Property: Vendor and Vendee: Words and Phrases.** Fair market value is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell.
7. **Eminent Domain: Easements: Damages: Juries.** In determining the fair and reasonable value of land before and after it is damaged by a taking of an easement under the power of eminent domain, it is proper for the jury to consider the purposes for which it was being used at the time it was damaged, and all uses for which it is adapted and might be put, and award compensation upon the basis of its most advantageous and valuable use.

8. **Eminent Domain: Juries: Evidence.** If the evidence as to whether property is adaptable for a certain use is in conflict, it is the jury's province to determine which highest and best use and resulting valuation are more credible.
9. **Eminent Domain: Expert Witnesses.** An expert witness' testimony as to the value of land taken is purely advisory and is not binding on the trier of fact.
10. **Eminent Domain: Trial: Expert Witnesses: Evidence: Appeal and Error.** Where testimony of an expert regarding the valuation of real estate in a condemnation action is admitted without objection by the opponent, the opponent may not on appeal seek to impeach the foundation of that testimony and destroy the admissibility of the evidence to argue that the proffered evidence does not support the verdict.
11. **Trial: Expert Witnesses: Juries.** Once admitted without objection, the weight and credibility of an expert's valuation testimony is a question for the jury.
12. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.
13. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
14. **Eminent Domain: Damages: Interest: Appeal and Error.** Neb. Rev. Stat. § 76-719.01 (Reissue 1990) requires in an eminent domain proceeding that if, on appeal from the appraisers, the compensation finally awarded is less than the amount of money received by the condemnee, the court shall enter judgment against the condemnee for the amount of overpayment, together with interest at the rate provided by law.
15. **Eminent Domain: Damages: Attorney Fees: Fees: Appeal and Error.** Neb. Rev. Stat. § 76-720 (Reissue 1990) requires that upon an appeal by a condemnee only, if the final judgment is not greater than the award of the appraisers, the condemnee shall be charged with a reasonable sum for the fees of the condemnor's attorney and for fees necessarily incurred for not more than two expert witnesses.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified, and cause remanded with directions.

Charles D. Humble and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

William F. Austin, Lincoln City Attorney, and Ernest R. Peo III for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

In this condemnation action, plaintiff-appellant and cross-appellee, the condemnee Lincoln Branch, Inc., appealed to the district court the $560,387.36 award made to it by the county court appraisers. Following trial, the district court, pursuant to verdict, entered judgment in the sum of $489,600 in favor of Lincoln Branch against defendant-appellee and cross-appellant, the condemnor City of Lincoln. Being dissatisfied with the amount of the judgment, Lincoln Branch appealed to the Nebraska Court of Appeals. We removed the matter to this court under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) to regulate our caseload and that of the intermediate court. Lincoln Branch asserts, in summary, that as the judgment is not supported by the evidence and is contrary to law, it is clearly wrong and must therefore be vacated and a new trial granted. The city, on the other hand, not only defends the judgment, but asserts in its cross-appeal that the district court erred in failing to (1) account for the fact that the city had, pursuant to the award of the appraisers, paid Lincoln Branch and its lienholder more than the verdict Lincoln Branch obtained and (2) assess costs against Lincoln Branch. We affirm as modified, and remand the cause with directions.

II. SCOPE OF REVIEW

In *Harmony Lanes v. State*, 193 Neb. 826, 832, 229 N.W.2d 203, 207 (1975), we wrote:

> In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. . . . The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.

Accord, *City of Hastings v. Peter Ellis Farms*, 216 Neb. 550, 344 N.W.2d 640 (1984); *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983). We have also declared:

> [I]n determining the sufficiency of the evidence to sustain

> a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury's verdict will not be disturbed unless it is clearly wrong.

Zwygart v. State, 230 Neb. 128, 132-33, 430 N.W.2d 301, 304 (1988).

III. FACTS

Lincoln Branch purchased that portion of an abandoned railroad right-of-way commencing at the city's 35th Street just north of Vine Street and ending approximately 560 feet east of 84th Street. Lincoln Branch paid $1,940,947 for the realty, which is 100 feet wide along most of its length but has segments which are 125 feet, 150 feet, and 200 feet wide.

Prior to the purchase of the subject realty, Lincoln Branch reviewed an appraisal prepared for the seller, which valued the realty at $2,150,000, based on the premise that the highest and best use of the realty was as a corridor. The seller's appraiser recited that "discontinuation of the corridor would result in land sections that are inconsistent in terms of development with adjoining property [and] would produce [an] uneconomic use of the lands."

Although Lincoln Branch admits that it purchased the realty as a corridor, it determined to subdivide it and sell some portions, develop some of the segments itself, and sell other portions to developers. Lincoln Branch's president had previously purchased other abandoned railroad rights-of-way, which he divided into parcels and sold at a profit, and at the time of Lincoln Branch's purchase of the realty, he was aware of interest in several tracts for commercial development. He was also aware that the city was interested in placing a bike path on the subject realty, recognized the city's commitment to bike paths, and knew that the city had purchased a 4-mile path in the south part of the city for $1,450,000. He expected to be treated fairly should the city seek to obtain a portion of Lincoln Branch's realty for such a path.

After several meetings between representatives of the city and Lincoln Branch's president, Lincoln Branch received a

letter advising that the city wished to acquire an easement for a bike path along the center of the realty. Although the city later agreed to deviate from the center in certain areas, the easement, as condemned, remains, for the most part, along the center. The deviations include points near 35th Street, where the easement commences at the south edge of the realty, then merges to the middle; between 48th and 56th Streets, where the easement is nearer to the south edge; east of 56th Street, where the easement crosses closer to the north edge of the realty and then, within a few blocks, crosses back toward the south side; between 66th and 70th Streets, where the easement, at the request of Lincoln Branch, lies near the northwest side of the realty; and, finally, southeast of O Street, where the easement passes over the street at the railroad bridge and lies at the southwest side of the realty.

Lincoln Branch's expert testified that although the highest and best use of the realty may at one time have been as a corridor, there is but a small likelihood that there now exist any such users other than the city, and that the expert knew of two other railroad rights-of-way abandoned in Lincoln which are being divided into and sold as segments. Moreover, the character of the subject realty as a corridor was broken by a lumberyard's purchase of a portion of the right-of-way to the west of 35th Street, where Lincoln Branch's realty now begins. Furthermore, the fact that the easement meanders across the realty diminishes its use as a corridor.

Therefore, in estimating the before- and after-taking value, Lincoln Branch's expert divided the realty into segments designed to achieve the highest and best uses to which the various portions of the realty could be put and to produce maximum marketability. The segmentation was based upon the existence of intersecting streets, the similarity of zoning classifications, the useability of the land within the segment, and the grade of the land. The highest and best uses of the resulting 18 segments varied. In his opinion, the easement reduced the realty's before-taking value of $1,795,430 by $1,068,050.

Predictably, the city's expert used a different approach. He rejected the over-the-fence appraisal method used by Lincoln Branch's expert, which would value the realty the same as the

abutting land. Since the realty is often to the rear of the abutting lot and may not match the topography of the abutting land, the city's expert used the "abutter's value" method, which values land based upon how much it could enhance the abutting property. Because of the land cuts made and fill used to create the roadbed for the railroad's use, in the view of the city's expert a large portion of the realty would require such extensive grading that development for other than corridor uses was not economically feasible. Thus, not only did the city's expert conclude that the highest and best use of the realty was as a corridor, but he also valued various segments of the realty for other than corridor uses differently than did Lincoln Branch's expert. In the opinion of the city's expert, the easement reduced the realty's before-taking value of $1,853,000 by $488,600.

IV. ANALYSIS OF LINCOLN BRANCH'S APPEAL

The measure of compensation for land taken for public use is the fair market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991); *Harmony Lanes v. State*, 193 Neb. 826, 229 N.W.2d 203 (1975); *Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc.*, 182 Neb. 791, 157 N.W.2d 384 (1968); *Berlowitz v. State*, 180 Neb. 164, 141 N.W.2d 764 (1966).

Fair market value "is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell." *Kohl v. State of Nebraska*, 214 Neb. 348, 354, 334 N.W.2d 173, 178 (1983).

In determining the fair market value of the property taken, it is appropriate to consider its highest and best use. As written in *Sump v. Omaha Public Power Dist.*, 168 Neb. 120, 123, 95 N.W.2d 209, 212 (1959):

> In determining the fair and reasonable value of land before and after it is damaged by a taking of an easement under the power of eminent domain it is proper for the jury to consider the purposes for which it was being used at the time it was damaged, and all uses for which it is adapted and might be put, and award compensation upon

> the basis of its most advantageous and valuable use. The evidence that is proper to be considered in establishing such value is discussed in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, as follows: "The court properly admitted evidence of the nature of the community and its development into acreage or small tracts for country or suburban homes and the adaptability of the land in question for that purpose. The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?"

Accord *Leffelman v. City of Hartington*, 173 Neb. 259, 113 N.W.2d 107 (1962). See *Danish Vennerforning & Old Peoples Home v. State*, 191 Neb. 774, 217 N.W.2d 819 (1974).

Furthermore, if the evidence as to whether the property is adaptable for a certain use is in conflict, it is the jury's province to determine which highest and best use and resulting valuation are more credible. *Pieper v. City of Scottsbluff*, 176 Neb. 561, 126 N.W.2d 865 (1964). See *State v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1963).

In reviewing the amount of damages awarded, we have observed: " 'Ordinarily, a verdict or award in a condemnation case will be sustained if . . . it is within the range of the testimony of the amount of the value or damages.' " *Zwygart v. State*, 230 Neb. 128, 133, 430 N.W.2d 301, 305 (1988). See, also, *State v. Dillon, supra*. Indeed, an expert witness' testimony as to the value of land taken is purely advisory and is not binding on the trier of fact. *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968).

Lincoln Branch urges, in essence, that the testimony of the city's expert that the realty's highest and best use is as a corridor

is clearly wrong and must be rejected as a matter of law. The testimony is troubling. For example, the city's expert witness acknowledged that his own market analysis demonstrated there presently exists no current market for corridor uses. When a market exists, it is limited and consists primarily of municipalities and common carriers having a need to lay pipelines or the like. He offered nothing to show it is economically feasible to cover the holding costs while waiting for such a market to develop. In fact, these holding costs are the very costs he said preclude holding the realty until it could be sold in parcels for development, a matter he conveniently overlooks when testifying as to the highest and best use for the realty.

However, whether the opinion of the city's expert concerning the damage caused by the taking should have been considered by the jury is not before us. Lincoln Branch neither objected to the opinion on the ground that it was factually unsupported and thus speculative and conjectural, nor moved to strike it on that ground. See, Neb. Evid. R. 103 and 705, Neb. Rev. Stat. §§ 27-103 and 27-705 (Reissue 1989); *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979) (expert testimony should not be received if appears witness not in possession of facts enabling expression of reasonably accurate conclusion as distinguished from guess or conjecture). See, also, *Boynton v. Canal Authority*, 311 So. 2d 412 (Fla. App. 1975) (error not to strike testimony of appraiser relating to remaining rights of landowners where no evidence to support appraiser's interpretation); *Commonwealth, Department of Highways v. Harvey*, 396 S.W.2d 311 (Ky. App. 1965) (error not to sustain motion to strike unsupported opinion of value), *criticized on other grounds, Commonwealth, Department of Highways v. Baker*, 442 S.W.2d 290 (Ky. App. 1969).

Where testimony of an expert regarding the valuation of real estate in a condemnation action is admitted without objection by the opponent, the opponent may not on appeal seek to impeach the foundation of that testimony and destroy the admissibility of the evidence to argue that the proffered evidence does not support the verdict. See, *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594

(1971); *Jensen v. State*, 184 Neb. 802, 172 N.W.2d 607 (1969). Once admitted without objection, the weight and credibility of the expert's valuation testimony is a question for the jury. *Iske v. Metropolitan Utilities Dist., supra.*

As we have recently reaffirmed, if, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence. *In re Application of Jantzen, ante* p. 81, 511 N.W.2d 504 (1994). This is an application of the principle that one cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993); *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984); *Johnson v. Nebraska Public Power Dist., supra.*

There is no merit to Lincoln Branch's challenge to the judgment.

V. ANALYSIS OF CITY'S CROSS-APPEAL

The foregoing determination makes it necessary that we consider the city's cross-appeal.

1. PRIOR PAYMENT

As noted in part I above, in accordance with the award of the appraisers, the city paid Lincoln Branch and its lienholder $70,787.36 more than the verdict.

Neb. Rev. Stat. § 76-719.01 (Reissue 1990) provides that if, under such circumstances, "the compensation finally awarded . . . is less than the amount of the money . . . received by the condemnee, the court shall enter judgment against the condemnee for the amount that the condemnee has been overpaid, together with interest at the rate provided" by law. Thus, in entering its judgment, the district court erroneously failed to deduct from the verdict the excess the city had paid Lincoln Branch and its lienholder and to calculate the interest due thereon. See *Clearwater Corp. v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981) (approves calculation of

overpayment and interest).

2. Costs

Next, the city argues that as the judgment was less than the amount awarded by the appraisers, it was entitled to an award of its costs.

The city is correct. Neb. Rev. Stat. § 76-720 (Reissue 1990) provides, in relevant part: "If appeal is taken by the condemnee only, he or she shall be charged with such costs if the final judgment is not greater than the award of the appraisers." The costs are defined elsewhere in the statute to be a reasonable sum for attorney fees and for fees necessarily incurred for not more than two expert witnesses. *Keller v. State*, 184 Neb. 853, 172 N.W.2d 782 (1969), teaches that the calculation as to whether the judgment exceeds the amount awarded by the appraisers is to be made without reference to interest.

While under certain other circumstances § 76-720 leaves the matter of assessing costs to the discretion of the district court, it is crystal clear from the foregoing language that when a condemnee as the sole appealing party fails to obtain a judgment which is larger than the award of the appraisers, the condemnee must be assessed the statutorily defined reasonable costs.

VI. JUDGMENT

For the foregoing reasons, the cause is remanded to the district court with directions that its judgment be modified in accordance with this opinion.

Affirmed as modified, and cause remanded with directions.

White, J., not participating.

Boslaugh, J., concurs in the result.

DALTON BUICK, OLDSMOBILE, PONTIAC, CADILLAC, INC., DOING BUSINESS AS DALTON BUICK-OLDS-PONT-CAD, INC., DOING BUSINESS AS DALTON'S AUTO CENTER, APPELLEE, V. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, APPELLANT.

512 N.W.2d 633

Filed March 4, 1994. No. S-92-463.

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. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final order and thus may not be appealed, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions or may make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
3. **Insurance: Contracts: Appeal and Error.** The construction of an insurance contract or policy is a question 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 court below.
4. **Insurance: Time.** Where an insurer has requested or acquiesced in the sending of premiums by mail, the payment is deemed to have been made at the time it was deposited in the mail.
5. **Contracts.** Acceptance of an offer is operative and completes the contract as soon as put out of the offeree's possession unless the offer otherwise provides.
6. **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.
7. **Insurance: Contracts.** When the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
8. _____: _____. While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
9. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
10. _____: _____. The natural and obvious meaning of the provisions in an insurance policy is to be adopted in preference to a fanciful, curious, or hidden meaning.
11. **Words and Phrases.** "Receive" means to take possession or delivery of, to

knowingly accept, to come into possession of, to acquire.

12. _____. "Possession" is the act or condition of having in or taking into one's control or holding at one's disposal, having actual physical control.
13. **Summary Judgment: Proof.** The 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 such movant is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted; 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 an issue of material fact which, as a matter of law, prevents judgment for the movant.
14. **Insurance: Estoppel.** An insurer is not estopped by acceptance of late inventory reports.
15. **Insurance: Liability: Estoppel.** The liability of an insurer under a full reporting clause may not be expanded by estoppel.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Ronald S. Depue, of McDermott & Depue, for appellant.

Howard P. Olsen, Jr., and Robert G. Simmons, Jr., of Simmons, Olsen, Ediger & Selzer, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this contract action, the plaintiff-appellee, Dalton Buick, Oldsmobile, Pontiac, Cadillac, Inc., doing business as Dalton Buick-Olds-Pont-Cad, Inc., doing business as Dalton's Auto Center, claims the defendant-appellant, Universal Underwriters Insurance Company, failed to pay all it owed under the policy of hail insurance it had issued. The district court granted Dalton's motion for summary judgment and overruled Universal's competing motion for such judgment. Universal thereupon appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court. Universal then successfully sought further review by this court, claiming, in summary, that the intermediate court erroneously

concluded that (1) the policy was vague and ambiguous in regard to its reporting requirements and (2) Universal had received the required inventory report from Dalton in such time as to entitle the latter to full coverage. Dalton contends that it is, in any event, entitled to full coverage because (1) Universal accepted a premium after the loss, (2) the policy ambiguously defines what Universal is to pay in the event of a late report, and (3) the auditing mechanisms provided in the policy negate the accurate reporting requirement. We reverse the judgment and remand the cause to the Court of Appeals with the direction that it be remanded to the district court for the vacation of the judgment in favor of Dalton and entry of summary judgment in favor of Universal.

II. SCOPES OF REVIEW

The procedural aspects of this matter are controlled by two rules. First, 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. *Hawkins Constr. Co. v. Reiman Corp., ante* p. 131, 511 N.W.2d 113 (1994); *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993). Second, although the denial of a motion for summary judgment, standing alone, is not a final order and thus may not be appealed, when adverse parties have each moved for summary judgment and the trial court sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions or may make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. See *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). Accord *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991).

The substantive issues are controlled by the rule that construction of an insurance contract or policy is a question 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 court below. See, *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993); *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988).

III. FACTS

Dalton operates an automobile dealership in Scottsbluff, Nebraska. Universal's policy insured a portion of Dalton's used automobile inventory for the 1991 calendar year. The policy required Dalton to report by the 15th of each month the cost of its inventory of automobiles as of the last day of the previous month and to remit within the same time period its variable monthly premium payment as calculated in the report. The monthly report and premium were to be mailed to Universal at P.O. Box 3485, Omaha, Nebraska, 68103-0485.

The pertinent language reads:

> YOU [Dalton] MUST REPORT - Within 15 days after the end of each calendar month, YOU must report the cost of all AUTOS owned by or consigned to YOU as of the last business day of that month.
>
> THE MOST WE [Universal] WILL PAY - Regardless of the number of AUTOS insured, the most WE will pay for any one LOSS to COVERED AUTOS is the least of the following:
>
> (a) the total cost of all COVERED AUTOS;
>
> (b) with respect to COVERED AUTOS owned by or consigned to YOU, the percentage the last report of AUTO values (received by US [Universal] prior to the LOSS) bears to the cost of all such AUTOS that YOU should have reported.

The policy also states:

> PREMIUM - YOU must pay all required premiums when due, on the basis specified in the declarations:
>
> "Variable" - each month YOU must calculate the earned premiums by multiplying the rates (shown on the required reports of values) times the values YOU report as

> applicable to those rates. Together with the specific premiums shown on the report, YOU must pay US within 15 days after the end of the calendar month for which the report is to be submitted. There will be no final adjustment in the earned premium if the values reported are accurate and premiums are paid promptly when due.

The policy gives Universal the right to audit Dalton as follows:

> INSPECTION AND AUDIT - WE have the right but not the duty, to inspect the insured property or operations at any time. . . .
>
> YOU must keep accurate records and send them to US promptly upon request. WE have the right to examine and audit YOUR books and records at any time, up to three years after this policy ends.
>
> YOU must allow US to perform any inspection or audit.

On Tuesday, May 14, 1991, Dalton mailed its inventory report as of April 30, 1991, showing an insured inventory of used automobiles totaling $701,536, together with its check for the premium due, addressed to Universal at its aforedescribed post office box. At approximately 7 p.m. central time on May 15, 1991, Dalton sustained a hail loss, which the parties agree resulted in damages of $105,550.

The U.S. Post Office "National Service Standards" provided for delivery of first-class mail from Scottsbluff to Omaha, whether to a post office box or to a street address, in 2 days; it was Universal's standard procedure to have a courier on a daily basis pick up the mail addressed to its box. After delivery of all premium checks to its depository bank, the courier delivered the mail to Universal's office, together with copies of checks deposited. Universal's courier picked up Dalton's premium check and inventory report from Universal's post office box on May 16, 1991.

In its report for the month prior to that in which the loss occurred, that is, its aforesaid report as of March 31, 1991, Dalton represented the cost of its used automobiles to be $510,436. It admits, however, that its actual cost of used automobiles not otherwise insured was approximately

$729,435.

Universal takes the position that as it did not receive the May report prior to the loss, and because Dalton had underreported its inventory as of March 31, 1991, by 30 percent, Dalton was only entitled to 70 percent of its actual loss. Accordingly, Universal paid Dalton $73,885. Dalton then sued to recover the remaining $31,665.

IV. ANALYSIS OF UNIVERSAL'S CLAIMS

The type of insurance coverage at issue is commonly referred to as either a provisional reporting policy or a reporting form policy. 15 George J. Couch, Cyclopedia of Insurance Law § 54:91 (rev. 2d ed. 1983). According to Couch:

> A monthly reporting policy is designed to afford a complete coverage and at the same time to avoid the maintenance of insurance in excess of the value of the property insured, so that the amount of the insurance, and the amount of the premium to be paid, are in direct proportion to the value of the goods on hand. Such a policy contravenes no sound principle of law and is peculiarly adapted to those cases in which the risk is constantly changing.
>
> . . . .
>
> A provisional or monthly reporting type of fire policy . . . with a value reporting clause requiring monthly reports of the total value of the insured property and the specific insurance, and with a full reporting clause containing a formula limiting liability to the proportion of the loss which the last reported value bears to the actual value less the specific insurance, is designed to afford the owner of a business with a fluctuating inventory the privilege of adjusting his coverage to the value of the monthly inventory, with the last monthly report determining the amount of the insurance in force and the premium. It is not unreasonable to penalize the insured in this way as a consequence of its failure to timely and properly report inventory values.

Id. at 478-80. See *Jones Whsle. Co., Inc. v. General A. F. & L. Assur. Corp., Ltd.*, 370 F. Supp. 478 (W.D. Va. 1973), *aff'd* 508

F.2d 838 (4th Cir. 1974).

As a result of the consequences to the insured caused by underreporting the monthly value or by a late report, the full reporting clause is also referred to as an "honesty clause." *Nile Valley Coop. G. & M. Co. v. Farmers Elevator Mut. Ins. Co.*, 187 Neb. 720, 193 N.W.2d 752 (1972); *Southern Sash v. U.S. Fidelity and Guar.*, 525 So. 2d 1388 (Ala. 1988); *Standard Lumber Company v. Travelers Indemnity Co.*, 440 F.2d 544 (7th Cir. 1971).

The rationale for using and allowing the enforcement of an honesty clause in a reporting form policy was explained as follows:

> From such a method of computing the premium, it can easily be recognized that the insured, in order to save premiums, might not correctly report the true value of his inventory. During the term of a policy, an insured could mistakenly underestimate the amount of his inventory and, if there were no loss, pay a premium based on such under-estimated amounts; and if, during the term of the policy, a loss occurred, he could simply ask the court to correct the erroneous estimate that had been made. In this way, according to [the insured's] contentions, an insured could easily escape the payment of the correct amount of premiums where there was no loss; and, in the event of a loss, he could collect the full amount of his policy by offering to pay an additional amount of premiums.

Camilla Feed Mills v. St. Paul Fire & Marine Ins. Co., 177 F.2d 746, 748 (5th Cir. 1949). Accord, *Standard Lumber Company, supra*; *Reilly-Benton Co. v. Liberty Mutual Insurance Corp.*, 260 So. 2d 797 (La. App. 1972), *aff'd* 278 So. 2d 24 (La. 1973); *Jones Whsle. Co., Inc., supra*.

1. Reporting and Payment Requirements

With that background in mind, we proceed to an analysis of the errors Universal has assigned, the first of which is that the Court of Appeals mistakenly concluded that the policy language with regard to reporting and payment of the premium is vague and ambiguous.

Reliance upon the "deposit-payment" rule and the

"deposit-acceptance" rule for the proposition that Universal received the report and premium when they were mailed is misplaced. The deposit-payment rule is used to avoid a forfeiture or lapse in coverage. Under that rule, where an insurer has requested or acquiesced in the sending of premiums by mail, the payment is deemed to have been made at the time it was deposited in the mail. *Tayloe v. Merchants' Fire Insurance Co.*, 50 U.S. (9 How.) 390, 13 L. Ed. 187 (1849); *Clarke v. American Concept Ins. Co.*, 758 P.2d 470 (Utah App. 1988); *American Cas. Co. of Reading v. Conn*, 741 S.W.2d 536 (Tex. Civ. App. 1987); 6 George J. Couch, Cyclopedia of Insurance Law § 31:106 (rev. 2d ed. 1985).

Our comment on the deposit-payment rule was made in *Hartford Life & Annuity Ins. Co. v. Eastman*, 54 Neb. 90, 74 N.W. 394 (1898). Therein, a check had been mailed from Omaha on December 1 to pay the insured's life insurance premium due on December 5 to the insurance company at its address in Hartford, Connecticut. Due to slow mail service, the premium check failed to reach the insurance company by December 5. After the insured died on December 26 of the same year, the insurer denied payment of benefits, taking the position that the policy had lapsed. We, however, ruled that the insurer had effectively designated the post office as the medium for making payments and held that

> [h]aving invited its patrons to use the mails in making payment of their premiums, it is but reasonable and just to infer that the company intended to accept as payment funds sent by mail in time to reach it, in due course, on or before the day such premiums would become due.

Hartford Life & Annuity Ins. Co., 54 Neb. at 93, 74 N.W. at 395.

But the deposit-payment rule does not apply where, as here, the policy language clearly provides to the contrary. See, *Clarke, supra*; 6 Couch, *supra*. Here, Universal specifically provided that its coverage would be determined by the last report it had received prior to the loss.

Nor does the deposit-acceptance rule apply. That rule holds that acceptance " 'is operative and completes the contract as soon as put out of the offeree's possession . . . unless the offer

otherwise provides.' " *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 608, 288 N.W.2d 743, 745 (1980). But the deposit-acceptance rule operates at the stage during which a contract is being formed; here, we are concerned with the meaning of the language of a contract which has been formed.

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. While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992). The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Design Data Corp., supra*; *Allstate Ins. Co. v. Farmers Mut. Ins. Co.*, 233 Neb. 248, 444 N.W.2d 676 (1989); *Central Waste Sys. v. Granite State Ins. Co.*, 231 Neb. 640, 437 N.W.2d 496 (1989).

We have also held that the " 'natural and obvious meaning of the provisions in a policy is to be adopted in preference to a fanciful, curious, or hidden meaning.' " *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 285, 505 N.W.2d 719, 722 (1993).

"Receive" is defined as meaning "to take possession or delivery of . . . to knowingly accept . . . to come into possession of : ACQUIRE . . . ." Webster's Third New International Dictionary, Unabridged 1894 (1981). "Possession" is defined as "the act or condition of having in or taking into one's control or holding at one's disposal . . . actual physical control . . . ." *Id.* at 1770. While dictionary definitions do not always control, the fact remains that the foregoing definitions contradict Dalton's contention that the report is to be deemed "received" when mailed. The policy language, which requires that the inventory report be "received by US," is not fairly susceptible to at least

two different interpretations and thus is neither vague nor ambiguous. See, *Moultrie Intern. v. Universal Underwriters Ins. Co.*, 545 F.2d 543 (5th Cir. 1977), *reh'g denied* 549 F.2d 203 (under value reporting language requiring inventory report be filed with insurer, report not effective until delivered to insurer); *Reilly-Benton Co. v. Liberty Mutual Insurance Corp.*, 260 So. 2d 797 (La. App. 1972), *aff'd* 278 So. 2d 24 (La. 1973). But see *Jones Whsle. Co., Inc. v. General A. F. & L. Assur. Corp., Ltd.*, 370 F. Supp. 478 (W.D. Va. 1973), *aff'd* 508 F.2d 838 (4th Cir. 1974).

Because the policy called for the inventory report and premium to be mailed to Universal's post office box, rather than directly to its office, Universal received the items when they were delivered to its post office box, irrespective of when its courier picked them up from the box. See, *Levy v. Massachusetts Accident Co.*, 124 N.J. Eq. 420, 2 A.2d 341 (1938); *Raidle-Cook Ins. v. Palm Beach Sanitation*, 410 So. 2d 613 (Fla. App. 1982); *Cary v. Atlantic Mut. Ins. Co.*, 30 Misc. 2d 299, 218 N.Y.S.2d 3 (1961), *rev'd on other grounds* 16 A.D.2d 867, 228 N.Y.S.2d 345 (1962).

2. Receipt of Report and Premium

That being so, the question remains whether, as Universal asserts in its second claim, the Court of Appeals incorrectly determined that Universal received the inventory report and premium benefit before the loss.

The evidence on the issue is that the items were mailed in Scottsbluff on May 14, 1991, when the applicable standard provided for the delivery of such mail within 2 days. It is true, as Dalton suggests, that the standard relating to the delivery of mail does not preclude earlier delivery. But Universal's courier picked up the items in Universal's box on a daily basis, and picked up Dalton's report and premium on May 16. The applicable rule is that the 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 such movant is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. 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 an issue of material fact which, as a matter of law, prevents judgment for the movant. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993).

Accordingly, in the absence of a showing by Dalton that its inventory report and premium payment had in fact been delivered to Universal's box sometime between the pickup on May 15 and that of the 16th, the only permissible inference is that the items were delivered to the box 2 days after Dalton mailed them and were thus received by Universal on May 16, after the loss.

V. ANALYSIS OF DALTON'S CONTENTIONS

Having so determined, it becomes necessary to consider whether any of Dalton's contentions nonetheless preclude judgment for Universal or mandate judgment for Dalton.

1. ACCEPTANCE OF PREMIUM

Citing *Lipe v. World Ins. Co.*, 142 Neb. 22, 5 N.W.2d 95 (1942), Dalton argues that Universal is estopped from denying full coverage because it accepted the premium payment together with the updated inventory report.

Lipe declares:

> "In fact, the retention of a premium on a fire insurance policy, after knowledge of the breach of a condition involving a right to forfeiture, is an election to waive such breach and continue the policy in force, and the policy should then be construed as though such condition had never existed."

Id. at 28, 5 N.W.2d at 98-99.

Here, Universal did not have knowledge when it accepted the payment on May 16, 1991, of Dalton's underreporting on the March 31, 1991, report. It was not until the audit Universal undertook after cashing the premium check that it learned of the underreporting.

We conclude, as have other courts, that an insurer is not estopped by acceptance of late inventory reports and that the

liability of the insurer under a full reporting clause may not be expanded by estoppel. *Southern Sash v. U.S. Fidelity and Guar.*, 525 So. 2d 1388 (Ala. 1988); *Midwest Office Tech. v. Am. Alliance Ins.*, 437 N.W.2d 555 (Iowa 1989); *Ron Henry Ford, Lincoln, Mercury, Inc. v. Nat'l Union Fire Ins. Co.*, 8 Kan. App. 2d 766, 667 P.2d 907 (1983); *Am. Motorists Ins. v. Farrey's Wh. Hardware*, 507 So. 2d 642 (Fla. App. 1987), *review denied* 518 So. 2d 1274 (Fla.).

2. CONSEQUENCE OF LATENESS

Next, Dalton contends that Universal's full reporting clause is ambiguous and must therefore be construed against Universal and in favor of Dalton.

As set forth in part III above, the clause provides that the most Universal will pay is "the percentage the last report of AUTO values" received by it prior to the loss "bears to the cost of all such AUTOS" that Dalton should have reported. It appears from the cases cited by the parties that a more common formulation of the reporting requirement is: " 'Liability under this [policy] shall not in any case exceed . . . [t]hat proportion of any loss hereunder, which the last value reported to this Company prior to the loss bears to the actual cash value of the property . . . .' " *Moultrie Intern. v. Universal Underwriters Ins. Co.*, 545 F.2d 543, 545 (5th Cir. 1977), *reh'g denied* 549 F.2d 203.

However, to read the clause as Dalton suggests, that is, that the statement as to the most Universal will pay only creates a dollar-value cap at the $510,436 figure reported on the March 31, 1991, inventory report, would render meaningless the language limiting the payment to no more than "the total cost of all COVERED AUTOS." If the automobiles are not reported, they are not covered, so that effectively limits the liability to the $510,436 reported as of March 31. The first language referred to in the paragraph above further limits the coverage so as not to permit Dalton to receive full coverage on the partial loss of its underreported inventory.

As written, the full reporting clause is unambiguous and limits Dalton's recovery to the percentage of the loss which the reported value bears to the actual cost of inventory which

should have been reported.

3. Audit Right

However, Dalton urges, in essence, that because of Universal's right to audit and inspect Dalton's records and the implicit right to adjust premiums in accordance with the audit, the arguments for Universal's paying less than the full amount of the loss evaporate.

We agree that the premium clause, see part III above, implies that if the values reported are not accurate, the earned premium may be adjusted. It is also true that Universal has the right to audit and inspect its insured's records. However, it is not obligated to conduct an audit and is entitled to require its insureds to in effect coinsure inventory they do not accurately report. See, *Camilla Feed Mills v. St. Paul Fire & Marine Ins. Co.*, 177 F.2d 746 (5th Cir. 1949); 15 George J. Couch, Cyclopedia of Insurance Law § 54:91 (rev. 2d ed. 1983).

VI. JUDGMENT

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the cause as set forth in part I above.

Reversed and remanded with direction.

Grant, J., Retired, dissenting in part.

I agree with the majority's reversal of the summary judgment in favor of Dalton. I respectfully dissent from the granting of Universal's motion for summary judgment.

I agree with the majority's holding that deposit in Universal's post office box in Omaha constitutes delivery to Universal. I cannot agree that when Universal makes one pickup from the post office box in Omaha on May 15, 1991, and the next pickup is made on May 16, that it may be concluded that mail taken out of the post office box by Universal on May 16 was deposited in that post office box after 12:01 a.m. on May 16. On the present state of the record, I think there is an equally persuasive conclusion that the letter was deposited, by a U.S. mail-sorting postal clerk, into Universal's post office box by 11:59 p.m. on May 15.

It is true that affidavits state that the standard for delivery of mail is 2 days from Scottsbluff, Nebraska, to Omaha,

Nebraska. It is also true that plaintiff's affidavits show the mail in question was deposited in a mailbox in Scottsbluff between 4 and 4:30 p.m. on May 14. Universal's affidavits show that the mail for Universal was picked up on May 16 at an unstated hour, but, according to Universal's affidavits, at a sufficiently early hour to be delivered to Universal's bank and later forwarded by the bank to Universal—all of which banking and business activity must have taken place before 4 p.m. on May 16. That means the mail was delivered from Scottsbluff to Universal's post office box in Omaha in less than 48 hours. The question remains—how much before the expiration of 48 hours?

The facts concerning the time that mail was actually placed in Universal's post office box in Omaha are much more likely to be able to be proved by Universal, located in Omaha, than by Dalton, located in Scottsbluff. I would place the burden on Universal to prove that Dalton's report and check were received after 11:59 p.m. on May 15, 1991, and were thus too late for Dalton's purposes. In my judgment, that fact question is open, and neither party is entitled to summary judgment.

STATE OF NEBRASKA EX REL. CHRISTINE GURNON, APPELLANT, V. THOMAS W. HARRISON, APPELLEE.

512 N.W.2d 386

Filed March 4, 1994. No. S-92-465.

1. **Jurisdiction.** Where jurisdiction of the person has attached, it is not defeated by a removal of the person beyond the jurisdiction of the court.
2. _____. Once a court lawfully and properly acquires jurisdiction, it retains it for the purpose of the entry of any judgment that might be proper under the pleadings and the evidence.
3. **Paternity: Child Support: Actions.** In a filiation proceeding, an application to modify a decree for child support is not an independent proceeding or the

commencement of an action, but, rather, is supplementary to the original proceeding.

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

Charles E. Dorwart, Deputy Sarpy County Attorney, for appellant.

No appearance for appellee.

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

LANPHIER, J.

The State, on behalf of Christine Gurnon, appeals from the order of the district court for Sarpy County denying its application for modification of a decree for child support originally entered by that court. The State asserts that the district court could exercise its continuing jurisdiction over the appellee, Thomas W. Harrison, even though he has since moved to Texas, where he was served with summons. The court denied the State's application on the basis of a lack of personal jurisdiction over Harrison. We reverse the judgment and remand the cause for further proceedings.

FACTS

On November 13, 1981, the State, on behalf of Gurnon, instituted a paternity action alleging that Harrison was the father of Gurnon's child, Warren William Gurnon. Harrison entered a voluntary appearance and acknowledged paternity. The district court ordered him to pay support in the amount of $100 per month. On February 20, 1992, Gurnon filed an application to modify the 1981 order so as to increase Harrison's support payments.

Harrison was personally served in San Antonio, Texas, on March 4, 1992, with the summons and a copy of the application to modify. Harrison never responded. A notice of default hearing was sent by regular U.S. mail on April 9.

On April 27, 1992, the date of the hearing, Gurnon and her attorney appeared, but Harrison did not. At the hearing,

evidence was adduced regarding Gurnon's and Harrison's income in 1981, when the original order of support was entered. Gurnon's current income was also established. However, Harrison's current income was not established. The record reflects that Harrison does not visit or have any contact with his child. Gurnon testified that Harrison has been paying the ordered support.

The district court denied the application for modification of child support after determining Harrison did not have sufficient contacts with the State to give the court jurisdiction over him.

ASSIGNMENT OF ERROR

We now turn to the issue raised by Gurnon's appeal: whether the trial court erred in denying the application to modify for lack of personal jurisdiction.

ANALYSIS

It is fundamental that a court may exercise personal jurisdiction over a person only when a proper statutory basis exists and when such exercise would not offend the Due Process Clause of the 14th Amendment to the U.S. Constitution. See *York v. York*, 219 Neb. 883, 367 N.W.2d 133 (1985).

Nebraska's "long-arm" statute, Neb. Rev. Stat. § 25-536 (Reissue 1989), clearly provides the necessary statutory basis. Section 25-536(2) explicitly extends the State's jurisdiction as far as the Constitution of the United States permits. Thus, we need only address whether Harrison has minimum contacts with the State such that maintenance of the suit would not offend traditional notions of fair play and substantial justice. See *York v. York, supra*.

In *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978), the Supreme Court held that the mere presence of one party in a state, along with the children of the parties, was not enough to allow a court of that state to obtain in personam jurisdiction over the nonresident party. The basis of the decision was that the unilateral activity of the wife, moving to California with the parties' children, could not constitute a "minimum contact" with the forum state, California, on the part of the husband, who had no other

contact with that state.

Here we are not concerned with merely unilateral activity of a resident party. The nonresident party, Harrison, lived in Nebraska and, in 1982, voluntarily appeared in the district court for Sarpy County to acknowledge his paternity. The district court exercised its personal jurisdiction over Harrison. Thus, we need not address whether minimum contacts exist, but whether the district court retained jurisdiction over Harrison after he moved to Texas.

As a preliminary matter, we note that the district court suggested that the Uniform Reciprocal Enforcement of Support Act (URESA) should have been used to obtain modification of the support order. However, at the time this proceeding was initiated, Neb. Rev. Stat. § 42-764 (Reissue 1988) (repealed effective January 1, 1994) provided that the remedies available through URESA "are in addition to and not in substitution for any other remedies." Thus, the State pursued a proper course in proceeding to modify the filiation proceeding decree through the Sarpy County District Court.

This court has long recognized that where jurisdiction of the person has attached, it is not defeated by a removal of the person beyond the jurisdiction of the court. *Miller v. Miller*, 153 Neb. 890, 46 N.W.2d 618 (1951). See, also, *Bolich v. Robinson*, 106 Neb. 449, 184 N.W. 218 (1921).

In *Bolich*, this court was confronted with the issue of whether the district court, having rightfully obtained jurisdiction, lost it when a mother who instituted a paternity action moved outside the jurisdiction of the court. There we held that once a court lawfully and properly acquires jurisdiction, it retains it for the purpose of the entry of any judgment that might be proper under the pleadings and the evidence.

In *Miller*, we addressed whether, in a proceeding to modify a divorce decree, the district court had personal jurisdiction over a resident of another state who was personally served with notice of the proceeding. Our ruling that the court had personal jurisdiction over the nonresident was based on the fact that an application to modify the terms of a divorce decree is not an independent proceeding or the commencement of an action. "It

is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification." 153 Neb. at 898, 46 N.W.2d at 624.

The statute referred to in *Miller* was Neb. Rev. Stat. § 42-312 (1943), since repealed. Section 42-312 merely allowed for the modification of a decree which concerned the care, custody, or maintenance of children. Currently, Neb. Rev. Stat. § 43-1402 (Reissue 1988), when construed with Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), has the same effect. See *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975).

We see no reason to treat the modification of a filiation decree differently than the modification of a divorce decree. In divorce proceedings, we view an application to modify as a supplementary proceeding. We, therefore, hold that this modification proceeding is supplementary to the filiation proceeding and not an independent proceeding or a new action. Since this is a supplementary proceeding, the district court retained the personal jurisdiction acquired in the original proceeding.

CONCLUSION

The district court erred in concluding that it did not have personal jurisdiction over Harrison. We, therefore, reverse the judgment of the district court and remand this cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GREGORY L. BAMFORD ET AL., APPELLANTS, V. UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, A BODY POLITIC, APPELLEE.

512 N.W.2d 642

Filed March 4, 1994. Nos. S-92-562, S-92-563.

1. **Injunction.** Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act

complained of has been committed and the injury has been done.

2. **Moot Question: Appeal and Error.** There is an exception to the general rule regarding moot questions. That applies to cases involving matters of public interest. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
3. **Waters.** The owner of land is entitled to appropriate subterranean waters found under his land, but if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.
4. **Constitutional Law: Statutes: Presumptions.** It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
5. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution.
6. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
7. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
8. **Constitutional Law: Legislature.** Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
9. **Administrative Law.** Standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations.
10. **Constitutional Law: Eminent Domain.** There is no constitutional limitation on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation.
11. **Waters.** Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1988), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
12. _____. Placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power.
13. _____. When the underground water supply is sufficient for all users, a landowner is entitled to reasonable and beneficial use of that supply.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Judgment in No. S-92-562 affirmed. Appeal in No. S-92-563 dismissed.

Richard A. Dudden, of Padley & Dudden, P.C., and Firmin Q. Feltz for appellants.

Terry E. Savage for appellee.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska Association of Resources Districts.

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

BOSLAUGH, J.

In these two cases which were consolidated for briefing and argument in this court, the plaintiffs-appellants, Gregory L. Bamford, Bamford Partnership, Dan Adler, and Robin Roth, sought to prevent the enforcement of a cease and desist order issued by defendant-appellee, Upper Republican Natural Resources District (URNRD). URNRD issued its cease and desist order on March 12, 1992, to prevent the appellants from withdrawing ground water from nine wells until the issuance of an additional allocation permitting further withdrawals. In response, on March 26, 1992, the appellants filed a petition in case No. S-92-562, pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992), seeking a review of URNRD's issuance of the cease and desist order. On that date, the appellants also filed a separate petition in case No. S-92-563 seeking an injunction enjoining URNRD from enforcing its March 12 cease and desist order. In its answer to the appellants' petition for injunctive relief, URNRD filed a counterclaim seeking an injunction enjoining the appellants from withdrawing ground water until the appellants' wells were granted another allocation of ground water.

Following a trial on the action for injunctive relief, the district court denied the injunction sought by the appellants and granted the injunction sought by URNRD. In addition, after a review, in accordance with § 84-917(5), of URNRD's action in issuing the March 12 cease and desist order, the district court determined that the cease and desist order was properly issued and dismissed the petition which the appellants had filed pursuant to § 84-917. The appellants now appeal the decisions of the district court.

Before reviewing the appellants' assignments of error, it is helpful to provide some minimal background. We first note that center-pivot irrigation systems have been installed on each of the nine wells which are involved in this case. Appellant Gregory Bamford is the owner of land irrigated by five wells; those five tracts or "circles" are farmed by his tenant, appellant Roth. Land irrigated by the other four wells is owned by appellant Bamford Partnership; those four circles are farmed by appellant Adler.

The land irrigated by the appellants' nine wells falls within the jurisdiction of URNRD and is within an area which, in 1977, was designated a ground water "control area." See Neb. Rev. Stat. § 46-658 (Reissue 1988). Although § 46-658(5) provides procedures for modification of a control area designation, the control area encompassing the appellants' wells remains unchanged. Consequently, the withdrawal of ground water from the appellants' wells is subject to the limitations imposed by URNRD. See Neb. Rev. Stat. § 46-666 (Reissue 1988).

In 1978, URNRD adopted rules regarding the withdrawal of ground water from wells within the district, and such withdrawals have been subject to regulation by URNRD since that time. In 1988, URNRD adopted an order allocating 75 acre-inches of ground water per irrigated acre for the 5-year period commencing January 1, 1988, and ending December 31, 1992. (Neb. Rev. Stat. § 46-657 (Reissue 1988) defines an acre-inch as "the amount of water necessary to cover an acre of land one inch deep.") Thus, in 1988, URNRD issued an allocation of 15 acre-inches per year for 5 years, but irrigators would be allowed to withdraw in excess of 15 acre-inches per year for each irrigated acre, so long as total withdrawals during the 5-year period did not exceed 75 acre-inches per irrigated acre.

In determining the total allocation available to the appellants during the 5-year period, URNRD and the appellants agreed to a "pooling" of the appellants' nine wells. Under this pooling arrangement, allocations of water which were not withdrawn from any of the nine wells could be withdrawn from any of the other nine wells. Thus, withdrawals from any single well could

exceed the 75-acre-inch allocation, but total withdrawals from all nine wells could not exceed the 5-year allocation of 75 acre-inches per irrigated acre. Nevertheless, at the end of 1991, i.e., the fourth year of the allocation period, the appellants' withdrawals of ground water from the nine pooled wells had exceeded the 75-acre-inch allocation by approximately 12 acre-inches per irrigated acre. While the four wells owned by Bamford Partnership had a remaining allocation of approximately 25 acre-inches per irrigated acre at the end of 1991, the five wells owned by Gregory Bamford had exceeded their allocations by approximately 41 acre-inches per irrigated acre, thus resulting in the 12-inch "deficit" for the nine pooled wells.

Because the appellants' nine pooled wells had, at the end of 1991, withdrawn all of the ground water allocated to those wells for the 5-year period ending December 31, 1992, URNRD conducted a hearing to determine whether a cease and desist order should be issued due to the appellants' withdrawals of ground water in excess of the amount allocated. Appellant Gregory Bamford testified at this February 11, 1992, hearing. Following the hearing, URNRD issued its March 12, 1992, cease and desist order to prevent further withdrawal of ground water until the issuance of another allocation. Appellants now contend that in upholding URNRD's cease and desist order, the district court erred in (1) finding that URNRD's issuance of the cease and desist order was not arbitrary and capricious, (2) finding that the appellants' nine wells were pooled, (3) denying appellants the right to use water underlying their land when evidence failed to show that the underground water supply was insufficient for all other water users, (4) finding that the Nebraska Ground Water Management and Protection Act was constitutional, and (5) finding that the appellants were not entitled to compensation for the taking of their property.

In reviewing the appellants' assignments of error in connection with their petitions, we first consider whether issues are presented which we may properly decide. The appellants' petitions primarily sought injunctive relief and a reversal of URNRD's issuance of the cease and desist order. However, it is apparent that the cease and desist order affected the appellants

during 1992 only. The record shows that the appellants were entitled to and would have been issued an additional allocation of ground water in 1993, and statements by the appellants' counsel made during oral argument indicate that the cease and desist order was effective during 1992 only.

In *Koenig v. Southeast Community College*, 231 Neb. 923, 925-26, 438 N.W.2d 791, 794 (1989), this court stated:

> At the heart of this action is the request for an injunction. The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done. [Citations omitted.] In this case the matter is fait accompli, and the action has been taken. No court could now prohibit what has already taken place .... As to injunction, the case has become moot.

As in *Koenig*, issues relating only to the cease and desist order which affected the appellants during 1992 have become moot; the matter is a fait accompli. Thus, we do not address the appellants' contention that URNRD's issuance of the cease and desist order was arbitrary and capricious. Nevertheless, we note that the evidence is uncontroverted that at the end of 1991, the fourth year of the 5-year allocation period, the appellants' withdrawals of ground water from the nine pooled wells had exceeded the amount allocated. Similarly, while the record does support the district court's determination that the nine wells were pooled, the appellants' assignment of error regarding the pooling of the nine wells is relevant only with respect to the moot issue of the propriety of URNRD's cease and desist order.

Although the passage of time has rendered moot those issues relating only to issuance of URNRD's cease and desist order, we are cognizant of additional language contained in *Koenig* which states:

> There is an exception to the general rule regarding moot questions which should be examined. That exception applies to cases involving matters of public interest. . . . The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires

> a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Id. at 926-27, 438 N.W.2d at 795. We now address the appellants' remaining assignments of error, as those assignments of error involve matters of public interest likely to arise in future similar cases.

The appellants contend that the district court erred in denying them the right to use water underlying their land when evidence failed to show that the underground water supply was insufficient for all other water users. This contention is apparently based upon Nebraska's common law of ground water, i.e.: " 'The owner of land is entitled to appropriate subterranean waters found under his land, but . . . if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .' " *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 188, 376 N.W.2d 539, 546 (1985).

At the February 11, 1992, hearing conducted by URNRD, and also at the trial conducted by the district court with respect to the appellants' petition for injunctive relief, the appellants did present evidence relating to the available supply of water in the Ogallala aquifer, from which water was being withdrawn, and the effect of such withdrawals upon other water users. However, such evidence was not relevant in this case, because the question whether conditions existed requiring the regulation of the withdrawal of ground water from the appellants' wells (i.e., the question whether the underground water supply was sufficient for all users) was settled when the Director of Water Resources, pursuant to § 46-658, designated a control area encompassing appellants' nine wells. That designation effectively established that the underground water supply was insufficient for all owners using that supply. Furthermore, the record indicates that the order designating the control area was entered on August 1, 1977, and it is apparent no petition was filed seeking a review of that order within the 30 days specified by § 84-917. See *B. T. Energy Corp. v. Marcus*, 222 Neb. 207,

382 N.W.2d 616 (1986). Nor has the control area designation been modified pursuant to § 46-658(5). Thus, the question whether the underground water supply was insufficient for all water users was not an issue properly before either the district court or URNRD at its February 11, 1992, hearing.

The appellants also assert that they are entitled to a ground water allocation greater than the 75-acre-inch 5-year allocation granted to all wells regulated by URNRD. Again, however, the time has passed to challenge that order. The record shows that URNRD adopted the 75-acre-inch order in January or February 1988, and the appellants apparently did not timely seek a review of that URNRD decision. Furthermore, the appellants do not contend and the record does not suggest that URNRD failed to comply with the notice and public hearing requirements of Neb. Rev. Stat. § 46-663.01 (Reissue 1988) when it adopted the 75-acre-inch allocation for the 5-year period ending December 31, 1992. The 75-acre-inch allocation having been previously adopted and not challenged, at its February 11 hearing URNRD was left to consider only whether the appellants' withdrawals of water had exceeded the allocated amount and whether a cease and desist order should therefore be issued. URNRD then determined that the appellants had exceeded their 75-acre-inch allocation, and in accordance with Neb. Rev. Stat. § 46-663(5) (Reissue 1988) and its own procedural rules, URNRD issued its cease and desist order.

The appellants next challenge the constitutionality of statutory provisions authorizing URNRD's issuance of a cease and desist order. In doing so, the appellants state that the Nebraska Ground Water Management and Protection Act is both vague and overbroad. See, also, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). However, the argument which the appellants articulate presents only a vagueness question in the form of an assertion that the applicable statutory provisions are an unconstitutional delegation of legislative authority. As stated in *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 182-83, 498 N.W.2d 102, 106 (1993):

> It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.

State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990). Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. See *id.* See, also, *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987).

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). See, also, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). "In other words, due process requires that an enactment supply (1) a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited' and (2) 'explicit standards for those who apply [it].' " *ABC Books, Inc.*, 238 Neb. at 382, 470 N.W.2d at 764 (quoting *Grayned, supra*).

In re Application U-2, 226 Neb. 594, 413 N.W.2d 290 (1987), presented an issue similar to the issue raised by the appellants. The court stated:

> Appellants . . . argue that § 46-226.01 is an unconstitutional delegation of legislative authority and that it does not contain adequate legal standards to govern the director's review of an application. We find no merit in this claim. We have held that where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists. *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 186 N.W.2d 729 (1971). Section § [sic] 46-226.02 sets out specific conditions which must be met before the director may approve an application . . . .

In addition, Neb. Rev. Stat. § 46-209 (Reissue 1984) gives DWR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes . . . ." The Legislature has recognized the expertise and experience needed to determine the difficult questions presented in the overall water situation in this state when it required, by Neb. Rev. Stat. § 46-701 (Reissue 1984), that the director of DWR be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work.

This court has recognized the difficulties inherent in requiring the Legislature to spell out each standard in complex fields in areas where expanding technology and complex theories daily change. In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979), we stated:

"The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

Similarly, in *Anderson v. Tiemann*, 182 Neb. 393, 401-02, 155 N.W.2d 322, 328 (1976), we stated: "Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision."

In re Application U-2, 226 Neb. at 607-09, 413 N.W.2d at 299-300.

We now turn to the statutory provisions bearing upon the issuance of the March 12 cease and desist order, first noting that with respect to the following quoted sections, § 46-657 provides requisite definitions. That section states:

> As used in the Nebraska Ground Water Management and Protection Act . . .
>
> (6) District shall mean a natural resources district operating pursuant to Chapter 2, article 32;
>
> (7) Director shall mean the Director of Water Resources;
>
> . . . .
>
> (14) Board shall mean the board of directors of a district . . . .

Section 46-658, further, provides:

> An area may be designated a control area by the director following a hearing initiated in accordance with subsection (3) of this section if it shall be determined, following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new development, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:
>
> (a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or
>
> (b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.
>
> (2) When determining whether to designate a control area because of the existence of any of the conditions listed in subsection (1) of this section, the director's considerations shall include, but not be limited to, whether conflicts between ground water users are occurring or may be reasonably anticipated or whether ground water users are experiencing or will experience within the foreseeable future substantial economic hardships as a direct result of current or anticipated

ground water development or utilization.

(3) A hearing to designate a control area may be initiated by a district whenever it has information, sufficient in the opinion of the board of directors, to require that any portion of such district should be designated as a control area. . . .

(4)(a) Within thirty days after a hearing has been initiated pursuant to subsection (3) of this section, the director shall consult with the district and fix a time and place for a public hearing to consider the information supplied and to hear any other evidence. . . .

(b) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, and the Department of Environmental Control shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing. After the hearing and after any studies or investigations conducted by or on behalf of the director as he or she deems necessary, the director shall determine whether a control area shall be designated. If the director determines that no control area shall be established, he or she shall issue an order declaring that no control area shall be designated.

(c) If the director determines that a control area shall be established, he or she shall consult with such relevant state agencies named in subdivision (b) of this subsection and with the district or districts affected and determine the boundaries of the control area, taking into account the considerations enumerated in subsection (1) of this section, the effect on political subdivisions, and the socioeconomic and administrative factors directly affecting the ability to implement and carry out local ground water management, control, and protection.

In addition, § 46-666 states:

(1) A district in which a control area has been designated pursuant to subsection (1) of section 46-658 shall by order adopt one or more of the following controls for the control area:

(a) It may determine the permissible total withdrawal of ground water for each day, month, or year and allocate such withdrawal among the ground water users;

. . . .

(2) In adopting, amending, or repealing any control authorized by subsection (1) of this section . . . the district's considerations shall include, but not be limited to, whether it reasonably appears that such action will mitigate or eliminate the condition which led to designation of the control or management area, will encourage a high degree of water use efficiency, or will improve the administration of the area.

(3) The adoption, amendment, or repeal of any authorized control in a control area shall be subject to the approval of the director. The director may hold a public hearing to consider testimony regarding the control prior to the issuance of an order approving or disapproving the adoption, amendment, or repeal of the control. . . . In approving the adoption, amendment, or repeal of an authorized control in a control area, the director's considerations shall include, but not be limited to, those enumerated in subsection (2) of this section.

. . . .

(5) If the district determines, following a public hearing conducted pursuant to section 46-665, that depletion or contamination of the ground water supply in the control area or any portion of the control area is so excessive that the public interest cannot be protected solely through implementation of reasonable controls adopted pursuant to subsection (1) of this section, it may, with the approval of the director, close all or a portion of the control area to the issuance of any additional permits for a period of one calendar year. Such areas may be further closed thereafter by a similar procedure for additional one-year periods. . . .

Finally, § 46-663 states:

Regardless of whether or not any portion of a district has been designated as a control, management, or special ground water quality protection area, in order to administer and enforce the Nebraska Ground Water

> Management and Protection Act and to effectuate the policy of the state to conserve ground water resources, a district may:
>
> . . . .
>
> (5) Issue cease and desist orders, following ten days' notice to the person affected stating the contemplated action and in general the grounds for the action and following reasonable opportunity to be heard, to enforce any of the provisions of the act or of orders or permits issued pursuant to it, to initiate suits to enforce the provisions of orders issued pursuant to the act, and to restrain the construction of illegal wells or the withdrawal or use of water from such wells.

We find that the above-cited statutes provide adequate notice to citizens and adequate enforcement standards regarding the establishment of control areas, the adoption of rules to control water usage, and the issuance of cease and desist orders to prevent violations of such rules. As in *In re Application U-2*, 226 Neb. 594, 610, 413 N.W.2d 290, 301 (1987), the applicable statutory provisions "clearly outlined the legal field of battle and [are] not unconstitutional."

We finally address the appellants' contention that the issuance of a cease and desist order in this case is tantamount to a regulatory "taking," and their claim that the district court therefore erred in failing to award them compensation as a result of the issuance of the cease and desist order. With respect to this issue, we point out that the issue of compensation was, in fact, not before the district court, since the appellants' petitions sought only a review of the action of URNRD in issuing the cease and desist order and an injunction which would have prevented the enforcement of that order. The appellants' petition did ask the district court to overturn URNRD's cease and desist order on the ground that the statute under which it was authorized and issued resulted in an unconstitutional taking of property without just compensation. In that regard, we note that there is no constitutional limitation on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. See *Hammer v. Department of Roads*, 175 Neb. 178, 120 N.W.2d

909 (1963). However, the appellants' petitions did not seek such compensation, and the appellants therefore failed to properly place that issue before the district court. In any event, however, the appellants' analysis fails to support their takings claim.

The appellants attempt to lay a foundation for their takings claim by citing language from *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985). In *Sorensen*, 221 Neb. at 191-92, 376 N.W.2d at 548, this court stated that "the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21: 'The property of no person shall be taken or damaged for public use without just compensation therefor.' " However, ground water, as defined in § 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. *In re Application U-2, supra*. Furthermore, placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

Quoting *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 705, 305 N.W.2d 614, 617 (1981), *rev'd on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982), recites Nebraska's common law of ground water:

> "The . . . rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. . . ."

Under this rule, when the underground water supply is sufficient for all users, a landowner is entitled to reasonable and beneficial use of that supply. Apparently with that in mind, the appellants point to language in *Prather v. Eisenmann*, 200 Neb. 1, 7, 261 N.W.2d 766, 770 (1978), stating: "Under the reasonable use doctrine, two neighboring landowners . . . can

withdraw all the supply he [sic] can put to beneficial and reasonable use. What is reasonable is judged solely in relationship to the purpose of such use on the overlying land." The appellants then conclude that they were entitled to withdraw as much water as was required to use their land as they chose—in this case, to grow a corn crop.

The appellants' reliance on *Prather* is improvident, for the court specifically found that under the circumstances of that case, the water supply was sufficient for all users. Contrarily, as discussed previously, the designation of a control area which included the appellants' irrigated land established that in this instance the available supply of water was insufficient for all users.

In addition, while the common-law rule for ground water was adopted in *Olson, supra*, the Legislature has the power to determine public policy with regard to ground water and can alter the common law governing the use of ground water. See *Sorensen, supra*. See, also, *Sporhase, supra*.

Finally, the appellants state that they were deprived of all economic use of their land during 1992 and argue that under *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), they were therefore entitled to compensation. In *Lucas*, the Court found that a landowner was entitled to compensation because South Carolina's Coastal Zone Management Act prohibited all economically beneficial use of his land. However, the appellants' assertions in this instance are little more than a claim that because they could not withdraw enough water to grow a corn crop, they were therefore deprived of all economic use of their land. The record here fails to show that the appellants were, in fact, deprived of all economic use of their land in 1992, and, if only for that reason, *Lucas* is inapplicable under the circumstances presented here.

For the reasons stated in the opinion, the appeal in case No. 92-563 is dismissed as moot; the judgment in case No. S-92-562 is affirmed.

JUDGMENT IN NO. S-92-562 AFFIRMED.
APPEAL IN NO. S-92-563 DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DYANE M. BROCK, APPELLANT.
512 N.W.2d 389

Filed March 4, 1994. No. S-93-161.

Criminal Law: Appeal and Error. A defendant in a criminal case may not take advantage of an alleged error which defendant invited the trial court to commit.

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

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

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GRANT, J., Retired.

Defendant, Dyane M. Brock, was charged with assault in the first degree and with the use of a firearm in the commission of a felony. After the evidence in defendant's jury trial was completed, the court instructed the jury as to the crime of assault in the first degree and the crime of use of a firearm in the commission of a felony. In an instruction conference, defendant's counsel stated she did not request an instruction on assault in the second degree. Defendant was convicted and was sentenced to 4 to 6 years' imprisonment on the assault charge and a consecutive sentence of 3 to 5 years' imprisonment on the firearm charge, with appropriate credit of 227 days for time served. Defendant timely appealed, and in this court she assigns a single error: that the trial court erred in failing to instruct the jury on the lesser-included offense of assault in the second degree.

The facts in the record show that about 9 p.m. on June 19, 1992, at the ShopKo store at 144th and West Center Road in Omaha, Douglas County, Nebraska, James Royer, who was employed there as a part-time security agent, saw a woman, later determined to be defendant, in the garden department. Defendant was pushing a shopping cart with a Weed Eater in the basket. Royer's attention was drawn to her because she

glanced over the top of the cart and watched him as he walked by. He stood behind a floor sign where defendant could not see him and watched her for 3 or 4 minutes. Defendant was standing by the greeting card aisle with a card in her hand, acting as if she were reading it, but each time a customer walked by, her eyes followed the passerby. Royer testified: "All of a sudden she put the card back on the rack and she proceeded past the cash register 15 out the doors." Defendant pushed the cart past the cash register and into the foyer of the store where Royer proceeded to stop her.

As defendant started through the first set of doors, Royer said, "Ma'am, I need to talk to you." Defendant did not acknowledge him at all, but pushed the cart to the side, taking her purse out at that time. As she started through the final set of doors, he said again, "Ma'am, I need to speak to you." Royer had the door open and was outside the building when defendant turned toward him with a silver automatic pistol in her right hand. She pointed it at Royer's stomach. He started to retreat. There was a loud explosion of the gun, and he felt a sharp pain in his right leg as he went down. Royer testified:

> As I was laying [sic] on the floor, I hollored [sic], I said, "She shot me," and I said, "Somebody get her license number." About that time I noticed she was still on the doors, her arm came up into a pointing position and for some reason she turned and ran.

Royer's testimony was corroborated by Linda Johnson, a shopper who was leaving the store through that same exit as the incident occurred. She testified defendant was 2 to 3 feet from Royer. Johnson thought defendant might kill Royer because defendant had the gun pointed directly at him. Defendant did not have the gun in her hand as she was pushing the cart. Johnson saw her take the gun out of her purse. Defendant then ran to a waiting car and escaped.

A witness gave police a description of the car and its license plate number. That information led police investigators to defendant on June 26, 1992, at an Omaha residence where the car with that license plate number was in the garage.

Defendant testified in her own behalf. She admitted having had the gun used in the incident for 6 to 8 years and testified that

she recovered it from a friend on the day of Royer's shooting. Defendant testified she had been shopping and had purchased and paid for some items. She admitted that as she left the ShopKo store, she tried to take a Weed Eater without paying for it. As she started out the door, she heard a man say twice, "Ma'am, ma'am, I would like to talk to you." Defendant then testified:

> After he said that the second [time,] I was going in through the middle of the door and I had my purse like part of my hand[.] I had the cart and I let go of the cart and I unzipped it and he was coming up to me and I took it out and then it went off.
>
> . . . .
>
> . . . I was trying to show him that I had a gun and I was going to put it back in but it went off.

Defendant denied aiming the gun. She testified that she was surprised when it went off and that she left because she was scared. Defendant testified that she wanted to scare the security officer and that "[w]hen I was showing it to him, it just went off." She also testified, "I didn't aim it at no one[,] I just took it out and it went off, as soon as I took it out it we want [sic] off." Defendant admitted pulling the trigger, but denied she did so intentionally. She testified, "I reached down and grabbed it and I was just bringing it out and it went off."

Before addressing the single assigned error, it is necessary to consider a point that defendant's appellate counsel, who replaced defendant's trial counsel, slides past to reach the alleged error of the court. Defendant relies on the general statement of law that it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986).

Relying on such a statement, in this case, shows a callous disregard for the facts before us. In the instruction conference after the evidence was concluded, the record shows the following:

> THE COURT: . . . The Court considered instructing on the charge of assault in the second degree. I take it the defendant objects to the instruction on assault in the second degree?

> [Counsel for defendant]: Defendant has not asked for the instruction, is not requesting that instruction.
>
> THE COURT: And I take it the defendant has no requested instructions at all at the present time; is that correct?
>
> [Counsel for defendant]: That is correct.

Defendant specifically accepted the instructions as given.

The underlying question before us really is, Can defendant now urge as error an action of the court which defendant has directly invited the court to commit?

In this case, defendant's counsel specifically informed the trial court she did not want any instruction on second degree assault. Now, on appeal, different counsel contends the court should have given the precise instruction that defendant did not want given. To follow defendant's request on appeal would make more difficult the minefield that each trial judge must traverse to reach the goal of submitting a criminal case fully, fairly, and properly to the jury. Defense counsel have a duty not to affirmatively mislead the court, and trial counsel forthrightly performed that duty by objecting to an instruction she did not want. As stated above, different appellate counsel has resurrected the issue.

We decide this case on the basis that a defendant in a criminal case may not take advantage of an alleged error which defendant invited the court to commit. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993); *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989). We affirm the judgment of the trial court.

In an effort toward judicial economy in avoiding future episodes similar to the one presented in this case, we note that in any event, the trial court did not err in refusing to instruct the jury on the alleged lesser-included offense of second degree assault.

In *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), this court returned to the statutory-elements approach in determining issues as to lesser-included offenses. We stated:

> Consequently, a court must instruct on a lesser-included offense if (1) the elements of the lesser offense . . . are such that one cannot commit the greater offense without

> simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

Williams, 243 Neb. at 965, 503 N.W.2d at 566.

We also stated in *Williams* that first, second, and third degree assaults are all general intent crimes. (Third degree assault is not involved in this case because the parties stipulated that the gunshot wound to Royer constituted a serious bodily injury.) Insofar as the elements of the crimes are concerned, second degree assault is fully encompassed within the elements of the offense of first degree assault, thus satisfying the first prong of the test set out in *Williams*.

However, when one applies the second prong of the test, it is clear that in this case no instruction on the lesser-included offenses need be given. The evidence in the case before us presents no rational basis for acquittal of a charge of first degree assault and conviction of second degree assault. The carefully presented defense in this case was that there was an accidental shooting, or, in other words, that defendant had no criminal intent.

As stated by defendant's counsel at sentencing, "[W]e still maintain that the shooting itself was accidental . . . ."

Accident was probably one of the very few possible defenses available to defendant in this bizarre, Wild-West, cops-and-robbers shooting tale of the attempted theft of an inexpensive Weed Eater and the senseless wounding of a man trying to do his job courteously and effectively.

The judgment is affirmed.

AFFIRMED.

BETHESDA FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT, AND NEBRASKA DEPARTMENT OF ADMINISTRATIVE SERVICES, APPELLEE.

513 N.W.2d 271

Filed March 11, 1994. No. S-91-847.

Actions: Pleadings. A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that the claimant seeks recovery on the same general set of facts. The general set of facts must be derived from the original pleadings.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and WRIGHT, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Michael J. Rumbaugh, Special Assistant Attorney General, for appellant.

Robert L. Lepp, Mark A. Pieper, and Larry J. Steier, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellee Bethesda Foundation.

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

WHITE, J.

This is an appeal from an administrative order denying a motion to amend and/or supplement original claims. The Department of Administrative Services denied the motion to amend and/or supplement because it found that the amendments did not relate back to the original claims. The district court and the Nebraska Court of Appeals found that the proposed amendments did relate back. We reverse the decision of the Court of Appeals, *Bethesda Found. v. Nebraska Dept. of Soc. Servs.*, 3 NCA 686 (1993), and remand the cause for further proceedings not inconsistent with this opinion.

Bethesda Foundation is a Nebraska nonprofit corporation, incorporated for the purpose of owning, operating, and maintaining hospitals and nursing homes throughout

Nebraska. The present action involves claims for medicaid payments filed by 12 Bethesda Foundation facilities (collectively Bethesda).

In Nebraska, medicaid is administered by appellant, Department of Social Services (DSS). See Neb. Rev. Stat. § 68-1018 et seq. (Reissue 1990). In 1982, the Nebraska Legislature enacted a statute which limited the amount which DSS, then known as the Department of Public Welfare, could pay to providers of medicaid services. The statute provided, in relevant part:

> For fiscal year 1982-83, no payments shall be made by the Department of Public Welfare to any vendor for services provided to public assistance recipients, if such payments would result in a payment in excess of the fee allowed on April 1, 1982, increased by three and seventy-five hundredths per cent.

Neb. Rev. Stat. § 68-720 (Cum. Supp. 1982). DSS adopted regulations implementing the statute. The statute was later amended to include fiscal year 1983-84. See § 68-720.

We will refer to the two statutes and the implementing regulations collectively as "the 3.75-percent cap." The 3.75-percent cap was challenged in federal court and was held to be invalid. *Nebraska Health Care Ass'n v. Dunning*, No. CV82-L-472 (D. Neb. July 10, 1984), *aff'd in part and vacated in part* 778 F.2d 1291 (8th Cir. 1985), *cert. denied* 479 U.S. 1063, 107 S. Ct. 947, 93 L. Ed. 2d 996 (1987).

On July 31, 1984, Bethesda filed claims with the Department of Administrative Services (DAS) seeking the medicaid payments it would have received but for the 3.75-percent cap. The claims sought sums due for the period from August 1, 1982, to December 31, 1983 (the original claims).

On June 15, 1989, Bethesda moved to amend and/or supplement its original claims to include sums due for the period from January 1 to October 10, 1984 (the 1984 claims). DAS held a hearing on the motion. The director of DAS first determined that the 1984 claims had not been filed within the applicable statute of limitation. This determination was not contested at the hearing and has not been appealed. The director next determined that the 1984 claims did not relate

back to the original claims. The director found that separate calculations were required "to determine reimbursements to providers from year to year" and that the 1984 claims were based on a separate set of facts. Accordingly, the director denied Bethesda's motion.

Bethesda timely filed a petition for review in the district court for Lancaster County. The district court held that the 1984 claims did relate back. The district court found that the 1984 claims arose out of the same conduct as the original claims, namely DSS' application of the 3.75-percent cap. The district court also found that the 1984 claims did not set forth any new legal theories, that DSS and DAS would not be prejudiced by granting the motion, and that the delay in filing the motion was not in bad faith. Accordingly, the district court reversed the decision of the director.

DSS perfected an appeal to the Court of Appeals. The Court of Appeals reviewed Nebraska cases, but found that none addressed "an amendment where the legal theory remains the same, but the time period for recovery is expanded by the amendment, thereby increasing the defendant's damage exposure." *Bethesda Found. v. Nebraska Dept. of Soc. Servs.*, 3 NCA 686, 691 (1993). The Court of Appeals then reviewed a number of federal cases in which the amendment increased the time period of recovery and was held to relate back to the original claim. Based on these cases, the Court of Appeals held that the 1984 claims did relate back to the original claims.

DSS petitioned for and was granted further review in this court. The single issue before us is whether Bethesda's 1984 claims relate back to the original claims.

Nebraska explicitly adopted the relation-back doctrine in 1970. See *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970). Under this doctrine, "[a] cause of action pleaded by amendment ordinarily relates back to the original pleading provided that claimant seeks recovery on the same general set of facts." *Id.* at 181, 174 N.W.2d at 338. The rationale of this doctrine is that the original pleading provides fair notice of the factual situation from which the claim arises. See 3 James W. Moore and Richard D. Freer, Moore's Federal Practice ¶ 15.15[3.—2] (2d ed. 1993).

The original pleadings in the present action are the 12 claims which Bethesda filed with DAS on July 31, 1984. Each claim consists of a cover letter with supporting documentation. The cover letters are virtually identical. The headings of the letters indicate the individual facility and the amount of the claim. The body of each letter, addressed to the director of DAS, states, in relevant part:

> We represent the above-named provider and this letter shall serve as its claim for Medicaid reimbursement for the period of August 1, 1982 to December 31, 1983.
>
> The basis for our calculation of the amount of this claim is set forth in the computation schedule attached hereto together with our provider agreement and other supporting documentation.

The computation schedules referenced in the letters are not included in the record. The provider agreements referenced in the letters show that each facility was a participant in the medicaid program during the period for which the facility claimed reimbursement. The supporting documentation referenced in the letters shows that each facility was properly certified by Nebraska's Department of Health during the same period.

The proposed amendments in the present action are set forth in a letter sent to DAS on June 15, 1989. The letter states, in relevant part: "In order to complete the record, please consider this letter as Bethesda's formal amendment and/or supplement of each of its claims currently pending before [DAS] thereby increasing such claims by the amounts and for the periods indicated in the computation set forth in the document attached hereto . . . ." The attached document referenced in the letter lists the total amount due for the period January 1 to September 30, 1984. The letter to DSS also states that if the proposed amendments are allowed, then Bethesda will "forego the additional nine days into October of 1984."

Having reviewed the original pleadings and the proposed amendment, we now consider whether the two seek recovery on the same general set of facts.

The general set of facts must be derived from the original pleadings. Jack H. Friedenthal et al., Civil Procedure § 5.27 at

306 (2d ed. 1993) (an amendment relates back to an original pleading provided that the amendment asserts a defense or claim which "arose out of the same transaction or occurrence as that *set forth in the original pleading*"). (Emphasis supplied.) See *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 424, 507 N.W.2d 275, 285 (1993) (fiscal year 1981 did not relate back because it "was not mentioned in the original petition"). This is true for two reasons. The first reason is founded in the rationale of the relation-back doctrine. The basis of the relation-back doctrine, as we have previously explained, is the notice which the original pleadings provide. To look outside the original pleadings for the general set of facts would suggest that notice is provided by something other than the pleadings and would, in essence, twist the relation-back doctrine beyond recognition. The second reason is founded in the efficient functioning of the judicial system. If the general set of facts cannot be derived from the original pleadings, then courts will be obliged to hold hearings to uncover the general set of facts. This would waste judicial resources and would create opportunities to lengthen litigation simply by raising relation-back issues. Therefore, when a court is asked to apply the relation-back doctrine, the court must find the general set of facts in the original pleadings.

Bethesda argues that the general set of facts is DSS' application of the 3.75-percent cap, that both the original claims and the 1984 claims arise from the application of the cap, and that therefore the amendments relate back. We disagree. Bethesda's original claims do not mention the 3.75-percent cap at all, let alone DSS' application of the cap. As a result, DSS' application of the 3.75-percent cap cannot serve as the general set of facts on which the proposed amendments could be based.

Bethesda seeks to add a block of time—1984—to the original claims. This Bethesda cannot do. The 1984 claims were not mentioned even obliquely in the original claims. The original claims provide so few factual details that the avenue of the relation-back doctrine is narrowed to the point of impassibility. We are unable to construct, from the original claims, a general set of facts which would encompass the 1984 claims.

For the proposition that an amendment can relate back if the

amendment does not change the theory of the case but increases the time period on which recovery may be had, Bethesda and the Court of Appeals relied on three federal cases: *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985); *Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y. 1984); and *Soler v. G & U, Inc.*, 103 F.R.D. 69 (S.D.N.Y. 1984). In each of these cases, the original pleading included facts which revealed the basis for the claim. Bethesda's original claims, in contrast, do not include such facts. We therefore find the cited cases distinguishable.

We hold that the 1984 claims do not relate back to the original claims. The judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating.

LINDA GIBB ET AL., APPELLANTS, V. ROBERT L. STRICKLAND ET AL., APPELLEES.

513 N.W.2d 274

Filed March 11, 1994. No. S-92-440.

1. **Pleadings: Appeal and Error.** Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal.
2. **Liability: Motor Vehicles.** The law requires that an owner use care in allowing others to assume control over and operate his or her automobile and holds the owner liable if he or she entrusts it to, and permits it to be operated by, a person whom he or she knows or should know to be an inexperienced, incompetent, or reckless driver; to be intoxicated or addicted to intoxication; or otherwise incapable of properly operating an automobile without endangering others.
3. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. _____: _____. 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, who is entitled to every reasonable inference deducible from the evidence.

5. **Agency: Intent.** An agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship.
6. **Pretrial Procedure: Appeal and Error.** The trial court has a broad discretion in regard to amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of discretion.
7. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Carole McMahon-Boies, of Pepperl & McMahon-Boies Law Offices, P.C., for appellants.

Rocky C. Weber, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees Walker.

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

HASTINGS, C.J.

The plaintiffs, Linda Gibb, Lisa Gibb, George A. Gibb, and Elizabeth Gibb, brought this action for damages arising from an automobile accident which occurred on April 21, 1990. Lisa Gibb was injured while a passenger in a car driven by her sister Linda, which car collided with a van driven by defendant Robert L. Strickland and owned by defendants Lynn and Patricia Walker. Following a bench trial, judgment was entered in favor of the Walkers. There was no question but that Strickland was negligent.

The plaintiffs contend that the district court erred in (1) finding that the Walkers had not negligently entrusted their vehicle to Strickland, (2) finding that there was not an agency relationship between the Walkers and Strickland, and (3) allowing the admission into evidence of Strickland's guilty plea. On appeal, the plaintiffs also contend that Strickland was acting in the scope of a joint adventure in which he was involved with the Walkers. However, this theory was not pled, and where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal. *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d

822 (1991); *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985). Therefore, we consider only the remaining errors alleged.

Prior to April 21, 1990, the Walkers had been acquainted with Strickland for about a month. Strickland worked on cars in a garage at the Walkers' residence and tried to teach Lynn Walker car repair techniques. He spent the night at the Walkers' home five or six times.

On the morning of April 21, after visiting his wife Patricia in jail, Lynn Walker purchased "a fifth" and a 12-pack of beer. He then went home and started drinking with Strickland at about 12:30 p.m. When these purchases were consumed by 3 o'clock in the afternoon, Walker returned to the liquor store to buy a pint of rum and a case of beer. Strickland and Walker continued to drink throughout the day. At some point during the evening, Walker became angry with his stepson Gordon Snider, and Strickland intervened in the argument, which made Walker more angry. According to his testimony, Walker did not clearly remember anything that happened after that point, although he did recall going outside and sitting in his camper. Walker admitted being very drunk.

Walker's stepson Gordon Snider testified that 30 or 45 minutes after the altercation, he saw his stepfather outside going toward the camper. At some point after that, Strickland told Gordon that Strickland had permission to use the Walkers' van and invited Gordon and his younger brother to go with him for a ride. Gordon stated that Strickland ran into "about five" other vehicles while driving the van that night. Gordon testified that Strickland told him that Walker gave him the keys to the van, but later stated that Strickland told him he took the keys from Walker when Walker was passed out. When Walker was asked how Strickland got the keys, he stated: "Alls I could remember is when I went to the camper, I was sitting there and I was going to put the keys into the ignition, but then all of a sudden I just laid over."

Lisa Gibb testified that she was injured on the evening of April 21 when the car in which she was a passenger collided with a blue van. Gibb stated that they were heading south on 27th Street in Lincoln and had no stop sign or stoplight. As a result

of her injuries, she was hospitalized for 3 days. Exhibit 3, a police report, establishes that the Gibb vehicle collided with the van owned by the Walkers while the van was being driven by Strickland. Exhibit 7, admitted over objection, establishes that Strickland pled guilty to unauthorized use of a propelled vehicle in connection with this incident. The district court found that the plaintiffs had failed to prove that Lynn or Patricia Walker had permitted Strickland to use their vehicle and, therefore, had failed to prove negligent entrustment. The court also found no evidence of an agency relationship existing between the Walkers and Strickland.

In asserting that the district court erred in failing to find that the Walkers negligently entrusted their vehicle to Strickland, the plaintiffs argue that implied consent is sufficient to establish that a driver has the permission of the owner in operating a vehicle, citing 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 675 at 910 (1980), which states:

> [I]mplied permission to use or operate another's motor vehicle may be gathered from all the circumstances surrounding its possession, and the courts will not be astute to discover a flaw in the chain of events leading up to such possession, or to withhold the principle of implied permission where the facts fairly warrant the extension of that principle.

The plaintiffs contend that implied permission is established when the owner of a vehicle fails to stop someone who is drunk from driving away in the vehicle and that Lynn Walker had a duty to stop Strickland, which he failed to meet. The plaintiffs further argue that the Walkers engaged in a course of conduct which gave Strickland the opportunity to secure possession of the van.

Citing *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956), the plaintiffs argue that whether or not permission is granted in allowing another to drive one's vehicle is irrelevant in assigning liability to the owner. In *Deck*, Richard Sherlock, the owner of the vehicle, accompanied by Robert Hull, drove around Ogallala and drank beer on the afternoon of the accident. Later in the evening, they were joined by Harold Duffy. The three continued to drink until about 9:30 p.m., when Sherlock

decided to go home. At that time, Duffy was driving. Sherlock testified that when he got out of the car, he told Duffy that Duffy could drive the car to the Vets Club. He also stated that he did not tell Hull that Hull could drive the car and that he knew Hull's driver's license had been revoked for driving while under the influence of intoxicating liquor. Hull and Duffy continued to drink at the Vets Club until the management refused to serve Hull. When they left the Vets Club, Hull drove and was involved in an automobile accident with the plaintiff. As the controlling rule, this court found that

> [t]he law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others.

Id. at 90-91, 75 N.W.2d at 102.

Although the plaintiffs assert that in *Deck*, this court "found liability even though no express permission to drive the car was given," brief for appellants at 3, this court in fact reversed the directed verdict in favor of Sherlock, finding that whether or not Sherlock exercised due care when he entrusted his car to Hull and Duffy was an issue of fact for the jury. We stated:

> A jury might well find that Sherlock was negligent in entrusting his car to Duffy or Hull, or both, in the light of the knowledge he had acquired throughout the afternoon and evening, even though he did not think Hull or Duffy were intoxicated when he permitted them to take the car.

162 Neb. at 92, 75 N.W.2d at 103. We noted that while Sherlock had not given Hull express permission to drive the car, express permission had been given to Duffy. We went on to suggest that the liability of Sherlock could be predicated on the initial act of allowing Duffy to use the car:

> We point out that if Sherlock was negligent in permitting Duffy to use his car because of the latter's intoxication, or the likelihood that he would become intoxicated, Sherlock is liable for every act of Duffy which contributed to the

> accident, including the act of Duffy in permitting Hull to drive while he was drunk.

Id. at 92-93, 75 N.W.2d at 103. Although it may be inferred from *Deck* that liability may attach to an owner from a driver's negligence even in the absence of express permission to that driver, the case may be factually distinguished from the case at bar, since Sherlock did give express permission to Duffy to use the car when he was accompanied by Hull, with knowledge that both had been drinking.

In *Kosrow v. Acker*, 188 Ill. App. 3d 778, 544 N.E.2d 804 (1989), the court noted that a person may be found liable for negligent entrustment where that person entrusts an automobile to one whose incompetency, inexperience, or recklessness is known or should have been known by the owner or entrustor of the automobile, and that in the context of an action for negligent entrustment, it was proper to define entrustment as express or implied permission. The court stated that " '[i]mplied permission exists where there is an inference or circumstances arising out of a course of conduct or a relationship between the parties whereby there is mutual acquiescence or lack of objection under circumstances that generally would indicate permission.' " 188 Ill App. 3d at 784, 544 N.E.2d at 807, quoting *Standard Mut. Ins. Co. v. Sentry Ins.*, 146 Ill. App. 3d 905, 497 N.E.2d 476 (1986). In *Kosrow*, plaintiffs' decedents were killed in an auto accident when their car was hit by a Cadillac owned by defendant Jeffrey Smith and driven by defendant Ronald Acker, Smith's stepbrother, who had admitted liability. The jury had been instructed to find Smith liable if Smith gave Acker either express or implied permission at any time to use his car on the day of the accident. Viewed in a light most favorable to the plaintiffs, the evidence established, inter alia, that a police officer had seen Acker driving the car with Smith as a passenger within 6 months before the accident; that Acker had once driven the car around the block in connection with repairs he made at Smith's request; that on the night of the accident, Smith drove his father's vehicle instead of his own; that a Sergeant Arquilla testified that Smith told him he left his keys in Acker's room on the dresser; and that Smith reported his car stolen because his

father wanted him to, but that he did not want to see Acker prosecuted. However, there was also evidence that Acker knew that Smith did not want him to drive the Cadillac and that Smith had left his keys on his own dresser in his own room, which he only occasionally shared with Acker. Although the jury found Smith liable for negligent entrustment, the appellate court reversed, finding that the facts failed to establish that Smith gave Acker either express or implied permission to use his car on the day of the accident.

In *Penland v. Allsup*, 527 So. 2d 715 (Ala. 1988), the victims of a two-vehicle accident brought an action for negligent entrustment against the owner of a car involved in the accident. The owner of the car, Ronald Allsup, and his passenger, one Mullinax, had each consumed four beers in the early afternoon of the accident. Mullinax had three more beers later in the day. Together, with Allsup driving, they traveled from Jacksonville to Birmingham to deliver a parachute to a friend. When they arrived at the friend's home, Allsup went inside, leaving his keys in the car so that Mullinax could listen to the radio while he was waiting. An unopened bottle of liquor was in the backseat of the car when Allsup left. When he came back outside approximately 20 minutes later, Allsup discovered that Mullinax had left with his car. Mullinax was involved in the accident with the plaintiffs several hours later and was charged with driving under the influence of alcohol and first degree assault. Although the plaintiffs conceded that no actual entrustment had occurred, they argued that Allsup was liable due to his past consent in allowing Mullinax to drive his car or due to Allsup's conduct in leaving the vehicle available to Mullinax on the occasion in question. The court rejected the plaintiffs' argument for a "continuing entrustment," stating:

> [T]he only evidence of Mullinax's past use of Allsup's vehicle is the fact that Mullinax had used Allsup's Corvette on three prior occasions. Each time he used the vehicle, however, he had had Allsup's express permission, and each time it was for a specific purpose. There is no evidence presented that Mullinax used Allsup's car "at will," nor is there evidence that Mullinax was drunk (or otherwise incompetent) on any of the previous occasions

when he was allowed the use of Allsup's vehicle.

Id. at 716. The court further rejected the plaintiffs' contention that Allsup was negligent in leaving his keys in the car, finding that it was not foreseeable that Mullinax would simply take the car without Allsup's consent, and affirmed the summary judgment granted by the trial court.

In the instant case, Lynn Walker testified that he could not recall Strickland's asking for his keys and did not know how Strickland got the keys. The district court found that the plaintiffs had failed to prove that Lynn or Patricia Walker permitted Strickland to drive their car.

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, who is entitled to every reasonable inference deducible from the evidence. *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993); *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993).

The district court was not clearly erroneous in finding that the plaintiffs had failed to establish that the Walkers had entrusted their vehicle to Strickland. Further, the evidence was insufficient to establish a "course of conduct" indicative of mutual acquiescence or lack of objection under circumstances that generally would indicate permission. Both Lynn and Patricia Walker testified that Strickland had driven their vehicle on only one previous occasion. On that occasion, Strickland took Patricia Walker to the store. She gave him the keys to the van for that trip, and he returned them to her when the trip was completed. He was not intoxicated at that time.

The plaintiffs also argue that an owner may be liable under certain circumstances for the negligence of a thief in operating the owner's vehicle, apparently seeking to analogize the facts of this case to "key-in-the-ignition" cases, as discussed in *Hosking v. Robles*, 98 Cal. App. 3d 98, 159 Cal. Rptr. 369 (1979). In *Hosking*, a California appellate court noted that in that state, "the owner of a motor vehicle is under no duty to a person injured by a thief's operation of a stolen vehicle absent 'special

circumstances' effecting [sic] the foreseeability of the theft and the thief's negligent operation of the vehicle." 98 Cal. App. 3d at 102, 159 Cal. Rptr. at 371. The court went on to explain that " '[s]pecial circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons. . . .' " *Id.* at 102, 159 Cal. Rptr. at 372. The court cited several cases in California and other jurisdictions where liability had been imposed in special circumstances. See, e.g., *Hergenrether v. East*, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964) (partly loaded 2-ton truck left in area populated by drunks, where defendant intended to leave it for a long period of time); *Enders v. Apcoa, Inc.*, 55 Cal. App. 3d 897, 127 Cal. Rptr. 751 (1976) (known that parking attendant left keys in cars and there were past thefts); *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955) (unattended and unlocked bulldozer); *Kacena v. George W. Bowers Co., Inc.*, 63 Ill. App. 2d 27, 211 N.E.2d 563 (1965) (auto dealer left keys in car in locality frequented by juveniles with high incidence of car theft); *Schaff v. R. W. Claxton, Inc.*, 144 F.2d 532 (D.C. Cir. 1944) (driver delivering goods to a restaurant left keys in car on parking lot next to the restaurant).

In *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959), this court found that no liability attaches to the owner of a car parked in violation of a key-in-the-ignition ordinance when the car is taken by a thief who negligently causes injury and damage to another. In *Flannery v. Sample Hart Motor Co.*, 194 Neb. 244, 231 N.W.2d 339 (1975), we stated that in the absence of applicable statutes or ordinances, the failure of a person having charge of a vehicle to remove the ignition key does not constitute a negligent omission or breach of a duty owed to a third party. Most recently, we addressed the issue of an owner's liability in regard to damages caused by a bulldozer left unattended with the keys in or near the ignition, in *Gerken v. Hawkins Constr. Co.*, 243 Neb. 157, 498 N.W.2d 97 (1993). In *Gerken*, we adhered to the holdings of *Hersh* and *Flannery* and concluded that the actions of an unknown person or persons who operated the bulldozer before it collided with the plaintiffs' house were an independent intervening cause and

were the proximate cause of the accident. Although we did not explicitly refer to "special circumstances," we noted that the plaintiffs did not allege facts in their petitions to show that the acts of the unknown person or persons in the operation of the bulldozer were foreseeable by the defendant.

The plaintiffs here contend that had Walker been sober, he would have known that Strickland was taking the children for a ride in the Walker vehicle, and that "[i]t was foreseeable to Walker that Strickland would leave in the Walker vehicle that night." Brief for appellants at 7. However, the keys to the Walkers' van were not in the ignition, but were attached to Lynn Walker's belt loop. The van was parked at their residence; it had not been driven for several days because there had been trouble with the transmission, and Strickland had driven the van on only one previous occasion, with the permission of, and accompanied by, Patricia Walker. Also, Lynn Walker testified that he did not ask Strickland to buy more alcohol or to care for his children. It would be an unwarranted extension of the "special circumstances" doctrine, and unreasonable to find foreseeability, under the circumstances of this case.

As their second assignment of error, the plaintiffs assert that the district court erred in finding that there was no agency relationship between the Walkers and Strickland, arguing that Strickland was acting as an agent of the Walkers in caring for their children.

An agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

Gordon Snider, Patricia Walker's son, testified that at the time of the incident in question, he was 16 years old and living with his mother and stepfather part time. During the afternoon and evening of April 21, 1990, he was at their residence and observed his stepfather and Strickland drinking. At some point, his stepfather became angry with him. Gordon stated that his stepfather did not hit him and that Strickland intervened. Later, Strickland told him that Strickland had permission to use the van and invited Gordon and his 13-year-old brother John to ride along. Gordon further testified that neither of the Walkers

had told him that Strickland was to watch over him while his mother was in jail. Although he denied that Strickland watched over him at the house, he agreed that Strickland had protected him when his stepfather became angry.

As noted above, Lynn Walker stated that he did not ask Strickland to help watch the children. Patricia Walker testified that she did not ask Strickland to help watch the children, stating, "My kids are old enough to take care of themselves." Although the plaintiffs argue that Strickland was "babysitting" and protecting the children from Walker, it is not clear from the record that Gordon needed to be physically protected from Walker. Even if that is true, at the time that Strickland took the children for a ride, Walker was apparently passed out in his camper, obviating the need for protection.

The facts are insufficient to establish the intent to create an agency relationship between the Walkers and Strickland in regard to caring for the children, and the district court properly found that no agency relationship was established.

As their final assignment of error, the plaintiffs assert that the district court erred in admitting into evidence Strickland's guilty plea to unauthorized use of a propelled vehicle. The plaintiffs argue that they objected to the defendants' motion to amend the pretrial conference order to allow the submission of Strickland's guilty plea at trial and further contend that the court abused its discretion in admitting the exhibit at trial over their renewed objection.

In stating that "[t]he waiver of a jury trial by the plaintiff accompanied the parties[']agreement as to exhibits," brief for appellants at 12, the plaintiffs apparently suggest that the waiver of a jury trial was conditioned on an agreement to limit the exhibits to those discussed at the pretrial conference, although that fact does not appear in the record. The plaintiffs refer us to the affidavit of attorney Richard Scott, who represented the Walkers at the time of the pretrial conference, which affidavit states that he had received a letter from the Walkers' insurance company denying coverage because Strickland had been convicted of unauthorized use of a motor vehicle; that he and the plaintiffs' counsel stipulated to waive a jury; and that they stipulated to the admissibility of Lisa Gibb's

doctor's reports and to the fairness and reasonableness of her medical bills. The affidavit does not state that the stipulations were conditional. Further, the amended pretrial order does not reflect that the plaintiffs objected to the admission of the guilty plea on that basis. According to the amended order, exhibit 9, a certified copy of the record of the conviction of Strickland in the county court for Lancaster County, was to be introduced at trial "subject to objection for competency, relevancy and materiality." Thus, the alleged error has not been preserved for the record, nor does the record reflect that the plaintiffs attempted to withdraw their waiver of a jury trial. It is within the discretion of the trial court to permit a party in a civil case to withdraw his waiver of a right to jury trial, if the application to do so is timely made and the waiver has not been acted upon to the prejudice of any party. *McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966).

The trial court has a broad discretion in regard to amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of discretion. *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985).

Although the plaintiffs objected at trial to the admission of the guilty plea "on the basis of relevancy and on the basis that it wasn't timely presented to the court at the time of the pre-trial," as noted above, the issue of timeliness was not preserved on the record at the time of the pretrial order. The plaintiffs argue on appeal that the document was "unduly prejudicial and misleading." Brief for appellants at 12. However, these issues and the issue of relevancy have not been assigned as error. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991). Thus, the record does not support the contention that the district court abused its discretion in allowing the amendment of the pretrial order. The reception into evidence of a party's guilty plea is proper as an admission. The plaintiffs' final assignment of error is therefore without merit, and the judgment of the district court is affirmed.

AFFIRMED.

FRANK NESTOR LATENSER AND RUTH M. LATENSER, APPELLEES AND CROSS-APPELLANTS, V. THE INTERCESSORS OF THE LAMB, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLANT AND CROSS-APPELLEE.

513 N.W.2d 281

Filed March 11, 1994. No. S-92-444.

1. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence to an appellate court.
3. _____: _____. It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
4. _____: _____. Without a complete record, an appellate court cannot make a de novo review.
5. **Records: Pleadings: Appeal and Error.** Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment.
6. **Injunction.** An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.

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

Monte Taylor, of Taylor, Connolly & Kluver, for appellant.

H. Daniel Smith, of Sherrets Smith & Gardner, for appellees.

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

BOSLAUGH, J.

The parties to this suit own adjacent property in Douglas County. The appellees, Frank Nestor Latenser and Ruth M. Latenser, own two parcels of land, referred to throughout the proceedings as plot B and plot C. The appellant, The Intercessors of the Lamb, Inc., owns three parcels of land referred to as plots A, D, and F. Plot A is a 7-acre tract which has located upon it a large residential structure. Plot B is a private road subject to an easement in plot A for ingress and egress. Plot D is an unimproved 5-acre tract which abuts plots A, B, and C.

The appellees filed this suit in the district court following the appellant's announcement that it planned to build a chapel on plot D. The appellees sought a declaratory judgment that the easement on plot B could not be used for access to plot D. The appellees also sought to enjoin the appellant from using plot A in a manner that violated restrictive covenants limiting the use of the land to single family dwellings, churches, or related uses. Finally, the appellees brought actions for alleged trespass and nuisance. The appellees and the appellant both filed motions for summary judgment on the first two causes of action.

At the hearing on the motions for summary judgment, the appellant conceded the issue concerning the first cause of action, and the district court enjoined the appellant from using the easement on plot B as a means of ingress and egress to plot D. In the second cause of action, the district court found that the appellant's use of the land did not constitute church use under the language of the covenants and issued an injunction restricting the appellant's use of the property to a use allowed by the covenants. The appellees dismissed their remaining causes of action.

The appellant brings an appeal from the judgment of the district court on the second cause of action. The appellees cross-appealed from the judgment of the district court denying the appellees' request for an injunction permanently preventing the appellant from using the easement on plot B for access to plot A.

The issue raised by the appeal is whether the actions of the appellant violate the restrictive covenants. In equity actions such as this, this court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Citizens State Bank v. Jennings State Bank*, 236 Neb. 307, 461 N.W.2d 78 (1990).

The bill of exceptions filed in this court contains only six exhibits that the appellant claims were introduced at the hearing on the appellees' motion for summary judgment. The order of the trial court recites that both parties adduced evidence, but the bill of exceptions does not contain any testimony from the hearing or a showing that the exhibits were received in evidence. The bill of exceptions is the only vehicle for bringing evidence to

this court. *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983). It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990). Without a complete record, the court cannot make a de novo review.

In *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 191, 465 N.W.2d 472, 475 (1991), this court said:

> In this case the parties have failed to preserve and present a record which will permit a review of the order overruling the motion of the Central District or the order sustaining the motion of NPPD. Since there is no bill of exceptions concerning the evidence which may have been offered at the hearing on the motion for summary judgment or at the hearing on the motion for new trial, there is nothing to review, and this court cannot determine whether error occurred. Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the court before an order on such a motion may be reviewed.

See, also, *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985); *Scarpello v. Continental Assur. Co.*, 187 Neb. 395, 191 N.W.2d 444 (1971); *Jung v. Cole*, 184 Neb. 153, 165 N.W.2d 717 (1969).

This court addressed a similar situation in *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1990). In *Scottsbluff Typewriter Leasing*, the appeal was from an order of the district court affirming the judgment of the county court. On appeal to this court, the appellant submitted a bill of exceptions which included only the proceedings from the county court; no record of the district court proceedings was filed. This court stated that absent a complete bill of exceptions, the only issue before the court on the appeal was whether the pleadings were sufficient to support the judgment.

We confine our analysis, therefore, to a determination of whether the pleadings support the district court's judgment

granting an injunction. An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate. *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991). The appellees' petition alleges facts to support each of these elements. The pleadings support the judgment, and the judgment will not be overturned.

The appellees cross-appealed from the judgment of the district court denying the termination of the easement over plot B. We analyze the cross-appeal in the same manner as the appeal, given the incomplete bill of exceptions. The pleadings in the case support the judgment of the trial court, and the judgment of the trial court on the subject of the cross-appeal will not be disturbed absent a complete bill of exceptions.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurs.

LINDA GAIL VOLZ, APPELLANT, V. GARY JOSEPH VOLZ, APPELLEE.
513 N.W.2d 284

Filed March 11, 1994. No. S-92-838.

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

Charles D. Hahn for appellant.

Curtis L. Maschman, of Kotouc, Fankhauser & Maschman, on brief for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

In this appeal of a dissolution action, the petitioner-appellant, Linda Gail Volz, challenges the district court's determination that the property settlement agreement she and the respondent-appellee, Gary Joseph Volz, executed

was unconscionable and therefore unenforceable and the district court's resulting division of the property.

From our de novo review of the record, we conclude that the district court did not abuse its discretion in either of these respects.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER W. HUEBNER, APPELLANT.

513 N.W.2d 284

Filed March 11, 1994. No. S-93-167.

1. **Constitutional Law: Appeal and Error.** Except in the most unusual cases, a question of constitutionality must have been properly raised in the trial court to be considered on appeal.
2. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
3. **Constitutional Law: Speedy Trial.** The right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested even though the prosecuting authorities had knowledge of the offense.
4. **Constitutional Law: Due Process.** The Due Process Clause requires dismissal only if a defendant shows that the prosecuting authorities' delay in charging him caused substantial prejudice to his right to a fair trial and that the delay was an intentional device to gain unfair tactical advantage over him.
5. **Due Process: Proof.** A defendant cannot rely on the real possibilities inherent in a delay in bringing charges against him, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice.
6. **Trial: Mental Competency.** The granting of a request for a psychiatric evaluation of a victim falls within the discretionary power of the trial court.
7. **Sexual Assault: Mental Competency: Witnesses.** The purpose of a psychiatric examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness.
8. **Trial: Mental Competency.** A trial court may, in its discretion, order a psychiatric examination of the complaining witness where the record establishes compelling reasons, but not for a mere fishing expedition.

9. **Trial: Witnesses.** A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.
10. **Sexual Assault: Witnesses.** In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details, and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details.
11. **Sexual Assault: Witnesses: Corroboration.** The rule which prohibits witnesses from testifying about the details of a sexual assault complaint made by a victim applies to corroborative evidence provided after the victim has given direct testimony of the assault.
12. **Sexual Assault: Corroboration: Proof.** After the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.
13. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
14. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
15. _____: _____: _____. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he wishes to have the benefit of a lesser-offense instruction.

Appeal from the District Court for Pierce County: ROBERT B. ENSZ, Judge. Affirmed.

Charles W. Balsiger, P.C., for appellant.

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

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

LANPHIER, J.

Appellant-defendant, Roger W. Huebner, was charged with first degree sexual assault on a child. Huebner was found guilty after a jury trial. On appeal, Huebner asserts the trial court erred in (1) overruling his plea in abatement; (2) denying him the opportunity to have the complaining witness examined by a psychologist or psychiatrist; (3) preventing him from offering evidence of a prior sexual assault on the alleged victim by someone else; (4) permitting the victim and others to testify regarding the particulars of the alleged sexual assault and in overruling his motion in limine on the grounds that the statement of the alleged victim was not timely reported; (5) denying his motion for dismissal and directed verdict upon the close of the State's case in chief, as the State failed to meet its burden of proof; and (6) denying his request to instruct the jury on a lesser-included offense. We affirm.

FACTS

Huebner was the boyfriend of the victim's mother. He lived with the victim, her mother, and a younger brother of the victim's. The events which give rise to Huebner's conviction took place in December 1989. The victim testified that her mother was with Huebner's parents. The victim and her younger brother were at home with Huebner. Her brother was sleeping in his room. While the victim was in her own room doing homework, Huebner came into her room, handcuffed her right arm to her bed, and held her other arm with his hand. He pulled her pants and underwear down to her knees and digitally penetrated her vagina. The victim did not report the incident to anyone until approximately July 1990. At that time, an official report was made by the Department of Social Services of the alleged assault.

On November 19, 1991, nearly a year and a half after the assault was first reported, a complaint was filed against Huebner. He filed a plea in abatement asserting that the evidence adduced at the preliminary hearing was insufficient to justify the filing of the information and that the proceedings against him were unreasonably delayed, since the State had had knowledge of the nature of the complaint for well over a year

before it was filed. The plea was overruled.

Before trial, Huebner requested that the victim undergo psychiatric examination to determine her credibility. The court denied the request. On January 11, 1993, 7 days before trial, Huebner filed a notice of intent to offer evidence of a prior sexual assault perpetrated upon the victim. The court denied this motion also.

At trial, Brigid Rock, a social worker, and Alfredo Ramirez, a counselor, testified about details of the sexual assault. Katie Boley, another social worker, testified as an expert witness about reasons child victims of sexual assault delay reporting the assaults.

After the State rested, Huebner moved for dismissal and a directed verdict, which the court denied.

PLEA IN ABATEMENT

Huebner claims that the trial court erred in overruling his plea in abatement. In that plea, Huebner challenged the sufficiency of the evidence to justify filing the information and binding the case over to district court. He also asserted that the filing of the charges had been unreasonably delayed and therefore denied him equal protection and due process of law.

SPEEDY TRIAL

At the outset, we note that on appeal, Huebner has attempted to raise a Sixth Amendment speedy trial claim. This court has consistently held that except in the most unusual cases, a question of constitutionality must have been properly raised in the trial court to be considered on appeal. *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987). In addition, in the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). At the hearing on the plea in abatement, Huebner's argument was threefold. He argued a due-process rights violation, a denial of his right to confront witnesses, and ineffective assistance of

counsel. Huebner did not raise the issue of speedy trial in the lower court; therefore, we need not address it.

DUE PROCESS

In any event, the right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested even though the prosecuting authorities had knowledge of the offense. *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Huebner's main due process contention is that the delay between the time the State learned of the assault and the time it filed the complaint and information was unreasonable and constituted a denial of his Fifth Amendment due process rights.

The Due Process Clause requires dismissal only if a defendant shows that the prosecuting authorities' delay in charging him caused substantial prejudice to his right to a fair trial and that the delay was an intentional device to gain unfair tactical advantage over him. *United States v. Marion, supra*; *U.S. v. Meyer*, 906 F.2d 1247 (8th Cir. 1990); *United States v. Russo*, 796 F.2d 1443 (11th Cir. 1986) (general allegations of prejudice are not evidence).

Huebner claims that the delay was a deliberate attempt by the State to gain advantage and that the delay caused him actual prejudice. A defendant cannot rely on the real possibilities inherent in the delay, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice. *United States v. Marion, supra.*

Huebner asserts that the State intended to gain tactical advantage by providing the victim with counseling in order to use her as a credible witness at trial. He claims he was prejudiced by the delay because he was unable to cross-examine the victim until after she had undergone counseling for 2 years. He does not state how he was prejudiced by his failure to cross-examine the victim before she received counseling. He provides no evidence showing that the State attempted to manipulate the counseling sessions in order to improperly mold the victim's testimony. He apparently claims that in receiving counseling to cope with the assault, the victim became a better witness; therefore, psychological counseling for her emotional

well-being should have been delayed until after Huebner was able to cross-examine her. Huebner urges that his ability to receive a fair trial depends, in effect, on the battered emotional state of the alleged victim. We recently held in *State v. Baker, ante* p. 153, 511 N.W.2d 757 (1994), that it was appropriate under the circumstances of that case to administer medical care to a defendant to render him competent to stand trial. It would indeed be anomalous for us to now deny an alleged victim the right to counseling to render her more competent to withstand the rigors of trial. We find that an alleged sexual assault victim need not forgo her own mental health pending the State's prosecution of her alleged attacker in order to preserve the defendant's right to cross-examination. Huebner cannot claim prejudice simply because the victim received such counseling.

The State submitted no justification for the approximately 17-month delay. However, the burden was on Huebner to show that the delay actually prejudiced his defense and that the government intentionally caused the delay to gain an unfair tactical advantage. He failed to meet this burden. His allegations of prejudice and improper State maneuvering are not supported by the evidence and are therefore insufficient.

PSYCHIATRIC EXAMINATION

Huebner next claims that the trial court erred in denying him the opportunity to have a psychiatric examination performed on the victim. The granting of a request for a psychiatric evaluation of a victim falls within the discretionary power of the trial court. *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992); *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992); *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990). The purpose of a psychiatric examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness. *Id.*

There is generally a reluctance by the courts to order a victim of sexual assault to submit to a psychiatric examination because of the substantial imposition it places on the victim.

> Because of the possible indignity of such an examination and the natural reluctance of persons to

> appear as witnesses if they were to be subjected to such examination, we believe a *strong and compelling* reason should appear before a trial court in the exercise of its discretion should order a medical examination even as a condition of testifying at the trial.

State v. Lederer, 99 Wis. 2d 430, 439, 299 N.W.2d 457, 463 (Wis. App. 1980), *questioned on other grounds, State v. Feela*, 101 Wis. 2d 249, 304 N.W.2d 152 (1981). Accord *State v. Miller*, 35 Wis. 2d 454, 151 N.W.2d 157 (1967).

This court has adhered to the principle and has stated that a trial court may, in its discretion, order a psychiatric examination of the complaining witness where the record establishes compelling reasons, but not for a mere fishing expedition. *State v. Welch, supra*; *State v. Nelson, supra*.

Two hearings were held because of Huebner's attempts to compel the victim to submit to psychiatric evaluation. At both hearings, Huebner's counsel argued that a psychiatric examination was necessary because a determination had to be made regarding the victim's credibility. Defense counsel stated that because the victim had made previous similar accusations in the past, the testimony of a psychiatrist who had had the opportunity to examine the victim could assist the trier of fact in making a determination of the credibility of the witness and also whether or not the victim knew fact from fantasy. During the hearing, defense counsel cited reports which it argued demonstrated that the victim had a history of fabricating stories. However, these alleged reports were not admitted into evidence, and therefore we will not consider them. See *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

Furthermore, we have stated that a witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder. *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). The cases cited by Huebner in support of his argument involve young children or developmentally impaired individuals whose competency, not their credibility, is at issue. We find no abuse of discretion in the trial court's denial of the psychiatric examinations.

RAPE SHIELD LAW

Huebner also contends that the trial court erred in excluding evidence of prior sexual abuse perpetrated upon the victim. The victim had been sexually assaulted a few years earlier by another male. The trial court excluded the evidence because Neb. Rev. Stat. § 28-321 (Reissue 1989) prohibits the introduction of evidence of a victim's prior sexual behavior except in certain limited circumstances. Huebner concedes that the evidence does not fit these circumstances. The evidence was therefore inadmissible.

However, § 28-321 also requires a defendant who wishes to offer evidence of past sexual behavior to provide notice of such intention to the prosecuting attorney and file the notice with the court not later than 15 days before trial. Huebner's notice was filed on January 11, 1993, and the trial commenced on January 18. The notice was therefore untimely in any event.

However, Huebner argues that the evidence of prior sexual assault perpetrated upon the victim was admissible to rebut inferences derived from testimony offered by the State. The State presented the testimony of Boley, a social worker called as an expert witness to testify about the reasons children delay in reporting incidents of sexual abuse. Boley attributed the delay in reporting to several factors:

> Children many times don't believe they'll be believed. This is something that's happened that is out of the realm of reality for them, and so they're having a difficult time with it themselves believing it. If they tell someone, is somebody going to believe me? Another reason is that children believe they're going to be blamed for it, it's going to be their fault because everything that happens to children, from their perspective, they get blamed for it. They sometimes don't have the words, don't know how to explain what has happened because this is a totally new experience for them.
>
> Sometimes there have been other things that have happened and they've told about it and that they haven't been believed. They also worry about what this is going to mean to the family. Even if it's an outside-of-the-family person that has done this to them, they still worry about

how is my family going to be affected by what I tell.

Huebner claims that Boley's testimony left the jury with the impression that the victim waited to report because she had no prior similar experience. Therefore, the evidence of the prior sexual assault was admissible to rebut the inference that the sexual assault in question was outside the realm of the victim's reality.

Huebner is incorrect. Boley's testimony provided the jury with general information regarding a victim's reluctance to report a sexual assault. She provided several alternative reasons for a child's delay in reporting a sexual assault. She did not testify regarding the specific reasons this particular victim had for not reporting the assault sooner. In fact, Boley never examined the victim, and testified only to her experience with children who had been sexually assaulted. Accordingly, there was no abuse of discretion in excluding the evidence of the prior sexual assault.

WITNESS TESTIMONY

VICTIM'S TESTIMONY

Huebner's next assignment of error asserts that the victim should not have been allowed to testify because she did not make a complaint about the assault until approximately 6 to 7 months after the alleged assault had taken place. Huebner relies on a number of cases in which we stated:

> The rule is well established in this state that in a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that others may likewise testify in chief to such fact and nature of the complaint, but not as to its details.

(Emphasis omitted.) *State v. Evans*, 212 Neb. 476, 481, 323 N.W.2d 106, 109 (1982).

Huebner's reliance on this rule is misplaced. The rule refers to corroborative evidence submitted after a victim has given direct testimony of an assault.

"[A]fter the prosecutrix has testified to the commission of

> the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made."

State v. Chaney, 184 Neb. 734, 738-39, 171 N.W.2d 787, 791 (1969).

The rule does not preclude the victim from providing direct testimony of the actual alleged assault. In the cases cited by Huebner, the issue was not whether the victims' direct testimony about the details of the assaults was inadmissible under the foregoing rule, but whether corroborative testimony of other witnesses regarding complaints of the assaults by the victims were admissible. See, *State v. Davis*, 214 Neb. 474, 334 N.W.2d 450 (1983) (defendant challenged corroborative testimony of investigating officer and doctor regarding complaint of sexual assault made by victim who offered direct testimony about assault); *State v. Evans, supra* (defendant challenged detailed corroborative testimony of other witnesses after victim offered detailed testimony describing assault which occurred 6 months prior to reporting the incident); *State v. Chaney, supra* (defendant challenged corroborative testimony of two witnesses to whom victim made complaint, and not victim's direct testimony about assault); *State v. Gero*, 184 Neb. 107, 165 N.W.2d 371 (1969) (victim's direct testimony of assault not challenged). See, also, *Peery v. State*, 163 Neb. 628, 80 N.W.2d 699 (1957). In the above cases, the victims gave direct testimony of sexual assault. The corroborative testimony of others regarding the sexual assault complaints made by the victims was what was challenged. The rule permits such testimony under certain circumstances to corroborate the testimony of a victim of sexual assault. The rule is not meant to prevent the victim of a sexual assault from providing direct testimony about the details of the assault, and we so hold. The trial court was correct in permitting the victim to testify about details of the alleged sexual assault perpetrated upon her even though there was a delay in reporting it.

TESTIMONY OF OTHER WITNESSES

Huebner claims that the trial court erred in admitting the testimony of Rock, a social worker, and Ramirez, a counselor, as to the details of the sexual assault. In *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992), this court upheld the admission of corroborative testimony under similar circumstances. The victim in *Smith* testified, and it was suggested during cross-examination that she had falsified her story of sexual abuse. Corroborative testimony by her mother and the investigating officer was challenged. The testimony of the mother and the investigating officer was held to be admissible to show that the victim had made prior consistent statements. Likewise, in this case, the victim testified prior to the testimony of Rock and Ramirez. During the victim's cross-examination, it was suggested that she had fabricated the story because she did not like the relationship between Huebner and her mother. The trial court did not abuse its discretion in admitting the challenged testimony as a prior consistent statement.

DIRECTED VERDICT

Huebner next contends that the trial court erred in denying his motion for dismissal and a directed verdict at the close of the State's case because the State failed to meet its burden of proof. In *State v. Gray*, 239 Neb. 1024, 1027, 479 N.W.2d 796, 798 (1992), we stated:

> A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.

Huebner claims that the State failed to prove beyond a reasonable doubt that the victim was under 16 years of age. The victim's mother testified that the victim was born in El Salvador and had been adopted by the mother. Huebner questioned the reliability of the Salvadoran documents relied upon to

determine the victim's age. According to the documents and testimony at trial, the victim was 12 years of age at the time the assault occurred. However, there was evidence suggesting that the victim was 2 to 3 years older than the age on the documents. Even if we accept as true Huebner's argument that the victim was 2 to 3 years older, the victim would have been only 15 years of age at the time of the assault and would still fall under the protection of the statute. After reviewing the entire record, we find the evidence was sufficient to support the conviction.

LESSER-INCLUDED OFFENSE

Finally, Huebner contends that the trial court erred in refusing to instruct the jury on the lesser-included offense of sexual assault of a child as defined by Neb. Rev. Stat. § 28-320.01 (Reissue 1989).

A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). See, also, *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978).

Neb. Rev. Stat. § 28-319 (1)(c) (Reissue 1989) defines sexual assault in the first degree as occurring when "[a]ny person . . . 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* . . . ." (Emphasis supplied.)

Section 28-320.01 defines sexual assault of a child as occurring when any person "subjects another person *fourteen years of age or younger* to sexual contact and the actor is at least nineteen years of age or older." (Emphasis supplied.)

In *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989), we held that sexual assault of a minor was not a lesser-included offense of first degree sexual assault because a defendant could be convicted of the greater but not the lesser offense if the victim was 15 years of age.

Furthermore, an instruction on the lesser-included offense was not appropriate because there was no evidence submitted which would offer a rational basis for acquitting Huebner of the greater offense and convicting him of the lesser offense.

> "Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he wishes to have the benefit of a lesser offense instruction."

State v. Tamburano, 201 Neb. at 707, 271 N.W.2d at 474, quoting *State v. McDonald*, 312 Minn. 320, 251 N.W.2d 705 (1977). The State presented evidence specifically intended to prove that Huebner digitally penetrated the victim in December 1989. It offered the testimony of the victim, who testified that Huebner had come into her room and digitally penetrated her. The State offered the victim's mother's testimony that she was with Huebner's parents on the day of the alleged assault. Huebner was not entitled to the lesser-included-offense instruction because he completely denied any inappropriate behavior with the victim and, in fact, based his defense on the theory that he was not at the home of the victim when the incident allegedly occurred. Thus, the trial court was correct in refusing to instruct the jury on the lesser-included offense of sexual assault of a child.

CONCLUSION

We find that the trial court did not abuse its discretion in the challenged rulings before us. Therefore, we affirm the conviction of Huebner.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR LYLE, APPELLANT.

513 N.W.2d 293

Filed March 11, 1994. No. S-93-414.

1. **Criminal Law: Judgments: Appeal and Error.** The judgment of a trial court on the facts in a jury-waived criminal action has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support the judgment.
2. **Homicide: Intent.** Whether a killing constitutes manslaughter or murder in the first degree depends upon the state of mind of the killer.
3. _____: _____. In one type of first degree murder, the defendant must have killed purposely and with deliberate and premeditated malice.
4. **Homicide: Intent: Words and Phrases.** Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
5. _____: _____: _____. Deliberate malice and premeditated malice are separate and distinct elements of the crime of murder in the first degree.
6. _____: _____: _____. Deliberate means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act.
7. _____: _____: _____. Premeditated means to have formed a design to commit an act before it is done.
8. _____: _____: _____. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
9. **Homicide: Intent: Time.** 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.
10. _____: _____: _____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
11. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
12. _____: _____. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
13. **Homicide: Intent.** It is not the assault or provocation alone that reduces the grade of a crime from murder to manslaughter, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent.
14. **Homicide: Intent: Time.** If one had enough time between the provocation and the killing to reflect on one's intended course of action, then the mere presence of

passion does not reduce a crime below murder.

15. _____: _____: _____. In determining whether a killing constitutes murder or manslaughter, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind.

16. **Homicide: Intent: Circumstantial Evidence: Proof.** Deliberation and premeditation may be proven circumstantially.

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

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

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

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

CAPORALE, J.

I. STATEMENT OF CASE

Following a bench trial, the court below convicted the defendant-appellant, Arthur Lyle, of, among other things, murder in the first degree, a violation of Neb. Rev. Stat. § 28-303 (Reissue 1989). Lyle assigns that conviction as error, claiming, in essence, that it is inconsistent with the trial judge's implicit finding, and the presence of evidence showing, that the killing was committed in the heat of passion. We affirm.

II. FACTS

On August 2, 1992, Lyle went to a nursing home to visit his mother. With him were his two grandsons. When he arrived at the home, his younger brother, John Gould, and Gould's wife were already there, seated with the mother at a table on the patio.

After some small talk, Gould, the wife, and Lyle began talking about the mother's property because it appeared that she would remain at the home indefinitely. They first talked about the mother's house and what they should do with it. Gould proposed that Lyle take it; Lyle, however, was not interested and suggested that the family sell the house and pay

off its liens with the proceeds. The wife disagreed and accused Lyle of not doing anything for his mother.

Lyle then contended that Gould and the wife had moved all of his things out of the mother's house and locked the garage without telling him. As the discussion turned to Lyle's possessions in the garage, he called the wife a "bitch." Gould stood up and told Lyle that he could not call Gould's wife those names, but Lyle again repeated the derogatory name.

The wife testified that a fight then broke out, but she did not see who threw the first punch. A nurse's aide first heard the men arguing loudly and then heard a loud thud. When he looked out a resident's window, he saw the brothers fighting and Gould straddling Lyle on the ground. When the aide ran out onto the patio to break up the fight, the wife told him it was over.

According to the wife, the initial fighting was "a lot of wrestling around and pushing and shoving kind of thing, and it didn't last very long at all." The brothers were getting up when Lyle threw a punch, hitting Gould in the jaw. Gould reacted by pushing Lyle over a concrete railing onto the grass, approximately 4 feet below. Lyle asserts that Gould struck him first, hitting him in the jaw, and that Gould continued to hit Lyle when he fell on the ground after the first blow. Lyle claims not to have landed any blows on Gould.

Lyle lay on the grass for about 10 to 12 seconds, then got up and headed toward his automobile, followed by his two grandsons. The aide noticed Lyle's glasses on the table and took them over to him. When he gave Lyle the glasses, Lyle appeared angry and told the aide that he was coming back.

After Lyle left the home, he drove his grandchildren to a convenience store and, without ever getting out of his automobile, returned to the home about 20 minutes later. The aide testified that his work was interrupted again when he heard people yelling, "He's coming back. He's driving up the grass." The wife said she saw Lyle drive at a high rate of speed and proceed to drive across the lawn to the front of the porch.

Lyle retrieved a gun which he kept under the front passenger seat of the vehicle and began running toward the porch, yelling "Here, you mother fucker," and immediately started firing. In the meantime, the aide had come running; when he heard the

shots, he stopped at the main entrance. The wife headed toward the main entrance when the shooting began to tell the aide that Lyle had a gun and to call the police. She heard some initial shots, and then Lyle started shooting at her, striking her in the upper arm and back. From where the aide stood, he saw Lyle standing on a ledge below the railing moving his gun arm up and down Gould's body as he shot him. Lyle hesitated, then jumped down and got back in his vehicle, which was parked on the lawn about 5 or 6 feet from the patio, and drove off. Gould was pronounced dead at the scene. He had been shot five times.

Lyle testified that when he was thrown off the porch, he "was so angry, [he] couldn't see straight"; he "was real angry with" his brother and "just couldn't think . . . couldn't see straight." He was still angry when he returned to the home and wanted to talk to his brother about what had happened. He drove up onto the grass so that he could call Gould out to the vehicle without the wife being involved in the conversation. He said he started shooting after he saw his brother jump up and put his hand in his pocket, which led Lyle to believe Gould had a gun; he admitted, however, that he had not shot in self-defense.

Lyle testified to his close relationship with Gould. He told how Gould, 15 years younger, had lived in Lyle's home as an adolescent for about 5 years before moving south to live with his mother. During that time, Lyle provided Gould with room and board and "everything he needed" at his own expense. When Gould returned to Omaha, Lyle gave Gould an automobile and later a motorcycle. This time, both Gould and their mother lived with Lyle for about 3 years.

The wife testified that the brothers had a normal brotherly relationship and that nothing like the fight at the home had ever happened before. She said that to the best of her knowledge, Lyle had never threatened Gould in the past.

In finding Lyle guilty of the murder, the trial judge editorialized as follows:

> I'm convinced in my own mind that you're a decent, hard-working man. And if you had to wait even 24 hours or go out and buy a gun and have a cooling-off period and come back, this never would have happened. That thing that you carried around for your own protection ends up

> destroying your brother's life and your life, and I don't think it ever saved you from any problems. All it was was the cause of all the problems you're in now. . . .
>
> . . . .
>
> . . . [I]t's a terrible shame that you didn't have at least 24 hours before you could take the action that you decided to take because I think, had you had that much time, this thing would never have happened.

Lyle asserts that, consistent with the evidence, the foregoing editorial comment amounts to an "implicit finding" by the trial judge that Lyle " 'acted irrationally and from passion, without due deliberation and reflection,' " and that he therefore should not have been found guilty of first degree murder. Brief for appellant at 10.

III. SCOPE OF REVIEW

The judgment of a trial court on the facts in a jury-waived criminal action has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support the judgment. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979).

IV. ANALYSIS

Under the relevant homicide statutes, whether a killing constitutes manslaughter or murder in the first degree depends upon the state of mind of the killer. See § 28-303(1) and Neb. Rev. Stat. § 28-305 (Reissue 1989).

1. Distinctions Between Crimes

In order to be guilty of first degree murder, one must have killed purposely and with deliberate and premeditated malice. § 28-303(1). Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993). Deliberate malice and premeditated malice are separate and distinct elements of the crime of murder in the first degree. *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. Thompson, supra*. Deliberate means not suddenly, not rashly; but deliberation requires that the

defendant considered the probable consequences of his or her act before doing the act. *State v. Cook, supra*; *State v. Thompson, supra*; *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

Premeditated means to have formed a design to commit an act before it is done. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *State v. Cook, supra*; *State v. Thompson, supra*; *State v. Batiste, supra*. 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. *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992); *State v. Batiste, supra*; *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *State v. Drinkwalter, supra*; *State v. Batiste, supra*; *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901).

One who has killed without malice upon a sudden quarrel is guilty not of first degree murder, but of manslaughter. See § 28-305.

2. Nature of Sudden Quarrel

A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. See *Savary v. State, supra*. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

In the instant case, there is very little dispute about the facts. Both parties agree that a fight occurred between Lyle and Gould about 20 minutes prior to the shooting. But this fact alone does not convert the crime from murder to manslaughter.

See *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992). It is not the assault or provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent. *State v. Clough*, 327 Mo. 700, 38 S.W.2d 36 (1931).

The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. *State v. Cave, supra*; *Savary v. State, supra*. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991). The test is an objective one. *State v. Cave, supra*.

It is well established that if one had enough time between the provocation and the killing to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder. *U.S. v. Bordeaux*, 980 F.2d 534 (8th Cir. 1992). See *Collins v. United States*, 150 U.S. 62, 14 S. Ct. 9, 37 L. Ed. 998 (1893).

> The true inquiry appears to be whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation till the very instant of the act producing death took place, and if, from any circumstances whatever shown in evidence, it appears that the party reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the provocation can not be considered by the jury in arriving at their verdict.

Savary v. State, 62 Neb. at 175-76, 87 N.W. at 38. Or, put another way, the question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind. *Savary v. State, supra*.

Where the time between the provocation and the killing is short, the practically universal doctrine is that all the circumstances may be considered. *State v. Robinson*, 353 Mo.

934, 185 S.W.2d 636 (1945). They include not only extraneous facts, such as the length of the cooling period and the violence of the assault, but also the showing made as to the effect on the accused as an average person. *Id.*

In the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion. *U.S. v. Bordeaux, supra.* See, *State v. Parker*, 358 Mo. 262, 214 S.W.2d 25 (1948) (law will not afford relief of any kind to one who, sufficient time for reflection elapsing, permits his anger to cause him to do wanton and cruel acts against another); *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920) (evidence that victim provoked defendant to anger, by itself, is insufficient as matter of law to reduce murder to manslaughter); *Morrison v. State*, 588 N.E.2d 527 (Ind. App. 1992) (fact defendant was angry, without evidence that victim provoked defendant, does not show sudden heat).

Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction. *U.S. v. Bordeaux, supra.* See *United States v. Lynch*, 800 F.2d 765 (8th Cir. 1986), *cert. denied* 481 U.S. 1022, 107 S. Ct. 1907, 95 L. Ed. 2d 513 (1987).

3. Application of Rules to Facts

Lyle's return to the vicinity of the fight manifests actions more consistent with a prior determination to seek out a confrontation than with a state of passion without sufficient time to cool which placed Lyle beyond control of his reason. See *State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628 (1985), *review denied* 314 N.C. 119, 332 S.E.2d 486. In the same 20-minute lapse of time between the provocation and the defendant's actions as in the case before this court, the *Highsmith* court held, the defendant failed to show that he acted under strong provocation where, after he was originally threatened by the victim, the defendant ran six blocks to his residence, obtained a shotgun and shells, and then, approximately 20 minutes later, returned to the vicinity where the original altercation with the victim had occurred and assaulted the victim. Similarly, in *State v. Crouch*, 124 S.W.2d

1185 (Mo. 1938), the Missouri Supreme Court held that a manslaughter instruction was not required where the victim struck the accused with a whiskey bottle, and after some argument, the defendant left to get his gun and returned 15 minutes later and began shooting the victim. See, *State v. Faison*, 90 N.C. App. 237, 368 S.E.2d 28 (1988) (evidence did not compel finding of provocation where defendant first confronted victim at work, walked out to his vehicle to obtain rifle, and returned and shot victim numerous times); *Jackson v. State*, 84 Nev. 203, 438 P.2d 795 (1968) (interval between provocation and killing provided no basis for finding that defendant was acting under irresistible impulse sufficient to warrant voluntary manslaughter instruction where, after fistfight occurred between victim and defendant, defendant retrieved rifle from his automobile, loaded it, and returned to shoot victim); *Com. v. Eddowes*, 397 Pa. Super. 551, 580 A.2d 769 (1990), *appeal denied* 529 Pa. 631, 600 A.2d 951 (1991) (evidence that defendant, after confrontation with victim, twice returned to safety of his home only to reemerge with weapons which he used to stab victim indicated defendant had time to reflect upon decision and was sufficient to support jury's rejection of voluntary manslaughter verdict). Contra *The People v. Harris*, 8 Ill. 2d 431, 134 N.E.2d 315 (1956) (trial court justified in submitting manslaughter to jury where deceased had severely beaten defendant at tavern and defendant returned after beating and shot deceased in back).

Lyle cites *People v. Hudson*, 71 Ill. App. 3d 504, 390 N.E.2d 5 (1979), *appeal after remand* 97 Ill. App. 3d 1144, 424 N.E.2d 50 (1981), in support of his proposition that he acted from the heat of passion without time for deliberation. In *Hudson*, the defendant's conviction of murder was reduced to voluntary manslaughter despite evidence that a period of 5 minutes had elapsed after a fistfight and before the defendant stabbed the victim. In reducing the degree of the offense, the court emphasized that the testimony of the state's witnesses was not adequate to indicate that a sufficient period of time to cool defendant's passions had elapsed. *Hudson*, however, is distinguishable on its facts. The evidence established that a fight had occurred between the victim and the defendant in

which the victim repeatedly kicked the defendant, who was lying on the floor, and had to be pulled away by one of the onlookers. During what appeared to be an extended violent struggle, the defendant sustained a cut over his eye. Furthermore, the court found that the knife used by the defendant, which was grabbed from the kitchen sink, illustrated the hasty and undeliberate nature of the defendant's act. The *Hudson* court also emphasized that the defendant voluntarily remained in the apartment until the police arrived.

The fight between Lyle and Gould was not of the same force or provocation described in *Hudson*. The wife described it as "a lot of wrestling around and pushing and shoving kind of thing, and it didn't last very long at all." Moreover, Lyle's actions were deliberate; he left the home, removed his grandsons from the scene, and returned at a high rate of speed, brandishing his gun. This conduct is not comparable to the actions of one who hastily grabs a kitchen knife. Finally, Lyle left the home after the shooting, and although he admitted his crime, he did at first lie about the location of the gun.

The mental process of forming an intent to kill cannot always, of course, be demonstrated by any direct evidence. *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). However, deliberation and premeditation may be proven circumstantially. *Id.*; *State v. Ortiz*, 187 Neb. 515, 192 N.W.2d 151 (1971). In addition to the deliberate manner in which Lyle returned to the home, Lyle's manner in shooting Gould is indicative of premeditated malice. Lyle shot Gould five times by aiming the gun "up and down Gould's body." His shots were not random; he selectively hit the wife as she attempted to exit the area and did not shoot his mother, who sat at the same table as Gould. The location, nature, and number of wounds inflicted are circumstances from which a finder of fact could draw the inference that a defendant with deliberate and premeditated malice killed his victim. See *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).

A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113

(1979). It does not clearly appear that the trial judge here did not know the controlling law.

The comment upon which this appeal is in part based does not, as Lyle claims, find that he acted without malice, but, rather, suggests only that he would have been better off if he had not had ready access to a gun. Indeed, the comment bears no relationship to the facts of the case: Lyle did not buy a gun to commit this killing; he already had it in his vehicle. While the comment may reflect that in the trial judge's view Lyle's anger was the motivating force behind the killing of Gould, the fact that Lyle was angry is not the standard for reducing a murder to manslaughter. Rather, it is whether Lyle's anger was prompted by a provocation which would so provoke a reasonable person to obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection. See, *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992) (victim's refusal to permit defendant to stay with her was not viewed as something that would so provoke reasonable person); *Tripp v. State*, 36 Md. App. 459, 374 A.2d 384 (1977) (defendant cannot have homicide reduced to voluntary manslaughter where time that had elapsed between provocation and deathblow is such that reasonable man would have cooled; this is so even though defendant, being slower to cool off than ordinary person, has not in fact cooled off). The concept of manslaughter " 'is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility . . . .' " *Com. v. Pirela*, 510 Pa. 43, 507 A.2d 23, 27 (1986) (quoting *Commonwealth v. Berry*, 461 Pa. 233, 336 A.2d 262 (1975), quoting *Commonwealth v. Paese*, 220 Pa. 371, 69 A. 891 (1908)). Again, contrary to Lyle's claim, the evidence here establishes that he killed purposely and with deliberate and premeditated malice.

V. JUDGMENT

Being correct, the judgment below is affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DAVID J. ROSNO, RESPONDENT.
513 N.W.2d 302

Filed March 11, 1994. No. S-94-199.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

David J. Rosno voluntarily surrendered his license and consented to disbarment. We accept Rosno's surrender and order him disbarred.

In 1987, Rosno was admitted to the practice of law in Nebraska. Rosno served as treasurer of the Lincoln Darts Association (LDA). While serving as treasurer, Rosno misappropriated LDA funds for his own personal use. Rosno eventually disclosed his misappropriation to LDA's board of directors.

On February 25, 1994, Rosno voluntarily surrendered his license. Rosno admitted that he had violated the Code of Professional Responsibility, as adopted by this court, and had violated his oath of office. As Rosno was no doubt aware, this court has uniformly imposed the sanction of disbarment in cases of misappropriation, even when the funds did not belong to a client. See *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981).

We order Rosno disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

LINDA NOVAK, APPELLEE AND CROSS-APPELLANT, V. GERALD H. NOVAK, APPELLANT AND CROSS-APPELLEE.

513 N.W.2d 303

Filed March 18, 1994. No. S-91-1142.

1. **Partnerships: Attachments: Claims.** The interest of a partner is not subject to attachment or execution, except on a claim against the partnership.
2. **Garnishment.** The provisions of Neb. Rev. Stat. § 25-1030 (Reissue 1989) are mandatory.
3. **Debtors and Creditors: Attachments: Garnishment.** Individual retirement accounts are generally protected from attachment and garnishment under Neb. Rev. Stat. § 25-1563.01 (Reissue 1989) to the extent the funds contained therein are reasonably necessary for the support of the debtor or any dependent of the debtor.
4. **Contempt.** When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.
5. **Contempt: Proof.** A defendant's contempt must be established by proof beyond a reasonable doubt.
6. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
7. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
8. **Corporations: Debtors and Creditors.** Corporate officers may not pay their personal debts by transfer or encumbrance of corporate property.
9. **Divorce: Contempt.** In order for a failure to comply with the terms of a divorce decree to be contemptuous, the failure to comply must be willful.
10. **Contempt.** If it is impossible to comply with the order of the court, the failure to comply is not willful.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, DONALD J. HAMILTON, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed, and cause remanded with directions.

Timothy K. Kelso and Albert L. Feldman, of Harris, Feldman, Stumpf Law Offices, for appellant.

Timothy J. Pugh, of McGrath, North, Mullin & Kratz, P.C., and, on brief, Patricia A. Lamberty, of Zweiback, Hotz & Lamberty, P.C., for appellee.

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

BOSLAUGH, J.

On August 21, 1990, the district court for Douglas County entered a decree of dissolution of the marriage of Linda Novak and Gerald H. Novak. Gerald was ordered to pay child support of $455 per month for each of two children, together with alimony for 6 months at $1,200 per month and then $1,000 per month for 54 months. Additionally, Gerald was ordered to pay Linda a total property settlement of $228,400, of which $165,000 was to be paid in 15 semiannual installments of $11,000 on March 1 and September 1 of each year beginning in March 1991, the balance being paid by property transfers which have been made.

Four months after the entry of the decree, Gerald filed an application to modify the decree with respect to alimony, child support, the property award, attorney fees, and court costs. Following Linda's motion to make more definite and certain, Gerald filed on May 22, 1991, an amended application to modify the decree, to which Linda demurred. The district court sustained Linda's demurrer and dismissed Gerald's application to modify without giving Gerald an opportunity to amend.

At the time of the hearing on these proceedings, Gerald was current as to alimony and child support payments, but he had not made any of the cash property settlement payments.

Linda attempted to collect the unpaid property settlement amounts by contempt proceedings and garnishments, including garnishment of Gerald's individual retirement account (IRA). At the same time that it ruled on the demurrer, the district court found that Gerald was not in contempt, denied Linda's attempt to establish garnishee liability against Property Investment Co., and found that Gerald's IRA was exempt from garnishment.

Gerald appealed the district court's judgment concerning the demurrer to the Nebraska Court of Appeals, and Linda cross-appealed the district court's judgment pertaining to the contempt proceedings, garnishment of Property Investment, and garnishment of Gerald's IRA. The Court of Appeals

reversed in part and affirmed in part the district court's judgment, finding that the district court improperly sustained the demurrer to Gerald's application to modify, that Gerald was in contempt of court for failure to make the two property division payments due to Linda, that the district court correctly dismissed Linda's application to establish garnishee liability against Property Investment, and that the district court erred in its decision that Gerald's IRA was unconditionally exempt from garnishment. The case was remanded to the district court for further proceedings on Gerald's application to modify and further proceedings on Linda's garnishment of the IRA as to whether the IRA funds are reasonably necessary for Gerald's support or the support of his dependents. See *Novak v. Novak*, 2 Neb. App. 21, 508 N.W.2d 283 (1993).

This court granted Gerald's petition for further review.

Gerald is a 53.5-percent owner of Novak & Sons, Inc., a closely held family corporation which deals in real estate. Three other members of Gerald's family hold the remaining stock in Novak & Sons.

At the time of these proceedings, Gerald's net monthly income from Novak & Sons was $2,092.12. He testified that upon receipt of his paycheck, he converts $1,910 to a cashier's check for alimony and child support and transfers it to the clerk of the district court, leaving him $182 to live on each month. Gerald lives in a condominium furnished by his parents, who assist with his remaining living expenses.

Gerald has no personal bank account and has no stocks or bonds except the stock of Novak & Sons. Gerald has an IRA at Conservative Savings Bank comprised of various certificates of deposit, which totaled $54,516.73 at the time of the hearing on this matter.

Gerald is a 50-percent partner in Property Investment Co., a real estate holding partnership. At the time of the hearing on this matter, Property Investment had liquidated all of its assets and was in the process of dissolving the partnership.

Gerald's assignments of error as summarized are that the Court of Appeals erred in (1) holding that the garnishment of Property Investment was governed by Neb. Rev. Stat. § 25-1056 (Reissue 1989) instead of Neb. Rev. Stat. § 25-1030

(Reissue 1989), (2) holding that the issue of the IRA exemption must be remanded for further proceedings, and (3) determining that Gerald was in contempt of court.

Linda did not respond to Gerald's petition for further review and concedes that the Court of Appeals correctly reversed the trial court's order sustaining her demurrer to Gerald's application to modify.

After Gerald missed the first scheduled property settlement payment of $11,000 on March 1, 1991, Linda filed garnishment proceedings, and a summons and order of garnishment and interrogatories were served on the garnishee, Property Investment. On May 9, 1991, Property Investment filed its answer to the interrogatories. In response to the question: "Do you have property belonging to the judgment debtor or credits or monies owing the judgment debtor, whether due or not, other than earnings as defined above?" Property Investment responded, stating: "Judgment debtor is a partner in garnishee company. The partnership currently holds one asset, real property located at 1112 Arbor Street, Omaha, Nebraska."

On August 13, 1991, Linda filed an application to determine garnishee liability alleging that on July 27, Property Investment had transferred the property at 1112 Arbor Street to Novak & Sons sometime after Property Investment had filed its answer to the interrogatories. The hearing held by the trial court on October 31, 1991, included Linda's application to determine garnishee liability.

The trial court found that Linda's application to determine garnishee liability was not filed within 20 days as required by § 25-1030 and that Property Investment was released from any liability as provided by the statute.

The Court of Appeals held that at the time Property Investment answered the interrogatories, stating Gerald, the judgment debtor, was a partner in the garnishee, which held real estate at 1112 Arbor Street, the liability of Property Investment was fixed by § 25-1056(1), which provides in part:

> Except when wages are involved, the garnishee shall hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and

interrogatories until the further order of the court.

The Court of Appeals went on to find that when Property Investment conveyed the real estate at 1112 Arbor Street to Novak & Sons after answering the interrogatories, it was in blatant disregard of the provisions of § 25-1056, and that Linda's remedies included an attempt to set aside the conveyance, as well as to hold Property Investment and Gerald in contempt.

Gerald contends that the Court of Appeals erred in its analysis of this issue. We agree.

Property Investment's answer to interrogatories showed that the garnishee is a partnership. Evidence adduced at the hearing also established Property Investment's status as a partnership. The only asset held by the partnership was the property at 1112 Arbor Street.

According to Neb. Rev. Stat. § 67-325 (Reissue 1990), Gerald's right in Property Investment's property "is not subject to attachment or execution, except on a claim against the partnership." The claim in this case was not against the partnership, but for a personal debt of Gerald.

The remedy for Gerald's individual creditor, Linda, was to apply for a charging order against Gerald's interest in the partnership. See Neb. Rev. Stat. § 67-328 (Reissue 1990). See, also, *Wills v. Wills*, 750 S.W.2d 567 (Mo. App. 1988).

When Property Investment answered the interrogatories, stating it was a partnership in which Gerald was a 50-percent partner and that the partnership held the property at 1112 Arbor Street, Property Investment's garnishee liability was not, as the Court of Appeals found, "fixed" by § 25-1056. If Linda was dissatisfied with Property Investment's answer and wished to controvert or traverse its response to the interrogatories, she had 20 days within which to do so. See § 25-1030. The provisions of this statutory remedy are mandatory. *NC + Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 422 N.W.2d 542 (1988). The trial court correctly dismissed Linda's application for garnishee liability because she failed to file it within 20 days of Property Investment's answer.

Next, Gerald argues that the Court of Appeals erred in determining that the issue of whether Gerald's IRA is exempt

from garnishment must be remanded for a factual finding by the trial court as to whether Gerald's IRA funds are reasonably necessary for his support or the support of his dependents, because if not, the IRA is not exempt from garnishment. According to Gerald, a factual finding on this issue was already determined in his favor by the trial court. We agree.

Neb. Rev. Stat. § 25-1563.01 (Reissue 1989) provides:

> In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service unless:
>
> . . . .
>
> (2) Such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986 or the successors of such sections.

The Court of Appeals held that IRA's are generally protected from attachment and garnishment under § 25-1563.01 to the extent the funds contained therein are reasonably necessary for the support of the debtor or any dependent of the debtor, and Linda concedes that the Court of Appeals was correct in its holding. However, the Court of Appeals also found that the trial court failed to completely analyze the issue because it made no finding regarding whether Gerald's IRA funds are reasonably necessary for his support or the support of his dependents. The Court of Appeals was incorrect in finding that the trial court had failed to completely analyze the issue of whether Gerald's IRA was exempt from attachment by Linda.

The trial court correctly found that Gerald's IRA was exempt from attachment by Linda. It is clear from the record that it specifically found the IRA was necessary for the support of Gerald and his dependents. In its order of November 8, 1991, the trial court stated:

> The Court finds that respondent's request to release garnishee Conservative Savings Bank should be sustained

> and the garnishee is released and discharged by reason of the Courts [sic] prior ruling on the same issue that the IRA funds in question are exempt pursuant to Sec. 25-1563.01 R.R.S. Neb 1989, and that all child support and alimony payments are current as ordered.

Linda had previously attempted to garnish Gerald's IRA for payment of her court-ordered attorney fees. In its prior order, following a hearing on the matter, the trial court found that the funds on deposit in the IRA were reasonably necessary for the support of Gerald.

The record supports the conclusion and order of the trial court concerning the issue of whether Gerald's IRA is exempt from garnishment by Linda. The Court of Appeals erred in remanding the cause for further proceedings on the issue of whether the IRA funds are reasonably necessary for Gerald's support or the support of his dependents.

Finally, Gerald contends that the Court of Appeals erred in finding him in contempt of court for failing to make the first two scheduled property settlement payments. We believe the Court of Appeals erred in its reasoning for finding Gerald in contempt of court; however, we find that Gerald should have been held in contempt of court for his failure to pay the first two property settlement payments.

In its opinion, the Court of Appeals incorrectly held that the required burden of proof in this civil contempt proceeding is by a preponderance of the evidence and that the appropriate standard of review is whether the trial court abused its discretion in finding that Gerald was not in contempt.

When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978); *Megel v. City of Papillion*, 190 Neb. 238, 207 N.W.2d 377 (1973). Most recently in *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), a case involving a civil contempt of court, this court held that a defendant's contempt must be established by proof beyond a reasonable doubt. See, also, *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984); *Bahm v. Raikes, supra*; *Paasch v. Brown*, 199 Neb. 683,

260 N.W.2d 612 (1977); *Megel v. City of Papillion, supra*. All of these cases involved civil contempt proceedings.

An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Dunning v. Tallman, supra*; *In re Contempt of Liles, supra*. A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Id.*

After listing a number of Novak & Sons' corporate accounts and the balances contained in those accounts around the time that each of the first two property settlement payments became due, the Court of Appeals found that Gerald was in contempt for failure to pay the property settlement payments due on March 1 and September 1, 1991. According to the Court of Appeals, Gerald had the means to pay the obligation under the decree, since he was signatory on the various Novak & Sons accounts and he had failed to show why he could not use them to make the payments.

At the hearing, when Gerald was asked why he did not use the funds contained in the Novak & Sons accounts to pay his property settlement obligations, Gerald testified that they were corporate accounts and that he was not authorized to use those funds to pay his personal debts. This court has previously held that corporate "officers may not pay their personal debts by transfer or encumbrance of corporate property." *Val-U Constr. Co. v. Contractors, Inc.*, 213 Neb. 291, 294, 328 N.W.2d 774, 776 (1983). See *Burke v. Munger*, 138 Neb. 74, 292 N.W. 53 (1940). The Court of Appeals erred in finding Gerald in contempt of court for failing to use corporate funds to pay his personal obligation under the property settlement agreement.

Although the Court of Appeals erred in its reason for reversing the finding of the trial court concerning the contempt issue, we believe that the trial court's finding that Gerald was not in contempt should be reversed for a different reason.

In order for Gerald's failure to comply with the terms of the divorce decree to be contemptuous, his failure to comply must be willful. See *Megel v. City of Papillion, supra*. Gerald attempted to defend against the contempt charge by showing it was impossible to comply with the terms of the property

settlement agreement because he had no personal funds available to pay the obligation. If it is impossible to comply with the order of the court, the failure to comply is not willful. *Id.*

The evidence showed, however, that Gerald has an IRA at Conservative Savings Bank with deposits totaling $54,516.73 at the time of the hearing on this matter. Although the IRA is exempt from garnishment by Linda, that does not mean that Gerald cannot voluntarily withdraw the funds to satisfy the obligations under the decree. After paying the income tax and a 10-percent penalty for early withdrawal of the IRA funds, there would still be enough left over for Gerald to pay the first two installments under the divorce decree. The trial court erred in not holding Gerald in contempt for this reason, and not for the reason given by the Court of Appeals.

The judgment of the Court of Appeals concerning the garnishment of Property Investment and the remand of the issue regarding the IRA exemption are reversed. The Court of Appeals' judgment to remand for further proceedings Gerald's application to modify is affirmed, and its decision finding Gerald in contempt for failure to pay the March 1 and September 1, 1991, property settlement payments is affirmed. The cause is remanded to the Court of Appeals with directions to remand that part of the cause concerning the application of the respondent, Gerald H. Novak, to modify the decree of dissolution and the application of the petitioner, Linda Novak, to hold the respondent in contempt for further proceedings consistent with this opinion.

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

RODNEY MACHOLAN, APPELLANT, V. STEVE WYNEGAR, APPELLEE.

513 N.W.2d 309

Filed March 18, 1994. No. S-91-1155.

1. **Directed Verdict.** In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

2. **Directed Verdict: Evidence.** In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Juries: Testimony.** A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence.
4. _____: _____. The jury is the sole judge of the credibility of witnesses and the weight to be given to expert testimony.
5. **Jury Instructions: Appeal and Error.** An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.
6. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Butler County, BRYCE BARTU, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Ray C. Simmons, P.C., for appellee.

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

PER CURIAM.

The plaintiff appealed to the Nebraska Court of Appeals, which on July 23, 1993, affirmed by memorandum opinion the judgment of the district court. Because the Court of Appeals Nebraska. The defendant admitted negligence, but denied that the plaintiff's personal injuries were proximately caused by the accident. Following a jury trial, a verdict was returned in favor of the defendant.

The plaintiff appealed to the Nebraska Court of Appeals, which on July 23, 1993, by affirmed memorandum opinion the judgment of the district court. Because the Court of Appeals did not review several trial exhibits which had inadvertently remained in the possession of the defendant's attorney, although the exhibits had been prepared as part of the bill of exceptions on appeal, this court granted the plaintiff's petition

for further review.

On March 21, 1987, the plaintiff was traveling west on Highway 92 east of David City. When the plaintiff reached a point approximately 2 1/2 miles east of David City, he came upon a number of vehicles parked along the highway on both sides because a consignment sale was taking place nearby. At that point, a pickup truck driven by the defendant emerged from the south ditch alongside the highway and struck the plaintiff's pickup truck, causing it to collide with a third vehicle parked on the north shoulder of the highway.

The plaintiff testified that he felt no pain at the time of the accident, but that he felt dizzy shortly after the accident. Following the accident, the plaintiff drove his truck to David City, where his son picked him up. When the plaintiff experienced dizziness and blurred vision while traveling home, he instructed his son to take him to the Schuyler hospital.

At the hospital, Dr. Howard Fencl, one of the plaintiff's family physicians, examined the plaintiff and found no bruises or other external injuries. Following the examination, the plaintiff was released to go home that same evening.

The plaintiff testified that he suffered back and neck pain, dizziness, headaches, and blurred vision. These maladies prevented him from engaging in his occupation as a truckdriver for 10 months following the accident. According to the plaintiff, his condition gradually improved between the date of the accident and the date of trial, but he still suffered from headaches and a stiff neck.

The plaintiff was seen by Dr. Joel Cotton, a neurologist, on May 19, 1987. He had been referred to Dr. Cotton by Dr. Gerald W. Luckey for blurred vision, dizziness, and tinnitus. According to Dr. Cotton, the plaintiff's neurological examination was normal except for spontaneous hyperventilation, which the doctor attributed to stress.

Dr. Schuyler Gooding saw the plaintiff in February 1988. He had the plaintiff x-rayed on February 12. From the x rays and his examination, Dr. Gooding was unable to identify any neck injury, but he did determine that the plaintiff had a disk abnormality that was most likely present prior to the accident. Based on his examination of the plaintiff and the plaintiff's

subjective complaints, Dr. Gooding testified that the plaintiff suffered an injury to his lower back from the accident of March 21, 1987.

Although the plaintiff made several visits to his family doctors' office after the accident for allergy treatments, he did not complain about his neck or back to them until June 16, 1988.

On June 16, the plaintiff complained to Dr. Merlin Sucha, Dr. Fencl's partner, that his neck and back were hurting him. Dr. Sucha testified that based upon the plaintiff's history and the doctor's examination of the plaintiff, it was Dr. Sucha's opinion that the plaintiff suffered a myofacial cervical strain in the accident of March 21, 1987.

On July 26, 1988, the plaintiff saw Dr. Fencl, complaining of pain in the right side of his neck. Dr. Fencl did not know what to do for the plaintiff and was concerned that the plaintiff was beginning to have a fixation problem with his neck pain. Dr. Fencl testified that because the plaintiff told him he had pain and had been in a motor vehicle accident, he assumed that the accident caused the plaintiff's pain.

The plaintiff was seen by Dr. Richard Cimpl, an orthopedist, on September 21, 1990. Following his examination of the plaintiff, Dr. Cimpl could find no symptoms on the cervical spine and no evidence of muscle spasm or tightness in the upper or lower back. According to the x rays he took, the plaintiff had some degenerative changes in his lower back. Based on the plaintiff's subjective complaints, Dr. Cimpl thought the accident had caused some injury to the plaintiff's neck and back.

On cross-examination, the plaintiff admitted that he had been treated by a chiropractor for back pain on several occasions prior to the accident.

The plaintiff's errors as assigned and argued in his briefs before the Court of Appeals can be summarized as follows: (1) The trial court erred by failing to grant the plaintiff's motion for directed verdict; (2) the jury verdict was not supported by the evidence and was so clearly wrong as to induce a belief that it must have been rendered under the influence of passion, prejudice, or mistake; (3) the trial court erred by submitting two

forms of verdict to the jury; (4) the trial court erred by giving a grammatically incorrect instruction; (5) the trial court erred by failing to give NJI2d Civ. 1.02; and (6) the trial court erred by failing to sustain the plaintiff's motion for new trial.

The plaintiff argues that the trial court erred by not directing a verdict in his favor because his expert witnesses concluded that his injuries were caused by the accident of March 21, 1987.

In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of a motion for directed verdict, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992).

Although the plaintiff's experts testified that he sustained an injury to his lower back from the March 21, 1987, accident, the record contains evidence that suggests that the plaintiff had preexisting injuries similar to those he claimed to have sustained in the accident. The earliest the plaintiff was seen by any of the plaintiff's physicians who testified, excluding the emergency room visit the evening of the accident, was nearly a year after the accident occurred. Furthermore, the neurologist that the plaintiff saw only 2 months following the accident concluded that the plaintiff's injuries were stress related. Because this evidence favored the defendant, the trial court's denial of the plaintiff's motion for directed verdict was not erroneous.

The plaintiff claims that the jury's verdict is unsupported by the evidence and was rendered under the influence of passion, prejudice, mistake, or something not apparent in the record. The plaintiff attempts to support his claim that the verdict was unsupported by the evidence by reasserting that the expert testimony regarding the cause of his injuries was uncontroverted.

The issue of the proximate cause of the plaintiff's injury was

for the jury to determine.

> A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184. It is fundamental in our adversary system that a jury alone is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony.

(Emphasis omitted.) *Batterman v. Richardson*, 189 Neb. 303, 309, 202 N.W.2d 613, 616 (1972).

This case is very similar to the *Batterman* case. In that case, the plaintiff sued the defendant for damages as a result of an automobile collision. The jury was instructed that the defendant was negligent as a matter of law, and the only issues submitted to the jury were whether the defendant's negligence proximately caused the plaintiff any injury and, if so, the amount of the damages.

The jury returned a verdict for the defendant, and the plaintiff appealed, claiming that the verdict was not supported by the evidence because both of her experts testified that she suffered an injury to her right knee due to the accident with the defendant.

The evidence showed that prior to the collision, the plaintiff had been treated for a degenerative problem with her right knee. The plaintiff did not see her doctor until 6 days after the accident, when she complained of pain in her neck and left knee. The first time the plaintiff complained of pain in her right knee was approximately 7 weeks following the accident. More than a year after the accident, the plaintiff was treated, and x rays showed a continuing and progressive condition in her right knee. The opinion testimony of the plaintiff's experts was based almost entirely upon the subjective oral complaints by the plaintiff.

In affirming the jury's verdict for the defendant, this court stated:

> [The jury] could have also found that the plaintiff made no complaint of injury to her right knee until 7 weeks after

> the accident and her own doctor did not feel that even an X-ray of her knee was necessary until almost 3 years after the accident. More important, in the status of the expert testimony, it could have found that the plaintiff's difficulties were the result of conditions preceding and unrelated to the accident, from the previous injury and such general disease conditions as arthritis . . . . It could have further found that the plaintiff had no permanent disability except to her right knee and that this disability in the right knee was about the same at the time of the trial as it was prior to the accident. It could have further found in this respect that whatever aggravation she may have suffered subsequent to the time of the accident rested on subjective oral recitals it did not believe, and could neither be apportioned in any reasonable sense to the trauma of the accident itself or that it may have been a progressive condition from disease arising from general arthritis and other unrelated conditions.
>
> It is quite apparent in the review of this case that the jury simply did not accept the evidence adduced to show that the plaintiff was indeed injured and entitled to damages. The jury is the sole judge of the credibility of the testimony and the weighing of the expert testimony. The evidence or lack of evidence in this case is ample to support the jury verdict and it must be permitted to stand.

Batterman, 189 Neb. at 311-12, 202 N.W.2d at 617-18.

In the present case, the opinions of the plaintiff's experts were based primarily on his subjective complaints of pain. With the exception of the plaintiff's visit to the emergency room on the evening of the accident, the four physicians who testified did not examine the plaintiff for his complaints until sometime later—almost a year following the accident for Dr. Gooding, 15 months following the accident for Drs. Sucha and Fencl, and nearly 3 1/2 years following the accident for Dr. Cimpl. In each instance, the plaintiff saw each doctor generally only once regarding his complaints. Moreover, the record contains evidence of a preexisting injury to the plaintiff's lower back and conflicting expert testimony on the cause of the plaintiff's injuries.

The evidence in this case supports the jury's verdict.

Next, the plaintiff contends that the trial court erred by submitting two forms of verdict to the jury. The plaintiff claims that the jury should have been given one verdict form on which the jury was required to find for the plaintiff with the only issue to be resolved by the jury being the issue of damages.

The effect of giving the jury one verdict form on which the jury must find for the plaintiff would be the same as awarding the plaintiff a directed verdict on the issue of proximate cause. As discussed, the plaintiff was not entitled to a directed verdict on the issue of proximate cause. Accordingly, the plaintiff's argument regarding the verdict forms is without merit.

The plaintiff asserts that the trial court erred in giving jury instruction No. 4, which stated:

> If your verdict is for the plaintiff and you find that the plaintiff, prior to March 21, 1987, had a bodily condition which was causing disability or pain, and that this pre-existing condition was aggravated by this collision, then, the plaintiff is entitled to recover only for the extent of the aggravation of the pre-existing condition proximately caused by the accident.
>
> However, if your verdict is for the plaintiff and you find that the plaintiff, prior to March 21, 1987, had a bodily condition which was not causing disability or pain, and that this pre-existing condition was activated or "lightened up" by this accident, then, the plaintiff is entitled to recover for the whole of such result proximately caused by the accident.

This instruction was taken from NJI 4.09 and 4.09A. The plaintiff's first complaint about this instruction is that the word "lightened" in the second paragraph is a misspelling of the word "lighted." The plaintiff claims this misspelling changes the meaning of the entire second paragraph.

A jury instruction is not prejudicially erroneous where its meaning is reasonably clear. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902

(1978).

The misspelling involved in instruction No. 4 does not change the meaning of the second paragraph. Any potential confusion over the misspelled word is cleared up by the term "activated," which was used in the alternative to the misspelled word. The trial court's grammatical error was harmless.

The plaintiff also complains that instruction No. 4 was erroneous because of a change in the Nebraska Jury Instructions regarding preexisting injuries. The instruction given by the trial court was taken from the first edition of the Nebraska Jury Instructions. The second edition combines NJI 4.09 and 4.09A and also contains the following sentence: "If you cannot separate damages caused by the preexisting (condition) from those caused by the . . . accident . . . then the defendant is liable for all of those damages." NJI2d Civ. 4.09. The comments to NJI2d Civ. 4.09 state that this sentence is appropriate only where the plaintiff has established injury and causation and there remains only a question of apportioning the damages between the preexisting injury and the defendant's negligence.

In this case, there was an issue as to causation. The trial court did not err by refusing to give the jury the above damage-apportionment instruction.

The plaintiff argues that the trial court erred in failing to give NJI2d Civ. 1.02, which states in part: "The following things are not evidence: 1. Statements, arguments, and questions of the lawyers for the parties in this case."

The plaintiff claims that certain questions by the defendant's lawyer during cross-examination of the plaintiff and of his witnesses were improper and would confuse the jury as being evidence. The questions asked were typical leading inquiries asked by trial attorneys on cross-examination and were not objected to by the plaintiff.

The instruction given by the court did not directly address the issue of an attorney's statements, questions, or arguments not being evidence; however, the plaintiff has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of his. See *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

Counsel has the duty of tendering a more specific instruction when one is desired. *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987).

The plaintiff filed five "offered instructions," but did not include NJI 1.11 or NJI2d Civ. 1.02.

At the instruction conference, the plaintiff made an oral request that instruction No. 1 include the following sentence from NJI 1.11: "However, the argument or remarks of an attorney are not evidence, and if an attorney has made any statement of fact which is not supported by the evidence, you should disregard it."

In instruction No. 1, the trial court did include the following language which was taken from NJI2d Civ. 1.01:

> In determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact.
>
> . . . .
>
> . . . The attorneys have a duty to represent their clients. In arguing their clients' case, attorneys may draw legitimate deductions and inferences from the evidence.

Since the court did instruct the jury that the attorneys may draw legitimate deductions and inferences from the evidence, we believe it was error for the trial court to fail to instruct the jury as requested that the argument or remarks of an attorney are not evidence and that any statement of fact by an attorney which is not supported by the evidence should be disregarded. As a consequence, we reverse the judgment and remand the cause for a new trial.

Finally, the plaintiff claims that the trial court's denial of his motion for new trial was erroneous.

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).

The plaintiff offers no basis for this assignment of error

other than the alleged errors previously discussed. Because all of the plaintiff's assigned errors are without merit, except the addition requested to instruction No. 1, the trial court did not otherwise err in denying the plaintiff's motion for new trial.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

I think that the instructions given by the trial court were adequate under the circumstances of this case and that the judgment should have been affirmed.

The jury was cautioned that "[i]n determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has." In effect, the plaintiff wants an additional statement to the jury that says the same thing that the trial court said.

Although the plaintiff argues that NJI2d Civ. 1.02 should have been given by the trial court, the fact is that it was not requested at the instruction conference or otherwise.

Completely ignored by the plaintiff is the requirement that he show how he was actually prejudiced in any way by the trial court's failure to give the added instruction requested orally at the instruction conference.

What was requested from NJI 1.11 refers to argument or remarks of an attorney, and there is no reference made by the plaintiff to any argument or remark of the defendant's counsel that was improper or not supported by the record. In fact, the argument was not reported, and the plaintiff made no objection to any argument or remark made by the defendant's counsel.

What the plaintiff was objecting to were questions asked by the defendant's counsel which were leading in some respects but asked upon cross-examination. There was an occasional objection made to a question, but in no case was the ruling of the trial court or the plaintiff's objection assigned as error.

STATE OF NEBRASKA, APPELLEE, V. MARVIN DYER, APPELLANT.

513 N.W.2d 316

Filed March 18, 1994. No. S-93-316.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. 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 it observed the witnesses.
2. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when 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 probative value, that a finding of guilt based on such evidence cannot be sustained.
3. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
4. **Verdicts: Appeal and Error.** 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.
5. _____: _____. 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.
6. **Miranda Rights: Self-Incrimination.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
7. **Constitutional Law: Search and Seizure.** Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
8. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
9. **Speedy Trial: Indictments and Informations: Time.** While time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.
10. **Rules of Evidence: Hearsay: Time.** 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.

11. **Trial: Witnesses.** The right to cross-examine a prosecution witness regarding bias or motive is an important interest.
12. _____: _____. The right to cross-examine includes the opportunity to show that a witness is biased or that the testimony is exaggerated or unbelievable.
13. **Criminal Law: Constitutional Law: Trial: Witnesses.** The denial of a criminal defendant's right to confront his or her accusers, and implicitly the right to cross-examination, is a violation of the defendant's constitutional rights.
14. **Appeal and Error.** Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. However, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
15. **Trial: Records: Appeal and Error.** The record of the trial court, when properly certified to an appellate court, imports absolute verity; if the record is incorrect, any correction must be made in the district court.

Appeal from the District Court for Box Butte County, BRIAN SILVERMAN, Judge, on appeal thereto from the County Court for Box Butte County, JAMES T. HANSEN, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Joy Shiffermiller, of Ruff, Nisley & Lindemeier, for appellant.

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

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

HASTINGS, C.J.

Defendant, Marvin Dyer, was charged with two counts of third degree assault, one involving his wife, Linda, and the other involving police officer Jim Olson. He was convicted of both counts by a jury in the county court for Box Butte County. The convictions were affirmed on appeal to the district court for Box Butte County. On appeal, he asserts that the county court erred in (1) overruling his motion to suppress, because he was subject to custodial interrogation without having been advised of his *Miranda* rights; (2) overruling his motion for discharge, because he was denied his right to speedy trial

contrary to statute and the federal and state Constitutions; (3) overruling his objection to the testimony of Dr. John J. Ruffing, Jr., on the basis of privilege, hearsay, and his constitutional right to confrontation of witnesses; (4) overruling his objections to the testimony of the ambulance drivers on the basis of privilege and the right of confrontation; (5) limiting his cross-examination of witnesses, police officers Gene Sheldon and Olson, by not allowing questions about the fact that a civil rights lawsuit is pending against them and the village of Hemingford, seeking monetary damages, in which Marvin is the plaintiff, which substantially bears on the officers' credibility as witnesses against Marvin; (6) overruling his motion to dismiss at the close of the State's case for failing to prove a prima facie case; (7) overruling his motion to dismiss at the end of all the evidence for lack of sufficient evidence to convict; and (8) entering a conviction against him, since there was insufficient evidence for the jury to convict.

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. 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 it observed the witnesses. *State v. Ranson, ante* p. 71, 511 N.W.2d 97 (1994); *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

In a criminal case, a court can direct a verdict only when 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 probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Hirsch, ante* p. 31, 511 N.W.2d 69 (1994); *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992).

A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *State v. Hirsch, supra*; *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993).

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. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Shortly after midnight on August 7, 1991, Hemingford police officer Gene Sheldon was dispatched to the residence of Marvin and Linda Dyer on an emergency call. Linda was reportedly suffering from a pleurisy attack. Officer Sheldon arrived at approximately the same time as an ambulance. He followed the ambulance crew into the house and found Linda seated on the floor of the bathroom. Emergency medical technicians convinced her to leave the house to seek medical attention.

Officer Sheldon remained at the residence to try to determine if a crime had been committed. According to Officer Sheldon, Marvin said that he had hit his wife. Officer Sheldon remained at the house for approximately 2 hours. The officer stated that he was concerned about the children in the home and that he asked a volunteer firefighter to stay with them. He further stated that Marvin was not under arrest during this period of time. Linda returned to the house in the ambulance at about 1:45 a.m. Marvin went outside, at which time Officer Sheldon called another officer for assistance. Officer Sheldon asked Marvin if there was some place where he could spend the night, and Marvin replied that there was not. When Officer Jim Olson arrived, Officer Sheldon told Marvin that he was under arrest. Officer Olson testified that when he tried to place handcuffs on Marvin, Marvin struck Officer Olson's left temple with his right fist. Officer Olson stated that "we had kind of a wrestling match" and that they fell to the ground. Marvin was then handcuffed. Marvin testified that he told the officers that he could not walk. He also stated that he told the officers that his legs, shoulders, and back hurt while he was being dragged to the police car. Marvin suffered fractured vertebrae and required

two surgeries after the incident that night. At trial, defense counsel was not permitted to inquire about a civil lawsuit filed against the police officers involved in the arrest.

As his first assignment of error, Marvin asserts that the trial court erred in overruling his motion to suppress, arguing that a statement was made to Officer Sheldon during the course of custodial interrogation. Although the statement was made to Officer Sheldon while Marvin was inside his home and prior to his formal arrest, Marvin contends that the evidence shows that he was questioned while "deprived of his freedom of action in a significant way," contrary to *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which states:

> [T]he 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. By custodial interrogation, we mean 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.

At the suppression hearing, Officer Sheldon stated that he went to the Dyer residence on August 7, 1991, in connection with an emergency call for assistance made to the Hemingford rescue unit. After he arrived, he remained at the residence because he was concerned about the children and wanted to try to determine if a crime had been committed. Officer Sheldon stated that he asked Marvin if he had hit Linda and that Marvin stated that he had hit her. Marvin was therefore interrogated within the meaning of *Miranda*. See *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (interrogation includes direct questioning or any practice reasonably likely to evoke an incriminating response from suspect). However, the more difficult question is whether Marvin was in custody for the purposes of *Miranda*.

Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact. *State v. Bowersmith*, 224 Neb. 6, 395 N.W.2d 527 (1986); *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986). But see *U.S. v. Griffin*, 922

F.2d 1343, 1347 (8th Cir. 1990) ("[c]ustody determinations are obviously mixed questions of law and fact which require that the entire circumstances of the particular case be carefully assessed").

In *Griffin*, the U.S. Court of Appeals for the Eighth Circuit found that factors previously deemed to be relevant to a determination of custody included the suspect's freedom to leave the scene, and the purpose, place, and length of the interrogation. However, the court noted that "[w]hile the accused's freedom of action during the interrogation remains a critical factor, the purpose, place and length factors have been interpreted to have inconclusive, independent relevance to the determination of custody." 922 F.2d at 1348. As to purpose, the court found: "[T]he fact that the purpose of the questioning is to further focus the investigation on the defendant 'does not weigh heavily in [the] analysis.' " *Id.*, quoting *U.S. v. Carter*, 884 F.2d 368 (8th Cir. 1989). The court further noted that while *Miranda* focused on the coercive aspects of station house interrogation, subsequent cases indicated that significant deprivations of freedom may occur elsewhere. See, e.g., *Orozco v. Texas*, 394 U.S. 324, 325, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969) (suspect questioned in home, but not "free to go," was in custody). The *Griffin* court also found that length of interrogation was not a determinative factor in the custody analysis, noting that custody had been found in relatively brief interrogations.

Other indicia of custody were found in *Griffin* to be

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the

questioning.

922 F.2d at 1349. The court found these indicia to be influential in a totality of the circumstances assessment, noting that

> [t]he first three of these factors may be fairly characterized as mitigating factors, that is to say the affirmative presence of one or more of these factors during questioning would tend to mitigate the existence of custody at the time of the questioning. Conversely, the remaining three factors may be characterized as coercive factors, which is to say that the affirmative presence of one or more of these factors during questioning would tend to aggravate the existence of custody.

Id.

We note that in the instant case, Officer Sheldon testified that when he first spoke to Marvin, he was trying to ascertain what had happened. Officer Sheldon stated that his purpose in remaining in the home for almost 2 hours was concern for the children, but admitted that he was there to learn if a crime had been committed. Officer Sheldon stated that he could not recall if Marvin ever asked him to leave.

Officer Sheldon also stated that he did not question Marvin during the first half hour he was there, but waited until the rescue unit had left with Linda to take her to the clinic. Officer Sheldon testified that he did not read Marvin his rights before they started talking. It is not clear at what point Officer Sheldon asked Marvin if he had hit Linda. Officer Sheldon was asked:

> Q- Do you recall anything else that he said at that time? At the time you asked him what happened and he said he hit her, do you remember anything else he said?
>
> A- I had a little difficulty in the next hour and 30 minutes or so that I talked to him before we got information on Mrs. Dyer. I remember the order of things being said.

Although Officer Sheldon remained with Marvin in the home until Linda returned, he also asked a third person, Hemingford fire chief Jim Yardley, to stay and watch the children. Officer Sheldon testified that he was not sure how many children were present, but that there were "more than five." During the time that Marvin was being questioned by Officer Sheldon, Yardley

and the children were in a different room. Officer Sheldon stated that at some point Marvin "said something to the effect that he wanted to go to bed and if anybody came back to the bedroom all they was going to hear was a loud bang. I took that to mean that he had a gun back there and might shoot." Officer Sheldon stopped Marvin from leaving by standing "in the hallway to prevent him from going down there and talked him into going and sitting down." Marvin was arrested after being questioned.

Applying the reasoning found in *U.S. v. Griffin*, 922 F.2d 1343 (8th Cir. 1990), to these facts, we note that apparently no "strong-arm" tactics were utilized during questioning. However, *Griffin* stated that "[a]n interrogation can still be custodial even though no strong-arm tactics are used . . . but the absence of such tactics is a factor which can assist us in reaching an objective conclusion that the suspect could not have associated the questioning with formal arrest." (Citation omitted.) 922 F.2d at 1351. But the remaining indicia, as applied to these facts, militate toward a finding of custody. Officer Sheldon clearly asserted control of the residence by remaining approximately 1 1/2 hours after Linda was taken away, for a total of 2 hours at the Dyer residence. Although Marvin remained in the home, Officer Sheldon arranged for a third party to watch over the children. While Officer Sheldon stated that he could not recall if Marvin asked him to leave, he did state that Marvin was concerned that he would be arrested or asked to leave the house. Further, while Officer Sheldon testified that he asked Marvin if he had somewhere else that he could spend the night, Officer Sheldon admitted on cross-examination that he asked Marvin to leave only after Linda returned, at approximately 2:08 a.m. At 2:10 a.m., when Marvin wanted to go outside to sit in his car, he was arrested. The State argues that Marvin was restricted from going to his bedroom as a matter of personal safety. However, *Griffin* explains:

> Though it is often the case that suspects are escorted or chaperoned during questioning for reasons unrelated to custody, as in this case where Agent Waldie testified that he was concerned for the safety of himself and his partner,

"the relevant inquiry is the *effect on the suspect*" . . . . (Emphasis in original.) 922 F.2d at 1350, quoting *U.S. v. Carter*, 884 F.2d 368 (8th Cir. 1989). According to *Griffin*, the test for determining whether a suspect is in custody at a particular time is to "examine the extent of the physical or psychological restraints placed on the suspect during interrogation in light of whether a 'reasonable person in the suspect's position would have understood his situation' to be one of custody." 922 F.2d at 1347. Under the totality of the circumstances, a reasonable person in Marvin's position could have understood his situation to be custodial. Although the State concedes that another court could apply the *Griffin* indicia of custody to the facts of this case and find custody, it argues that that is insufficient to find clear error on the part of the trial court. However, as noted in *Griffin*:

> The motivation and purpose of the *Miranda* opinion, as well as the ease of its application, are undermined if its effect is to simply substitute the endless chain of voluntariness questions that crowded court dockets prior to its announcement with a new class of case-by-case determinations on the issue of what is custody. . . .
>
> . . . We see no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of *Miranda* warnings. As noted in the *Miranda* opinion, and as demonstrated by case law and legal authority appearing in the intervening years since the announcement of the *Miranda* decision, the effectiveness of law enforcement is not undermined by informing suspects of their rights.

922 F.2d at 1355-56.

We find that Marvin was in custody at the time of his interrogation. Therefore, the trial court erred in overruling his motion to suppress.

Marvin next asserts that the court erred in overruling his motion for discharge, alleging that he was denied his right to a speedy trial contrary to statute and the federal and state Constitutions.

Neb. Rev. Stat. § 29-1207 (Reissue 1989) provides that "[e]very person indicted or informed against for any offense

shall be brought to trial within six months." In computing the time for trial, certain periods are to be excluded, including periods of delay resulting from the absence or unavailability of the defendant, and the time from filing until final disposition of pretrial motions of the defendant. See § 29-1207(4).

Marvin contends that the record is "far from clear on the applicable dates which the state may argue should be excluded." Brief for appellant at 11. According to an order of the county court for Box Butte County on Marvin's motion for discharge for lack of speedy trial, case No. 91-520 was filed against him on August 9, 1991, and subsequently dismissed by the county attorney on December 16. The only specific allegation of error by Marvin refers to a time period between "August 15th through October 1991," when it is apparently unclear whether he willfully made himself unavailable. Brief for appellant at 12. Although Marvin refers to a "bond form" which shows that he was to appear on August 15, and a "return" made on October 1, these documents are missing from the record, as is the original information. Brief for appellant at 11. Thus, the only record available for our review is the county court's order which refers to dates pertinent to case No. 91-520, and the documents filed in relation to the case when it was refiled as case No. 92-155. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

In the absence of evidence in the record to support Marvin's claim that the county court erred in computing the relevant time periods for the purposes of the speedy trial act, the court's decision must be affirmed in regard to the initial case filed against him. A review of the computation made by the county court in connection with case No. 92-155 indicates that the court correctly excluded the time period between dismissal of case No. 91-520 and its refiling as case No. 92-155. While time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled,

during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991).

The county court also properly excluded the time periods of pending discovery motions and a pending motion to suppress. See, *State v. Classen*, 216 Neb. 323, 343 N.W.2d 749 (1984); § 29-1207(4). The court determined that the total time elapsed pursuant to the speedy trial right was 95 days, and properly denied Marvin's motion for discharge.

It is next asserted by Marvin that the trial court erred in overruling his objections to the testimony of a physician and ambulance attendants, who testified in regard to statements made by Linda. The State contends that the statements are admissible as exceptions to the hearsay rule under Neb. Rev. Stat. § 27-803 (Reissue 1989), which provides, in pertinent part:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Dr. John J. Ruffing, Jr., testified in regard to his August 7 emergency room examination of Linda. The record reflects that his testimony related generally to the nature of her injuries, including the fact that she had been subject to some "recent trauma." However, he was also asked over objection by Marvin:

> Q- During the examination, did Linda Dyer tell you how those injuries had occurred?
>
> A- No. When I asked her how they occurred, and I put this in quotes in my chart, - - -
>
> . . . .
>
> A- When I asked her how the altercation occurred she

answered, "I don't know. I don't know. It's been awhile. I don't know. It feels just like it is bruised. It's not broken. My left breast hurts a lot — a lot. My right arm hurts."

Dr. Ruffing's testimony in regard to how the "altercation" occurred relates more to fault than to what would be considered "reasonably pertinent to diagnosis or treatment." However, his testimony was inconclusive and did not assign fault to Marvin; thus, any error was harmless.

The State contends that statements made to ambulance attendants were also admissible under § 27-803(3). At the trial, Marvin objected to the admission of a statement made by Linda in the presence of Yardley, who was at the Dyer home on August 7 as a member of the Hemingford fire and rescue squad.

Yardley testified in regard to that statement:

Q- Okay. What do you mean by EMT?

A- Emergency medical technician.

Q- And what were you emergency medical technician personnel collectively doing with Linda in the kitchen of her home at that time?

A- We were trying to convince her to go with us to receive medical attention.

Q- Had you observed things about her that made you believe she needed medical attention that you could not give her in her kitchen?

A- Yes.

. . . .

Q- What did you hear [another EMT, Pat Moser] ask her?

. . . .

A- I don't remember the specific questions, but Pat was directing questions to her trying to get her to come with us to seek medical attention.

Q- But do you remember anything about what the questions were? Yes or no?

A- Not now.

Q- Okay. Do you remember what her response to the questions was? Yes or no?

A- Yes.

Q- Okay. What?

Over objection by Marvin, the answer given was, "She said, 'He beat me. Okay. He beat me.' "

This exchange was immediately followed by cross-examination, during which Yardley was asked, "Mr. Yardley, this was after EMT Moser had put quite a little pressure on her, correct?" to which Yardley responded, "Yes."

This testimony indicates that Linda's statement was made while she was being encouraged to *seek* medical treatment. However, it does not in any way indicate that she was being offered medical treatment, was receiving medical treatment, or was being diagnosed; thus, the testimony is inadmissible under § 27-803(3). Neither was it admissible under § 27-803(1). "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," although hearsay, is admissible under the excited utterance exception to the hearsay rule. § 27-803(1).

In *State v. Tlamka*, 244 Neb. 670, 676, 508 N.W.2d 846, 850 (1993), we stated:

> " '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. 311, 316-17, 488 N.W.2d 33, 37 (1992) (quoting *In re Interest of D.P.Y. and J.L.Y.*, 239 Neb. 647, 477 N.W.2d 573 (1991)). See, also, 2 McCormick on Evidence § 272 (John W. Strong ed. 1992).

As may be noted above, Yardley's testimony does not adequately relate the condition of Linda or that her statement made was being made under stress caused by the event or the condition. Rather, it appears to be the result of pressure exerted on her; therefore the necessary element of spontaneity is absent and the testimony should have been excluded as inadmissible hearsay. See *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991).

Marvin also contends that these statements were admitted in violation of the Confrontation Clause. However, having

determined that the evidence should have been excluded, we find it unnecessary for us to deal with this question.

It is next contended that the trial court should have allowed Marvin to inquire into his pending lawsuit against Officers Olson and Sheldon. Officer Olson was asked on cross-examination if he had been sued by Marvin, to which he answered, "Yes." However, the prosecution objected, and the court sustained the objection, instructing the jury not to consider any evidence on that issue. In regard to Officer Sheldon's testimony, the defense made the following offer of proof:

> [Defense counsel]: Your Honor, I would offer to prove — I don't — I don't think it is necessary that we call Officer Sheldon back in to do that. I would offer to prove that if I were to ask Officer Sheldon whether he has been sued as a result of this incident that he would answer yes, that he has. I think it goes toward his credibility as a witness as well as Officer Olson's credibility as a witness.
>
> THE COURT: Well, you are claiming more bias than credibility.
>
> [Defense counsel]: Well, bias is one measure of credibility.
>
> THE COURT: Right. That question, if asked of a jury [sic] and an objection was made, would be sustained and the jury would be told to disregard that question, so that would be the ruling of the Court. So you have preserved your record on that issue. But I believe — I am of the opinion that's not proper impeachment procedure.

We stated in *State v. Hartmann*, 239 Neb. 300, 310-11, 476 N.W.2d 209, 216 (1991):

> The right to cross-examine a prosecution witness regarding bias or motive is an important interest. "A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' . . .

> We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), citing 3A J. Wigmore, Evidence in Trials at Common Law § 940 (J. Chadbourn rev. 1970). In a more recent review of the confrontation clause, the U.S. Supreme Court wrote: "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), quoting, in part, *Davis v. Alaska, supra*. "[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Thus, the denial of a criminal defendant's right to confront her or his accusers, and implicitly the right to cross-examination, see *Davis v. Alaska, supra*, is a violation of the defendant's constitutional rights. *State v. Warford* [223 Neb. 368, 389 N.W.2d 575 (1986)].

Thus, the trial court erred in refusing to allow Marvin to cross-examine Officers Olson and Sheldon in regard to possible bias. We noted in *Hartmann* that the improper denial of a defendant's opportunity to impeach a witness for bias was subject to harmless-error analysis and that where evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless.

In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the

error was harmless beyond a reasonable doubt. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993).

Because the State has failed to demonstrate that the error was harmless beyond a reasonable doubt, the failure of the trial court to allow Marvin to cross-examine Officers Olson and Sheldon in regard to the pending lawsuit was reversible error.

As his final assignment of error, Marvin contends that there was insufficient evidence for conviction.

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. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Although the evidence is in conflict, there is sufficient evidence to support Marvin's conviction as to the assault on Linda. Linda testified that during the incident of August 7, she hit her husband several times in the face, that he was trying to make her stop, and that he never once hit her. On direct examination she stated: "The last time that I hit Marvin, he had grabbed ahold of me and nailed me up against the bathroom closet and told me to stop it, to knock it off, settle down. It triggered. That was it. My pleurisy had hit it's [sic] point and I couldn't breathe." However, on cross-examination she admitted that she testified during a custody hearing that "[I] got shoved up against the bathroom shelving which knocked the wind out of me and my chest was hurting pretty bad."

As to the assault of Officer Olson, his supervisor at the time of the incident, Jay Smith, stated that Officer Olson had an injury to the left side of his face the next morning. However, Smith stated that he did not know how the injury occurred, except for what Officer Olson had told him. Although on remand Marvin should be permitted to question Officer Olson in regard to possible bias, Officer Olson did give direct

testimony that he was assaulted by Marvin.

Finally, we note that the bill of exceptions contains a statement by the prosecution to the effect that exculpatory evidence was being withheld from Marvin, although this was not assigned as error.

Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1993); *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). However, we always reserve the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Myers, supra*; *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

To put the statement in context, it is necessary to set out a portion of the colloquy between counsel and the court:

> [Defense counsel]: Yes, Your Honor. We made a motion for discovery early on in this case and one of the items that we asked for was any documents, papers, books, accounts, letters, photographs, objects or other tangible things which could be used as evidence. It has come to my attention that [the prosecutor] has some statements, and I am not even sure who they are of, but I believe they were taken by an insurance adjuster probably in connection with the civil case. He has got those and I think that those are witnesses that are being called or may be called in this action and I would submit that we are entitled to copies of those statements in our discovery motion.
>
> THE COURT: [Prosecutor]?
>
> . . . .
>
> [Prosecutor]: May it please the Court, she is absolutely right. *They contain exculpatory evidence and if I don't disclose it I am risking the State's case, but that is my decision to make, not hers.*

(Emphasis supplied.) The court denied Marvin's request.

In *State v. Phelps*, 241 Neb. 707, 730-31, 490 N.W.2d 676, 692, (1992), we stated:

> The U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that the suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Meis* [217 Neb. 770, 351 N.W.2d 79 (1984)]. In *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), the U.S. Supreme Court explained that "[t]he heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."
>
> However, the State is not under a constitutional duty to disclose all information that might affect the jury's verdict. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Rather, a prosecutor has a duty to disclose all material exculpatory evidence. *Brady v. Maryland, supra*. As we said in *State v. Tweedy*, 224 Neb. 715, 718, 400 N.W.2d 865, 868 (1987), citing *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983): "In order to be a material omission, the omitted proposed evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence 'might' influence the outcome is insufficient."

The court having raised this question during argument, the State was granted leave to file a supplemental brief. In that brief, the State correctly asserts that "[t]he United States Constitution does not demand that a prosecutor allow complete discovery of his files to the defense." Additional brief for appellee at 5. As stated in *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985):

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to

> ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

However, here we are faced with a statement, on the record, that the prosecution is in possession of exculpatory evidence which it refuses to disclose. The State offers no rationale for the prosecutor's apparent belief that the documents at issue became work product when they came into his possession and were therefore not subject to Marvin's motion for discovery. See Neb. Rev. Stat. §§ 29-1912 and 29-1914 (Reissue 1989), which provide for the discovery procedures available to a defendant charged with a felony or a misdemeanor for which imprisonment is a possible penalty. The prosecutor also argued that it was not necessary to disclose evidence which could be used only for impeachment. However, the Supreme Court stated in *Bagley* that in both *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976),

> the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. *Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.* See *Giglio* v. *United States*, 405 U. S. 150, 154[, 92 S. Ct. 763, 31 L. Ed. 2d 104] (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U. S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

(Emphasis supplied.) 473 U.S. at 676.

The only direct evidence of the assault on Officer Olson was his own testimony. Although we do not know the nature of the exculpatory evidence, there is a high probability that any exculpatory evidence would be material under these circumstances, and the trial court therefore erred in refusing to allow inspection of the statements.

The State contends that an error was made in the

transcription of the bill of exceptions, and offers the specious suggestion that the word "if" is missing preceding the word "they" in the phrase "they contain exculpatory evidence." Additional brief for appellee at 3. The State argues that the remarks of defense counsel and the court are inconsistent with an admission by the prosecutor that he was in possession of exculpatory evidence. However, adding the word "if" would not explain why the court would fail to review potentially exculpatory evidence. Furthermore, this court can decide only issues based on the record before it. *Raymond v. Department of Motor Vehicles*, 219 Neb. 821, 366 N.W.2d 758 (1985). See, also, *Wonderling v. Conley*, 182 Neb. 446, 155 N.W.2d 349 (1967) (the record of the trial court, when properly certified to an appellate court, imports absolute verity; if the record is incorrect, any correction must be made in the district court).

The proper procedure for amending a bill of exceptions is stated in Neb. Ct. R. of Prac. 5E (rev. 1992):

> Amendments to the Bill of Exceptions. The parties in the case may amend the bill of exceptions by written agreement to be attached to the bill of exceptions at any time *prior* to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Hearings with respect to proposed amendments to a bill of exceptions may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing, or shall be absent from the state, such proposed amendments shall be heard by the successor judge, or by another district judge in the district, or by a district judge in an adjoining judicial district.

(Emphasis supplied.)

Rule 5C(4), regarding preparation and delivery of a bill of exceptions, states, in pertinent part:

> Upon receipt of the bill of exceptions, the clerk of the district court shall forthwith file it and notify all parties or

their attorneys of record and the Clerk of the Supreme Court of the date of such filing. *When filed with the clerk of the district court, such bill of exceptions becomes the official bill of exceptions* in the case and shall not be altered or marked in any fashion by any person.

(Emphasis supplied.)

Because of the various prejudicial errors detailed above, it is necessary that the judgment be reversed and the cause remanded to the district court with directions to remand it to the county court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

JANET A. PALMTAG, APPELLEE, V. GARTNER CONSTRUCTION CO., A NEBRASKA CORPORATION, APPELLANT.

513 N.W.2d 495

Filed March 25, 1994. No. S-92-387.

1. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
2. **Motions to Dismiss: Directed Verdict.** A motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict.
3. **Trial: Directed Verdict.** A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict made at the close of all the evidence, which motion should have been sustained because of a want of evidence.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error in a trial court's refusal to give a requested instruction, one 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.
5. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating a reversal.
6. **Licensee: Words and Phrases.** One who is privileged to enter or remain upon land by virtue of the possessor's consent is a licensee.

7. _____: _____. A licensee is on the premises of another for the licensee's own interest or gratification; such person is exercising the privilege solely for that person's own convenience or benefit and does not stand in any contractual relation with the owner or occupant of the premises.
8. **Invitor-Invitee: Words and Phrases.** One who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties is an invitee.
9. _____: _____. One who is expressly or impliedly invited or permitted to enter or remain on the premises in the possession of another for a purpose directly or indirectly connected with the business of the possessor or with business dealings between them is a business visitor or invitee.
10. **Licensee: Invitor-Invitee: Words and Phrases.** The distinction between invitees and licensees rests on the purpose for which the invitation was extended; if it is an invitation for the personal pleasure, convenience, or benefit of the person enjoying the privilege, the person receiving it is a licensee; if the invitation relates to the business of the one who gives it or for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee.
11. **Jury Instructions.** While instructions withdrawing consideration of material issues of fact presented by pleadings and evidence are erroneous, the trial court must eliminate all matters not in dispute and submit only the controverted questions of fact on which the verdict must depend.
12. **Trial.** When reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide.
13. _____. Where facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law, rather than submit it to the jury for determination.
14. **Words and Phrases.** Reasonable care is that degree of caution which an ordinary, or reasonably prudent, person would exercise under like circumstances.
15. **Jury Instructions: Appeal and Error.** While ordinarily the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter, a trial judge is nonetheless under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made.

Appeal from the District Court for Otoe County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

Alan L. Plessman for appellant.

James L. Schneider, of Kennedy, Holland, DeLacy & Svoboda, and Otto H. Wellensiek for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this negligence action, the district court, pursuant to verdict, entered judgment in favor of the injured plaintiff-appellee, Janet A. Palmtag, against the defendant-appellant, Gartner Construction Co. Defendant appealed to the Nebraska Court of Appeals, and we, under the authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the matter to this court in order to regulate the caseloads of the appellate courts. Defendant asserts, in summary, that the district court erred in (1) overruling its motion made at the close of plaintiff's evidence to either dismiss the action or direct a verdict in defendant's favor, (2) refusing to grant defendant's subsequent motion for judgment notwithstanding the verdict, and (3) instructing the jury. Because the record sustains the last assignment of error, we reverse the judgment of the district court and remand the cause for further proceedings.

II. FACTS

Plaintiff and her husband, John Palmtag, hired defendant to remodel their newly purchased home under an oral arrangement whereunder defendant was to be paid for time and materials. Defendant was given the keys to the house, and plaintiff and her husband visited the structure to monitor the progress of the work; the husband visited on a daily basis and plaintiff once or twice a week.

Defendant's employees were usually present during the husband's visits on workdays, and the house was open. Even during those times when the employees were not around, the house was usually left open, and the husband would be able to "just go in." According to the husband, defendant's employees never limited or restricted where he could go. Plaintiff had once met a Caroline Gartner at the house to look at tile and possibly paint colors.

The remodeling included the removal of a spiral staircase which was located in the main floor entry area and descended

therefrom to the basement through a 5-foot-square opening.

The staircase was made up of pie-shaped treads. Attached to the narrow end of each tread was a round disk which when stacked one on top of another formed a center post with the treads fanned around it. The top disk fit up under the main floor landing. Working without reference to any plans, David Njus, an employee of defendant, disassembled the staircase by beginning with the top tread and working his way down. As he took out each tread and disk, the center post was whittled down.

A handrailing located around the staircase was taken out after the treads and center post were removed, leaving an empty opening in the floor. Njus also removed the plywood aprons and angle irons which were located along the underside of the landing, thus leaving the plywood floor around the opening jutting "something like a diving board out in the air."

After Njus removed the treads, aprons, and angle irons, he wondered how springy the outer edge of the flooring would be and checked it before leaving that evening by reaching up from the basement and hanging his full weight, 165 pounds, on it; nothing gave way. He then hung a wire and plywood barricade across the handrailing and walked on top of the landing area; he felt no sensation of weakness in it. In Njus' opinion, the landing felt solid, and he was "not anymore" concerned about the landing "not holding anybody's weight." Njus believed the landing would stay in place because he thought it was a contiguous part of the rest of the floor of the house. The landing, however, was a separate piece of wood which had been toenailed into the rest of the floor.

The barricade Njus hung was suspended diagonally across the landing from handrail to handrail on the main floor. It consisted of a wire, in the middle of which was hung a piece of plywood approximately 18 inches by 6 to 8 inches in size. It did not cover the hole and left half of the landing unguarded. No warning signs were attached to the barricade.

Plaintiff and her husband had arranged to meet at the house to review the remodeling work. Plaintiff, who was then 8 months pregnant and weighed 200 pounds, arrived at the house at about 5 p.m., accompanied by her 3-year-old son. She met

and spoke briefly with Njus and an unidentified employee of defendant, who were leaving for the day.

As she walked through the entry area, she did not know the staircase had been removed, but noticed "a wire with something hanging on it" and paused approximately 8 to 9 inches from the wire. She then saw that the staircase was gone, at which time she was probably about a foot from the opening. Plaintiff warned her son not to get close to the stairwell. As she paused long enough for her son to pass by, the landing collapsed. As a consequence, she fell to the basement floor and landed on her seat and hands, after which her back and head hit the floor. Her face hit something on the way down.

When the husband found plaintiff, she was in extreme pain and somewhat delirious. Plaintiff could not feel the fetus move, and both she and her husband thought she had ruptured her uterus. Plaintiff was hospitalized for 3 days following the accident and was diagnosed as having a 20-percent compression fracture of her 12th thoracic vertebra, a torus fracture of her right wrist, a sprained left ankle, and a very painful tailbone area. As a result of the compression fracture in her back, plaintiff suffered a 20- to 25-percent permanent disability. Her pregnancy successfully came to term approximately a month after she fell.

The husband remembered that the staircase had been removed for a couple of days before the accident, and he had seen the barricade in place across the stairwell handrailing. He also stated that he had walked across the landing without any problems, although he weighed 250 pounds at the time of the accident.

Jesse Sutton, a semiretired general contractor knowledgeable about the installation and removal of spiral staircases, was of the opinion that the spiral staircase provided the support for the landing area and that when it was removed, the whole structure of the landing area was weakened. Sutton testified that removing the plywood aprons and angle irons, coupled with the earlier removal of the center post, left nothing to support the landing other than the nails toenailing the landing to the rest of the flooring and the approximate 1-percent stability given by the tile which covered the entire

area.

Sutton further testified that the better way to support the landing when it was originally installed would have been to scab some joists from the surrounding floor so that they ran under the landing. While the subfloor rested on top of a joist, its edges flush with the joist underneath it, the landing butted against the edges of the subfloor but did not rest on a joist. That this was not done when the house was originally built should have been apparent to Njus.

Moreover, in Sutton's opinion, the barricade Njus made did not comply with industry standards. He indicated that the proper barricade would have been either metal framing or a 2-by-4 stud wall with signs and flagging on it.

Njus agreed with Sutton's opinion regarding the support for the landing area, admitting that the center post had supported the landing and that the angle irons and plywood aprons provided "maybe some support."

III. ANALYSIS

1. Dismissal or Direction of Verdict

Claiming in the first summarized assignment of error that plaintiff failed to prove defendant was negligent or that there was any causal connection between its conduct and her fall, defendant urges that the district court erred in failing to sustain its motion made at the close of plaintiff's evidence to either dismiss the cause or to direct a verdict in defendant's favor.

However, after the district court overruled the motion, defendant proceeded to adduce evidence. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984). See, also, *State v. Huebner, ante* p. 341, 513 N.W.2d 284 (1994). We have also uniformly held that a motion to dismiss for failure to prove a prima facie

case should be treated as a motion for a directed verdict. *In re Estate of Chaney*, 232 Neb. 121, 439 N.W.2d 764 (1989); *Wax v. Co-Operative Refinery Assn.*, 154 Neb. 42, 46 N.W.2d 769 (1951).

Therefore, we will not review the correctness of the district court's ruling on defendant's motion for a directed verdict or motion to dismiss. *Brown v. Farmers Mut. Ins. Co., supra*; *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln, supra*; *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983); *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983).

2. JUDGMENT NOTWITHSTANDING VERDICT

In its second summarized assignment of error, defendant challenges the district court's decision not to grant its motion for a judgment in its favor notwithstanding the verdict in favor of plaintiff. One difficulty from defendant's point of view in this regard is that it did not make a new motion for a directed verdict at the close of all the evidence or renew at that time the motion it had made at the close of plaintiff's case.

Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) provides that a motion for a directed verdict made at the close of all the evidence is a prerequisite to a motion for judgment notwithstanding the verdict. Although at times we have stated that in order to obtain a judgment notwithstanding the verdict, a motion for a directed verdict must have been made during the course of trial, we have failed to clarify that such must be done at the close of all of the evidence. See, *Lockhart v. Continental Cheese, Inc.*, 203 Neb. 331, 278 N.W.2d 604 (1979); *Pearson v. Schuler*, 172 Neb. 353, 109 N.W.2d 537 (1961); *Springer v. Henthorn*, 169 Neb. 578, 100 N.W.2d 521 (1960); *Kohl v. Unkel*, 163 Neb. 257, 79 N.W.2d 405 (1956). We now expressly state that the "made during the course of trial" language means that a motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict made at the close of all the evidence, which motion should have been sustained because of a want of evidence. *Lockhart v. Continental Cheese, Inc., supra*; *Pearson v. Schuler, supra*; *Springer v. Henthorn, supra*.

Thus, defendant's motion for judgment notwithstanding the verdict is not before us.

3. Instructions

In its third and last summarized assignment of error, defendant asserts the district court incorrectly instructed the jury in that, contrary to defendant's requests, it failed to (a) itemize each of plaintiff's allegations of negligence, (b) permit the jury to determine plaintiff's status, and (c) define negligence.

(a) Allegations of Negligence

Plaintiff alleged that defendant failed to maintain the premises in a reasonably safe condition, that defendant failed to warn or otherwise give her notice of an unsafe and hazardous condition about which defendant knew or should have known, that defendant invited plaintiff onto or permitted her to enter a portion of the house that defendant knew or should have known was in an unsafe and hazardous condition, and that defendant failed to maintain adequate support beneath the portion of the floor over which it knew or should have known plaintiff or others would walk while defendant performed its construction activities.

The district court's instructions advised the jury that the plaintiff alleged that

> as she walked across the floor adjacent to an interior stairway in her [house], the floor collapsed and she fell approximately eight feet onto a concrete floor below, in the basement of the [house]. She alleges that an employee of the defendant . . . had removed the support from beneath that section of the floor.

The district court also instructed the jury that before plaintiff could recover, she must have proved, by the greater weight of the evidence, each and all of the following:

> 1. That the defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition;
>
> 2. That the defendant should have realized that the condition involved an unreasonable risk of harm to plaintiff;

3. The defendant should have expected that the plaintiff either:

a. would not discover or realize the danger; or

b. would fail to protect herself against the danger;

4. That the defendant failed to use reasonable care to protect plaintiff against the danger;

5. That the condition was the proximate cause of some damage to the plaintiff; and

6. The nature and extent of that damage.

Defendant argues that by failing to specify the acts of negligence which plaintiff alleged and which were supported by the evidence, the jury was permitted to speculate as to which of defendant's acts constituted negligence. It is true that where specific acts of negligence are alleged and supported by the evidence, it is error for the trial court to fail to instruct as to such allegations. *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983), *appeal after remand* 218 Neb. 425, 355 N.W.2d 786 (1984); *Pool v. Romatzke*, 177 Neb. 870, 131 N.W.2d 593 (1964). However, to establish reversible error in a trial court's refusal to give a requested instruction, one 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. *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993). Moreover, in reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating a reversal. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993); *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

Whatever else might be said about this phase of defendant's complaints concerning the district court's instructions, a mere reading of the portions of the district court's instructions set forth above makes it clear that defendant was not prejudiced by the district court's characterization of plaintiff's claims of

negligence. With the exception of the matter of notice, the instructions given accurately summarized those of plaintiff's allegations which were supported by the evidence; that is, defendant invited plaintiff to walk on an area from which the support had been removed.

Since the evidence supported plaintiff's allegation that defendant failed to warn her of the dangerous condition created by the removal of the support, the trial court erred in not instructing the jury as to that allegation of negligence. However, the error benefited defendant, for in that regard the instructions limited what the jury could consider as constituting defendant's lack of reasonable care. The jury could not know of claims about which it was not told and therefore could not take them into account. That being so, defendant could not have been prejudiced by the district court's disregard of plaintiff's failure-to-warn allegation.

(b) Plaintiff's Status

Next, defendant complains that the district court determined as a matter of law that plaintiff was an invitee. Defendant urges that had the jury been permitted to consider the matter, it might well have found that plaintiff was but a licensee. We note at this point that the parties raise no issue as to whether the fact that plaintiff is an owner of the premises renders the invitee-licensee analysis inappropriate. However, because no such issue has been raised and because the case was tried on that theory, we, without passing any judgment on the matter, dispose of the case upon the theory on which it was tried. See, *Ingerslew v. Bartholomew*, 216 Neb. 836, 346 N.W.2d 258 (1984); *Mathis v. State*, 178 Neb. 701, 135 N.W.2d 17 (1965).

Under that circumstance, the determination as to whether plaintiff is an invitee or a licensee is indeed important, for the law imposes a duty of greater care for the protection of an invitee than it does for a licensee. *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 151 N.W.2d 451 (1967).

Under our law, a licensee is defined as one who is privileged to enter or remain upon land by virtue of the possessor's consent. *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991); *McCurry v. Young Men's Christian Assn.*, 210 Neb.

278, 313 N.W.2d 689 (1981); *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966). A licensee is on the premises of another for the licensee's own interest or gratification. Such person is exercising the privilege solely for that person's own convenience or benefit and does not stand in any contractual relation with the owner or occupant of the premises. See *Malolepszy v. Central Market*, 143 Neb. 356, 9 N.W.2d 474 (1943).

In general, an invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties. *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Anderson v. Moser*, 169 Neb. 134, 98 N.W.2d 703 (1959); Restatement (Second) of Torts § 332 (1965).

A business visitor or invitee, on the other hand, is one who is expressly or impliedly invited or permitted to enter or remain on the premises in the possession of another for a purpose directly or indirectly connected with the business of the possessor or with business dealings between them. *Roan v. Bruckner, supra.* Similar definitions are found in *Schild v. Schild*, 176 Neb. 282, 125 N.W.2d 900 (1964), and *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962).

The distinction between invitees and licensees rests on the purpose for which the invitation was extended. See, *Roan v. Bruckner, supra*; *Lindelow v. Peter Kiewit Sons', Inc., supra* (express invitation or consent that person be on premises does not by itself make person an invitee). If it is an invitation for the personal pleasure, convenience, or benefit of the person enjoying the privilege, the person receiving it is a licensee. But if the invitation relates to the business of the one who gives it or for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee. *Roan v. Bruckner, supra*; *Lindelow v. Peter Kiewit Sons', Inc., supra.*

Under this "economic benefit" test of invitee status, one who enters upon land of another is not entitled to the status of invitee unless the visit is directly or indirectly connected with business dealings between them. *Roan v. Bruckner, supra*; the Restatement, *supra.*

In *Presho v. J. M. McDonald Co., supra*, we relied on the

elements of the economic benefit test to determine whether the injured party, who went into the backroom of a retail store for an empty packing box to mail an article she had purchased elsewhere and for which no charge would be made, was an invitee or a licensee. Concluding that the injured party was not an invitee, we distinguished that part of the store in which merchandise was displayed and sold from that part in which the party was injured.

In similar fashion, the *Lindelow* court concluded that where the employees' use of the employer's recreational facilities conferred no immediate business benefit to the employer and the employees' attendance at the facilities had nothing to do with their work, the injured employee had been granted the privilege to make use of the facilities as a licensee and not as an invitee.

While the facts in *Von Dollen v. Stulgies*, 177 Neb. 5, 128 N.W.2d 115 (1964), are not identical to those now at hand, *Von Dollen* is nonetheless instructive. Therein, Von Dollen's sister was having a new house built. One afternoon when Von Dollen visited the premises to view the progress of the construction and to measure a window for a traverse rod, wallboard that had been stacked against a wall fell, scraping Von Dollen's right leg and pinning her right foot to the floor. Von Dollen argued that she was an invitee entitled to the affirmative duty of reasonable care to keep the premises safe and to anticipate her presence. We, however, concluded that Von Dollen was a mere licensee. Determinative was the fact that as Von Dollen had no contract with the builder, the builder was not responsible to Von Dollen for its work, and, thus, Von Dollen's visits had no relationship to any business or matter of mutual advantage to her and the builder.

The Kansas Supreme Court, in *Hanks v. Riffe Constr. Co.*, 232 Kan. 800, 658 P.2d 1030 (1983), determined that a purchaser of a house under construction, who was injured when a stack of Sheetrock fell on her leg, was, as a matter of law, a business invitee to whom the contractor owed a duty to exercise ordinary care. Noting that throughout the progress of the construction the purchaser from time to time had criticism about the quality of the workmanship, which she would relay to

the contractor's employees, the *Hanks* court reasoned that by "the execution of the real estate contract, [the purchaser] became [an owner] of a contract interest in the property [with] rights in the property substantially different from those of the casual visitor to the premises who is there only with the permission of the owner" and concluded that the purchaser had been invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. *Id.* at 804, 658 P.2d at 1033.

In *Singleton v. Charlebois Const. Co.*, 690 S.W.2d 845 (Mo. App. 1985), a prospective home buyer was injured by falling Sheetrock as he inspected premises under construction. The *Singleton* court concluded the prospective buyer was a business invitee on the basis of the economic benefit to the builder and an implied invitation extended by the "For Sale" sign in front of the house. Furthermore, the court held that because the evidence which went to the establishment of the prospective buyer's status was not disputed, the determination of his status was for the court.

The facts essential to the determination of plaintiff's status here are likewise not in dispute. Defendant was doing work for plaintiff, and she thus had a right to control what was done under her arrangement with defendant. It is this circumstance which distinguishes the case at hand from *Von Dollen v. Stulgies, supra.*

Although there was no direct testimony that defendant expressly invited the Palmtags,

> [a]n invitation is inferred where there is a common interest or mutual advantage, or where an owner or occupant of premises, by acts or conduct, leads another to believe the premises, or something thereon, were intended to be used by such other person; that such use is not only acquiesced in by the owner or occupant, but is in accordance with the intention or design for which the way, place or thing was adapted or prepared or allowed to be used . . . .

Kruntorad v. Chicago, R. I. & P. R. Co., 111 Neb. 753, 755-56, 197 N.W. 611, 612 (1924). See, also, *Guinn v. Murphy*, 788 F. Supp. 525 (D. Kan. 1992).

The only permissible inference from the undisputed facts is

that plaintiff was at the jobsite for the mutual benefit of herself and defendant and that her visit served defendant's economic interest. Thus, she was, as a matter of law, an invitee. See, *Troll v. Schoonmaker Bros., Inc.*, 34 A.D.2d 1030, 310 N.Y.S.2d 878 (1970) (homeowner injured visiting construction site of her new home had right to be on premises and was business invitee); *Polinelli v. Union Supply Co.*, 403 Pa. 547, 170 A.2d 351 (1961) (purchaser of house, who was at house at invitation of vendor, was business invitee). Contra *Shoffner v. Pilkerton*, 292 Ky. 407, 166 S.W.2d 870 (1942) (whether plaintiff homeowner was invitee was question for jury in action against contractor).

While instructions withdrawing consideration of material issues of fact presented by the pleadings and evidence are erroneous, *Ring v. Duey*, 162 Neb. 423, 76 N.W.2d 433 (1956), the trial court must eliminate all matters not in dispute and submit only the controverted questions of fact on which the verdict must depend, *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983). When reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide. *Gillam v. Firestone Tire & Rubber Co.*, 241 Neb. 414, 489 N.W.2d 289 (1992); *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991); *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991). Where facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law, rather than submit it to the jury for determination. *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980); *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980).

Accordingly, the district court correctly determined plaintiff's status to be that of an invitee as a matter of law.

(c) Definition of Negligence

In its final challenge to the instructions, defendant denounces the district court's failure to define the word "negligence," arguing that such failure deprived the jury of the ability to correctly judge defendant's conduct.

But the word "negligence" appears nowhere in the

instructions or verdict forms, and, therefore, its definition was not left for the jury's own interpretation; rather, the issue becomes whether the instructions given regarding defendant's standard of care correctly stated the law. See, *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989).

As noted in part III(3)(a) above, the district court advised the jury that it was plaintiff's burden to prove, among other things, that defendant had "failed to use reasonable care to protect" her from the condition described elsewhere in the instruction. That was an acceptable means of informing the jury that in order for plaintiff to recover, it was necessary that she prove that defendant had breached its described duty by having failed to exercise the requisite degree of care toward her.

The difficulty is that nowhere in its instructions did the district court define reasonable care as being that degree of caution which an ordinary, or reasonably prudent, person would exercise under like circumstances. See *Black v. C., B. & Q. R. Co.*, 30 Neb. 197, 46 N.W. 428 (1890). As a consequence, the instructions erroneously and prejudicially failed to limit the jury's consideration to the degree of caution a reasonably prudent contractor would have exercised in like circumstances.

It is true that defendant did not ask the district court to define reasonable care, but the concept is closely related to defendant's request that the district court define negligence. In any event, while ordinarily the failure to object to instructions after they have been submitted for review will preclude raising an objection thereafter, a trial judge is nonetheless under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made. See, *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991); *Keller v. Noble*, 229 Neb. 542, 428 N.W.2d 170 (1988); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

The situation here is not unlike that presented in *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983), *appeal after remand* 218 Neb. 425, 355 N.W.2d 786 (1984), wherein we held

that the failure to define proximate cause constituted plain error requiring a new trial.

IV. JUDGMENT

Thus, the judgment of the district court must be, and hereby is, reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WILLA HOW AND JOSEPH W. BROTT, APPELLANTS AND CROSS-APPELLEES, V. PAUL A. MARS ET AL., APPELLEES AND CROSS-APPELLANTS.

513 N.W.2d 511

Filed March 25, 1994. No. S-92-443.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions.
2. **Pleadings: Demurrer: Appeal and Error.** One must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer.
3. **Constitutional Law: Statutes: Service of Process.** If a statute is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.
4. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal.
5. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Martin J. Kushner, of Kushner Law Office, for appellants.

E. Michael Slattery, of Reinsch & Slattery, P.C., for appellees.

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

FAHRNBRUCH, J.

Two Beaver Lake Subdivision, Cass County property owners (plaintiffs) appeal the denial of their requests for declaratory relief and the denial of certification to proceed as a class action in their lawsuit against the Beaver Lake Association and its directors. We affirm.

STANDARD OF REVIEW

The relief requested by the plaintiffs in their fourth amended petition is equitable in nature. In reviewing an equity action for a declaratory judgment, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993). When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions. *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

FACTS

Carl J. How and Joseph W. Brott, property owners in Beaver Lake Subdivision, filed an amended petition on December 21, 1987, naming as defendants the Beaver Lake Association (Association), a Nebraska nonprofit corporation, as well as its seven directors, individually and in their capacities as directors (hereinafter, collectively, defendants). How, a real estate broker who owned both commercial and residential property at Beaver Lake, died during the pendency of this appeal. His widow, Willa How, has been substituted as a party as How's successor in interest.

The Association is a Nebraska nonprofit corporation whose

members are landowners in Beaver Lake Subdivision. The Association was formed to acquire, provide, and maintain utility and recreational facilities and otherwise provide for the health, recreation, safety, benefit, and other interests of its members.

In their amended petition, the plaintiffs alleged that they brought the action "on their own behalf and on behalf of all others similarly situated and namely, the owners of property within said subdivision, members of the Association and subject to the decisions and actions of the board of directors of the Association (herein referred to as 'the class')." On March 10, 1988, the court sustained a demurrer by the defendants alleging that the plaintiffs' amended petition failed to state a cause of action under Nebraska's class action statute. The plaintiffs subsequently amended their petition, omitting any reference to proceeding as a class action. The case went to trial on March 25, 1991, on the plaintiffs' fourth amended petition.

The plaintiffs' first cause of action alleged that the procedure for electing directors of the Association was void because members were denied the right to vote for directors unless their Association dues were paid in full. They asked the court to declare that the elections were invalid and to order that a new election be held.

The second cause of action sought a declaratory judgment that "all assessments for membership dues and/or expenses imposed by the Association be upon individual lots, notwithstanding that said lots are contiguous, owned by one ownership and used as a single unit" and that such dues were personal in nature and were not a lien upon individual lots. It also requested that the court direct the Association to refrain from informing prospective buyers that unpaid dues were liens upon delinquent members' lots.

The third cause of action alleged that the Association had denied lot owners permission to build boathouses on their lots, thereby depriving them of the beneficial use of their property. A declaratory judgment holding such denial of permits to be unlawful was requested.

On May 5, 1992, the trial court issued a memorandum opinion and judgment finding that (1) the Association bylaws

restricted voting privileges to members in good standing as authorized by Neb. Rev. Stat. § 21-1914 (Reissue 1991) and (2) a member who has not paid dues is not in good standing. Although plaintiffs attempted in their trial brief to challenge the constitutionality of § 21-1914, the trial court found that the issue was not properly before the court because it had not been pled, nor had notice been given to the Attorney General. The trial court found for the defendants and dismissed the plaintiffs' first cause of action.

On the second cause of action, the trial court found that plaintiffs were entitled to declaratory relief that assessments be upon individual lots prior to 1990, at which time an amendment to Association bylaws was passed permitting "homesteading" of two contiguous lots. The court further found that assessments of the Association constituted liens against the individual lots.

On the third cause of action, the trial court held that the Association had the right to deny a permit for a boathouse by enforcement of covenants, restrictions, and regulations, but not because a member was delinquent in payment of dues, and granted the requested declaratory relief.

The plaintiffs timely appealed to this court, and the defendants cross-appealed.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs contend that the trial court erred in (1) refusing to permit this case to proceed as a class action, (2) refusing to address the constitutionality of the actions of the Association in restricting voting privileges for the Association based on nonpayment of dues, (3) failing to grant a declaratory judgment invalidating the board of directors election, and (4) failing to grant a declaratory judgment that the defendants were to stop informing prospective buyers of lots that dues and assessments "ran with the lot" and declaring that such dues and assessments were personal in nature.

The defendants assert on cross-appeal that the trial court erred in denying their motion to dismiss the causes of action of plaintiff Brott at the close of the evidence.

ANALYSIS

CLASS ACTION

The plaintiffs claim that they "made a *pre-trial motion* in March of 1988 to proceed with the case as a class action." (Emphasis supplied.) Brief for appellants at 11. A review of the record reveals no such motion by the plaintiffs in March 1988. Rather, as previously noted, the issue of proceeding as a class action was raised in the plaintiffs' amended petition. Subsequently, in their second amended petition, the plaintiffs omitted any reference to proceeding as a class action.

One must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer. *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991). Having amended their petition to omit any reference to a class action, the plaintiffs have waived this issue on appeal, and the correctness of the trial court's ruling will not be reviewed.

CONSTITUTIONALITY OF STATUTE

Next, the plaintiffs argue that the trial court erred in refusing to consider the constitutionality of § 21-1914, which permits the Association to restrict voting privileges of members. We disagree.

Neb. Rev. Stat. § 25-21,159 (Reissue 1989) provides that "if [a] statute . . . is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard."

The record shows that the Attorney General was not given notice of this action until December 28, 1992, after the case had been tried and some 6 months after the case was appealed to this court. Because the plaintiffs failed to comply with the terms of § 25-21,159, the constitutionality of § 21-1914 was never properly before the trial court, and the plaintiffs were not entitled to declaratory relief on this issue. See, also, *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993). This assignment of error is without merit.

VALIDITY OF ELECTIONS

The plaintiffs allege in their third assignment of error that the

1985, 1986, 1987, 1988, and 1989 elections of the Association's board of directors should be invalidated. The plaintiffs' fourth amended petition alleges in part as follows:

> 8. That the right to vote . . . for members of the Association's Board of Directors is not a privilege which can be restricted or denied through covenant or resolution, but an absolute "right" granted to all regular members of the Association.
>
> 9. That Defendants wrongfully restricted the May 17, 1987 election and similar elections in 1985 and 1986 of the Board of Directors by prohibiting regular members to vote for the Directors . . . unless their Association assessments . . . were paid in full. Similar restrictions were applied, and improperly applied, to subsequent elections in 1988 and 1989.
>
> 10. That each of the elections for Directors of the Association in 1985, 1986, 1987, 1988 and 1989 is void because authorized voting members were wrongfully and unlawfully instructed . . . that they were unqualified to vote by virtue of nonpayment of Association dues and/or assessments and by that reason, either did not vote or were restricted from voting by Defendants.

In their brief, the plaintiffs argue that the elections are void because the bylaws, as amended in 1978 and 1990, were not properly enacted and recorded. However, the issue of whether the bylaws were properly enacted and recorded was not raised by the plaintiffs' fourth amended petition, and the trial court correctly refused to decide issues which had not been properly pled. See Neb. Rev. Stat. § 25-1101 et seq. (Reissue 1989). Moreover, an issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992).

We now turn to the only issue framed by the pleadings in the plaintiffs' first cause of action, that is, whether members of the Association who are delinquent in their assessments and/or dues may be restricted from voting at board of directors elections by virtue of the bylaws as they existed at the time of the

elections in question.

The legislation governing nonprofit corporations in Nebraska is the Nebraska Nonprofit Corporation Act, Neb. Rev. Stat. § 21-1901 et seq. (Reissue 1991). Section 21-1914 of that act provides:

> The right of the members, or any class or classes of members [of a nonprofit corporation], to vote *may be limited, enlarged, or denied to the extent specified in the articles of incorporation or the bylaws*. Unless so limited, enlarged, or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(Emphasis supplied.)

Both the articles of incorporation of the Association and its initial bylaws, adopted August 30, 1974, grant the board of directors the authority to amend the bylaws. The 1974 bylaws provide in article II, § 6, that "[e]ach Regular Member shall be entitled in the election of directors of the corporation to cast . . . one vote for each such membership held."

The bylaws were revised on July 20, 1978, and amended in 1983. Article II, § 6, of the amended 1978 bylaws, which were in effect at all times material to this case, provides:

> Each Regular Member *of good standing at the date of the election* shall be entitled in the election of directors of the corporation to cast . . . one vote for each such dues-paying membership held. . . . *Members not in good standing as to membership dues shall not be entitled to voting privileges.*

(Emphasis supplied.)

Because § 21-1914 specifically provides that the rights of members of nonprofit corporations to vote may be limited as specified in the bylaws, and the 1978 bylaws as amended explicitly limit voting rights to members in good standing as to membership dues, it was not clearly erroneous for the trial court to find that members delinquent in their payment of dues were restricted from voting for the board of directors. The trial court correctly dismissed this cause of action.

WHETHER DUES RUN WITH THE LAND

Finally, the plaintiffs argue that the trial court erred in failing

to find that the dues and assessments of the Association are personal in nature and do not run with the land. We find that Willa How is collaterally estopped from raising this issue by virtue of this court's prior decision in *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986).

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

In *How v. Baker*, a case in which Carl and Willa How sued the Association, we held that the Association had authority to amend covenants to assess lot dues and special assessments and that such covenants run with the land. Willa How, being a party to the prior action in *How v. Baker* in which the issue of dues and assessments running with the land was fully litigated and a final judgment was rendered on the merits of the case, is thus estopped from now asserting that the dues and assessments of the Association do not run with the land.

As to plaintiff Brott, we have reexamined our analysis of the issue in *How v. Baker* and adhere to our previous holding that the assessments and dues of the Association run with the land.

Accordingly, the plaintiffs are not entitled to an order directing the defendants to stop informing prospective purchasers of Beaver Lake lots that unpaid membership dues run with the land and constitute a lien on said land. This assignment of error is without merit.

CONCLUSION

As we have found no merit to any of the plaintiffs' arguments on appeal, it is not necessary for us to address the issue raised on cross-appeal. We affirm the order of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

MARY LOU BURNS, APPELLANT, V. PHILIP S. METZ, M.D., APPELLEE.

513 N.W.2d 505

Filed March 25, 1994. No. S-92-482.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing 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 failure to give the tendered instruction.
2. **Jury Instructions.** Where a tendered instruction is not an incorrect statement of the law, but is also not wholly correct, the trial court, whether requested or not, has the duty of instructing the jury on issues presented by the pleadings and the evidence.
3. **Malpractice: Physicians and Surgeons: Proof.** Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony.
4. **Jury Instructions: Appeal and Error.** All jury instructions must be read together and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by pleadings and evidence, there is no prejudicial error necessitating reversal.
5. _____: _____. The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. **Principal and Agent: Master and Servant: Negligence: Liability.** Unless the servant or agent is liable in negligence, there can be no liability on the master or principal.

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

James R. Welsh, of Bradford, Coenen, Ashford & Welsh, for appellant.

James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

HASTINGS, C.J.

Plaintiff, Mary Lou Burns, brought this action for professional negligence arising from breast reduction surgery performed by defendant-appellee Philip S. Metz, M.D., and his assistant, defendant Richard M. Pitsch, Jr., M.D. Plaintiff assigns as error the failure of the trial court to instruct the jury as to the definition of negligence and its failure to instruct that Dr. Metz was responsible for all negligent acts of his assistant.

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing 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 failure to give the tendered instruction. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Where a tendered instruction is not an incorrect statement of the law, but is also not wholly correct, the trial court, whether requested or not, has the duty of instructing the jury on issues presented by the pleadings and the evidence. *Wilson v. Misko, supra*; *Professional Recruiters v. Oliver*, 226 Neb. 16, 409 N.W.2d 304 (1987).

Because of physical discomfort in her neck and shoulder area due to her large breasts, Burns, after an examination and recommendation by Dr. Metz, consented to breast reduction surgery which was accomplished on Friday, September 18, 1987. Dr. Metz had described for her how the reduction would be accomplished, informed her of possible complications, and told her that he always had a surgeon assisting him during any major surgery. Dr. Metz' office manager informed her that Dr. Rick Windle would be assisting with the surgery. Burns was familiar with Dr. Windle and "had no problems with him being in [the operating room] assisting at all."

On the following Sunday, Burns had a chance to observe her breasts during a dressing change. She noticed that her breasts were asymmetrical and that the sutures on the right breast were

very small and even, while on the left breast the sutures were not as evenly spaced and there were areas where pieces of skin and tissue were "puckering out a little bit."

Prior to Burns' next appointment, she received the operative and pathology reports in the mail, attached to an insurance form. After reading the reports, Burns concluded that two different surgeons had performed surgery on her and that this was the reason one breast was so much smaller than the other. The second surgeon was Dr. Pitsch. Burns saw in the report that 186 more grams of tissue were taken from the right breast than the left. She stated that she felt she had been deceived because she had not been told that the other surgeon would do anything but assist. The surgical report stated that "Dr. Pitsch had removed the left and right segments" on the right breast and that he had closed on the left breast, while Dr. Metz closed on the right.

Dr. Simon Fredricks testified by deposition as an expert for Burns. He testified that Dr. Pitsch, the assisting surgeon, departed from the appropriate standard of care by failing to object to Dr. Metz' request to resect the breast tissue. However, he also stated that even if Dr. Pitsch had objected, if Dr. Metz had insisted that he do so, Dr. Pitsch should have done what was requested of him. Dr. Fredricks further testified on cross-examination that if Dr. Metz directly supervised Dr. Pitsch in resecting the medial and lateral portions of the breast, then both Drs. Metz and Pitsch had met the standard of care in regard to that issue. He added that as the assistant, Dr. Pitsch was under obligation to do everything he was requested to do by Dr. Metz.

Dr. Fredricks stated that Dr. Metz had departed from the standard of care by failing to obtain informed consent, by failing to inform Burns that he intended to permit the assisting surgeon to sculpture breast tissue, by failing to take preoperative photographs to aid him during the surgery, by failing to be personally responsible for sculpturing both breasts, and by failing to evaluate the breasts in the erect position during surgery.

However, Drs. William LeWorthy and Colleen Stice both testified that Dr. Metz followed the standard of care in his

treatment of Burns. Although he agreed that there was asymmetry, Dr. Metz stated that he had complied with the appropriate standard of care. Both Drs. Fredricks and Metz testified that asymmetry may occur despite the exercise of reasonable care.

At the close of Burns' case, Dr. Pitsch moved for a directed verdict. The court sustained the motion and dismissed Dr. Pitsch as a party defendant. Dr. Metz' motion for a directed verdict was overruled. Following completion of the testimony, the case was submitted to the jury on the issues of whether Dr. Metz was negligent in failing to do a proper preoperative workup, in failing to inform Burns that Dr. Pitsch would be removing tissue from her right breast, and in failing to properly remove tissue from her right breast. The jury returned a verdict in favor of Dr. Metz. Burns appeals to this court.

Burns first asserts that the court erred in failing to give her proposed instruction defining negligence.

Malpractice or professional negligence is defined under the Nebraska Hospital-Medical Liability Act in Neb. Rev. Stat. § 44-2810 (Reissue 1988) as follows:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

Burns' proposed instruction No. 10, based on the NJI2d Civ. 3.02 definition of ordinary negligence, stated: "Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances."

The trial court refused this instruction, stating that its instruction No. 7 "adequately instructs the jury in this case on that issue." The court's instruction No. 7 stated:

> This is an action based on a claim of malpractice, sometimes called professional negligence.
>
> A plastic surgeon such as the defendant has the duty to possess and use the care, skill and knowledge ordinarily possessed and used under like circumstances by other plastic surgeons engaged in a similar practice in the same or similar communities.

The second paragraph of this instruction is taken virtually verbatim from NJI2d Civ. 12.01, which sets out the "duty of a health care provider." However, Burns objects to the first paragraph of the court's instruction, contending that it indicates to the jury that she would have a stronger burden of proof than ordinary negligence. On the contrary, *professional* negligence does not merely require that the rendered care be judged by what a reasonably careful person would do or not do under similar circumstances, but, rather, requires that the professional's actions be measured by the care, skill, and knowledge ordinarily possessed and used by other comparable *professionals* in a similar practice. It is Dr. Metz who must measure up to the higher standard of care.

The Nebraska Jury Instruction does not use the phrase "reasonable care," as does the definition provided in § 44-2810. However, as noted in NJI2d Civ. 12.01 comment at 688, " 'the care, skill, and knowledge ordinarily possessed and used under like circumstances by other [such health care providers] engaged in a similar practice in the same or similar localities' *will* be reasonable care." (Emphasis supplied.) Thus, the definition of "reasonable care" is inherent in the Nebraska Jury Instruction, and an additional instruction relating negligence to the absence of reasonable care would be redundant and possibly confusing to the jury.

Although Burns further argues that the case was tried in "negligence" and that there is no rationale for the court's failure to instruct on this key word, this is clearly an action in professional negligence. As stated in *Kortus v. Jensen*, 195 Neb. 261, 268, 237 N.W.2d 845, 850 (1976):

> [P]roof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony.

(Emphasis in original.) NJI2d Civ. 12.01 clearly addresses the standard necessary for a determination of medical negligence as set forth above.

The court's instruction as given could have been made more clear by explicitly stating that professional negligence means the *failure* to "possess and use the care, skill and knowledge ordinarily possessed and used under like circumstances." However, as we have often noted, all jury instructions must be read together and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by pleadings and evidence, there is no prejudicial error necessitating reversal. See, *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992). As stated in *Carter v. Consolidated Cabs, Inc.*, 490 S.W.2d 39, 43 (Mo. 1973), " ' "Although we do not hold that in every case the giving of a negligence definition is required by MAI, it would appear to be a better practice to include such definition where the term 'negligence' appears in any of the instructions." ' "

Here, the jury was given instruction No. 3, which states, in pertinent part, that

> [t]he plaintiff, Mary Lou Burns, claims that the defendant, Dr. Philip S. Metz, was negligent in one or more of the following ways in connection with his care and treatment of Mary Lou Burns:
>
> 1. In failing to do a proper preoperative workup to determine the state of asymmetry or nature of plaintiff's breasts.
>
> 2. In failing to inform plaintiff that Dr. Richard Pitsch

would be removing tissue from plaintiff's right breast.

3. In failing to properly remove tissue from plaintiff's right breast.

The plaintiff, in this action, claims that as a direct and proximate result of the negligence of the defendant, she sustained injury to her breasts.

The defendant denies that he was negligent in any manner.

. . . .

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of evidence, each and all of the following:

1. That the defendant was negligent in one or more of the ways claimed by the plaintiff;

2. That the negligence of the defendant was a proximate cause of the plaintiff's injury; and

3. The nature and extent of the plaintiff's damages.

Before the plaintiff can recover against the defendant on her claim of failure to obtain informed consent, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant failed to obtain the plaintiff's informed consent before he operated on the plaintiff;

2. That under similar circumstances, a reasonably prudent plastic surgeon in this community or similar communities would have obtained express or implied consent for such an operation;

3. That a reasonably prudent person in the plaintiff's position would not have undergone the operation had she been properly informed;

4. That the lack of informed consent was the proximate cause of some damage to the plaintiff; and

5. The nature and extent of that damage.

Consent to a course of treatment is informed consent if it is based on information that would ordinarily be provided to a patient under like circumstances by a surgeon engaged in a similar practice in the same or similar localities.

The latter part of the instruction, beginning with "[b]efore the

plaintiff can recover," is the critical portion of the instructions and placed the proper burden upon Burns. The jury was also instructed on the definition of proximate cause.

Again, as to Dr. Metz' care and treatment of Burns, the first part of the above instruction fails to explicitly relate his actions to the appropriate standard of care. However, on the issue of informed consent, the latter part of the instruction does relate Dr. Metz' actions to the appropriate standard, as provided in instruction No. 7. The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous. *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978).

Taken as a whole, the instructions adequately convey to the jury that Dr. Metz would be professionally negligent in departing from the appropriate standard of care, as set out in instruction No. 7, in his treatment of Burns.

Burns next contends that the court erred in failing to give the following proposed instruction No. 9:

> As the surgeon for the plaintiff, Philip Metz, M.D., is responsible for the total care of his patient, Mary Lou Burns. He may not relieve himself of his responsibility to his patients by delegating his duties to a general surgeon. The responsibility for the proper performance of a duty cannot be delegated, although actual performance of the task may be done by another. The law does not permit a physician to avoid liability by the act of attempting to transfer his responsibility to another.
>
> You are instructed that, as a matter of law, the Court has found that Dr. Richard Pitsch was at all times during the course of the breast reduction surgery to the plaintiff on September 18, 1987, under the exclusive control and supervision of the defendant, Philip Metz, M.D., and that any negligence you may find against Dr. Richard Pitsch must be considered by you to be the negligence of the defendant, Philip Metz, M.D.

During the instruction conference, counsel for Burns argued that this instruction was necessary to advise the jury that Dr. Pitsch had been dismissed because Dr. Metz had exclusive

control and supervision of Dr. Pitsch. Dr. Metz argues that this instruction would have permitted the jury to find that Dr. Pitsch was negligent despite the fact that in dismissing Dr. Pitsch, the court ruled as a matter of law that insufficient evidence of Dr. Pitsch's negligence had been presented. In sustaining Dr. Pitsch's motion for a directed verdict, the court stated:

> I think that [Dr. Pitsch's counsel's] argument is accurate as to what the evidence is, and as to the law that applies, and certainly the testimony of Dr. Metz here this morning filled in whatever gaps there might have been as to Dr. Pitsch's conduct. Performance of the surgery was under the supervision and control of Dr. Metz. Dr. Metz is dismissed as — Dr. Pitsch is dismissed as a party defendant.

Although these comments reflect the court's consideration of the fact that Dr. Pitsch was under the exclusive control and supervision of Dr. Metz, it was proper to dismiss Dr. Pitsch as a defendant on the basis that the evidence offered by Burns was not sufficient to make out a prima facie case against him. As noted above, in a medical malpractice action, the plaintiff has the burden of establishing by expert medical testimony (1) the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The only evidence offered in this regard was the deposition testimony of Dr. Simon Fredricks. In regard to Dr. Pitsch's responsibilities, Dr. Fredricks testified:

> Q. I believe you also indicated that, under the direct supervision of Dr. Metz, he [Dr. Pitsch] could remove tissue?
>
> A. Absolutely. I think that, if he acted as an extension of Dr. Metz's arm and was an extension of the scalpel of the surgeon of record, the surgeon of record remained in verbal and visual continuity and directed him in what he wanted him to excise and sculpture, then he had — then that would be the proper and appropriate thing for an assistant to do.

Q. I'll represent to you, Doctor, that Dr. Pitsch had assisted Dr. Metz prior to Ms. Burns' surgery and in the same manner. And I believe he testified to that in his deposition. You have read his deposition; right?

A. Yes, I have. I haven't read it recently, but I have read it.

Q. You had read it before you gave your prior deposition; correct?

A. I did, sir.

. . . .

Q. And, at that time, do you recall testifying that you didn't have any problem with Dr. Pitsch's care of Ms. Burns?

A. That is correct.

Q. The same would be true today?

A. Yes, sir.

Q. You indicated at that time that Dr. Pitsch was simply doing what he was asked by the surgeon of record?

A. That is correct.

Q. And I believe you also indicated that at that time the final result is the responsibility of the surgeon of record, not the assistant?

A. Without question. Absolutely.

Dr. Fredricks also stated that Dr. Pitsch would not have the responsibility to perform the procedure such that upon completion the breasts would be symmetrical, nor was it Dr. Pitsch's responsibility to explain the risks and alternatives of the procedure to the patient.

Dr. Metz was asked:

Q. Do you have the responsibility of controlling and supervising what Dr. Pitsch does in the surgical suite as far as removing tissue from Mrs. Burns' right breast?

A. I controlled and supervised it, yes.

Q. Did Dr. Pitsch have any discretion as to how much tissue he should or should not carve out of Mrs. Burns' right breast?

A. No, he was told what to cut out.

Q. And whatever he cuts out and whatever he did cut out on September 18, 1987, was done pursuant to your

control, supervision and command?

A. Yes.

Burns cited *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991), as authority for her proposed instruction. However, in *Swierczek*, res ipsa loquitur was pled, raising the inference of negligence. We stated that "[t]he duty of care owed by a physician is nondelegable, which 'means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties *negligently* performed.' " (Emphasis supplied.) *Id.* at 482, 466 N.W.2d at 520.

Here, there is nothing in the record to indicate that Dr. Pitsch departed from the appropriate standard of care in regard to his responsibilities as an assisting surgeon. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Swartz v. Peterson*, 199 Neb. 171, 256 N.W.2d 681 (1977). Furthermore, we have held that unless the servant or agent is liable in negligence, there can be no liability on the master or principal. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991). Thus, in the absence of evidence of any negligence by Dr. Pitsch, the court properly refused Burns' proposed instruction which would have allowed the jury to consider any negligence of Dr. Pitsch, which evidence did not exist in determining the negligence of Dr. Metz.

Finding no prejudicial error having been committed by the district court, we affirm its judgment.

AFFIRMED.

WHITE, J., concurs in the result.

CENTRAL PLATTE NATURAL RESOURCES DISTRICT, APPELLEE AND CROSS-APPELLEE, V. STATE OF WYOMING, APPELLANT, CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE AND CROSS-APPELLANT, AND LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLEES, APPLICATIONS A-17004, A-17005, A-17006, A-17007, A-17008, AND A-17009, OF THE CENTRAL PLATTE NATURAL RESOURCES DISTRICT.

513 N.W.2d 847

Filed March 25, 1994. No. S-92-664.

1. **Administrative Law: Waters: Appeal and Error.** In appeals from the Department of Water Resources, an appellate court's review of factual determinations is limited to deciding whether the agency's determination is supported by competent and relevant evidence and is not arbitrary, capricious, or unreasonable.
2. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
3. **Waters: Words and Phrases.** For purposes of an instream flow application, unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
4. **Waters.** The holder of an appropriation right is required to use the water only for beneficial purposes. This is known as the beneficial use requirement.
5. _____. The beneficial use requirement limits the amount of water which the holder can actually appropriate. An appropriation right extends only as far as the beneficial use requirement will allow.
6. **Waters: Words and Phrases.** In the definition of unappropriated water, the phrase "subject to an existing appropriation right" refers to the appropriation right measured by the beneficial use limit.
7. **Waters.** In applications for instream flows, the historic flow method is a permissible way of measuring the beneficial use limit.
8. _____. In determining the amount of unappropriated water available for an instream flow appropriation, the director must account for water which may be diverted by two types of senior appropriators whose rights are not reflected in the historic flow records: pending senior applications and approved-but-unconstructed senior applications.
9. **Waters: Endangered Species.** Before authorizing a diversion project, the Department of Water Resources must obtain from the Game and Parks Commission a "nonjeopardy opinion," an opinion that the project will not jeopardize threatened or endangered species.
10. **Waters: Endangered Species: Evidence.** Although the nonjeopardy opinion does not give the Game and Parks Commission absolute veto power, neither the Department of Water Resources nor the applicant can ignore the conclusion of the Game and Parks Commission, if in fact the evidence supports that conclusion.

11. **Waters.** The opinion of the Game and Parks Commission does not, merely by being issued, impose affirmative requirements upon an application for a water appropriation.
12. _____. Neb. Rev. Stat. § 46-2,115(1) (Reissue 1988) does not require the director of the Department of Water Resources to consider future ground water depletion.
13. _____. To the extent that ground water will be withdrawn in the future, this ground water remains, at the present, unappropriated water; ground water which has not been removed also constitutes unappropriated water.
14. _____. To be available, a water supply does not need to be perfectly reliable. To be available in a practical sense, the supply of water must be fairly continuous and dependable.
15. _____. A determination regarding water availability cannot and should not be divorced from the applicant's purpose.
16. **Waters: Endangered Species: Words and Phrases.** In the context of an instream flow application to maintain existing wildlife habitats, "fairly continuous and dependable" means the flow regime which the species can bear. Put another way, there is sufficient water available under Neb. Rev. Stat. § 46-2,115(1) (Reissue 1988) when there is enough water to maintain the wildlife habitat sought by an applicant.
17. **Waters.** Interference with senior water rights occurs when a junior appropriator's use deprives the senior appropriator of some part of his allotment.
18. **Waters: Proof.** An applicant can establish noninterference by showing that the sought-after appropriation meets the definition of an instream flow appropriation. That is, the applicant must establish that the appropriation will be (1) an undiverted application (2) of the waters of a natural stream within or bordering upon the state (3) for recreation or fish and wildlife purposes.
19. **Administrative Law: Waters.** The Department of Water Resources is subject to the Administrative Procedure Act.
20. **Administrative Law.** Under the Administrative Procedure Act, an agency's order must contain findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.
21. **Administrative Law: Appeal and Error.** The Administrative Procedure Act requires agency orders to contain conclusions on each contested issue of fact so that reviewing courts can discern why the agency reached its ultimate conclusions.
22. **Administrative Law.** An administrative order which does no more than state its ultimate conclusion—"application granted" or "application denied"—clearly fails to provide a sufficient basis for the order.
23. _____. An administrative order which fails to make findings on each required element also fails to provide a sufficient basis for the order.
24. **Administrative Law: Waters.** Neb. Rev. Stat. § 46-2,116 (Cum. Supp. 1992) does not require the director of the Department of Water Resources to make a finding regarding forgone uses.

25. **Administrative Law: Evidence: Appeal and Error.** Unless there is affirmative evidence to the contrary, a reviewing court will presume that an agency has duly considered all the evidence before it.
26. **Waters.** In complying with Neb. Rev. Stat. § 46-2,115(5) (Reissue 1988), the director of the Department of Water Resources is not required to provide a discussion of forgone uses.
27. **Waters: Witnesses.** The Department of Water Resources has the power to compel the attendance of witnesses.
28. **Administrative Law: Judicial Notice: Appeal and Error.** Nebraska appellate courts generally do not take judicial notice of administrative rules and regulations.
29. **Administrative Law: Rules of Evidence: Witnesses: Presumptions.** When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. However, there are limits to an agency's power to shield its employees from a subpoena. An employee with unique knowledge indispensable to the adjudication may be subject to a subpoena.
30. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
31. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
32. **Administrative Law: Due Process.** Although due process requires disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the Department of Water Resources. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded for further proceedings.

Dennis C. Cook, Senior Assistant Wyoming Attorney General, and Donald M. Gerstein; Lawrence J. Wolfe, of Holland & Hart; and James W. Hewitt for appellant.

James E. Doyle IV, of Cook, Wightman & Doyle, for appellee Central Platte Natural Resources District.

Michael C. Klein, of Anderson, Klein, Peterson & Swan, for appellee Central Nebraska Public Power and Irrigation District.

George E. Svoboda and Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellee Lower Platte North Natural Resources District.

Glen A. Murray for appellees National Audubon Society and Nebraska Chapter of the Sierra Club.

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

WHITE, J.

The Central Platte Natural Resources District (CPNRD) applied for instream flow appropriations in the Platte River. The director of the Department of Water Resources (director) granted portions of the applications. The State of Wyoming (Wyoming), which had objected to the applications, appealed to the Nebraska Court of Appeals. The Court of Appeals affirmed. Wyoming then petitioned for and was granted further review in this court. We affirm in part and in part reverse. The cause is remanded for further proceedings.

I. BACKGROUND

On July 25, 1990, CPNRD filed six applications for permits to appropriate water for instream flows in the Platte River. CPNRD essentially sought to reserve water rights in order to maintain food sources and habitats for five bird species. The details of these applications are set forth in the Court of Appeals opinion, *In re Applications A-17004 et al.*, 1 Neb. App. 974, 512 N.W.2d 392 (1993). Wyoming objected to the applications. Wyoming owns land bordering the Platte River in Buffalo and Kearney Counties in Nebraska and intends to use that land as a whooping crane migrational habitat.

During July and September 1991, the Department of Water Resources held hearings on CPNRD's application. On July 2, 1992, the director granted three of the applications, granted in part and denied in part one of the applications, denied one application, and dismissed one application. Wyoming appealed from this decision. The appeal concerns only those applications and parts of applications which the director granted. Additional facts will be supplied in conjunction with the specific assignments of error.

Wyoming asserts eight assignments of error. These assignments of error fall roughly into two groups. First,

Wyoming asserts that the Court of Appeals improperly interpreted and applied three subsections of Neb. Rev. Stat. § 46-2,115 (Reissue 1988): subsection (1), concerning the availability of unappropriated water; subsection (3), concerning the interference with senior water rights; and subsection (5), concerning the public interest. Second, Wyoming asserts that the Court of Appeals erred in finding that the participation of Dr. Ann Bleed, a state hydrologist, did not violate due process.

The standard of review in appeals from the Department of Water Resources is well established. Regarding factual determinations, an appellate court's review is limited to deciding whether the agency's determination is supported by competent and relevant evidence and is not arbitrary, capricious, or unreasonable. *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993) (*Blue River*), *modified on other grounds* 243 Neb. 419, 499 N.W.2d 548; *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990) (*Long Pine Creek*); *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987) (*Enders Reservoir*). The meaning of a statute, however, is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Long Pine Creek, supra.*

II. ANALYSIS

1. § 46-2,115

Nebraska has enacted a statutory scheme which permits instream flow appropriations. See Neb. Rev. Stat. §§ 46-2,107 through 46-2,119 (Reissue 1988 & Cum. Supp. 1992). We have held that this statutory scheme is constitutional. See *Long Pine Creek, supra.*

Under the statutory scheme, the director shall approve applications for instream flows only if the director finds that (1) there is unappropriated water available to provide for the instream appropriation; (2) the appropriation is necessary to maintain the instream use or uses for which the appropriation has been requested; (3) the appropriation will not interfere with any senior surface water appropriation; (4) the rate and timing of the flow is the minimum necessary to maintain the instream

use or uses for which the appropriation has been requested; and (5) the application is in the public interest. § 46-2,115. The burden of proof is on the applicant to establish these elements. Neb. Rev. Stat. § 46-209 (Cum. Supp. 1992). At issue here are subsections (1), (3), and (5).

(a) Availability of Unappropriated Water

Wyoming contends that the director improperly found, under § 46-2,115(1), that there was sufficient unappropriated water to grant the instream flow applications. Wyoming further contends that the Court of Appeals improperly reviewed the decision. Wyoming's contention regarding unappropriated water consists of four separate arguments.

(i) Methodology

Wyoming first argues that the director used an improper methodology to determine water availability. Wyoming also argues that the Court of Appeals improperly reviewed the director's decision.

The testimony at the hearing established two possible methods of determining water availability.

CPNRD's witness, Duane Woodward, testified to the historic flow method. To arrive at the historic flow, Woodward obtained daily flow records from various gauging stations along the river. Using approximately 30 years of such measurements, Woodward determined how often a given flow occurs at a given station. For example, the historic flow data could establish that the flow at the Overton station will exceed 500 cubic feet per second (cfs) 91 percent of the time. The historic flow data can also be used to establish the mean and median flow levels, or incremental flow levels, at a given station. The historic flow data represents the amount of water actually flowing in the river; as such, it reflects the consequences of any actual upstream diversions by appropriators.

Wyoming's witness, David Frick, suggested a different method for determining water availability, which we will refer to as the full rights method. Frick testified that the historic flow data should be reduced by the existing appropriation rights. Frick would also estimate and account for any flow returning to

the river. The downward-adjusted number would thus represent the amount of water available if all appropriators simultaneously exercised the full extent of their appropriation rights.

In reaching his final decision, the director concluded that "the historic records fairly reflect current and reasonably expected river flows, and . . . adjustments are deemed unnecessary." It thus appears that the director followed the historic flow method.

The Court of Appeals found that the choice of methodology was a factual question—whether the director was using a relevant methodology—and that Woodward's testimony supported the director's methodology.

We find that the Court of Appeals erred in characterizing the methodology issue as a factual question; the methodology issue is a question of law. Certainly the methodology must be relevant, but it must also be in accord with law. We understand Wyoming's challenge to be that the historic flow method is relevant but not in accord with law. Addressing methodology as a question of law, we conclude that the director used a permissible method to determine the amount of unappropriated water.

To grant an instream flow application, by statute, the director must find that there is sufficient "unappropriated water available." § 46-2,115(1). For purposes of an instream flow application, this court has previously defined "unappropriated water" as " 'that water which is available for appropriation because it is not subject to an existing appropriation right.' " *Long Pine Creek*, 236 Neb. at 692, 463 N.W.2d at 606. Accord *Enders Reservoir, supra*. We must now decide what is meant by "subject to an existing appropriation right." Specifically, we must decide whether the director may use the historic flow method to determine the amount of water not subject to an existing appropriation right.

We have touched upon the methodology issue twice before, in *Enders Reservoir* and *Long Pine Creek*. Significantly, however, these two cases did not require us to approve either the historic flow method or the full rights method. Thus, these two cases do not provide us with a rule by which we can test the

director's methodology.

According to the Nebraska Constitution, the use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Neb. Const. art. XV, § 5. All appropriations must be for some beneficial purpose. Neb. Rev. Stat. § 46-229 (Reissue 1988). The holder of an appropriation right is required to use the water only for beneficial purposes. *Enders Reservoir, supra*; *Frenchman Valley Irr. Dist. v. Smith*, 167 Neb. 78, 91 N.W.2d 415 (1958). This is known as the beneficial use requirement. See, *Enders Reservoir, supra*; *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

The beneficial use requirement limits the amount of water which the holder can actually appropriate. For example, if a landowner had an appropriation right to use 10 cfs for irrigation purposes, and if the landowner needed only 5 cfs in a given month, then the landowner would not be entitled to capture and sell the other 5 cfs. Cf. *Hostetler, supra*. An appropriation right extends only as far as the beneficial use requirement will allow. A. Dan Tarlock, Law of Water Rights and Resources § 5.05[2] (1993).

It thus appears that an appropriation right can be measured in two ways. First, the right can be measured with reference to the appropriation limit. This is a fixed and theoretical limit—the most water that a particular holder is authorized to use. Second, the right can be measured with reference to the beneficial use limit. This is a fluctuating and practical limit—the amount of water that a particular holder is entitled to use at any given time.

We find that the phrase "subject to an existing appropriation right" refers to the appropriation right measured by the beneficial use limit. That is, when the director considers an instream flow application, the director must find that there is enough water that is not subject to another appropriator's beneficial use. The question then becomes how the director is to measure the water that is not subject to another appropriator's beneficial use.

We find that the historic flow method is a permissible way of measuring the beneficial use limit. As explained above, the

beneficial use limit fluctuates with the appropriators' needs. The appropriators' needs fluctuate with external factors. The most important external factor is the weather; in a dry year, the holders' need to divert water for irrigation increases dramatically. The historic flow method lends perspective to the fluctuations because the data is collected over a span of years. According to Woodward, the historic flow data used in his calculations encompassed almost 30 years and included periods of high precipitation and periods of drought. In short, the amount of water that is actually in the river is a rough approximation of the amount of water not needed for beneficial use elsewhere. Accord *Temescal Water Co. v. Dept. Public Works*, 44 Cal. 2d 90, 280 P.2d 1 (1955) (stating that the amount of unappropriated water will depend on the stream's flow, the rainfall, and the nonuse of existing rights).

We hold that the director used a permissible methodology, the historic flow method, to determine that there was sufficient unappropriated water available. We stress that our holding is limited to applications for instream flows.

(ii) Senior Applications

Wyoming next argues that the director erred by failing to account for pending senior applications. Wyoming also argues that in reviewing this issue, the Court of Appeals erred by relying on evidence submitted for a limited purpose.

In determining the amount of unappropriated water available, the director must account for water which may be diverted by two types of senior appropriators whose rights are not reflected in the historic flow records: pending senior applications and approved-but-unconstructed senior applications. The director considered two such senior applications relevant to CPNRD's instream flow applications: the Landmark Project and the Prairie Bend Project.

The director denied the application for the Landmark Project, and this court affirmed that decision. See *Blue River, supra*. Therefore, the Landmark Project does not necessitate any adjustments to the historic flow records. The Prairie Bend Project is more problematic.

Prairie Bend is CPNRD's own project. Prairie Bend

involves, in part, a diversion of water from the Platte River near Kearney, Nebraska. Ron Bishop, manager of CPNRD, testified that although the Prairie Bend Project would be senior in priority to CPNRD's instream flow appropriations, CPNRD would operate Prairie Bend in such a manner as to first honor its own instream flow permits. Relying on Bishop's testimony, the director found that the Prairie Bend Project did not necessitate any adjustments to the historic flow records.

We find that the record does not support the director's conclusion that Prairie Bend will divert water as if it were junior to, not senior to, the instream flows.

The director's reliance on Bishop's sworn testimony is misplaced. In essence, Bishop purported to waive Prairie Bend's appropriation right to the extent necessary to satisfy the requirements of the instream flow application. There is no evidence to establish that Bishop has the power to bind CPNRD to such a waiver. If Bishop has no power to bind CPNRD, then his testimony cannot be relied on as substantive proof that the Prairie Bend Project will not reduce the existing flows. We therefore find that the evidence cited by the director does not support his conclusion.

The Court of Appeals affirmed the director's decision on a different basis. The court linked together three items: Neb. Rev. Stat. § 37-435 (Cum. Supp. 1992), a Game and Parks Commission opinion, and a biological assessment. We find that the evidence cited by the Court of Appeals does not support the director's conclusion.

Under § 37-435, before authorizing a diversion project, the Department of Water Resources must consult with the Game and Parks Commission. See *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982) (*Little Blue II*), *overruled on other grounds, Blue River, supra*. The department must obtain from the Game and Parks Commission a "nonjeopardy opinion"—an opinion that the project will not jeopardize threatened or endangered species. See *Little Blue II, supra*.

In *Little Blue II*, this court discussed the relative power of the Game and Parks Commission, the Department of Water Resources, and the applicant. We held that although the

nonjeopardy opinion does not give the Game and Parks Commission absolute veto power, neither the department nor the applicant can ignore the conclusion of the Game and Parks Commission, "if in fact the evidence supports that conclusion." *Little Blue II*, 210 Neb. at 873, 317 N.W.2d at 733.

Citing *Little Blue II*, the Court of Appeals stated that "the Game and Parks Commission can impose minimum instream flow requirements upon an application." *In re Applications A-17004 et al.*, 1 Neb. App. 974, 990, 512 N.W.2d 392, 402 (1993). While this may be true in a practical sense, it is not true in a legal sense. For example, the director is not required to accept the conclusion of the Game and Parks Commission if the evidence does not support that conclusion. See *Little Blue II, supra*. The opinion of the Game and Parks Commission does not, merely by being issued, impose affirmative requirements upon an application.

There is simply no evidence in the record that the Prairie Bend Project is legally obligated to pass the minimum flows required by the instream flow applications. Although the biological assessment cited by the Court of Appeals is some evidence of Prairie Bend's intent to pass certain flows, it is not legally binding. Parenthetically, we also note that not all the flows suggested by the biological assessment meet or exceed the requirements of the instream flow applications.

Without firm evidence that Prairie Bend will pass the minimum flows required by the instream flow applications, the possibility exists that the operation of Prairie Bend will reduce the amount of water available for the instream flow applications. Thus, the director was not at liberty to assume that Prairie Bend would have no effect on water availability. The record does not support the director's conclusion that "there are no pending senior applications that would in fact or in effect further deplete existing flows." The applications must be remanded so that the director can consider how the Prairie Bend Project will affect water availability.

In the interest of judicial economy, we will consider Wyoming's additional assignments of error.

(iii) Ground Water Depletion

Wyoming next argues that the director should have adjusted the historic flow amounts by subtracting future and current ground water depletion.

Ground water depletion, in this context, concerns wells which drain water from the aquifer. The aquifer, in turn, is recharged by the river. As a result of this depletion and recharging, the flows in the stream may be reduced.

At the hearing, Wyoming offered the testimony of Vern Hinckley, a hydrogeologist. Hinckley reviewed a number of studies regarding future ground water depletion. These studies were predicated on varying projections regarding the extent of future ground water development. Based on his review of the studies, Hinckley offered his opinion that future ground water depletions will reduce the flows in the Platte River by 100 to 200 cfs. However, on cross-examination, Hinckley admitted that he had not made any effort to compare the studies' projections with actual ground water development.

The director's opinion does not discuss ground water depletion. The Court of Appeals affirmed the director's decision, reasoning that the director, as fact finder, was entitled to determine the weight given to expert testimony. We find that the Court of Appeals reached the correct result for the wrong reason.

To put this argument into perspective, we reiterate that the central issue is the proper definition of unappropriated water. Relying on Hinckley's testimony, Wyoming suggests in essence that ground water withdrawn from wells which are recharged by the Platte constitutes appropriated water. We disagree.

We have faced this issue once before. In *Long Pine Creek*, the objectors raised the possibility of future ground water depletion. Based on the evidence then presented, we found that sufficient water existed in the creek to meet the application despite the possibility of increased ground water withdrawals. We reserved the question of "whether the statute requires a finding that the availability of water for the instream appropriation will not be adversely affected by subsequent events." *Long Pine Creek*, 236 Neb. at 694, 463 N.W.2d at 607.

We now answer the question reserved in *Long Pine Creek* by holding that the statute does not require the director to consider

future ground water depletion.

To the extent that ground water will be withdrawn in the future, this ground water remains, at the present, unappropriated water. In part II(1)(a)(i) of this opinion, we held that for purposes of an instream flow application, surface water which had not been diverted from the Platte River for a beneficial use constituted unappropriated water. It logically follows that ground water which has not been removed also constitutes unappropriated water. We therefore hold that the director was not obliged to reduce the historic flow records to account for future ground water depletions.

To the extent that ground water is currently being withdrawn and recharged by the Platte, the ground water depletion is accounted for by the historic flow records. Hinckley testified that ground water depletion is not always immediately reflected by the level of flow; the depletion and recharge occur over a period of time, which can be as long as 17 years. Other than these general statements, however, there is no specific evidence establishing any depletions for which the historic flow records have failed to account. There is no evidence, in other words, that the historic flow records are inaccurate with respect to current ground water depletion. The director therefore did not err in relying on the historic flow records to account for current ground water depletion.

We note that the relative rights of those using ground water and those using surface water are often unclear. The courts can begin to give outlines and shape to these rights, but only in a case-by-case, piecemeal fashion, and only when those rights are brought into direct conflict. Wyoming's evidence regarding ground water depletion does not establish a direct conflict, but, rather, an anticipated conflict. This anticipated conflict is best resolved by the policy-based decisionmaking process that is the province of our Legislature. In fact, the Legislature has recently created a system whereby public water suppliers—municipalities, water districts, irrigation districts, and the like—can apply for appropriation rights and thus secure their priority. See 1993 Neb. Laws, L.B. 301.

It is the Legislature, and not the courts, which can paint a water rights picture with broad strokes and bold colors. It is to

the Legislature that Wyoming must direct its argument regarding future ground water depletion.

(iv) Continuity and Dependability

Wyoming next argues that the director misapplied the relevant legal standard regarding water availability. Wyoming also argues that the Court of Appeals erred in failing to correct this misapplication. The director's approach to water availability and Wyoming's argument regarding that approach cannot be understood without some discussion of the *Enders Reservoir* case, to which we now turn.

In *Enders Reservoir*, three irrigation districts applied for a transbasin diversion. The applicants proposed to divert water from the South Platte River basin to the Frenchman River, which flows into the Enders Reservoir and eventually into the Republican River. The director found that there was insufficient available water: " '[On] average, less than one-fourth [applicants'] maximum demand would have been available at their proposed diversion point.' . . . '[T]here is not a source of unappropriated water at [a]pplicants' proposed South Platte River diversion point sufficient to meet their demand.' " *Enders Reservoir*, 226 Neb. at 156, 410 N.W.2d at 107-08. Due in part to insufficient water availability, the director denied the application.

This court affirmed the director's decision. We recognized that to be "available," a water supply did not need to be perfectly reliable. "[T]o be available in a practical sense the supply of water must be fairly continuous and dependable." *Id.* at 156, 410 N.W.2d at 108. See *Wyoming v. Colorado*, 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922). Applying this standard to the transbasin diversion, we stated that water clearly "would not be present in such a quantity as to supply the [applicants'] desired amount on a fairly continuous and dependable basis." *Enders Reservoir*, 226 Neb. at 156, 410 N.W.2d at 108.

Immediately following this statement, the *Enders Reservoir* opinion contains an economic discussion focusing on the likely success of the applicants' proposed irrigation project. In this economic discussion, we considered a New Mexico case and a Texas case, both of which held that an application could be

denied if there was so little water that the project would be doomed to failure. We found that the director had the power to act in the public interest and to deny an application doomed to failure.

With regard to CPNRD's applications, the director merged *Enders Reservoir*'s water availability analysis with its economic analysis. On one hand, the director recognized that the actual flows were often less than the requested flows. The director noted that the flow regime was highly variable and that the species identified in the applications had adapted to the fluctuations. On the other hand, the director explained that the instream flow applications did not contemplate investment or construction and thus would not require revenues to offset expenses. The director judged "conventional methods" for assessing proposals "inappropriate" for CPNRD's applications. The director determined that the "fairly continuous and dependable" standard had to be considered in the context of the application at hand. The director concluded that CPNRD's applications met the standard.

The Court of Appeals did not reach any conclusion on this issue. The court set forth some of the director's findings and briefly discussed *Enders Reservoir*. The court then distinguished *Enders Reservoir* from CPNRD's application because the latter did not require "great financial expenditure." *In re Applications A-17004 et al.*, 1 Neb. App. 974, 988, 512 N.W.2d 392, 401 (1993).

Wyoming argues that the director has established two separate standards—one for irrigation projects and one for instream flow applications. Wyoming further argues that if the director can view the standard within the context of a particular application, then the director can arbitrarily set the standard and decide when the standard has been met.

We find that the director correctly considered the purpose of the requested flows. We further find that the record supports the director's determination that there was a fairly continuous and dependable flow.

A determination regarding water availability cannot and should not be divorced from the applicant's purpose. There are two ways in which the applicant's purpose affects the "fairly

continuous and dependable" standard.

First, the nature of a fairly continuous and dependable flow may change depending upon the nature of the application. An application to divert water is not the same as an application for instream flows; an irrigation project is not the same as a habitat project. If an irrigation project fails because insufficient water was available, then there is a loss on the investment and a loss to any junior downstream appropriators who could have used the diverted water. In contrast, if a habitat project fails, then there is minimal, if any, loss of investment, and there is no loss to junior downstream appropriators, because the water was never removed from the stream.

Second, in the context of instream flow applications, the threshold of a fairly dependable and continuous flow may change depending on the specific goals of the application. A wildlife project is not the same as a recreation project.

In the context of an instream flow application to maintain existing wildlife habitats, we hold that "fairly continuous and dependable" means the flow regime which the species can bear. Put another way, there is sufficient water available under § 46-2,115(1) when there is enough water to maintain the wildlife habitat sought by an applicant.

The purposes of CPNRD's applications were (1) to maintain habitats for fish and aquatic macroinvertebrates that serve as a food source for least tern and piping plovers, and (2) to maintain staging and roosting habitats for sandhill cranes and whooping cranes. Although the flows in the river are highly variable, the record reflects that the species identified in the applications have adapted to the variable flow regime. There is not so little water that the project is doomed to failure; to the contrary, the habitats are likely to succeed. We conclude that because the habitats sought by the current applications can survive under the existing flow regime, there is sufficient water available.

(b) Interference with Senior Surface Water Rights

The director found, under § 46-2,115(3), that CPNRD's instream appropriations would not interfere with any senior surface water appropriation. Wyoming correctly notes that

CPNRD has the burden of establishing noninterference. See § 46-209. Wyoming contends that CPNRD failed to present evidence of noninterference and that therefore the director could not have found noninterference.

The Court of Appeals found that the director's decision was supported by two pieces of "evidence": exhibit 54, showing the senior appropriators and their respective priority dates, and a statutory declaration, see § 46-2,119, that instream appropriations are subject to the doctrine of prior appropriation.

With somewhat different reasoning, we find that the director's decision is supported by competent evidence.

Section 46-2,108 defines an instream appropriation as "the undiverted application of the waters of a natural stream within or bordering upon the state for recreation or fish and wildlife purposes." An instream appropriation contrasts with a stream diversion; the former leaves the water in the stream, while the latter takes water out of the stream. An instream appropriation essentially sets minimum flow levels which must be met before junior appropriators can begin to divert water from the stream.

Interference with senior water rights occurs when a junior appropriator's use deprives the senior appropriator of some part of his allotment. See *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W.2d 239 (1940). Because an instream appropriation leaves the water in the stream, an instream appropriation does not create a physical interference with a senior appropriation right. In addition, to the extent that an instream appropriation is junior to other appropriations, an instream appropriation does not create a legal interference with a senior appropriation right.

The issue then becomes how an applicant can establish noninterference. We find that an applicant can establish noninterference by showing that the sought-after appropriation meets the definition of an instream flow appropriation. That is, the applicant must establish that the appropriation will be (1) an undiverted application (2) of the waters of a natural stream within or bordering upon the state (3) for recreation or fish and wildlife purposes. See § 46-2,108.

In the present case, there is no dispute regarding any of these

three elements. First, CPNRD's applications do not propose any diversion of water from the Platte River. Second, the reaches identified in the applications on appeal are parts of the Platte, undeniably a natural stream within the state. Third, the purpose of the applications is to maintain various types of existing wildlife habitats. We conclude that CPNRD has established that its instream appropriation will not interfere with other senior surface water appropriations.

(c) Public Interest

Wyoming contends that the director improperly found, under § 46-2,115(5), that CPNRD's applications were in the public interest. Wyoming claims that the director erred (1) in failing to discuss forgone uses and (2) in relying on incompetent evidence.

(i) Forgone Uses

In order to grant an instream flow application, the director must find that the application is in the public interest. § 46-2,115(5). In order to determine whether an application is in the public interest, "the director shall consider . . . [t]he economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted." § 46-2,116(2).

At the hearing on CPNRD's application, two witnesses discussed forgone uses. Dr. Raymond Suppalla, an economist, testified on behalf of CPNRD. Dr. Suppalla estimated that 5 percent of CPNRD's applications would constitute water precluded from other reasonably foreseeable alternative out-of-stream uses. Dr. Suppalla's opinion also was embodied in exhibit 49, a report prepared by him and entitled "Analysis of Public Interest Factors for Proposed Platte River Instream Flows." Gary Watts, another economist, testified on behalf of Wyoming. Watts estimated that an additional 17 percent of CPNRD's applications would be precluded from such uses.

In his order, the director discussed Dr. Suppalla's testimony, exhibit 49, and Watts' testimony. The director did not discuss forgone uses. The director concluded that the application is in the public interest.

Wyoming contends that the director is obliged to discuss forgone uses and to document his discussion to the hearing record. The Court of Appeals held that the director was not obliged to document his decision to the hearing record. We hold that the director is not obliged to discuss forgone uses.

Wyoming first argues that the director is obligated to discuss forgone uses as a matter of water law. Wyoming cites as authority Neb. Rev. Stat. § 46-289 (Reissue 1988) and our decision in *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988) (*Little Blue III*).

Section 46-289 provides that when the director is called upon to determine whether an application for an *interbasin* transfer is in the public interest, the director must consider certain factors. The statute further provides that the director's order shall contain "a discussion of the required factors for consideration . . . and shall document such decision by reference to the hearing record." § 46-289. In *Little Blue III*, we noted that the director's order discussed the required factors but lacked references to the record.

Both of the authorities cited by Wyoming are inapplicable. Section 46-289, by its own terms, applies only to interbasin transfers. There is no similar statute which requires the director to discuss the factors for an instream flow appropriation. As demonstrated by § 46-289, the Legislature is aware of the desirability of such discussions and is fully capable of requiring such discussions when it so desires. Our decision in *Little Blue III* does no more than reflect the provisions of § 46-289. Moreover, the result in *Little Blue III* turned not on the provisions of § 46-289, but, rather, on the invalid assignment of purported water rights. Thus, Wyoming's appeal to these authorities is without merit.

Wyoming next argues that the director is obliged to discuss forgone uses as a matter of administrative law. According to this argument, the director's findings are inadequate because they fail to disclose a clear basis for the order. This argument directs us to Nebraska's Administrative Procedure Act (APA).

The Department of Water Resources is subject to the APA. *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981). Under the APA, an agency's

order must contain findings of fact and conclusions of law. See Neb. Rev. Stat. § 84-915 (Reissue 1987). "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." *Id.* The APA imposes this burden on agencies so that reviewing courts can discern why the agency reached its ultimate conclusions. See *Yellow Cab Co. v. Nebraska State Railway Commission*, 176 Neb. 711, 127 N.W.2d 211 (1964).

Our precedents provide considerable guidance as to what sort of findings constitute a sufficient basis for an agency order. An order which does no more than state its ultimate conclusion—"application granted" or "application denied"—clearly fails to provide a sufficient basis for the order. See, *Basin Truck Co. v. All Class I Rail Carriers*, 172 Neb. 28, 108 N.W.2d 388 (1961); *Oakdale Tel. Co. v. Wilgocki*, 171 Neb. 425, 106 N.W.2d 486 (1960); *Skeedee Independent Tel. Co. v. Farm Bureau*, 166 Neb. 49, 87 N.W.2d 715 (1958). An order which fails to make findings on each required element also fails to provide a sufficient basis for the order. See, *Prigge v. Johns*, 184 Neb. 103, 165 N.W.2d 559 (1969); *In re Application of Hergott*, 145 Neb. 100, 15 N.W.2d 418 (1944).

The director's ultimate conclusion with regard to instream flow applications is "application granted" or "application denied." The required elements of this conclusion are listed in § 46-2,115. One of these required elements is that the application must be in the public interest. § 46-2,115(5). Thus, the director's order must explicitly find that the application is in the public interest. Wyoming is arguing, in essence, that a finding regarding forgone uses is a required element of a finding regarding public interest. Section 46-2,116 does not require the director to make a finding regarding forgone uses. If the director is not required to make a finding regarding forgone uses, then such a finding is not a required element of either a finding of public interest or a granting of an application.

The real question, then, is whether the director considered forgone uses. As discussed previously, ample evidence was presented regarding forgone uses—Dr. Suppalla's testimony, exhibit 49, and Watts' testimony. Although it does not discuss forgone uses, the director's order shows that he carefully

examined and weighed Dr. Suppalla's testimony, exhibit 49, and Watts' testimony in order to determine whether CPNRD's applications were in the public interest. Unless there is affirmative evidence to the contrary, we will presume that an agency has duly considered all the evidence before it. Accord, *City of Alma v. U.S.*, 744 F. Supp. 1546 (S.D. Ga. 1990); *Lopez v. Industrial Com'n of Arizona*, 162 Ariz. 578, 785 P.2d 98 (Ariz. App. 1989); *Coggins v. Public Employee Relations Board*, 2 Kan. App. 2d 416, 581 P.2d 817 (1978); *Mattison v. City of Signal Hill*, 241 Cal. App. 2d 576, 50 Cal. Rptr. 682 (1966); *Faulkner v. Cal. Toll Bridge Authority*, 40 Cal. 2d 317, 253 P.2d 659 (1953) (in bank). Cf. *Babish v. Babish*, 361 Pa. Super. 118, 521 A.2d 955 (1987) (where record affirmatively showed that hearing officer, in calculating child support, disregarded a worker's compensation award paid to father, the hearing officer failed to consider the award).

The director's order describes his reasoning process. In the order, the director first notes Dr. Suppalla's opinion that the applications were in the public interest. The director next explains that although Watts criticized Dr. Suppalla's methodology, neither Watts nor any other witness had testified that the applications were not in the public interest. Finally, the director remarks that according to Dr. Suppalla's rebuttal testimony, the methodology suggested by Watts would be inappropriate. Accordingly, the director found that CPNRD's applications were in the public interest.

We find that this description of the director's reasoning process provides a sufficient basis for the order. The director was not required to provide, in addition to this description, a discussion of forgone uses.

(ii) Incompetent Evidence

Wyoming next contends that the director's decision regarding public interest was based on incompetent evidence.

In support of this contention, Wyoming makes the following argument: The director's decision relied heavily on the opinion of Dr. Suppalla, as expressed in testimony and in exhibit 49; Dr. Suppalla's opinion, in turn, relied heavily on the results of a public interest survey. According to Wyoming, the surveyors

asked the survey respondents "to effectively assume that further loss of Platte River water would threaten some wildlife species with extinction." Brief for appellant at 28. The director did not find that denying the requested instream flows would threaten any wildlife species with extinction. Wyoming claims that the premise behind the survey does not comport with reality and that therefore the survey is incompetent evidence. Because the survey is incompetent evidence, Wyoming concludes, neither Dr. Suppalla nor the director was entitled to rely on the survey in order to determine whether the applications would be in the public interest.

The Court of Appeals did not address this argument.

We find that Wyoming has mischaracterized the surveyors' statements. Before asking their survey question, the surveyors said:

> Some persons have suggested that it will economically benefit local areas and states to divert additional water from rivers to irrigate agricultural crops. Other persons fear that loss of river — that further loss of river water will threaten some wildlife species with extinction and further deteriorate the river's potential as a natural recreation source.

The surveyors then asked the respondents, "Would you agree to protect the endangered species of birds and other wildlife and preserve the remaining rivers and natural areas along their shores, even if it meant limiting the additional amount of water that could be diverted from rivers for agricultural use?" The respondents then chose among four answers: strongly agree, agree, disagree, or strongly disagree.

As these quotations demonstrate, the surveyors did not ask the survey respondents to assume that water losses would threaten species with extinction. Wyoming's argument is without merit.

2. Due Process

Wyoming asserts that the director's refusal to subpoena Dr. Ann Bleed and the hearing officer's refusal to disqualify her from participating in the hearing denied Wyoming a fair hearing.

Dr. Bleed is the state hydrologist. Dr. Bleed served as the State's "examining officer" at the hearing. The record reflects that, as examining officer, Dr. Bleed attended most of the hearing sessions and often cross-examined witnesses.

Prior to the hearing, Wyoming submitted a witness list which included Dr. Bleed. One month later, during the hearing, Wyoming filed a praecipe asking the Department of Water Resources to issue a subpoena for Dr. Bleed. The director refused to issue the subpoena, as the hearing officer explained, because Dr. Bleed would be assisting the director in the decisionmaking process.

Two months later, Wyoming moved to disqualify Dr. Bleed, claiming that Dr. Bleed was biased. In its motion, Wyoming argued that Dr. Bleed had coauthored a report which "concluded that instream flows at a rate similar to those being sought by the applicant provide an optimum tradeoff between instream uses for wildlife habitat and out of stream uses." The hearing officer denied Wyoming's motion to disqualify Dr. Bleed. The hearing officer found that the report did not favor any particular plan for river management. The hearing officer also suggested that Dr. Bleed's role in the decisionmaking process was so limited that she could not prejudice the director's ruling:

> [B]y statute, the Director, Mike Jess, will make the decision in this matter. Dr. Bleed's role would be specifically limited to offering any type of technical interpretation of the evidence which has been received. Dr. Bleed would not in any way make a decision regarding any of the applications, and I think given the fact that the Director is going to be the sole individual responsible for making the ultimate decision on each and every one of these applications, I'm going to deny Wyoming's motion.

In the Court of Appeals, Wyoming argued that the department's conflicting explanations of Dr. Bleed's role violated due process. Wyoming argued that Dr. Bleed should have been subject to the subpoena and that Dr. Bleed should have been disqualified as an examining officer because she was biased. The Court of Appeals rejected both arguments. The court first addressed the subpoena issue. The court noted that

under the Nebraska Evidence Rules, which applied to the hearing by agreement of the parties, a judge may not be called as a witness. See Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 1989). The court determined that Dr. Bleed was functioning as the alter ego of the director and, as such, was not subject to a subpoena. The court then addressed the disqualification issue. The court found that the report itself did not reveal any bias on the part of Dr. Bleed. The court suggested that Wyoming could have cross-examined Dr. Suppalla, who coauthored the report with Dr. Bleed, about Dr. Bleed's opinions. The court also suggested that Wyoming could have called other witnesses to establish Dr. Bleed's supposed bias. The court concluded that Wyoming had failed to establish bias and that Dr. Bleed was correctly not disqualified.

Wyoming asserts that the Court of Appeals erred in failing to address its argument that the department's contradictory explanations of Dr. Bleed's role violated due process. The department's contradictory explanations of Dr. Bleed's role did not, in and of themselves, violate due process. If Dr. Bleed should have been subject to a subpoena, then Wyoming was denied due process. If Dr. Bleed should have been disqualified, then Wyoming was denied due process. The Court of Appeals did not err in failing to discuss the contradictory explanations.

(a) Subpoena for Dr. Bleed

We first discuss whether Dr. Bleed should have been subject to a subpoena.

The Department of Water Resources has the power to compel the attendance of witnesses. § 46-209. According to Wyoming, a Department of Water Resources rule provides that a subpoena " 'will be issued by the Director or Hearing Officer on written request of any interested party . . . .' " (Emphasis omitted.) Brief for appellant at 37, quoting Nebraska Department of Water Resources, Rules of Practice and Procedure, 454 Neb. Admin. Code, ch. 4, § 006 (1989). This rule was not judicially noticed at the hearing. Nebraska appellate courts generally do not take judicial notice of administrative rules and regulations. See, *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363

(1991); *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988). Wyoming, therefore, has failed to establish that it has a right to have a subpoena issued at all.

Assuming, arguendo, that Wyoming has a due process right to have a subpoena issued, the question remains whether a subpoena should have been issued for Dr. Bleed.

The hearing on CPNRD's applications, by agreement of the parties, was conducted according to the Nebraska Evidence Rules. Rule 605 provides that "[t]he judge presiding at the trial may not testify in that trial as a witness." This rule is identical to rule 605 of the Federal Rules of Evidence. The federal rule was founded, in part, on concerns that the judge would not be able to perform certain judicial functions if the judge took the witness stand:

> The rationale for a rule of incompetency is obvious. When a judge testifies as a witness in a trial at which he presides, his role as a witness is inconsistent with the posture of impartiality which the court is expected to maintain. Permitting a judge to testify raises perplexing questions of who will rule on objections, who will compel answers, what will be the scope of cross-examination, and how counsel is to maintain a proper relationship with the court.

3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 605[01] at 605-4 to 605-5 (1993). When the judge is a witness, the judge cannot perform two crucial judicial functions: controlling the presentation of evidence and deciding impartially the merits of the case.

Wyoming correctly notes that Dr. Bleed is not, technically, a judge. We would add that technically, the hearing officer is not a judge and the director is not a judge. Nevertheless, the same concerns which are raised by the prospect of judicial testimony are raised by the prospect of testimony by administrative adjudicators. The hearing officer, the director, and Dr. Bleed are all performing adjudicative functions: the hearing officer is controlling the presentation of evidence, the director is deciding the ultimate outcome of the case, and Dr. Bleed, according to the explanations provided by the department, assists in the

decisionmaking process by providing technical expertise.

Rule 605's unequivocal prohibition of judicial testimony does not neatly fit the realities of agency adjudications because there is no single agency "judge." When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. To hold otherwise would enable the parties to remove unwanted adjudicators simply by requesting a subpoena. However, there are limits to an agency's power to shield its employees from a subpoena. An employee with unique knowledge indispensable to the adjudication may be subject to a subpoena. See *American Cyanamid Company v. F. T. C.*, 363 F.2d 757 (6th Cir. 1966) (where parties were charged with improperly influencing a patent officer, who had decided the parties' priority with respect to the claimed invention, the facts were known only to the patent officer, and therefore the patent officer could be subpoenaed to testify as to the alleged misconduct).

In the present case, there is no indication that Dr. Bleed's testimony was crucial to Wyoming's case. There is no claim that Dr. Bleed had any unique knowledge of the facts. There is no claim that the facts were inadequately presented by the witnesses. The record certainly does not lack the testimony of expert hydrologists.

We therefore find that Dr. Bleed was properly excluded from testifying at the hearing. Without a showing that her testimony was necessary, issuing a subpoena for Dr. Bleed would have unduly burdened the decisionmaking obligation of the agency and would have tainted the impartiality of the hearing process.

(b) Disqualification of Dr. Bleed

We next discuss whether Dr. Bleed should have been disqualified.

Wyoming claims that Dr. Bleed was biased in two ways. First, Wyoming claims that Dr. Bleed favors the specific amount of instream flow requested in CPNRD's applications. Second, Wyoming claims that Dr. Bleed favors instream flows in general. Wyoming cites exhibit 113 as evidence of Dr. Bleed's bias.

Exhibit 113 is a report prepared by Dr. Bleed, Dr. Suppalla, and two others. The report is entitled "Economic, Environmental and Financing Optimization Analysis of Platte River Development Alternatives" and is published by the University of Nebraska. The study upon which the report is based had three general research objectives, one of which was to analyze the economic and environmental tradeoffs associated with alternative uses of the Platte River. To analyze these tradeoffs, the study correlated varying instream flow levels first with environmental consequences and then with economic consequences. The study concluded that instream flow constraints would not dramatically affect net economic returns.

In formal agency adjudications, as in court proceedings, "due process requires a neutral, or unbiased, adjudicatory decisionmaker." 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.8 at 67 (3d ed. 1994). See, also, *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988); *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985). Administrative adjudicators serve with a presumption of honesty and integrity. *Withrow, supra*; *Dieter, supra*. With these basic principles firmly in mind, we turn to a consideration of the two alleged biases of Dr. Bleed.

First, Wyoming accuses Dr. Bleed of having a specific bias in favor of the amount of flows requested in CPNRD's applications. Wyoming argues that the study sought to identify "optimum instream flows for the Central Platte River in relation to other water users" and that the study "adopted Alternative J . . . as the optimum flow levels." Brief for appellant at 33. Wyoming then notes that the flows requested in CPNRD's applications are "strikingly similar" to Alternative J. *Id.* Alternative J is one of 15 instream flow levels analyzed in the study.

Wyoming's claim that the study adopted Alternative J as the ideal is unfounded. In discussing the economic and environmental tradeoffs, the study notes that Alternative J seems to be a turning point: "The present value of net economic benefit expressed in 1983 dollars remained essentially constant

until instream flow provision 'J' was reached, where they declined . . . ." In summarizing the tradeoffs, the study again makes reference to Alternative J:

> The establishment of instream flow constraints to meet environmental quality needs substantially reduced the aggregate quantity of water diverted under the corresponding optimum development plan. However, net economic returns were not significantly reduced. For example, in comparison to the option of providing no required instream flow, instream flow provision "J" reduced the optimum diversion water quantity by nearly 300,000 acre feet per year but reduced economic returns by only 7.2 percent.

Nothing in exhibit 113 indicates that the study authors designated or selected Alternative J as the ideal or optimum flow level.

To the extent that Dr. Bleed's participation in the study may have caused her to form an opinion as to the optimum flow level, such an opinion is not disqualifying. Although due process requires disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue. Compare *Cinderella Career and Finishing Schools, Inc. v. F. T. C.*, 425 F.2d 583 (D.C. Cir. 1970) (due process required disqualification of Federal Trade Commission chairman, who, while considering a misrepresentation case, made a speech mixing facts of the case with examples of obvious fraud), and *American Cyanamid Company v. F. T. C.*, 363 F.2d 757 (6th Cir. 1966) (due process required disqualification of Federal Trade Commission chairman, who had ruled upon an issue in a different capacity and had written a letter expressing factual conclusions about the case), with *Withrow, supra* (state examining board, which held an investigative hearing, was not disqualified from holding a "contested" hearing and deciding whether to suspend the doctor's license), and *Dieter, supra* (director, who had made the initial determination to revoke a day-care operator's license based on the recommendation of a licensing supervisor, was not disqualified from making the final

decision to revoke the license). Of course, administrators are not disqualified from deciding a case after remand. See, *Withrow, supra*; *Labor Board v. Donnelly Co.*, 330 U.S. 219, 67 S. Ct. 756, 91 L. Ed. 854 (1947).

Wyoming has not provided any evidence which would suggest that Dr. Bleed has prejudged the ideal level of instream flow for the Platte River. The evidence merely indicates that she has been exposed to and has investigated various instream flow levels.

Second, Wyoming fears that Dr. Bleed has a general bias in favor of instream flows. Wyoming does not cite us to any part of the record which would establish this bias. Exhibit 113 does not establish this bias—the tradeoff analysis reflects only an assumption that both instream and out-of-stream uses are positive and the two uses should somehow be brought into balance.

Even if Wyoming could establish that Dr. Bleed has a general bias in favor of instream flows, such a bias would not be disqualifying. An administrative adjudicator's prejudgment of a law or policy question is not disqualifying. See, *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 493, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976) ("[n]or is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute"); *Trade Comm'n v. Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948) (commission, which had made a full investigation and report to Congress expressing the opinion that a certain system of selling cement violated the Sherman Act, was not disqualified from instituting proceedings and issuing a cease and desist order against a cement company). If such prejudgments were disqualifying, no judge could try the same issue of law twice. See *id.* To put the case more strongly still: "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions . . . then no one has ever had a fair trial and no one ever will." *In re J. P. Linahan*, 138 F.2d 650, 651 (2d Cir. 1943).

We therefore hold that the Department of Water Resources was not obligated to disqualify Dr. Bleed from assisting in the decisionmaking process. We note that although the Court of

Appeals reached the correct result, its discussion of other sources which Wyoming could have called on to establish bias is mere dicta and should not be cited as precedent.

III. CONCLUSION

The decision of the Court of Appeals is reversed and the cause remanded so that the director can consider the possible effect the Prairie Bend Project will have on CPNRD's instream flow applications. In all other respects, the decision is affirmed.

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

CAPORALE, J., concurring in part, and in part dissenting.

I agree that the decision of the Department of Water Resources must be reversed in order that the director can consider the effects of the Prairie Bend Project. However, I disagree with the majority's determination concerning Dr. Ann Bleed's participation in this matter.

She not only coauthored a report which involved the central issue the director was to decide and examined witnesses, she may, or may not, have been a part of the decisionmaking process. If she was, her participation as a coauthor of the article on the central issue before the director would entitle a reasonable disinterested observer to conclude that she had in some measure adjudged the facts in controversy. Such a circumstance, arising in an adjudicative setting, would provide a due process basis for disqualifying her as a decisionmaker. See, e.g., *American General Ins. Co. v. F. T. C.*, 589 F.2d 462 (9th Cir. 1979) (decision set aside because one commissioner had previously participated in case as counsel); *Cinderella Career and Finishing Schools, Inc. v. F. T. C.*, 425 F.2d 583 (D.C. Cir. 1970) (public statements of commission chairman indicating some measure of prejudgment, combined with other errors, required vacation of order); *American Cyanamid Company v. F. T. C.*, 363 F.2d 757 (6th Cir. 1966) (one who had served as counsel for Senate subcommittee investigating many of same facts and issues could not sit as commission chairman); *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962), *criticized, National Rifle Ass'n v. U. S. Postal Service*, 407 F. Supp. 88 (D.C. 1976) (one who had

participated as employee in investigation of charges could not sit as commission member).

In view of the department's contradictory characterizations of Bleed's role, the State of Wyoming should have been permitted to depose her in order to determine what that role in fact had been and was to be. I would therefore remand the entire matter for such to be done. If it were to develop that Bleed in fact served as a decisionmaker, I would vacate the entire order of the department and direct that proceedings begin anew.

JOHN H. FRITSCH AND JOSEPHINE M. FRITSCH, APPELLANTS, V HILTON LAND & CATTLE COMPANY, A CORPORATION, AND SOUTHWEST NEBRASKA PRODUCTION CREDIT ASSOCIATION, APPELLEES.

513 N.W.2d 534

Filed April 1, 1994. No. S-91-540.

1. **Actions: Contracts: Rescission: Equity.** An action to rescind a written instrument is an equity action.
2. **Specific Performance: Equity.** An action for specific performance sounds in equity.
3. **Equity: Appeal and Error.** 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, when 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.
4. **Final Orders: Jurisdiction: Appeal and Error.** An appellate court is not bound by the parties' acquiescence or consent as to whether a district court has entered a final order which would confer jurisdiction upon the appellate court.
5. _____: _____: _____. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. _____: _____: _____. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
7. **Final Orders: Words and Phrases.** A final order is an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a

special proceeding, or upon a summary application in an action after judgment.

8. **Judgments: Contracts: Specific Performance.** A decree for specific performance must as nearly as possible order the contract's performance according to its terms.
9. _____: _____: _____. In decreeing specific performance, a court of equity must require the performance of some certain and specific act which ought to be performed by the delinquent party, and it cannot enter a general decree that in the future the delinquent party shall perform the acts required of him by his contract.
10. _____: _____: _____. Decrees ordering specific performance should state what the defendant must do without reference to other documents and without the necessity of interpreting other documents.
11. **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.
12. **Contracts.** Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.
13. **Contracts: Time.** What constitutes a reasonable time for the performance of a contract must be determined from the general nature and circumstances of each case.
14. **Contracts: Rescission.** In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
15. _____: _____. When a party seeks the aid of a court to rescind a contract, the bringing of the action is sufficient disaffirmance of the contract for purposes of the action.
16. _____: _____. On rescission of a contract, the rights and duties which have accrued under the rescinded contract are terminated and nullified.
17. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
18. **Laches: Time.** Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
19. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
20. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel.
21. **Equity: Fraud.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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

Waldine H. Olson and Thomas W. McPherson, of Schmid, Mooney & Frederick, P.C., for appellee Hilton Land & Cattle Co.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

After a trial, the district court for Red Willow County dismissed the amended petition of John H. Fritsch and Josephine M. Fritsch (the purchasers), in which they sought to rescind a 1981 agreement to purchase certain real estate from the defendant Hilton Land & Cattle Company (Hilton), a Nebraska corporation, and obtain a refund of $131,062.80.

The 298 acres of land involved in the 1981 agreement was included in the 1,025 acres of land the purchasers originally sold on contract to Hilton in 1976. Not all provisions of the 1976 contract had been fulfilled at the time the 1981 contract was executed or at time of trial of this lawsuit.

The trial court also found in favor of Hilton on its counterclaims seeking specific performance by the purchasers not only of the 1981 contract, but also of the 1976 contract, which was referred to in the 1981 agreement.

The purchasers appealed to this court the dismissal of their cause of action and the entry of judgment against them. Claiming that this court lacked jurisdiction because there was no final order, Hilton filed two motions to dismiss the purchasers' appeal. We reserved ruling on the motions until after argument of the case.

We find that (1) the trial court's order denying the purchasers rescission of the 1981 contract was a final and appealable order, (2) the trial court erred in denying the purchasers' rescission of the 1981 agreement, and (3) the cause should be remanded for further proceedings consistent with this opinion.

ASSIGNMENTS OF ERROR

The purchasers claim that the trial court erred in finding that (1) the purchasers were not entitled to rescind the 1981 contract,

(2) Hilton was entitled to specific performance of the 1981 contract, (3) explorations conducted and payments made pursuant to the 1976 contract constituted waiver of the purchasers' contractual right to rescind the 1981 contract, and (4) unpaid fertilizer and pesticide billings constituted waiver of the purchasers' contractual right to rescind the 1981 contract.

STANDARD OF REVIEW

An action to rescind a written instrument is an equity action. *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993). Likewise, an action for specific performance sounds in equity. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993).

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, when 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. *In re Estate of Stephenson, supra.*

FACTS

In 1973, by written contract for $250,000, William Spader and his wife purchased 1,040 acres of land in Red Willow County from Griffith and Carol Helm. The Spaders subsequently assigned an undivided one-half interest in the contract to John Fritsch. In 1976, Fritsch, Spader, and their wives contracted to sell Hilton 1,025 acres of the 1,040 acres for $307,500 (1976 contract).

In 1978, Hilton obtained a $750,000 line of credit from the Southwest Nebraska Production Credit Association (PCA). As security, a $717,358.58 mortgage was given to the PCA on the entire 1,040 acres. Hilton Land & Cattle Company is listed as the mortgagor on the mortgage. Signatories to the mortgage were Kenneth A. Hilton and his wife, Peggy L. Hilton. Kenneth Hilton is president and his wife is secretary of Hilton. Together, the Hiltons own all of the stock in the corporation. The PCA mortgage, however, fails to reflect that either of the Hiltons executed or acknowledged the mortgage in a corporate capacity on behalf of the corporation. The copies of the mortgage

received in evidence also fail to reflect that the mortgage carried Hilton's corporate seal.

On November 24, 1981, the Fritsches and the Spaders, by written contract, agreed to repurchase 298 acres of the tract they had sold to Hilton (1981 contract). The repurchase price was $300,000. The purchasers' attorney at that time testified at trial that she had advised her clients not to execute the agreement until such time as she had the opportunity to review the abstract. However, that attorney testified that when the parties met to sign the contract, the attorney representing Hilton said that the title to the property was free and clear and asked Kenneth Hilton, "Isn't that true, Ken?" The purchasers' November 24, 1981, attorney testified further that "Ken affirmed that the title to the property was free and clear." At trial, Hilton's former counsel testified that on November 24, 1981, he was unaware of the $717,358.58 mortgage that had been given to the PCA. He could not recall making any statement on November 24, 1981, that the title to the 298 acres was free and clear.

The 1981 contract provided that payments due from Hilton to the purchasers under the 1976 contract were to be credited to Hilton as installments due under the 1981 contract on March 1, 1982, through March 6, 1985, both inclusive. The purchasers were then to make a final balloon payment of $228,065.20 on March 1, 1990.

The 1981 contract further provided that beginning in 1986, the unpaid balance of the purchase price would be subject to interest accruing at 7 percent per year until receipt of the final payment. In addition, the 1981 contract provided that from March 1, 1983, to March 1, 1990, Hilton would pay the purchasers a share of the crops and pasture rent for use of the 298 acres. During the same period, the purchasers were to pay Hilton a portion of the chemical and fertilizer expenses incurred in the production of crops on the property. The record reflects that Hilton never set over to the purchasers, or set aside for the purchasers, a landlord's share of the crops raised on a portion of the 298 acres involved in the 1981 contract and that the purchasers never paid Hilton what was to be the purchasers' share of the chemical and fertilizer costs in raising the crops. In

early March 1983 and early March 1984, Hilton paid the purchasers $2,485.20 as pasture rent for each of those years. However, no pasture rent was paid for the year beginning March 1, 1985, or thereafter. Because this court is granting the purchasers' prayer for rescission of the 1981 contract, upon remand, the principles of equity and justice require that the purchasers should account to Hilton for the pasture rent that Hilton paid to them. By the same token, on remand, the purchasers are entitled to any credits Hilton received under paragraph 3.2 of the 1981 contract.

The closing on the 1981 contract was to be on or before December 24, 1981, unless extended by agreement of the parties. The purchasers were not to have possession of the 298 acres until the 1981 contract was closed. Before a closing could be held, it was necessary for the purchasers, at their own cost, to obtain a survey of the land they were buying. That survey was provided to Hilton by letter mailed July 5, 1984. The record reflects that there has never been a closing on the 1981 contract.

At trial, John Fritsch testified that in April or May 1982, he heard a rumor that Hilton had mortgaged the property. By that time, Hilton had not provided an abstract of title to the property updated to November 24, 1981. The 1981 contract required Hilton to do so within a reasonable time after November 24, 1981. Shortly after Fritsch heard the rumor about the mortgage, the purchasers' then attorney telephoned the Red Willow County register of deeds and was advised that the PCA mortgage did, in fact, exist. At the urging of the purchasers' then attorney, Hilton produced an abstract and delivered it on or about August 16, 1982, to the purchasers' then attorney. That abstract had not been extended to November 24, 1981, and did not contain an entry reflecting the 1978 PCA mortgage. The purchasers' then attorney, on her own initiative, obtained a supplemental abstract extended to October 25, 1982. The supplemental abstract confirmed the existence of the 1978 mortgage to PCA in the principal sum of $717,358.58 on the entire 1,040 acres of land.

In late 1984 or early 1985, the attorneys for both the parties began settlement negotiations verbally and by letter. The attorney who previously represented Hilton testified that in

April 1985, Hilton was waiting to hear from the PCA regarding Hilton's request for a partial release of the mortgage regarding the 298 acres. The attorney also testified that he had told the purchasers' attorney that Hilton was ready, willing, and able to provide a partial release to the 298-acre tract. However, it was not until May 29, 1985, that Hilton assigned its right to payments under the 1981 contract to the PCA. And it was not until July 16, 1985, several days after this suit was filed, that the PCA executed a partial release of its mortgage as to the 298-acre tract and delivered it to the State Bank of Bartley, Nebraska, to be held in escrow until the bank received Hilton's proceeds from the 1981 contract.

On or about July 9, 1985, after settlement negotiations appeared to have deteriorated, the purchasers filed this action for rescission and for return of $131,062.80 that they claim was paid or credited to Hilton pursuant to the 1981 contract. In July 1985, Spader and his wife went bankrupt. In their federal bankruptcy proceeding, the Spaders and the trustee in bankruptcy abandoned any interest they had in the property involved in this lawsuit and in the lawsuit itself.

On August 20, 1986, while this case was pending in the district court for Red Willow County, Hilton filed for reorganization under chapter 11 of the federal Bankruptcy Act. On May 26, 1988, the U.S. bankruptcy judge permitted the parties to proceed in the Nebraska district court.

In its answer to the purchasers' petition, Hilton claimed that the rescission of the real estate contract by the purchasers was barred by laches, waiver, unclean hands, and estoppel. Hilton counterclaimed for specific performance of both the 1976 and 1981 contracts.

After trial in 1991, the district court denied the purchasers' rescission of the 1981 contract and granted Hilton specific performance of the 1976 and 1981 contracts. The district court found that (1) the purchasers had accepted benefits of the 1981 contract by way of mineral exploration and pasture rent and (2) the purchasers had participated in the extension of time to perfect title and failed to bring the mutual delay to a close. The district court determined that Hilton was entitled to time to deliver good title, provided the purchasers performed their

obligations under the 1981 contract.

The court further ordered: "Since some of the amounts due as between the parties have been established, but no accounting has been made or pled respecting the crop rentals due the plaintiff, specific orders on amounts to be paid by the parties is [sic] not determinable in this order."

The purchasers appealed the district court's ruling to this court. Hilton filed two motions to dismiss the appeal, arguing that the trial court had not entered a final order because there remained before the district court an accounting and inquiry into the amounts due under 1981 agreement and the leases contained therein.

ANALYSIS

APPEALABLE ORDER

At the hearing in this court, Hilton reversed its prior position and claimed that the trial court had entered a final order. An appellate court is not bound by the parties' acquiescence or consent as to whether a district court has entered a final order which would confer jurisdiction upon the appellate court. See *Anderson v. HMO Nebraska*, 244 Neb. 237, 505 N.W.2d 700 (1993).

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Neb. Rev. Stat. § 25-1912 (Reissue 1989). Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. See, *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

Neb. Rev. Stat. § 25-1902 (Reissue 1989) provides that a final order is "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."

There is no doubt that the trial court's dismissal of the

purchasers' petition for rescission is a final order because it prevents a judgment in favor of the purchasers. See *Akins v. Chamberlain*, 164 Neb. 428, 82 N.W.2d 632 (1957).

Our finding that the purchasers' rescission of the 1981 contract was valid invalidates the order of the district court granting Hilton's request for specific performance of the 1981 contract, and Hilton's counterclaim for specific performance of that contract should be dismissed.

Because the trial court's specific performance order in regard to the 1976 contract lacks specificity, it cannot be considered an enforceable final order.

A decree for specific performance must as nearly as possible order the contract's performance according to its terms.

> In decreeing specific performance, a court of equity must require the performance of some certain and specific act which ought to be performed by the delinquent party, and it cannot enter a general decree that in the future the delinquent party shall perform the acts required of him by his contract.

71 Am. Jur. 2d *Specific Performance* § 221 at 287 (1973). See, also, *Morgan v. United States Fidelity & Guaranty Co.*, 191 So. 2d 851 (Miss. 1966) (decrees ordering specific performance should state what the defendant must do without reference to other documents and without the necessity of interpreting other documents).

Therefore, on remand, the district court should enter a final, enforceable order for specific performance of the 1976 contract which, as nearly as possible, sets forth what is required of the purchasers under the contract.

RESCISSION

The terms of the 1981 contract govern the rights and duties of the parties in regard to that contract. 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. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993). Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable

persons would understand them. *Prawl Engineering v. Charles Vrana & Son Constr.*, 241 Neb. 49, 486 N.W.2d 24 (1992).

The terms of the 1981 contract relevant to this action state:

> 6.1 Upon execution of this agreement, or within a reasonable time thereafter, Seller shall, at his own expense, furnish to the Purchaser an abstract or abstracts of title to the premises, updated to the date of this agreement. Purchaser shall have the right to have an attorney of his choice examine the abstract. *If the abstract discloses any title defects not consented to by the Purchaser, the Seller shall have a reasonable time in which to remedy and/or remove any such title defects. . . .*
>
> 6.2 *If the Seller does not so remedy or remove such title defects, the Purchaser may* either (A) complete the purchase of the property and accept title thereto as Seller is able to convey without a reduction in the purchase price, unless such title defects are encumbrances or liens for an ascertainable amount, in which case that amount may be deducted from the purchase price, *or (B) at any time prior to closing declare this agreement null and void.*

(Emphasis supplied.)

Section 8.1 of the 1981 agreement provides, "Closing date for this agreement shall be on or before December 24, 1981, unless extended by agreement of the parties hereto."

Section 8.2 of the 1981 contract provides, "It is understood and agreed by the parties that possession of the property shall be given to the Purchaser at closing."

It is clear from the evidence in this case that a future closing date for the 1981 contract agreement was necessary because the contract called for Hilton to furnish the purchasers an abstract free of any title defects that the purchasers had not waived.

In the 1981 contract, the purchasers had agreed that the 1973 real estate purchase agreement involving the Helms would not be considered a title defect. As to any other defects not consented to by the purchasers, the contract provided that Hilton would have a reasonable time in which to convey a clear title to the purchasers. What constitutes a reasonable time for the performance of a contract must be determined from the general nature and circumstances of each case. *Chilton Accts.*

Rec. Mgmt. v. Project Life Min., 225 Neb. 482, 406 N.W.2d 133 (1987).

In this case, Hilton had to be aware that the PCA mortgage existed when it executed the 1981 contract. Just 3 years earlier, Hilton had obtained a $750,000 line of credit from the PCA. It was at that time that the PCA was given a $717,358.58 mortgage on the land. It is undisputed that Kenneth A. Hilton's signature appears on the PCA mortgage, as well as that of his wife, Peggy L. Hilton, although it is not apparent from the mortgage that they executed it in their corporate capacities. Nevertheless, when asked on November 24, 1981, whether title to the property was free and clear, Kenneth Hilton assured the purchasers that Hilton had clear title to the land.

Hilton never provided the purchasers with an updated abstract showing the PCA mortgage. Instead, the purchasers had to learn about the PCA mortgage through rumor and through their attorney's investigation. The purchasers' then attorney had to order a supplemental abstract to confirm that a $717,358.58 mortgage on the land had existed since 1978 in favor of the PCA.

Under paragraphs 7.1 and 7.2 of the 1981 contract, Hilton was required to prepare and execute a warranty deed conveying title of the property to the purchasers and to place the deed in escrow. After the purchasers provided a survey of the land to Hilton in early July 1984, Hilton prepared a warranty deed, which was backdated to November 24, 1981. It was not acknowledged by Hilton's president until February 20, *1990*, long after this lawsuit was filed. Although the purchasers had agreed to accept title to the 298 acres subject only to the Helm agreement, the deed prepared by Hilton did not comply with that provision of the 1981 contract. Hilton's deed warranted only that the land was free from encumbrance *except those of record*. On November 24, 1981, the $717,358.58 PCA mortgage was of record.

Moreover, Kenneth Hilton and his wife, Peggy Hilton, executed and acknowledged the mortgage to the PCA without reference to whether they were acting as officers of Hilton. The corporation's seal was not placed on the mortgage. By these omissions, there was a cloud upon the title to the real estate as to

whether Kenneth Hilton and his wife had some personal interest in the land which would require a disclaimer of interest or quitclaim deed from them personally. The record fails to reflect that such a disclaimer or quitclaim deed has ever been prepared for delivery to the purchasers.

Under the terms of the 1981 contract, it was the duty of Hilton to cure any unconsented-to defect in title within a reasonable time. Although Hilton's president knew of the title defect due to the $717,358.58 mortgage when he executed the 1981 contract, he did nothing to cure the defect until the purchasers' attorney complained about the defect in late 1984 and early 1985. Under the 1981 contract, if Hilton failed to cure any unconsented-to defects, the purchasers could rescind the agreement at any time prior to closing. No closing was ever held on the 1981 contract. Under these circumstances, Hilton failed to cure a defective title within a reasonable time, and the purchasers had a right to exercise their contractual right to rescind.

In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances. *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985). Before filing this suit for rescission, the purchasers indicated to Hilton that they wanted to rescind. In a letter to Hilton's attorney dated April 8, 1985, the purchasers' attorney stated:

> I guess it gets down to that there is no way your man can come up with a clear title to that property. Under the terms of the agreement, he has to do this or he gets no money. . . .
>
> I assume that by now you haven't heard from P.C.A. on the matter. My feeling as to a settlement would be that we declare the contract null and void, and that we would work out an arrangement whereby your man will pay back a percentage.

Whether or not this letter or subsequent actions of the purchasers constituted an effective rescission, the purchasers certainly exercised their right to rescind when they filed their petition for rescission on July 9, 1985. When a party seeks the aid of a court to rescind a contract, the bringing of the action is sufficient disaffirmance of the contract for purposes of the

action. *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985). On rescission of a contract, the rights and duties which have accrued under the rescinded contract are terminated and nullified. *Lustgarten v. Jones, supra*. See, also, *Robinson v. Bressler*, 122 Neb. 461, 240 N.W. 564 (1932); 17A C.J.S. *Contracts* § 440 (1963). Therefore, once the purchasers exercised their right to rescind the contract by filing this action, Hilton's contractual right to cure the defect terminated.

Prior to the filing of this action by the purchasers, Hilton apparently had begun its efforts to cure a major defect in the title by attempting to negotiate with the PCA for a partial release of its mortgage. However, the PCA did not grant a partial release of its mortgage until July 16, 1985, more than 3 years after execution of the contract, 3 months after the purchasers' attorney sent Hilton a letter indicating that the purchasers wanted to rescind, and 7 days after the purchasers filed their action to rescind. Hilton's attempts to cure the defect after the purchasers rescinded the contract do not invalidate the purchasers' rescission of the 1981 contract.

EQUITABLE DEFENSES

In its answer, Hilton asserts that the equitable defenses of laches, waiver, unclean hands, and estoppel should bar rescission of the 1981 contract. Hilton does not discuss each of these defenses separately in its brief, but essentially claims that the purchasers waived their right to rescind the 1981 contract by waiting too long to exercise that right and by accepting certain benefits of the 1981 contract.

It is true that the purchasers did not attempt to rescind the contract until about 2 years after they became aware of PCA's mortgage. However, the defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990). Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

Hilton has produced insufficient evidence to show that during the time before the purchasers rescinded the contract, circumstances changed to such a degree that Hilton would be prejudiced if the contract were rescinded. Rather than being prejudiced by the delays, Hilton has enjoyed the full use and possession of the property ever since the contract was executed in 1981. Except for 2 years' pasture rent totaling $4,970.40, which it paid to the purchasers, Hilton has retained all the benefit of the proceeds from the crops raised on the 298 acres. Given these circumstances, we are unable to find that Hilton has been prejudiced by the purchasers' failure to rescind the 1981 contract sooner than they did.

Hilton contends in its brief that the purchasers waived their right to rescind the 1981 contract because they (1) allowed payments due them under the 1976 contract to be credited to Hilton as installments due under the 1981 contract, (2) received benefits from their assignment of the mineral and gravel rights to the property, and (3) accepted 2 years' pasture rent from Hilton.

A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993).

Hilton claims that the purchasers waived their right to rescind by allowing credits to accumulate on the 1976 contract, or in other words, ratifying the 1981 contract. We find no clear, unequivocal, or decisive action by the purchasers to establish such a ratification or waiver of their right to rescind. We do not find that the purchasers ever acknowledged that credits had been made in their favor on the 1976 contract. There appears to be no evidence that either party contacted the State Bank of Bartley, the escrow agent, to determine whether such credits were being recorded, nor did the bank notify the purchasers that credits were accumulating under the 1976 contract.

Even if credits were in fact made, the purchasers received no benefit from such credits. While the purchasers received no

monetary payments on the 1976 contract during the time such credits were supposed to have been made, neither did they receive a clear title to the property under the 1981 contract. Under the record in this case, we are unable to find that any inaction on the part of the purchasers during this time ratified the 1981 contract or waived the right the purchasers had to rescind the 1981 contract.

In its second argument regarding waiver, Hilton claims the purchasers benefited from the 1981 contract by way of mineral exploration. This argument has no merit. Any benefits of mineral exploration or rights to gravel enjoyed by the purchasers were granted originally under the 1976 contract. Similar rights were granted to the purchasers under the 1981 contract. Because the 1981 contract became a nullity, the purchasers still had their rights to mineral exploration and gravel under the 1976 contract.

Hilton's final claim of waiver suggests that the purchasers waived their right to rescind by accepting 2 years' pasture rent pursuant to the 1981 contract. That rent amounted to about $4,970.40, a fraction of the $300,000 contract purchase price. Given the relatively small amount paid in pasture rent and the other circumstances of this case, we find that the purchasers' acceptance of this rent did not amount to an unequivocal act of waiver that would bar rescission. In determining what amounts, if any, are owed to either party by the other under the 1976 contract or the rescinded 1981 contract, under the principles of equity and justice, the trial court must take into account the effect of our determination that the purchasers' rescission of the 1981 contract was valid. This would include giving Hilton credit for the pasture rent it paid to the purchasers. Since Hilton retained the benefit of all the crops raised on the land involved in the rescinded 1981 contract, the principles of equity and justice would not require the purchasers to pay for any chemicals or fertilizer that Hilton used on the 298 acres involved here.

Hilton does not discuss the defense of unclean hands in its brief, but claimed in its pleadings that because the purchasers refused to pay real estate taxes and their share of fertilizer and chemical expenses, the purchasers' rescission of the 1981

contract should be barred by the doctrine of unclean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988).

With regard to the unpaid real estate taxes, no closing was ever held, and the purchasers never took possession of the property. Hilton paid only 2 years' pasture rent and none of the crop rental owed to the purchasers. The purchasers did not act unfairly or inequitably by failing to pay real estate taxes on property of which Hilton had full use and possession. Similarly, the purchasers did not act unfairly or inequitably by refusing to pay fertilizer expenses for the production of crops when Hilton failed to pay the purchasers for their share of those crops.

If anything, Hilton, through its officers, acted inequitably and unfairly when it failed to extend the abstract of title to the land involved to reflect a mortgage that was more than double the sale price in the 1981 contract. Although Hilton was required to convey clear title except for the Helms' contract, Hilton, through its president, continued to act inequitably and unfairly by having prepared and placed in escrow a deed that conveyed the property to the purchasers "free from encumbrance *except those of record*." Moreover, its officers, by not executing the PCA mortgage in their corporate capacities, created a cloud upon the title to the land involved in the 1981 contract.

CONCLUSION

We reverse the order of the district court and find that the purchasers' rescission of the 1981 contract was valid; that Hilton's counterclaim for specific performance of the 1981 contract should be dismissed; that the trial court should enter a final, enforceable order for specific performance of the 1976 contract; and that the trial court should determine whether the purchasers are entitled to a monetary award by reason of their rescission of the 1981 contract and whether Hilton is entitled to a setoff or a money judgment against the purchasers by reason of the pasture rent which it paid the purchasers.

This cause is remanded to the district court for further proceedings and entry of judgment consistent with this opinion.

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

WHITE, J., participating on briefs.

SHANAHAN, J., not participating.

NATHAN JAMES VOSBURG ET AL., APPELLANTS, V. CENEX-LAND O'LAKES AGRONOMY COMPANY, A CORPORATION, APPELLEE.

513 N.W.2d 870

Filed April 1, 1994. No. S-92-191.

Mental Distress: Negligence. The factors to be considered in determining whether there may be recovery based upon negligent infliction of emotional distress to a bystander are whether there exists (1) a seriously injured victim as the result of the proven negligence of the defendant, (2) an intimate familial relationship with the victim, and (3) emotional distress so severe that no person could be expected to endure it.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

David Geier, of Healey & Wieland Law Firm, and, on brief, Thomas B. Dawson for appellants.

Randall L. Goyette and Brenda S. Spilker, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORALE, J.

The minor plaintiffs-appellants, Nathan James, Jason Anthony, and Shelly Lee Vosburg, by and through their next friend, Garth Thomson, hereinafter collectively referred to as the Vosburgs, seek to recover damages allegedly resulting from injuries sustained by the minors' mother, Georgia Thomson, which the Vosburgs assert were caused by the negligence of

the defendant-appellee, Cenex-Land O'Lakes Agronomy Company. Following the sustainment of Cenex-Land's demurrer, the district court dismissed the Vosburgs' petition. They appealed to the Nebraska Court of Appeals, seeking to establish that a minor has a common-law cause of action for the loss of consortium of a nonfatally injured parent. On the motion of Cenex-Land, we, pursuant to the provisions of Neb. Rev. Stat. § 24-1106(2) (Cum. Supp. 1992) and Neb. Ct. R. of Prac. 2B (rev. 1992), ordered bypass of the Court of Appeals. Following our rejection in *Guenther v. Stollberg*, 242 Neb. 415, 495 N.W.2d 286 (1993), of the Vosburgs' thesis, Cenex-Land moved for summary affirmance. We overruled the motion and directed the parties to brief whether the Vosburgs' petition stated a negligent infliction of emotional distress action. We affirm.

We recently reaffirmed that in judging whether a petition states a cause of action, 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 facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Lawyers Title Ins. Corp. v. Hoffman, post* p. 507, 513 N.W.2d 521 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

According to the petition, the mother was employed by a third party from November 1987 until June 7, 1988, performing assembly work at a warehouse in which Cenex-Land stored agricultural herbicides and pesticides. The Vosburgs allege that Cenex-Land was negligent in a variety of respects in the placement and storage of its herbicides and

pesticides.

They also claim that as a direct and proximate result of Cenex-Land's negligence, their mother sustained the following:

> A. Severe organo-phosphate poisoning resulting in diarrhea, irregular menstrual periods with heavy bleeding, vomiting and painful dermatitus [sic] covering large portions of her body, abdominal cramping, numbness in her extremities, loss of hair, blurred vision, bladder spasms, insomnia and kidney dysfunction.
>
> B. Extreme mental anguish and extreme depression in apprehension of further contact with or poisoning from toxic substances.
>
> C. Increased risk of substantial future physical and mental harm due to the hypersensitivity to organo-phosphate pesticides and other related toxic chemicals.
>
> D. Extreme past and present pain and suffering, and it is reasonably certain that [the] mother will sustain physical and mental pain and suffering for an indefinite period of time in the future.
>
> E. Permanent injury and disability to her body.
>
> F. Physical disfigurement, scarring, humiliation and loss of enjoyment of life.
>
> G. Loss of income from gainful employment, impaired future income earning capacity.

The Vosburgs assert that as a consequence, they

> have suffered great mental anguish by being forced to witness the suffering endured by their mother, whereby their own nerves and health have been seriously and permanently shocked, weakened, and impaired, and by reason of the physical and mental condition of their mother, [they] still continue to suffer in mind and body, and have been denied the care, protection, consideration, companionship, aid, advice and solace, comfort and society of their mother.

Inasmuch as we adhere to our ruling in *Guenther, supra*, that a minor child has no cause of action for the loss of the consortium of a nonfatally injured parent, the only issue is whether the petition pleads a negligent infliction of emotional

distress action.

In *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985), this court abandoned the "zone of danger" rule which required that a bystander wishing to recover damages because of negligently inflicted emotional distress prove that the plaintiff was (1) within the physical zone of danger, (2) feared for her or his own safety, and (3) suffered physically manifested mental or physical injuries as a result of the fear.

In place of the zone of danger rule, the *James* court embraced the foreseeability of the risk approach announced by the California Supreme Court in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and concluded that several factors were to be considered in determining whether injury to a bystander was reasonably foreseeable. Through *James* and its progeny, this court has established that the factors to be considered in determining whether there may be recovery based upon negligent infliction of emotional distress to a bystander are whether there exists (1) a seriously injured victim as the result of the proven negligence of the defendant, (2) an intimate familial relationship with the victim, and (3) emotional distress so severe that no person could be expected to endure it. *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992); *James, supra*.

The *Haselhorst* court allowed recovery to parents who did not witness the sexual abuse of their children by a foster child, which took place over an 11-month period, but learned of it when told by another foster child, at which time the abuser was removed from the home.

In *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993), an intentional infliction of emotional distress case, the court relied on the analysis in *James* by analogy to reject an argument based upon the Restatement (Second) of Torts § 46 (1965), which would limit recovery to a plaintiff seeking recovery for conduct directed at a third party to a person who is present at the time of the conduct.

The *Nichols* court held that "[a]s we have rejected the requirement of contemporaneous observance in 'bystander recovery' cases involving negligence, logic dictates that the

same rule apply to situations involving reckless or intentional acts." 243 Neb. at 819-20, 503 N.W.2d at 180-81. In continuing its analysis, the *Nichols* court reviewed the foreseeability approach adopted in *James*, and observed:

> We set out three requirements that must be shown in order for the plaintiff to recover: (1) that a marital or intimate familial relationship existed between the plaintiff and the victim; (2) that the plaintiff's shock is, in part, a result of the manner in which the plaintiff became aware of the injury to the victim; and (3) that the foreseeable harm to the plaintiff arose from the death or serious injury of the victim. The first and third requirements are objective, while the second is subjective, dependent on the facts of the particular case.

243 Neb. at 820, 503 N.W.2d at 181.

Focusing on the second requirement articulated in *Nichols*, it is important to recall that in *James*, after noting that the psychological reaction of the plaintiff could be the same or perhaps worse upon hearing of a loss, as opposed to viewing the loss, the court stated:

> We believe that the Massachusetts Supreme Court has a better perspective on this criterion. The determination of liability for the injury sustained "depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship . . . ." *Dziokonski v. Babineau*, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978). "A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable."

James v. Lieb, 221 Neb. 47, 57, 375 N.W.2d 109, 116 (1985).

The determination of foreseeability requires consideration of the nature of a plaintiff's shock in terms of where, when, and how the injury to the third person entered into a plaintiff's consciousness. This is virtually always met when the plaintiff

personally observes the injury to the victim. Moving away from that most obvious end of the spectrum is the case where the plaintiff rushes to the hospital to find a seriously injured or dead victim or hears of such injury or death in a shocking manner.

Here, two factors are missing. First, there is pled no single, sudden event such as a violent injury or accident giving rise to the mother's suffering; there is no allegation she suffered her injuries suddenly. On the contrary, the inference is that her symptoms developed slowly because of exposure to chemicals. Second, notwithstanding the alleged severity of the Vosburgs' emotional and physical reactions, the manner in which they became aware of the injuries is not alleged to have been, nor can it be inferred to have been, sudden and shocking or startling such as to have produced emotional distress so severe that no person could be expected to endure it.

Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STEVEN L. BOOTH, APPELLEE, V. BLUEBERRY HILL RESTAURANTS, INC., APPELLANT.

513 N.W.2d 867

Filed April 1, 1994. No. S-92-474.

1. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system.

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

Terry K. Gutierrez, of Gast & Peters, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Steven L. Booth sued Blueberry Hill Restaurants, Inc., for injuries which occurred when Booth was attacked and beaten while in the Blueberry Hill parking lot. Blueberry Hill failed to answer interrogatories as ordered by the court, and as a sanction, the court dismissed Blueberry Hill's answer to Booth's petition, entered judgment on liability against Blueberry Hill, and awarded expenses in favor of Booth in the amount of $875. Blueberry Hill appeals the trial court's order striking its answer and entering a judgment on liability.

SCOPE OF REVIEW

Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion. *Stanko v. Chaloupka*, 239 Neb. 101, 474 N.W.2d 470 (1991).

FACTS

Blueberry Hill operated a bar at 8141 West Center Road in Omaha, Douglas County, Nebraska. On December 8, 1989, Booth was a customer of Blueberry Hill and left its premises about 1 a.m. At approximately 1:15 a.m., while standing in Blueberry Hill's parking lot, Booth was struck on the side of his head, knocked to the ground, and beaten on and about his face.

On May 9, 1990, Booth filed a petition alleging that on numerous occasions prior to and after December 8, 1989, other individuals who were business invitees on Blueberry Hill's premises had been assaulted under conditions similar to those experienced by Booth. He alleged that Blueberry Hill should have known that such conduct or occurrences were likely to occur in the future and would constitute a threat to the safety of persons such as Booth.

Booth alleged that Blueberry Hill was negligent in not taking

proper precautions to control, supervise, and manage its premises and in failing to protect Booth while he was on the premises. Booth also alleged that Blueberry Hill, in the exercise of reasonable care, should have known that the previous unlawful assaults occurring before December 8, 1989, constituted an unreasonable risk of harm to Booth and that Booth should have been warned of the danger.

On November 21, 1991, Booth served written interrogatories upon Blueberry Hill pursuant to Neb. Ct. R. of Discovery 33(a) (rev. 1992). According to rule 33(a), each interrogatory is to be repeated and answered separately and fully in writing under oath, unless objected to, and a copy of the answer, and objections if any, shall be served within 30 days after the service of the interrogatories. When no answers were provided by Blueberry Hill, Booth filed a motion to compel discovery. On December 27, the trial court gave Blueberry Hill until January 3, 1992, to answer Booth's interrogatories. Blueberry Hill failed to file its answers, and on January 9, Booth filed a motion to strike Blueberry Hill's answer and for expenses and attorney fees.

At the time of the January 21, 1992, hearing on the motion to strike, the answers to interrogatories had still not been received. The court noted that the case had been dismissed on July 2, 1991, and then reinstated on July 11. The court also noted that the certificate of readiness had been extended first from November 1 to November 30, 1991, then extended to February 1, 1992, and again extended until March 1.

Blueberry Hill's attorney stated that although he had not delivered answers signed by his client, he had previously supplied Booth's counsel with unacknowledged answers. Blueberry Hill's counsel submitted an affidavit in further explanation, which stated that the managing agent for Blueberry Hill was not a resident of Omaha, had no telephone at his residence, and did not receive mail at his residence due to the absence of a mailbox. The only means of contacting the agent was by leaving telephone messages for him at a relative's house or at a tavern in Des Moines, Iowa. After many repeated attempts to contact the agent, counsel finally contacted the agent on January 8, 1992, by telephoning a particular tavern in

Des Moines. The agent acknowledged receipt of the interrogatories and represented that answers to the interrogatories had been completed and forwarded to the affiant. As of January 9, the date of the affidavit, the affiant had not received the answers to the interrogatories. No other explanation was given for the failure to properly file answers to the interrogatories.

The court sustained Booth's motion to strike, entered judgment on the issue of liability, and awarded Booth expenses totaling $875. The issue of damages was to be determined at an evidentiary proceeding.

On May 14, 1992, the parties stipulated that if a jury were duly impaneled and sworn, if evidence were adduced, and if the jury were duly instructed on the issue of damages, it would return a verdict in the amount of $50,000. Judgment was entered in favor of Booth against Blueberry Hill in the amount of $50,000 together with interest and costs.

ANALYSIS

On appeal, the only issue is whether the trial court abused its discretion in entering the default judgment on liability when Blueberry Hill failed to respond to the court's order directing that it answer Booth's interrogatories by January 3, 1992. A court's rulings concerning sanctions will not be disturbed on appeal absent a showing of an abuse of discretion. *Stanko v. Chaloupka*, 239 Neb. 101, 474 N.W.2d 470 (1991).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

Neb. Ct. R. of Discovery 37(b)(2)(C) (rev. 1992) provides that upon the failure of a party to comply with an order to permit discovery, the court may sanction the failing party by dismissing the action. *Stanko v. Chaloupka, supra.* The determination of the appropriate sanction is to be considered in the factual context of the particular case. *Id.*

In this case, after repeated attempts by Blueberry Hill's counsel to obtain sworn answers to Booth's interrogatories, the managing agent failed to comply with the court's order setting a January 3 deadline. At the time of the hearing, which was originally scheduled for January 10 and then continued to January 21, no answers had been filed by Blueberry Hill.

In *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987), we recognized that sanctions under rule 37 exist to punish a litigant or counsel who might be inclined or tend to frustrate the discovery process. Under rule 37, the appropriate sanction is to be determined from the factual context of the particular case and is left to the discretion of the trial court. The "hierarchy of harshness in permissible sanctions under Rule 37" ranges from reimbursement of expenses incurred as a result of noncompliance to a default judgment. *Norquay*, 225 Neb. at 540, 407 N.W.2d at 155.

In *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984), we affirmed the entry of a default judgment against the defendants for failure to comply with an order directing the production of documents. We noted that entering a default judgment was an appropriate sanction for an unjustifiably obstructionist party. The plaintiff in *Aetna Cas. & Surety Co.* filed a motion to require the defendants to produce documents by November 17, 1980. For reasons which were not clear from the record, the motion for sanctions was overruled, and the court again ordered production of the documents by February 19, 1981. The defendants did not comply, and on March 11, the court sustained a motion for sanctions and entered a default judgment against the defendants. We held that the trial court was correct in its refusal to set aside the default judgment and that the case clearly established that some individuals believe they can "play games" with the courts.

In *Stanko*, we affirmed the dismissal of the plaintiff's action for failure to comply with a discovery order. The record demonstrated that the plaintiff, without proper cause, steadfastly obstructed the defendants' legitimate discovery efforts. Notwithstanding the fact that the plaintiff was properly ordered to do so by the court, he refused to produce documents relating to the damages he claimed, to produce documents

relating to the running of the applicable statute of limitations, and to answer relevant interrogatories. The plaintiff also refused to be deposed. We stated that the appropriate sanction under rule 37 is a matter which initially rests within the discretion of the trial court and that the trial court's ruling will not be disturbed on appeal absent a showing of an abuse of that discretion.

Blueberry Hill concedes that sanctions should be imposed in this case for failure to timely file answers to the interrogatories and that it bears the burden to show that the discovery sanction was clearly untenable, depriving it of a substantial right and denying it a just result. See *In re Interest of C. W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

Rule 37 in essence contains two elements. The first element permits the party requesting discovery to make application for an order compelling discovery. The sanctions against the party whose conduct necessitated the court order shall include attorney fees unless the court finds that the opposition to the motion was substantially justified or that other circumstances make such an award of expenses unjust. The second element provides for much more serious sanctions by the court because the sanctions are imposed for failure to comply with the order of the court. If a party chooses to ignore the order of the court, the party risks the sanction that the court chooses to impose, which may be the entry of a judgment.

We find no abuse of discretion by the district court. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAVELL DEAN FLYE, APPELLANT.
513 N.W.2d 526

Filed April 1, 1994. No. S-92-808.

1. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been

submitted for review precludes raising an objection on appeal.

2. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
3. **Criminal Law: Words and Phrases.** As used in the criminal mischief statute, Neb. Rev. Stat. § 28-519 (Reissue 1989), "pecuniary loss" means the monetary loss suffered by another as the result of the defendant's conduct.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Criminal Law.** The amount of pecuniary loss is not an element of criminal mischief as defined by Neb. Rev. Stat. § 28-519 (Reissue 1989), but determines the grade of the offense and relates to the punishment which may be imposed.
6. **Criminal Law: Property.** Ownership of property is not an essential element of criminal mischief as defined by Neb. Rev. Stat. § 28-519 (Reissue 1989) and is immaterial except to identify property as not that of the accused.
7. **Due Process: Sentences.** The imposition of a heavier sentence upon a reconvicted defendant for the explicit purpose of punishing the defendant for having succeeded in getting the original conviction set aside violates the Due Process Clause.
8. **Due Process: Prosecuting Attorneys: Plea Bargains.** Due process is not violated when a prosecutor carries out a threat made during plea negotiations to charge a defendant with a more serious offense on which the defendant is plainly subject to prosecution if the defendant does not plead to the offense charged.
9. **Habitual Criminals: Probation and Parole.** One found to be a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989) may not be placed on probation.
10. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this criminal proceeding the district court, pursuant to verdict, adjudged the defendant-appellant, Lavell Dean Flye, guilty of criminal mischief, in violation of Neb. Rev. Stat. § 28-519 (Reissue 1989); found him to be a habitual criminal, as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989); and sentenced him to imprisonment for a period of 10 years. In appealing to the Nebraska Court of Appeals, Flye asserted that the district court erred in (1) instructing the jury as to the meaning of "pecuniary loss," (2) finding the evidence sufficient to support the verdict, (3) failing to find the habitual criminal charge to be the result of prosecutorial vindictiveness, and (4) refusing to place him on probation. The Court of Appeals determined the district court's definition of pecuniary loss to have been prejudicially erroneous and thus vacated the sentence and remanded the cause for a new trial solely on the issue of the amount of pecuniary loss Flye caused. *State v. Flye*, 2 Neb. App. 96, 507 N.W.2d 493 (1993). We granted the plaintiff-appellee State's petition for further review and now reverse the judgment of the Court of Appeals and remand the cause to that court, directing that it reinstate and affirm the judgment of the district court.

II. FACTS

While in detention awaiting trial on charges of burglary, a Class III felony, Neb. Rev. Stat. § 28-507 (Reissue 1989), and first degree sexual assault, a Class II felony, Neb. Rev. Stat. § 28-319 (Reissue 1989), Flye was charged with criminal mischief as the result of vandalizing his jail cell, thereby causing a pecuniary loss in excess of $300, a Class IV felony, § 28-519. Later, and while still incarcerated, Flye was charged with second degree nonsexual assault, also a Class IV felony, Neb. Rev. Stat. § 28-309 (Reissue 1989).

The State then offered to allow Flye to plead guilty to the burglary charge in exchange for dismissing the sexual assault charge and dismissing either the criminal mischief or the

nonsexual assault charge in exchange for Flye's plea to the other. Flye rejected the State's offer, but proposed pleading to two Class IV felonies in exchange for dismissal of all the other charges. Flye's counteroffer was rejected by the State.

On the subsequent date scheduled for preliminary hearings on the criminal mischief and nonsexual assault charges, the State offered to permit Flye to plead to the burglary charge and one misdemeanor in exchange for the dismissal of all other charges. The State advised Flye that if he went to trial on the sexual assault and burglary charges, he would be charged as a habitual criminal on the pending criminal mischief and nonsexual assault charges. Later that same day, the State advised Flye that if he proceeded with the preliminary hearings in the criminal mischief and nonsexual assault charges, he would be charged as a habitual criminal on all of the pending felony charges. The preliminary hearings on the criminal mischief and nonsexual assault charges were continued to a future date in order to allow time for Flye to respond. When Flye did not respond by that date, the preliminary hearings on the criminal mischief and nonsexual assault charges were rescheduled.

After Flye rejected the State's plea offer, the State amended the information in the sexual assault and burglary charges to allege that Flye is a habitual criminal. A jury later acquitted Flye of both charges.

The next day, Flye offered to plead to Class I misdemeanors in the criminal mischief and nonsexual assault charges. The State rejected Flye's offer and informed him that he would be charged as a habitual criminal in both the criminal mischief and nonsexual assault charges regardless of whether he had a preliminary hearing. Flye then offered to waive the preliminary hearing and plead to one Class IV felony and one Class I misdemeanor. The State rejected Flye's offer and informed him that he would have to plead to one felony charge as a habitual criminal or go to trial on two felony charges as a habitual criminal.

The State subsequently filed informations charging Flye with second degree assault and criminal mischief and with being a habitual criminal.

Prior to trial on the criminal mischief charge, Flye filed a plea in abatement, alleging that the filing of the habitual criminal charge was an act of prosecutorial vindictiveness intended to punish him for successfully exercising his right to a jury trial on the prior sexual assault and burglary charges.

The district court denied Flye's plea in abatement. In finding Flye guilty, the jury fixed the amount of pecuniary loss value at $1,147. The district court later determined that Flye was a habitual criminal.

III. ANALYSIS

1. Pecuniary Loss Instruction

In the first assignment of error, Flye asserts that the district court erroneously instructed the jury as to what constitutes pecuniary loss and that the error prejudiced him.

We note at the outset that Flye did not object to the instruction; on the contrary, at the instruction conference, he affirmatively told the district court that he had no objection to its proposed instructions. Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992); *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991).

However, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Myers, supra*; Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992). Thus, the question is whether the district court's definition of pecuniary loss constituted plain error such as to prejudice Flye.

The defendant in *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989), was convicted of criminal mischief for intentionally driving his automobile into another's pickup truck. A repairman testified that the fair and reasonable cost of repairing the damage to the truck was $595.94; no evidence of the predamage market value of the truck was adduced. Arguing

that pecuniary loss for purposes of the criminal mischief statute should be determined by the civil rule measuring damage to personal property, i.e., the lesser of the cost of repair or replacement, Pierce objected to any instruction which did not refer to the predamage market value of the truck.

The trial court in *Pierce* nonetheless instructed the jury that pecuniary loss meant the " 'loss in the form of money, property, commercial interest, or anything else, the primary significance of which is economic loss.' " *Id.* at 970, 439 N.W.2d at 439. Recognizing that there is no universal and comprehensive formula or method of determining the extent of pecuniary loss for the purposes of the criminal mischief statute, we rejected use of the civil damages rule and defined pecuniary loss with respect to criminal mischief as being the "monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519." *Id.* at 975, 439 N.W.2d at 442. Concluding that the *Pierce* instruction did not conform with this definition and "permitted the jury to speculate about various losses, including a loss of a commercial interest 'or anything else' which involved 'economic loss,' " we held the instruction to have been "incomplete and misleading" and that, as such, it constituted "prejudicial error." *Id.* at 976, 439 N.W.2d at 443.

While the district court's definition of pecuniary loss in this case is the same as was the definition used by the trial court in *Pierce*, the circumstances in this case are quite different. The *Pierce* record did not disclose what the jury found the pecuniary loss to have been. Here, not only does the record reveal that figure, it establishes the figure to be consistent with the evidence presented by the State as to the cost of repairing or replacing the broken fixtures in the jail cell Flye damaged. Thus, although, in light of our holding in *Pierce*, the district court should have used an instruction which followed the definition of pecuniary loss set out in that opinion, it is clear that the jury was not misled by the instruction.

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Messersmith*, 238

Neb. 924, 473 N.W.2d 83 (1991); *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991).

Under the circumstances, Flye was not prejudiced by the erroneous instruction; thus, there is no merit to the first assignment of error.

2. SUFFICIENCY OF EVIDENCE

In the second assignment of error, Flye argues that the evidence is insufficient to support the verdict in that it (a) is at best speculative as to the extent of the pecuniary loss and (b) does not establish who owned the property which was damaged.

(a) Pecuniary Loss

Section 28-519 provides, in relevant part: "(1) A person commits criminal mischief if he or she: (a) Damages property of another intentionally or recklessly . . . . (2) Criminal mischief is a Class IV felony if the actor intentionally causes pecuniary loss in excess of three hundred dollars . . . ."

Two witnesses testified with respect to the amount of the pecuniary loss, which is not an element of the criminal offense but determines the grade of the offense and relates to the punishment which may be imposed. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). A project manager for one of the contractors helping build the jail testified as to the costs of each component part involved in repairing the damaged cell. He estimated the replacement cost for the security shelf at $138 plus labor cost of $36 for installation and the replacement cost for the stainless steel mirror at $45 plus $50 for epoxy caulk and an additional $144 for labor. In addition, some damaged concrete blocks would have to be replaced and painted at a cost of $250. The vice president of the electrical contractor for the jail estimated that the cost to replace the light fixture would total $484. The evidence thus fully supports the jury's finding concerning the pecuniary loss caused.

(b) Ownership

Next, Flye urges that there is no competent evidence concerning the ownership of the damaged property and that

such lack constitutes a failure to prove the crime charged. However, the specific ownership of property is not an essential element of criminal mischief and is immaterial except to identify the property in question as not that of the accused. See, *State v. Ransom*, 182 Neb. 243, 153 N.W.2d 916 (1967) (proof of specific ownership of building involved in burglary is not essential element of offense, and allegation of ownership is immaterial except for purpose of identifying property involved as not property of accused); *Liakas v. State*, 161 Neb. 130, 72 N.W.2d 677 (1955), *cert. denied* 351 U.S. 924, 76 S. Ct. 780, 100 L. Ed. 1454 (1956); *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946).

Moreover, while there was no direct testimony of ownership, the record supports an inference that Flye did not own the property he damaged.

Accordingly, neither is there any merit to the second assignment of error.

3. Prosecutorial Vindictiveness

In the third assignment of error, Flye complains of the district court's failure to find that he was unlawfully charged with being a habitual criminal as a result of prosecutorial vindictiveness. More specifically, Flye argues that his due process rights were violated by the State's addition of the habitual criminal allegation after Flye was found not guilty of sexual assault and burglary.

The U.S. Supreme Court first articulated in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), that the Due Process Clause bars vindictiveness. In *Pearce*, one of the defendants had received a more severe sentence upon reconviction after his original conviction was overturned. The High Court held that although neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction, imposing a heavier sentence upon a reconvicted defendant for the explicit purpose of punishing the defendant for having succeeded in getting the original conviction set aside would be a "flagrant" violation of the Due Process Clause. The *Pearce* Court advanced two reasons for its holding. First, due process of law

requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725. Second, "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.* Specifically, the *Pearce* Court held that a judge who had originally sentenced a defendant could not impose a more severe punishment upon resentencing unless the new sentence were based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

In a later case, *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), after a defendant convicted on a misdemeanor assault charge exercised his statutory right to appeal to a trial de novo, the prosecutor responded by charging the defendant with a felony for the same criminal conduct covered by the earlier misdemeanor charge. The U.S. Supreme Court held that the prosecutor's action violated due process. While the *Blackledge* Court found no evidence that the prosecutor acted in bad faith or maliciously in seeking a felony indictment against the defendant, it noted that *Pearce* was not based upon actual retaliatory motivation. The *Blackledge* Court concluded that the prosecutor "clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court." 417 U.S. at 27. By following an appeal with an increased charge, thereby " 'upping the ante,' " the government could "insure that only the most hardy defendants will brave the hazards of a *de novo* trial." 417 U.S. at 28.

Both *Pearce* and *Blackledge* involve situations in which the defendant was penalized after exercising his right to appeal. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), *reh'g denied* 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511, presented a different situation. There, the High Court considered an allegation of vindictiveness which arose in a pretrial setting. The state prosecutor had threatened the

defendant that unless he pled guilty to the forgery charge, the prosecutor would also bring habitual criminal offender charges, on which the defendant was plainly chargeable. The habitual criminal charge carried a mandatory life imprisonment term; the forgery charge carried a maximum 10-year prison term. When the defendant refused to plead guilty, the prosecutor added the habitual count, and the defendant was convicted of the more severe charges. Even though the prosecutor openly admitted that he had acted vindictively in making his charging decisions, the *Bordenkircher* Court held that there was no due process violation, as the prosecutor had "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." 434 U.S. at 365.

Interpreting *Pearce* and *Blackledge* to forbid the State from unilaterally imposing a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction, the *Bordenkircher* Court contrasted the " 'give-and-take' " of plea bargaining where there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. 434 U.S. at 363. Significantly, the *Bordenkircher* Court stated that "by tolerating and encouraging the negotiation of pleas, [the U.S. Supreme Court] has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." 434 U.S. at 364.

In *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), the defendant was originally charged with several misdemeanor and petty offenses. The case was assigned to an attorney who did not have authority to try felony cases or to seek indictments from the grand jury. After the defendant initiated plea negotiations with the prosecutor, he advised that he did not wish to plead guilty and desired a trial by jury. The case was transferred to the appropriate court, where the prosecutor obtained a four-count indictment charging defendant with one felony count and three misdemeanor counts. After the defendant was found guilty on the felony

count and one misdemeanor count, he moved to set aside the verdict on the ground of prosecutorial vindictiveness, arguing that the additional felony indictment "gave rise to an impermissible appearance of retaliation." 457 U.S. at 371.

Unlike the situations presented in *Pearce* and *Blackledge*, posttrial settings in which there was a presumption of prosecutorial vindictiveness, *Goodwin* arose in a pretrial setting in which there is no presumption of prosecutorial vindictiveness. Finding no evidence that could give rise to a claim of actual vindictiveness and absent a presumption of vindictiveness, the *Goodwin* Court held that no due process violation had been established. It reasoned that the Due Process Clause is not offended by all possibilities of increased punishment, but only by those which pose a realistic likelihood of vindictiveness. Importantly, the *Goodwin* Court stated that a "prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." 457 U.S. at 382.

Consistent with the law developed by the U.S. Supreme Court, we have in the past rejected a claim of prosecutorial vindictiveness where increased charges were filed prior to trial. For example, in *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992), a complaint was initially filed against the defendant, charging him with aiding the consummation of a felony and with being a habitual criminal. The information was dismissed when he was convicted of an unrelated sexual assault and habitual criminal charge. After the defendant successfully appealed his conviction for sexual assault, the prosecutor refiled the aiding and habitual criminal charge. We concluded that the State was entitled to such discretion and that there had thus been no unlawful prosecutorial vindictiveness.

Although Flye alleges that the habitual criminal offender charges were added in the criminal mischief case because he successfully exercised his rights in the sexual assault and burglary proceedings, it is apparent from the record that Flye was informed during plea bargaining that the habitual criminal charges would be added to all of his pending four felonies if he rejected the State's offer. The State was well within its rights;

accordingly, there is no merit to this assignment of error.

4. PROBATION

In the fourth and final assignment of error, Flye argues that the district court mistakenly thought that, having found him to be a habitual criminal, it had no authority to place him on probation and that it was error not to grant him probation.

Citing *Brown v. Parratt*, 560 F.2d 303 (8th Cir. 1977), Flye incorrectly postulates that probation is a sentencing option for a habitual criminal. In *Brown*, a Nebraska prisoner appealing from the denial of his petition for a writ of habeas corpus alleged that the Nebraska habitual criminal statute constituted cruel and unusual punishment. Judge Gerald W. Heaney concurred in the decision of the court that the habitual criminal statute did not constitute such punishment. However, in doing so, Judge Heaney urged, notwithstanding a prior opinion of the Eighth Circuit to the contrary, that the statute unconstitutionally gives prosecutors unreasonable discretion to control a defendant's sentencing. In the course of that discussion, he observed that the "trial court may place the convicted defendant on probation but it must impose the minimum required by the statute." *Id.* at 305-06. However, not only was Judge Heaney not deciding anything, he cited no authority for the proposition that one found to be a habitual criminal can be placed on probation.

In point of fact, our statutes reflect otherwise. Probation is an option under Neb. Rev. Stat. § 29-2260(2) (Reissue 1989) if the offender has been convicted of "a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required." Section 29-2221 provides that a convicted habitual criminal shall be punished by imprisonment in the Department of Correctional Services adult correctional facility for a term of not less than 10 nor more than 60 years.

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and 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. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992); *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d

173 (1992); *State v. Matthews*, 237 Neb. 300, 465 N.W.2d 763 (1991). Because a conviction of habitual criminal dictates mandatory imprisonment, the court did not have discretion to impose a sentence of probation. Thus, the fourth and last assignment of error is as devoid of merit as were the preceding three.

IV. JUDGMENT

Inasmuch as the record fails to sustain any of Flye's assignments of error, the judgment of the Court of Appeals is reversed, and the cause is remanded with the direction that the judgment of the district court be reinstated and affirmed.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

LAWYERS TITLE INSURANCE CORPORATION, APPELLEE, V. CONRAD P. HOFFMAN, DOING BUSINESS AS HOFFMAN ENGINEERS & SURVEYORS, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, CLARENCE ROGER CARRELL AND CARRELL & ASSOCIATES, INC., THIRD-PARTY DEFENDANTS AND FOURTH-PARTY PLAINTIFFS, APPELLANTS, AND LAMP, RYNEARSON & ASSOCIATES, INC., A NEBRASKA CORPORATION, FOURTH-PARTY DEFENDANT, APPELLEE.

513 N.W.2d 521

Filed April 1, 1994. No. S-92-910.

1. **Demurrer: Pleadings: Appeal and Error.** In appellate review of a ruling on a general demurrer, the court is required to accept as true all of the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Demurrer: Pleadings.** In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial.
3. **Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.

4. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Ralph E. Peppard for appellants.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellee Lamp, Rynearson & Associates.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

This is a fourth-party action arising out of an action originally brought by Lawyers Title Insurance Corporation (Lawyers Title) against Conrad P. Hoffman, doing business as Hoffman Engineers & Surveyors (Hoffman). Lawyers Title alleged that a survey prepared by Hoffman failed to disclose an encroachment which Lawyers Title had insured against in reliance upon the survey. Hoffman brought a third-party action against another engineering firm, Carrell & Associates, Inc. (Carrell), claiming that Carrell had performed the actual survey. Carrell brought a fourth-party action for indemnification from Lamp, Rynearson & Associates, Inc. (Lamp). Lamp's demurrer was sustained on the basis that the statute of limitations barred Carrell's claim against Lamp. Carrell appeals.

SCOPE OF REVIEW

In appellate review of a ruling on a general demurrer, the court is required to accept as true all of the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial.

Wheeler v. Nebraska State Bar Assn., 244 Neb. 786, 508 N.W.2d 917 (1993).

FACTS

On or about June 2, 1989, Jiffy Lube International, Inc., entered into a contract with Hoffman in which Hoffman agreed to prepare an "as built survey" for property located in Omaha, Nebraska, and to certify the accuracy of the survey to Lawyers Title. Hoffman then retained Carrell to perform the survey, and on June 12, 1989, Carrell certified the survey to Lawyers Title. Carrell was paid $600 by Hoffman for preparation of the survey.

Lawyers Title was then requested to issue a title insurance policy on behalf of Pennzoil Products Company for the real estate encompassed by the survey and to give the insured insurance protection against encroachments relating to the real estate. Relying on the survey and the certification contained therein, Lawyers Title issued a policy of insurance in favor of Pennzoil Products Company granting protection against encroachments onto another's real estate.

In January 1990, a lawsuit was filed by Center Development Company, alleging, among other matters, that structures on the real estate owned by Pennzoil Products Company encroached onto real estate owned by Center Development Company. When Lawyers Title notified Hoffman of the lawsuit, Hoffman refused to take part in the litigation. Lawyers Title then entered a defense and eventually settled all claims regarding the encroachment for $7,500. Lawyers Title also incurred legal fees in the amount of $12,346.72.

Lawyers Title then sued Hoffman, alleging that Hoffman breached its contract with Jiffy Lube by preparing an incorrect survey and by certifying there were no encroachments when in fact there were substantial encroachments on the real estate owned by Center Development Company.

Hoffman sued Carrell, alleging that Hoffman had retained Carrell to conduct the "as built survey" of the Jiffy Lube property and that Carrell had breached its contract with Hoffman by preparing an incorrect survey when Carrell certified there were no encroachments when substantial

encroachments existed.

Carrell then filed a fourth-party action against Lamp, alleging that on or about December 1980, Lamp had originally surveyed the property that is the subject of this lawsuit; that during the course of that survey, Lamp incorrectly placed pins on the boundary of the surveyed property; and that Lamp knew or should have known that the pins placed by Lamp would be relied upon by subsequent surveyors. Carrell alleged that it relied upon the pins placed by Lamp in conducting its survey and that it should be entitled to indemnification or to receive contribution from Lamp in the amount of the judgment if Carrell was found liable.

Lamp demurred to the fourth-party petition, asserting, inter alia, that the petition failed to state a cause of action because the claim against Lamp was barred by the professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1989). The district court sustained Lamp's demurrer on that basis and dismissed the petition.

ANALYSIS

We must first determine whether the pleadings set forth sufficient facts upon which we can make a determination as to whether § 25-222 applies. Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided,* if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further,* that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or

> failure to render such professional service which provides the basis for the cause of action.

(Emphasis in original.)

A demurrer which challenges the sufficiency of the allegations is a general one. In our review of a ruling on a general demurrer, this court is required to accept as true all of the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). The court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

The demurrer of the fourth-party defendant, Lamp, states that the petition does not state facts sufficient for a cause of action for the following reasons:

> 1. Fourth-Party Plaintiff's Petition shows on its face that the cause of action asserted therein is barred by the professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1989).
>
> 2. That Lamp, Rynearson & Associates was not in privity of contract with the Fourth-Party Plaintiff and therefore, Lamp, Rynearson & Associates did not owe the Fourth-Party Plaintiff any legal duty and consequently can have no liability to the Fourth-Party Plaintiff.
>
> 3. As a matter of law, the Fourth-Party Plaintiff is obligated to personally perform any survey undertaken by it and to independently satisfy itself of the accuracy of pin placements. The Fourth-Party Plaintiff may not merely rely upon the accuracy of existing pins and therefore, the Fourth-Party Plaintiff is not entitled to contribution or indemnity as a matter of law.

The pleadings and exhibits attached do not permit this court to conclude or reasonably infer that Lamp's activity falls under the acts or omissions described in § 25-222. The petition states only that in 1980, Lamp "surveyed the property that is the subject of this lawsuit." We have not previously specifically included surveyors in our definition of professionals. In

Georgetowne Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 430 N.W.2d 34 (1988), although we determined that the specialty engineering firm rendered professional services for purposes of § 25-222, we did not discuss surveyors. The record here does not specifically disclose who performed the survey, the reason for the survey, or for whom the survey was done.

The Legislature has not specifically stated which occupations are governed by § 25-222. See *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987). In *Tylle*, we recognized that the term "profession" originally contemplated only theology, law, and medicine but that other vocations were later designated as a profession. We have applied the professional period of limitations contained in § 25-222 to architects and engineers, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); to accountants, *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983); to medical technicians, *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976); and to those giving investment advice, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). *Tylle, supra* (Caporale, J., concurring).

In *Georgetowne Ltd. Part.*, 230 Neb. at 27, 430 N.W.2d at 38, we defined the term "profession" as

> a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.

In this case, the petition does not set forth sufficient facts to establish whether § 25-222 applies to Lamp's activities in performing the survey, if in fact we are inclined to make such a determination. Defining the class of persons who will receive the benefit of a shortened statute of limitations may require the court to engage in a form of classification which more properly should be done by the Legislature. On the limited facts articulated by this pleading, we decline to even consider

whether surveyors render professional services under § 25-222. The court incorrectly sustained Lamp's demurrer on the basis that the statute of limitations barred Carrell's claim against Lamp.

We next consider whether Carrell failed to state a cause of action for the reasons stated in paragraphs 2 and 3 of Lamp's demurrer. A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

Paragraph 2 of Lamp's demurrer alleges that Lamp owed Carrell no legal duty and consequently had no liability to Carrell regarding the survey that was prepared in 1980 by Lamp. Carrell alleges that Lamp knew or should have known that the pins placed by Lamp would be relied upon by subsequent surveyors and that should Carrell be found liable, Carrell should be entitled to indemnification or to receive contribution from Lamp in the amount of the judgment. These facts are insufficient to establish a duty between Lamp and Carrell, and the court could have properly sustained the demurrer for this reason.

In order to establish a claim against Lamp, Carrell must show the existence of a legal duty from Lamp to Carrell. Such duty would have to be determined from the terms of the agreement between Lamp and the party for which the survey was performed. See *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989). We recognize that there is a common-law duty to perform the activity agreed to be done with care, skill, reasonable expediency, and faithfulness and that a negligent failure to do these conditions may be a tort as well as a breach of contract. *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954). However, the pleadings do not set forth Lamp's contractual duties in performing the survey. Without knowing what the duties were, it is not possible for us to determine whether such duties were in fact breached and whether such duties extended to persons not a party to the contract.

We have not previously dealt with the duty of a surveyor to third parties not in privity with the surveyor or the party for whom the survey was performed. In other situations, we have held that the duty of reasonable care generally does not extend to third parties absent fraud or other facts establishing such a duty. See, *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989) (accountant's duty of reasonable care did not extend to third parties absent fraud); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) (lawyer's duty to clients did not extend to third parties absent facts establishing a duty to them).

Carrell seeks to recover damages against Lamp based on Lamp's alleged negligent performance of its contract with a party which is not described in the pleadings. The pleadings do not allege that Lamp's duty of reasonable care extended beyond the obligation to the party for whom the survey was performed and do not indicate why that duty extended to Carrell as a third party.

Carrell's petition did not state that Lamp had any contractual obligation or privity of contract with Carrell. If the action resulted from a negligent performance of a contract, the court was correct in sustaining the demurrer because there was no privity of contract between the parties. The petition made no allegation that fraud had occurred or that the survey was a false representation.

The petition does not allege that the damages were reasonably foreseeable, nor does the petition state why the damages were reasonably foreseeable. The petition fails to state why a party that prepared a survey in 1980 should have foreseen the damages alleged by Carrell. Carrell alleged that Lamp should have known that the pins placed by it would have been relied upon by subsequent surveyors. Such an allegation is a conclusion not supported by any facts within the pleadings. In considering a demurrer, we accept the facts and reasonable inferences drawn from such facts, but not the conclusions of the pleader. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). The facts as alleged are insufficient to establish a duty between the parties either in contract or in tort, and the demurrer should have been sustained for this reason.

Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993). A correct result will not be set aside merely because it is based upon reasons which may be incorrect. *Healy v. Langdon, ante* p. 1, 511 N.W.2d 498 (1994).

In *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990), we held that if a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of an amendment, with or without costs, as the court in its discretion shall direct. Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that if a demurrer is sustained, the adverse party may amend if the defect can be remedied by amendment. We find that it may be possible for Carrell to state a cause of action in an amendment and that Carrell should be permitted to do so.

CONCLUSION

The order dismissing the petition without leave to amend was in error and an abuse of discretion. We remand the cause for further proceedings, and upon receipt of the mandate by the clerk of the district court, Carrell shall have 30 days to file an amended petition.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JIM PETERSON, APPELLEE, V. DENNIS P. KELLNER, APPELLANT.
513 N.W.2d 517

Filed April 1, 1994. No. S-92-1035.

1. **Judgments: Appeal and Error.** 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 a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Judgments.** In a bench trial, the trial court's entry of judgment in favor of a

certain party warrants the conclusion that the trial court found in that party's favor on all issuable facts.

3. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due.
4. **Accord and Satisfaction.** To constitute accord and satisfaction, there must be (1) a bona fide dispute between parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
5. _____. The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction? (2) Does that performance constitute a sufficient consideration for a return promise or for a discharge?
6. _____. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact.
7. _____. Where the terms of an accord are uncertain, there can be no meeting of the minds and, therefore, no accord and satisfaction.
8. **Prejudgment Interest.** In order to receive prejudgment interest in a cause of action accruing after January 1, 1987, a litigant must comply with the requirements of Neb. Rev. Stat. § 45-103.02 (Reissue 1988).

Appeal from the District Court for Johnson County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Johnson County, THOMAS J. GIST, Judge. Judgment of District Court affirmed in part, and in part reversed.

Thomas L. Morrissey, of Morrissey, Morrissey & Dalluge, for appellant.

Steven J. Mercure, of Nestor and Mercure, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

The plaintiff-appellee, Jim Peterson, sued the defendant-appellant, Dennis P. Kellner, for the claimed balance due for the lease of pastureland to the appellant lessee, who contended that an accord and satisfaction had been reached. The county court for Johnson County awarded the appellee "$1,600.00 together with prejudgment interest from October 12, 1990 through [May 14, 1992,] and costs of $38.48." On appeal to the district court, the county court's judgment was affirmed.

The appellant contends that the district court should have reversed the judgment of the county court, because the county court failed to find in the appellant's favor that an accord and satisfaction had been reached. However, since there was no meeting of the minds in regard to the alleged accord and satisfaction, we affirm that part of the judgment of the district court.

The appellant also contends that the award of prejudgment interest was improper. Although the appellant failed to assign this as an error on appeal to the district court, we note that it was plain error to award prejudgment interest where the requirements of Neb. Rev. Stat. § 45-103.02 (Reissue 1988) were not complied with. We, therefore, reverse the district court's judgment with respect to the award of prejudgment interest.

BACKGROUND

On May 10, 1990, the parties entered into a written lease agreement whereby the appellant lessee would rent 240 acres of pastureland from the appellee lessor. The agreement provided that the first half of the $7,200 rent would be paid on May 10, 1990. The second half would be due when the "cows and calves are taken from pasture." Although it was not a part of the writing, the appellant submits that the agreement required the appellee to make repairs of the fence surrounding the pasture. The appellee admitted to making some repairs on the fence and erecting an electric fence along one side of the pasture. The case proceeded on the basis of the contents of oral understandings and the written agreement.

On May 10, 1990, the appellant gave the appellee a check for $3,200. On or shortly after October 12, the appellant tendered a check to the appellee for $2,400 with the following memo: "Balance 1990 pasture rent." A letter delivered with the check stated: "This is the balance of the rent which equal's [sic] too [sic] $25.00 per acre. (Not $30.00) Since you did not fix no fence you agreed to fix." The appellee deposited both checks.

On October 22, 1990, the appellee's attorney sent the appellant a demand letter. On October 29, the appellant responded with a letter but no money. This action followed.

STANDARD OF REVIEW

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 a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

ACCORD AND SATISFACTION

The appellant contends the district court should have reversed the judgment of the county court, because the county court failed to find that an accord and satisfaction had been reached. The record before us merely shows that the appellant pled the defense of accord and satisfaction. However, given the general verdict, we conclude that the county court determined there was no accord and satisfaction. See *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986) (in a trial without a jury, trial court's entry of judgment in favor of a certain party warrants the conclusion that the trial court found in his favor on all issuable facts).

An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due. *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979). To constitute accord and satisfaction, there must be (1) a bona fide dispute between parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Mahler v. Bellis*, 231 Neb. 161, 435 N.W.2d 661 (1989).

We have stated that the principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction? (2) Does that performance constitute a sufficient consideration for a return promise or for a discharge? See *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974). The question of whether a payment rendered by the obligor, and later asserted to be in

satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact. *Id.*

The trial court made no specific findings of fact and was not requested to do otherwise. The court rendered a general verdict; therefore, we conclude that the trial court resolved this issue in favor of the appellee. See *Havelock Bank v. Woods, supra.*

The evidence adduced at trial on this issue shows that the appellee received a check from the appellant in the amount of $2,400. On that check was written "Balance 1990 pasture rent." Along with that check, the appellee received a letter from the appellant stating that the "balance of the rent," the equivalent of $25 per acre, was going to be paid instead of the $30 per acre agreed upon. The check and the letter are in conflict. According to the letter, the appellee could expect to receive the balance of rent totaling $25 per acre, or $6,000. However, the $2,400 check tendered as the balance due, when considered with the previous rent check of $3,200, was equal to total rent of $5,600, only $23.33 per acre.

When we consider this evidence in the light most favorable to the appellee and give the appellee the benefit of every reasonable inference deducible from the evidence, we conclude that the record would support a conclusion by the trial court that the appellee did not know, nor should he have known, that the $2,400 check was tendered in full satisfaction of the debt. The appellant was obviously offering to strike an accord, but the terms of that accord were uncertain.

The terms of the accord being uncertain, there could be no meeting of the minds, thus, no accord and satisfaction. See *Cox v. Rippe*, 146 Neb. 309, 19 N.W.2d 514 (1945) (absent evidence of a meeting of the minds, there was no accord and satisfaction.) A determination by the county court that there was no accord and satisfaction must therefore be upheld. The district court's affirmance was therefore proper.

PREJUDGMENT INTEREST

Appellant argues that the judgment awarded by the county court and affirmed by the district court erroneously included prejudgment interest. Although this issue was not raised on

appeal to the district court, from our review of the record in this matter, we note plain error with respect to the award of prejudgment interest.

In order to receive prejudgment interest in a cause of action accruing after January 1, 1987, as is the case here, a litigant must comply with the requirements of § 45-103.02. See *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993). Section 45-103.02 provides in relevant part:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

The record contains no evidence that these provisions were complied with. Therefore, the award of prejudgment interest was erroneous, and we reverse that part of the district court's judgment.

CONCLUSION

The county court's implicit determination that there was no accord and satisfaction is supported by the record under our standard of review. We, therefore, affirm that part of the district court's judgment upholding the county court's judgment for $1,600. However, the county court's award of prejudgment interest and the district court's affirmance thereof were erroneous, and we reverse the judgment to that extent.

AFFIRMED IN PART, AND IN PART REVERSED.