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REPORTS OF CASES

DECIDED BETWEEN

MAY 10, 1996 and OCTOBER 24, 1996

IN THE

Supreme Court of Nebraska

VOLUME CCL

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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DAVID J. LANPHIER, Associate Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	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
		Karen Flowers	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	Robert R. Steinke	Columbus
		John C. Whitehead	Columbus
		Alan G. Gless	Wahoo
		Michael Owens	York

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 Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchock, 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 Robert O. Hippe John D. Knapp Brian Silverman	Chadron 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	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		John V. Hendry	Lincoln
Fourth	Douglas	Samuel V. Cooper	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
		Lawrence Barrett	Omaha
Fifth	Boone, Butler, Colfax, Dodge Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary R. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F.A. Gossett III	Blair
		Patrick G. Rogers	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
		Philip 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, Hitchock, 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, Morrill, 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
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	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
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Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Joseph S. Ramirez	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln

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LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-93-930: **State ex rel. NSBA v. Carper.** Motion sustained; probation status lifted.

No. S-94-485: **State ex rel. NSBA v. Schmeling.** Motion sustained; Richard L. Schmeling reinstated as a member of the Nebraska State Bar Association.

No. S-94-864: **Village of Denton v. Board of Cty. Comrs.** Motion of appellant to dismiss appeal sustained; appeal dismissed as moot.

No. S-94-865: **Village of Denton v. Board of Cty. Comrs.** Motion of appellant to dismiss appeal sustained; appeal dismissed as moot.

No. S-94-1023: **Needlepoint Guard, Inc. v. Friedman.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-94-1047: **Van Groningen v. Department of Revenue.** Affirmed. See rule 7A(1).

No. S-94-1052: **Gronewold v. North Platte, Neb., Hosp. Corp.** Motion sustained; appeal dismissed; each party to pay own costs.

No. S-94-1069: **Kuebler v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-1103: **Hughes Corp. v. Nebraska Liquor Control Comm.** Stipulation allowed; appeal dismissed.

No. S-94-1161: **Hilton v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-1209: **Growing Place v. County Bd. of Equal. of Seward Cty.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-95-020: **Flores v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-95-247: **Global Credit Servs. v. AMISUB.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-95-260: **YMCA v. International Surplus Lines Ins.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-95-899: **Dawson v. Tomek.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-95-1305: **Hicklin v. Hicklin.** By order of the court, appeal dismissed for failure to file briefs.

No. S-95-1322: **McAtee v. Nebraska Dept. of Soc. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. S-95-1335: **Roach v. Wal-Mart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-95-1400: **Knaub v. Knaub.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-96-370: **State v. Garza.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-96-413: **State v. Wounded Arrow.** By order of the court, appeal dismissed for failure to file briefs.

No. S-96-695: **State v. Joubert.** Affirmed. See rule 7A(1).

No. S-96-715: **State ex rel. NSBA v. Mahlin.** By order of the court, Cynthia S. Mahlin suspended from the practice of law until further order of the court.

No. S-96-716: **State ex rel. NSBA v. Dolan.** By order of the court, Gary L. Dolan is suspended from the practice of law until final disposition of the charges against him.

No. S-96-794: **State ex rel. NSBA v. Green.** Respondent suspended from the practice of law until further order of the court.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-93-933: **Becker v. Allen**, 96 NCA No. 11. Petition of appellant for further review overruled on June 26, 1996.

No. A-94-069: **Schank v. TAS Truckline, Inc**. Petition of appellant for further review overruled on September 25, 1996.

No. A-94-308: **Becker v. Board of Regents**, 96 NCA No. 4. Petition of appellant for further review overruled on May 22, 1996.

No. A-94-566: **Sweetman v. Sweetman**. Petition of appellant for further review overruled on May 16, 1996.

No. A-94-579: **In re Estate of Snover**, 4 Neb. App. 533 (1996). Petition of appellee for further review overruled on June 12, 1996.

No. S-94-608: **Sandoval v. O'Neal**, 96 NCA No. 11. Petition of appellant for further review sustained on May 1, 1996.

No. S-94-712: **Boss v. Fillmore Cty. Sch. Dist. No. 19**, 4 Neb. App. 624 (1996). Petition of appellee for further review sustained on July 2, 1996.

Nos. A-94-730, A-94-980: **Travelers Ins. Co. v. Nelson**, 4 Neb. App. 551 (1996). Petition of appellant for further review overruled on June 19, 1996.

No. A-94-731: **Konat v. Schmitz**, 96 NCA No. 25. Petition of appellees for further review overruled on September 18, 1996.

No. A-94-753: **State v. Marion**. Petition of appellant for further review overruled on May 16, 1996.

No. S-94-756: **Swoboda v. Mercer Mgt. Co.**, 96 NCA No. 10. Petition of appellee for further review sustained on May 30, 1996.

No. A-94-827: **Gallner v. Gallner**. Petition of appellant for further review overruled on May 30, 1996.

No. A-94-831: **City of Pierce v. Lambrecht**, 96 NCA No. 13. Petition of appellant for further review overruled on May 16, 1996.

No. S-94-913: **Doe v. Golnick**. Petition of appellee for further review sustained on May 30, 1996.

No. A-94-940: **Rezabek v. Rezabek**, 96 NCA No. 15. Petition of appellant for further review overruled on July 2, 1996.

No. A-94-944: **Rudol v. Elder**. Petition of appellee for further review overruled on May 1, 1996.

No. A-94-984: **Utter v. Utter**, 96 NCA No. 15. Petition of appellant for further review overruled on September 18, 1996.

No. A-94-996: **Johnson v. Union Pacific RR. Co.** Petition of appellant for further review overruled on May 16, 1996.

No. A-94-1031: **Wiebelhaus v. Nagengast**. Petition of appellant for further review overruled on May 22, 1996.

No. A-94-1042: **Jamison v. Kenzy**, 96 NCA No. 21. Petition of appellant for further review overruled on September 25, 1996.

No. A-94-1110: **Simmons v. Connot**. Petition of appellants for further review overruled on July 17, 1996.

No. A-94-1121: **Haught v. Farm Bureau Ins. Co. of Neb.** Petition of appellee for further review overruled on July 17, 1996.

No. S-94-1142: **Blanchard v. City of Ralston**, 4 Neb. App. 692 (1996). Petition of appellee for further review sustained on September 25, 1996.

No. S-94-1198: **Allemang v. Kearney Farm Ctr.**, 96 NCA No. 17. Petition of appellant for further review sustained on May 30, 1996.

Nos. S-94-1239, S-94-1240, S-95-761, S-95-762: **In re Interest of Joshua M. et al.**, 4 Neb. App. 659 (1996). Petition of appellee for further review sustained on July 17, 1996.

No. A-94-1252: **Light v. Glass**, 96 NCA No. 24. Petitions of appellants for further review overruled on September 18, 1996.

No. A-95-001: **Brown v. Safeway Cab, Inc**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-013: **Larsen v. Grabowski**, 96 NCA No. 12. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-021: **Robinson v. Robinson**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-034: **Wynn v. Hathaway**. Petition of appellant for further review overruled on June 26, 1996.

No. S-95-080: **Olson v. SID No. 177**. Petition of appellant for further review sustained on June 26, 1996.

No. A-95-123: **State v. Green**. Petition of appellant for further review overruled on September 18, 1996.

No. S-95-125: **Pope v. Pope**, 96 NCA No. 21. Petition of appellee for further review sustained on September 18, 1996.

No. A-95-132: **Ferguson v. Village of Miller**. Petition of appellee for further review overruled on September 18, 1996.

No. S-95-177: **Dau v. Hellbusch**. Petition of appellee for further review sustained on September 18, 1996.

No. A-95-205: **Prince v. Prince**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-237: **Mueller v. Bohannon**, 96 NCA No. 26. Petition of appellee for further review overruled on October 2, 1996.

No. A-95-237: **Mueller v. Bohannon**, 96 NCA No. 26. Petition of appellee for further review overruled on August 2, 1996, for lack of jurisdiction.

No. A-95-254: **State v. Gaston**, 96 NCA No. 5. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-291: **State v. Lomack**, 4 Neb. App. 465 (1996). Petition of appellee for further review overruled on May 16, 1996.

Nos. A-95-319, A-95-320: **Mach v. Schmer**, 4 Neb. App. 819 (1996). Petition of appellant for further review overruled on September 18, 1996.

No. A-95-332: **Hroch v. Farmland Indus.**, 4 Neb. App. 709 (1996). Petition of appellant for further review overruled on July 9, 1996, as filed out of time.

No. A-95-334: **Shafer v. Shafer**, 96 NCA No. 33. Petition of appellee for further review overruled on October 2, 1996.

No. A-95-361: **State ex rel. Clanton v. Clanton**, 96 NCA No. 33. Petition of appellee for further review overruled on October 2, 1996.

No. A-95-373: **State v. Tunender**, 4 Neb. App. 680 (1996). Petition of appellant for further review overruled on July 17, 1996.

No. A-95-406: **Yerkes v. Mark Hopkins Homes, Inc.**, 96 NCA No. 32. Petition of appellant for further review overruled on September 13, 1996.

No. A-95-410: **In re Interest of Shannon R.**, 96 NCA No. 6. Petition of appellant for further review overruled on May 22, 1996.

No. S-95-413: **Klinginsmith v. Wichmann**, 96 NCA No. 29. Petition of appellant for further review sustained on September 18, 1996.

No. A-95-444: **State v. Johnson**, 4 Neb. App. 776 (1996). Petition of appellee for further review overruled on September 25, 1996.

No. A-95-455: **In re Interest of Theodore W.**, 4 Neb. App. 428 (1996). Petition of appellant for further review overruled on May 16, 1996.

No. S-95-531: **Estate of Stine v. Chambanco, Inc**. Petition of appellant for further review sustained on October 2, 1996.

No. A-95-568: **Allied Mut. Ins. Co. v. Farmers Ins. Exch.**, 96 NCA No. 32. Petition of appellant for further review overruled on September 25, 1996.

No. A-95-577: **State v. Flanagan**, 4 Neb. App. 853 (1996). Petition of appellant for further review overruled on September 25, 1996.

No. A-95-590: **State v. Kennedy**, 96 NCA No. 16. Petition of appellant for further review overruled on June 12, 1996.

No. A-95-604: **State v. Brachtenbach**, 96 NCA No. 10. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-618: **State v. Hunt**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-626: **State v. Adams**, 96 NCA No. 16. Petition of appellant for further review overruled on June 12, 1996.

No. A-95-646: **State v. Tiff**, 96 NCA No. 13. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-659: **State v. Allen**. Petition of appellant for further review overruled on June 19, 1996.

No. S-95-669: **State v. Adams**, 96 NCA No. 18. Petition of appellee for further review sustained on July 2, 1996.

No. A-95-715: **McCormick v. McCormick**. Petition of appellant for further review overruled on May 22, 1996.

No. A-95-730: **Kusek v. Burlington Northern RR. Co.**, 4 Neb. App. 924 (1996). Petition of appellee for further review overruled on September 25, 1996.

No. A-95-741: **Wright v. Wright**. Petition of appellee for further review overruled on July 17, 1996.

No. S-95-745: **In re Interest of Borius H. et al.**, 96 NCA No. 21. Petition of appellant for further review sustained on September 18, 1996.

No. S-95-785: **In re Interest of Thomas M.**, 96 NCA No. 13. Petition of appellee for further review sustained on May 16, 1996.

No. S-95-785: **In re Interest of Thomas M.**, 96 NCA No. 13. Petition for further review dismissed on October 2, 1996, as having been improvidently granted. Petition for further review filed out of time.

No. S-95-800: **State v. Lundahl**, 96 NCA No. 12. Petition of appellant for further review sustained on May 22, 1996.

No. A-95-809: **State v. Naber**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-812: **Deckard v. Nebraska Bd. of Parole**. Petition of appellant for further review overruled on May 16, 1996.

No. S-95-821: **State v. Lee**, 4 Neb. App. 757 (1996). Petition of appellee for further review sustained on September 18, 1996.

No. S-95-853: **State v. Swift**, 96 NCA No. 17. Petition of appellant for further review sustained on June 12, 1996.

No. A-95-861: **State v. Ford**, 96 NCA No. 16. Petition of appellant for further review overruled on May 30, 1996.

No. S-95-922: **State v. Kinser**. Petition of appellee for further review sustained on September 18, 1996.

No. A-95-939: **Thomsen v. State**. Petition of appellants for further review overruled on September 25, 1996.

No. A-95-942: **State v. Gray**, 96 NCA No. 23. Petition of appellee for further review overruled on July 17, 1996.

No. A-95-943: **State v. Ackerman**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-946: **Johnson v. Johnson**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-963: **In re Interest of Teela H.**, 4 Neb. App. 608 (1996). Petition of appellant for further review overruled on June 26, 1996.

No. S-95-964: **State v. Konfrst**, 4 Neb. App. 517 (1996). Petition of appellant for further review sustained on May 22, 1996.

No. A-95-973: **In re Interest of Christopher L.**, 96 NCA No. 21. Petition of appellant for further review overruled on July 17, 1996.

No. A-95-986: **State v. Thompson**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-1026: **State v. Mowitz**. Petition of appellant for further review overruled on May 30, 1996.

No. A-95-1040: **Swearingen v. Swearingen**. Petition of appellant for further review overruled on September 18, 1996.

No. S-95-1045: **Memorial Hosp. of Dodge Cty. v. Porter**, 4 Neb. App. 716 (1996). Petition of appellee for further review sustained on July 17, 1996.

No. A-95-1054: **State v. Hill**. Petition of appellant for further review overruled on May 1, 1996.

No. A-95-1063: **State v. Mackey**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1077: **Zoucha v. United Parcel Service**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. S-95-1119: **Dougherty v. Swift-Eckrich, Inc.**, 4 Neb. App. 653 (1996). Petition of appellee for further review sustained on June 12, 1996.

No. S-95-1120: **State v. Hingst**, 4 Neb. App. 768 (1996). Petition of appellee for further review sustained on September 18, 1996.

No. S-95-1130: **PSB Credit Servs., Inc. v. Rich**, 4 Neb. App. 860 (1996). Petition of appellee for further review sustained on September 25, 1996.

Nos. A-95-1139 through A-95-1142: **In re Guardianship of Alice D. et al.**, 4 Neb. App. 726 (1996). Petition of appellant for further review overruled on July 17, 1996.

No. A-95-1143: **In re Interest of Brandon W.**, 4 Neb. App. 811 (1996). Petition of appellant for further review overruled on September 18, 1996.

Nos. A-95-1146, A-95-1147: **State v. Beeder**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1176: **State v. Freeman**. Petition of appellant for further review overruled on June 19, 1996.

No. A-95-1191: **State v. Urban**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-1223: **Paulsen v. Paulsen**. Petition of appellant for further review overruled on May 30, 1996.

No. A-95-1245: **State v. Freeman**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1254: **State v. Garber**. Petition of appellant for further review overruled on September 18, 1996.

Nos. S-95-1275, S-95-1276: **State v. Kennedy**. Petition of appellee for further review sustained on September 25, 1996.

No. A-95-1307: **State v. Krason**. Petition of appellant for further review overruled on June 26, 1996.

No. A-95-1313: **State v. Thomas**. Petition of appellant for further review overruled on June 12, 1996.

No. S-95-1337: **Hynes v. Hogan**, 4 Neb. App. 866 (1996). Petition of appellee for further review sustained on September 18, 1996.

No. A-95-1353: **State v. Longoria**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1363: **In re Adoption of Trabert**. Petition of appellant for further review overruled on October 2, 1996.

No. A-95-1366: **State v. Talley**. Petition of appellant for further review overruled on June 12, 1996.

No. A-95-1371: **State v. Wittmuss**. Petition of appellant for further review overruled on May 16, 1996.

No. A-95-1389: **Nicholson v. Nicholson**. Petition of appellant for further review overruled on July 2, 1996.

No. A-96-016: **State v. Langone**. Petition of appellant for further review overruled on September 25, 1996.

No. A-96-020: **Koenigsman v. Department of Pub. Inst.** Petition of appellant for further review overruled on June 26, 1996.

No. A-96-047: **State v. White**. Petition of appellant for further review overruled on July 17, 1996.

No. A-96-057: **State v. Holder**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-073: **Saltz v. Rose Lane Home**. Petition of appellant for further review overruled on October 2, 1996.

No. A-96-176: **State v. Tobin**. Petition of appellant for further review overruled on July 17, 1996.

Nos. A-96-228, A-96-229: **State v. Schlagenhauff**. Petition of appellant for further review overruled on October 2, 1996.

No. A-96-234: **State v. Tietjen**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-235: **State v. Polivka**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-236: **State v. Patrick**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-281: **State v. Vongrasmy**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-472: **State v. Fraser**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-566: **Wineberg v. Austin**. Petition of appellant for further review overruled on September 18, 1996.

ERNEST G. SCHIFFERN AND ROSEANNE D. SCHIFFERN, PERSONAL REPRESENTATIVES OF THE ESTATE OF DALE SCHIFFERN, DECEASED, APPELLANTS, V. NIOBRARA VALLEY ELECTRIC MEMBERSHIP CORPORATION, APPELLEE.

547 N.W.2d 478

Filed May 10, 1996. No. S-94-193.

1. **Summary Judgment: Negligence: Proof.** To entitle a defendant to summary judgment on the issue of contributory negligence, the defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) the plaintiff's contributory negligence was more than slight as a matter of law or (2) the defendant's negligence was not gross in comparison to the plaintiff's negligence as a matter of law.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Negligence: Time.** In actions accruing before February 8, 1992, a plaintiff may be barred from recovering as a matter of law if his or her contributory negligence is more than slight and the defendant's negligence was not gross in comparison.
4. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Reversed and remanded for further proceedings.

James Widtfeldt for appellants.

Steven E. Guenzel, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

The estate of Dale Schiffern brought this wrongful death action against Niobrara Valley Electric Membership Corporation (Niobrara), alleging that Niobrara's agents negligently caused Schiffern's death. The trial court granted Niobrara's motion for summary judgment, and the Schiffern estate appeals. Because there is a genuine issue of fact as to the degree of Schiffern's negligence as compared with Niobrara's, we reverse the district court's order of summary judgment, and remand for further proceedings.

FACTUAL BACKGROUND

Schiffern was the operator of a vehicle in which Edgar Tunender was a passenger. The vehicle that Schiffern was operating struck Niobrara's parked truck. As a result of the collision, Tunender and Schiffern were both killed. Tunender's estate sued Niobrara and recovered $19,614.36.

The Schiffern estate brought the present action against Niobrara. The estate filed a motion for partial summary judgment on the issue of Niobrara's negligence. Likewise, Niobrara filed a motion for summary judgment alleging that Schiffern's contributory negligence should bar his recovery as a matter of law.

In the summary judgment proceedings in the district court, Niobrara offered, inter alia, the bill of exceptions from the Tunender trial. The following facts have been gleaned from the Tunender bill of exceptions:

ACCIDENT

In the early morning hours of March 12, 1989, Niobrara received reports of power outages in the area north of Atkinson, Nebraska. At this time, the area surrounding Atkinson was enveloped in a thick fog. Two of Niobrara's employees, Ron Clark and Mick Humpal, were on call that night.

According to Clark's testimony, Clark and Humpal went to a utility pole north of Atkinson to repair the fault in the electrical line. Because of the fog, Clark parked the truck facing oncoming traffic with the brightest headlights on and as close to the utility pole as possible. Clark testified that he pulled the

truck as far off the highway as he could, but remained partly in the lane of oncoming traffic because he was afraid of becoming stuck in the ditch. Trooper Keith Rodaway, who was qualified as an accident reconstruction expert and who investigated the accident scene, estimated that the east side of the truck was 3 feet from the west edge of the pavement.

Neither Clark nor Humpal could recall whether or not the emergency strobe light on the top of the utility truck had been turned on. Nevertheless, Humpal left the truck to repair the electrical fault, while Clark stayed in the truck. After resetting the device, Humpal was headed to the back of the truck to replace some equipment when he heard a high-pitched squeal and saw the truck go flying by him. The Schiffern car, which was proceeding south, hit the utility truck head on. The Niobrara truck was thrown 38 feet by the impact. The accident killed both Tunender and Schiffern.

Speed of Schiffern Car

The officers who examined the scene of the accident found tire skid marks measuring 104 feet. During the Tunender trial, Dr. Ted Sokol, an accident reconstruction expert, testified that the very lowest possible range of speed for the Schiffern car immediately preceding impact was 32 to 41 miles per hour. Taking into account the braking distance indicated by the length of the skid marks, Sokol conservatively estimated that the speed of the car prior to the application of brakes was, at a minimum, 52 to 60 miles per hour. Furthermore, Rodaway testified that one of the causes of the accident was the "speed for the conditions of the environment."

Also during the Tunender trial, various law enforcement officers, ambulance drivers, Humpal, and Clark testified concerning visibility during the time at which the accident occurred. All of these parties testified that visibility was poor, and most testified that they thought that 35 miles per hour was the absolute maximum safe speed.

Effect of Lights of Niobrara Vehicle

The experts also testified on what effect the fog, in combination with the headlights, was likely to have on an approaching motorist. Rodaway testified that another cause of the acci-

dent was the "placement of the vehicles on the roadway." Explaining his attribution of cause to the placement of the vehicles, Rodaway stated:

> Placement of the vehicles in this particular situation presented an unusual environment for a driver. In other words, if I put the vehicle in this position, I expect it to be on a certain place on the road, and when I have the environment that I have, if I can't respond to that correctly, then this contributes to the accident.

Rodaway found two problems with the placement of the vehicles. First, the driver of an approaching vehicle might experience "night vision blindness" from the strength of the long-range headlights. Second, Rodaway testified:

> All defensive tactics say go to the right. If the person in front of you has gone across your lane, and you try to go to the left of him, and he now realizes now [sic] what he has done, and he tries to go back into his lane, you may end up having a collision on the wrong side of the road for you, just because you are trying to avoid that gentleman. Always teach go to the right.

However, Sokol disagreed with Rodaway's opinions. With regard to the night blindness issue, Sokol testified that night blindness did not play a role because "if you have ever seen car headlights approach you in a fog, they are very, very dim, and are not bright at all, so you don't have a night blindness." In fact, Sokol testified, "The lights of the truck were simply a visible indicator to the approaching driver of the position of the vehicle. It in no way blinded the approaching driver of that Mustang." Second, Sokol discounted Rodaway's opinion that the defensive driving technique of steering to the right may have contributed to the accident, stating that in his opinion, Schiffern was not intentionally steering to the right.

Motions for Summary Judgment

The Schiffern estate filed a motion for partial summary judgment on the issue of Niobrara's negligence. Niobrara filed a motion for summary judgment alleging that Schiffern's contributory negligence barred recovery as a matter of law. At the hearing on the estate's motion for partial summary judgment

and Niobrara's motion for summary judgment, the district court received the bill of exceptions from the Tunender trial. The estate did not object to receipt of this evidence. The district court granted both the estate's motion for partial summary judgment and Niobrara's motion for summary judgment, resulting in judgment for Niobrara. Niobrara does not appeal the grant of summary judgment on the issue of its negligence. The estate appeals.

ASSIGNMENTS OF ERROR

The Schiffern estate's assignments of error, summarized, are as follows: (1) The trial court erred in sustaining Niobrara's motion for summary judgment, (2) the court's order was against the law and the evidence, (3) the court erred in determining that Schiffern was speeding before applying the brakes and colliding with the truck, (4) the court erred in drawing conclusions from the evidence adduced in the Tunender trial, and (5) the evidence from the Tunender trial was improperly received because collateral estoppel does not apply.

STANDARD OF REVIEW

To entitle a defendant to summary judgment on the issue of contributory negligence, the defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) the plaintiff's contributory negligence was more than slight as a matter of law or (2) the defendant's negligence was not gross in comparison to the plaintiff's negligence as a matter of law. *John v. ∞ (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

Summary judgment is proper 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

ANALYSIS

We begin by noting that the law in Nebraska on contributory negligence has changed since the time at which this action arose. Under the present law, a plaintiff's contributory negligence "diminish[es] proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence" but does not bar recovery unless the plaintiff's share of fault is greater than or equal to the defendant's. Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). However, Neb. Rev. Stat. § 25-21,185 (Reissue 1995) sets forth the law in effect for actions arising prior to the new comparative negligence scheme. Section 25-21,185 provides:

> In all actions accruing before February 8, 1992, brought to recover damages for injuries to a person or to property caused by the negligence or act or omission giving rise to strict liability in tort of another, *the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison*, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff, and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

(Emphasis supplied.)

Thus, this court has previously concluded that a plaintiff may be barred from recovering as a matter of law if his or her contributory negligence is more than slight and the defendant's negligence was not gross in comparison. See, *Birchem v. Eggers*, 236 Neb 775, 463 N.W.2d 824 (1990); *Hines v. Pollock*, 229 Neb. 614, 428 N.W.2d 207 (1988); *Krul v. Harless*, 222 Neb. 313, 383 N.W.2d 744 (1986). Additionally, we have held, with regard to the predecessor of this statute, that the words "slight" and "gross" are comparative terms, and the negligence of the plaintiff or the defendant is not to

be evaluated as slight, gross, or otherwise, standing alone. *Niemeyer v. Tichota*, 190 Neb. 775, 212 N.W.2d 557 (1973).

The trial court's rationale for granting Niobrara's motion for summary judgment was explained as follows:

> The court is mindful that comparative negligence is a question of fact for the jury. Therefore, summary judgment is proper only if the facts, and all reasonable inferences flowing therefrom, viewed in the light most favorable to the Schifferns, will lead a reasonable mind to only one possible conclusion. This is an extremely high burden to overcome.
>
> However, this court concludes that any reasonable mind would arrive at only one conclusion on this issue. That three-part conclusion, which the court determines as a matter of law, is: (1) that the decedent was negligent in operating his vehicle at a speed greater than was reasonable and prudent under the conditions then existing, (2) that this negligence was a proximate cause of the accident, although not the sole proximate cause, and (3) that the negligence of the decedent was more than slight in comparison to the negligence of Niobrara.
>
> The court sympathizes with the Schifferns concerning the loss of their son. However, the law rejects sympathy as a basis for legal results. A legal decision must be based upon the applicable facts and law of the case. The *Tunender* decision established Niobrara's negligence. The evidence here, presented originally in *Tunender*, demonstrates the decedent's concurring negligence. Under the "slight/gross" standard applicable to this case, the law simply provides no basis for recovery. Accordingly, Niobrara's motion for summary judgment will be sustained and the Schifferns' petition will be dismissed with prejudice.

We must determine if the Schiffern estate is barred as a matter of law from recovering because of the level of Schiffern's contributory negligence. We have previously recognized that to obtain summary judgment on the issue of contributory negligence, the defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1)

the plaintiff's contributory negligence was more than slight as a matter of law or (2) the defendant's negligence was not gross in comparison to the plaintiff's negligence as a matter of law. *John v. ∞ (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

However, as always, summary judgment is proper 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). We must, therefore, determine whether any genuine issues of material fact remain.

At the hearing on the motion for summary judgment, Niobrara introduced evidence of Schiffern's contributory negligence by introducing the entire bill of exceptions from the Tunender trial. The Schiffern estate did not object to its receipt. Nevertheless, the estate now complains of the receipt of the bill of exceptions of the Tunender trial. We have previously held that failure to make a timely objection waives the right to assert prejudicial error on appeal. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). As the estate failed to object to the receipt of the bill of exceptions from the Tunender trial, we will not consider its receipt as error.

Furthermore, the Schiffern estate objects to the receipt of the testimony from the Tunender trial as an improper use of collateral estoppel. The collateral estoppel doctrine precludes the same parties from retrying an issue of ultimate fact which has been determined by a valid and final judgment in another case. *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). The bill of exceptions from the Tunender trial was not received on the basis of collateral estoppel because the estate was not a party to the Tunender trial. Instead, the testimony from the Tunender trial was introduced

as evidence of Schiffern's negligence, and the estate failed to object to its receipt. Therefore, the estate is barred from objecting to its use.

The evidence adduced during the Tunender trial demonstrates that Schiffern was contributorily negligent. Rodaway testified that one of the causes for the accident was the "speed for the conditions of the environment." Furthermore, Sokol testified that prior to the application of brakes, the minimum speed of Schiffern's vehicle was 52 to 60 miles per hour. At the hearing on the motion for summary judgment, the estate did not introduce evidence to contradict Sokol's testimony from the Tunender trial. Thus, there was uncontroverted evidence in the record to establish contributory negligence on the part of Schiffern.

However, the experts disagreed as to the effect the placement of the Niobrara vehicle had upon Schiffern. Rodaway testified that the accident would not likely have occurred absent the placement of the vehicles. Rodaway reasoned that Schiffern may have been temporarily blinded by the oncoming headlights. Additionally, he asserted that defensive driving technique would have caused Schiffern to steer to the right—right into the path of Niobrara's truck.

On the other hand, Sokol discounted the effect of the placement of the vehicle, saying that because of the fog, the headlights would not have had much impact, because the fog itself would have made the light hazy rather than bright. Likewise, he disagreed with Rodaway's opinion that Schiffern may have steered to the right in the hopes of avoiding the collision.

Thus, the evidence introduced at the summary judgment hearing indicates a conflict in expert testimony on the issue of the effect of the bright headlights on Schiffern. Notwithstanding the evidence of speed and conditions, Rodaway testified that the accident may not have occurred in the absence of the placement of the truck. Sokol disagreed. In order to resolve the issue of the relative negligence of Niobrara and Schiffern, the issue of the effect of the placement of the utility truck must be resolved.

Having determined that the testimony received from the experts in the Tunender trial conflicts, we conclude that a genuine issue of material fact exists concerning the relative degrees of negligence of Niobrara and Schiffern. The presence of a genuine issue of material fact precludes the granting of the summary judgment; therefore, the trial court erred.

CONCLUSION

As the conflict in expert testimony creates a genuine issue of material fact, the district court erred in granting summary judgment. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., not participating.

WESTGATE RECREATION ASSOCIATION, APPELLEE, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT.

547 N.W.2d 484

Filed May 10, 1996. No. S-94-273.

1. **Pleadings: Motions to Strike: Appeal and Error.** Whether allegations in a pleading should be stricken presents a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Judgments: Appeal and Error.** A party who, after appealing from a judgment in that party's favor, voluntarily accepts the benefits or receives the advantage of the judgment is thereby precluded from afterward prosecuting his or her appeal.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Trial: Rebuttal Evidence.** The general rule is that rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced

by the adverse party; it is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case in chief or should have been introduced during the case in chief.

5. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
6. **Trial: Eminent Domain: Evidence: Real Estate: Sales: Valuation.** Generally, in a condemnation action evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant; foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
7. ____: ____: ____: ____: ____: ____. Whether properties which are the subject of other sales are sufficiently similar to the property condemned as to have some bearing on the value under consideration, and to be of aid to the jury, rests largely in the discretion of the trial court.
8. **Trial: Evidence: Testimony: Witnesses.** Where testimony given by a witness on direct examination creates an inference favorable to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.
9. **Trial: Eminent Domain: Expert Witnesses: Evidence: Sales.** In a condemnation proceeding, a party may be permitted to cross-examine an expert witness as to comparable sales other than those relied upon by the witness, provided that foundation has been laid that the sales inquired about are, in fact, comparable.
10. **New Trial: Verdicts: Appeal and Error.** Only an error which is prejudicial to the rights of the unsuccessful party justifies a new trial; in the absence of such an error, the successful party, having sustained the burden and expense of trial, is entitled to keep the benefit of the verdict.
11. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error.
12. **Eminent Domain: Real Estate: Valuation.** The three generally accepted approaches used for the purpose of valuing real property in eminent domain cases are: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation.
13. ____: ____: ____. Each of the three generally accepted approaches for the purpose of valuing real property in eminent domain cases is but a method of analyzing data to arrive at the fair market value of the real property as a whole.
14. **Eminent Domain: Real Estate: Improvements: Valuation.** The unit rule for valuing property requires that the value of improved property be considered as

a whole, without the assignment of separate costs for the land and individual improvements.

15. ____: ____: ____: ____. Generally, the reproduction cost method for valuing property may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist.
16. ____: ____: ____: ____. A finding of uniqueness or special use is proper only when property has special capabilities which make it unmarketable at its true value due to unique improvements.
17. **Trial: Evidence: Rebuttal Evidence: Waiver.** Normally, an objection to inadmissible evidence is waived if the objecting party later introduces similar evidence; however, the rule does not apply where the objecting party introduces similar evidence solely for the purpose of meeting the adversary's case by explaining or rebutting the original evidence.
18. **Trial: Evidence: Appeal and Error.** Where it does not appear from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error.
19. **Property: Valuation: Words and Phrases.** Cost of repair is not synonymous with market value.
20. **Trial: Evidence: Testimony: Hearsay.** A written summary of oral trial testimony offered to prove the truth of the matter asserted therein constitutes inadmissible hearsay.
21. **Trial: Evidence: Testimony: Appeal and Error.** The admission of written summaries of oral trial testimony is prejudicially erroneous.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for a new trial.

Paul F. Peters, of Schmid, Mooney & Frederick, for appellant.

James D. Sherrets and David A. Jarecke, of Sherrets, Smith & Gardner, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

This is a condemnation action in which the trial court, pursuant to verdict, entered judgment in the amount of $435,000 in favor of the plaintiff-appellee condemnee, Westgate Recreation Association. In appealing to the Nebraska Court of

Appeals, the defendant-appellant condemner, Papio-Missouri River Natural Resources District, assigned a number of errors to the trial court, including that it (1) incorrectly struck certain allegations from the district's answer and (2) wrongly received certain evidence. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to our docket. We now reverse the judgment of the trial court and remand for a new trial.

II. BACKGROUND

Seeking land for its Big Papillion Creek Channel Improvement Project and its Trailhead Park Project, the district instituted this action to acquire fee title to a portion of the land owned by Westgate. Westgate used its land as a swimming pool complex, which contained a main pool, a wading pool, a bathhouse, a parking lot, a redwood pavilion, a pumphouse, a storage area, outside lighting, and a chain link fence. The line of the taking went across a corner of the main pool, making its retention infeasible. Before the taking, the land contained 143,545 square feet and was zoned development reserve/flood plain/floodway. The property actually taken contained 81,725 square feet, leaving the condemnee 61,820 square feet.

III. ANALYSIS

With that background, we turn our attention to the assignments of error, supplying such additional facts as resolution of the issues requires.

1. Stricken Allegations

In the first assignment of error, the district complains of the trial court's striking from the district's answer the allegations which pled, as an affirmative defense, that Westgate's acceptance of the full amount of the award of the appraisers waived any right of appeal it otherwise had.

(a) Scope of Review

Whether allegations should be stricken presents a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those

reached by the lower courts. See *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996).

(b) Application of Law to Facts

The district's answer alleged that the amount awarded to Westgate by the county court appraisers was the sum of $291,569.66; that subsequent to such award, the district deposited the amount of $291,569.66 with the clerk of the county court in payment of such award; and that subsequent thereto, on or about September 17, 1991, Westgate obtained the district's stipulation and was paid by, and accepted from, the clerk of the county court the entire $291,569.66; and that having accepted the payment of the entire amount of the damages awarded, Westgate waived, and is precluded from further prosecuting, its appeal.

The district contends that the foregoing affirmative defense is based on our holding in *McCook Livestock Exchange Co. v. State*, 173 Neb. 766, 115 N.W.2d 147 (1962). The county court appraisers therein assessed the damages to the condemnee in the sum of $1,730, and the condemnee filed its notice of appeal to the district court. While the appeal was pending, the parties entered into a stipulation to release to the condemnee $1,350, an amount somewhat less than the 80 percent authorized to be released under then Neb. Rev. Stat. § 76-719.01 (Cum. Supp. 1959). However, almost 3 months before the stipulation, the condemnee's accountant had received a check of the county judge for $1,730, the full amount of the award, which was marked "For Condemnation." The accountant deposited the check to the credit of the condemnee. After the issues were joined on the appeal, the condemner successfully moved the district court to dismiss the appeal because the condemnee had ratified the award of the appraisers by acceptance of the full amount of the award from which it had appealed. We affirmed.

However, *McCook Livestock Exhange Co.* is distinguishable from the situation at hand on two separate grounds. First, § 76-719.01 has since been amended so that there no longer is a restriction on the amount authorized to be released to a condemnee. 1969 Neb. Laws, ch. 329, § 13, p. 1184. Second,

although the *McCook Livestock Exchange Co.* opinion states the general rule that a party who, after appealing from a judgment in that party's favor, voluntarily accepts the benefits or receives the advantage of the judgment is thereby precluded from afterward prosecuting his or her appeal, it also observed:

> Where in a condemnation suit a condemnee receives the full amount of an award made to it in county court by reason of a mistake in the payment, both on the part of the county judge and the condemnee's agent, and fails to pay or tender back the portion of the payment which exceeds that to which it was entitled with reasonable promptness after the discovery of the mistake, its appeal to the district court should be dismissed.

Id. at 770, 115 N.W.2d at 150.

Neb. Rev. Stat. § 76-719 (Cum. Supp. 1994) provides, in part, that "[i]n case an appeal is taken either to the district court or the Court of Appeals, any money deposited by the condemner shall remain in the hands of the county judge until a final judgment is rendered except as provided in section 76-719.01."

Section 76-719.01 (Reissue 1990), in effect at the time of the stipulation, provided, in part:

> Upon stipulation of the parties in interest, the county judge shall order that the amount stipulated by the parties, of the money deposited by the condemner in the county court, be paid forthwith for or on account of the damages the condemnee has sustained or will sustain by the appropriation of the property to the use of the condemner.

As Westgate received the moneys pursuant to the stipulation with the district, and because § 76-719.01 was amended as described earlier, Westgate received no money in excess of that which it was entitled to withdraw. Therefore, *McCook Livestock Exchange Co.* is inapposite.

(c) Resolution

The allegations at issue were therefore irrelevant and were properly stricken. See Neb. Rev. Stat. § 25-833 (Reissue

1995). Accordingly, there is no merit to the first assignment of error.

2. Evidence Received

The second assignment of error claims that the trial court wrongly admitted evidence concerning comparable sales, incorrectly received the testimony concerning the cost of reproducing the pool facility, improvidently accepted evidence concerning past costs of repairs, and mistakenly refused to reject written summaries of testimonial evidence.

(a) Scope of Review

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995).

(b) Application of Law to Facts

(i) Comparable Sales

One of the real estate appraisers called by Westgate testified in Westgate's case in chief that in his opinion the value of the facility before the taking was $945,635 and the value of the property that was taken was $760,175. The claim that the trial court improperly received evidence concerning comparable sales on which Westgate's appraiser relied in formulating those opinions rests on the fact that the trial court permitted the appraiser to testify concerning those sales for the first time during the rebuttal phase of the trial.

The general rule is that rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977). However, it is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case in chief or should have been introduced during the case in chief. *Id.*; *Sacco v. Gau*, 188 Neb. 808, 199 N.W.2d 605 (1972). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial

right and a just result. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995).

As the district's appraiser had testified concerning the comparable sale prices he relied upon in formulating his opinion that Westgate's damage by the taking was $190,259, it cannot be said that allowing Westgate's appraiser to testify in rebuttal with regard to the particulars of the comparable sales that formed the basis of his valuation opinion given in Westgate's case in chief constituted an abuse of discretion.

Although the district further asserts that no adequate foundation for the testimony had been laid, we wrote in *Wear v. State of Nebraska*, 215 Neb. 69, 75-76, 337 N.W.2d 708, 713 (1983):

> Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. . . .
>
> Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. The trial court's determination will not be interfered with in the absence of an abuse of discretion. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.

Westgate's appraiser testified as to the size of the properties, the time of the transactions, the locations of the properties, the highest and best uses of the properties, and the means by which he confirmed the sale prices. This meets the minimum foundational requirements.

The district also complains, however, that the trial court permitted Westgate during the district's presentation in chief to cross-examine the district's appraiser about the comparable

sales relied upon by Westgate's appraiser, notwithstanding that Westgate's appraiser had not yet testified about those sales.

One of the issues presented in *Janik v. Gatewood*, 233 Neb. 298, 444 N.W.2d 900 (1989), was whether the trial court had improperly limited the plaintiff's cross-examination of the defendant's expert witness, thus preventing the plaintiff from eliciting testimony that would affect the credibility of the witness. We noted that Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 1995), provides that a judge may, in the exercise of discretion, permit, during cross-examination, inquiry into additional matters as if on direct examination and that cross-examination on matters affecting the credibility of a witness is permitted. We held that

> where testimony is given by a witness on direct examination and that testimony creates an inference favorable to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.

233 Neb. at 303-04, 444 N.W.2d at 904.

In *Morrison v. Development Co.*, 38 Wyo. 190, 266 P. 117 (1928), the appellant condemnees complained that the trial court erred in permitting cross-examination of their witnesses concerning sales of property of which nothing had been said in their direct examination. The Wyoming Supreme Court noted, however, that the witnesses had testified in the course of their direct examination that there were no sales of other lands in the vicinity of the subject properties and no market value therefor. The court stated that "it was proper that such witnesses should be asked on cross-examination about other sales which had occurred in the neighborhood in order that their knowledge on the subject might be tested." *Id.* at 198, 266 P. at 120.

This holding was refined in *Routh v. State Highway Commission*, 402 P.2d 706 (Wyo. 1965). There, the appellants complained that the trial court erred in restricting their cross-examination as to lands and the valuation thereof in the immediate vicinity or adjacent to lands presented as compara-

bles. The court noted that in the case then before it, the appellants "established no sufficient background for cross-examination by presenting evidence that the property inquired about was similar or comparable to the condemned property," and that, therefore, insufficient foundation had been laid for the interrogation. *Id.* at 709-10. See *Ohio Turnpike Commission v. Fiehler*, 139 N.E.2d 452 (Ohio App. 1955).

Therefore, in a condemnation proceeding, a party may be permitted to cross-examine an expert witness as to comparable sales other than those relied upon by the witness, provided that foundation has been laid that the sales inquired about are, in fact, comparable. Here, at the time the district's appraiser was cross-examined, there had been no foundation laid that the sales used by Westgate's appraiser were comparable. Consequently, it was wrong to permit such questioning.

But not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so; in the absence of such an error, the successful party, having sustained the burden and expense of trial, is entitled to keep the benefit of the verdict. See, *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). See, also, *Clouse v. St. Paul Fire and Marine Ins. Co.*, 152 Neb. 230, 40 N.W.2d 820 (1950) (error does not justify new trial unless it disadvantaged complaining party).

In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994); *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994). Here, the necessary foundation was ultimately laid during Westgate's rebuttal evidence. Thus, the error was not prejudicial.

(ii) Reproduction Cost

A builder called by Westgate testified that in his opinion the replication cost, or a cost to reproduce the pool facility, was $502,303. In reaching his opinions, the appraiser for Westgate referred to in subpart (i) above relied upon that testimony. The district urges that as the land and the fixtures should have been

valued as a whole rather than separately, neither the opinion of the builder nor those of the appraiser should have been received. In effect, the district argues that such testimony violated the "unit rule" in valuing fixtures.

We agree that there are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. *Ellis v. City of Kansas City*, 225 Kan. 168, 589 P.2d 552 (1979); *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 377 N.E.2d 909 (1978); *Manchester Housing Auth. v. Reingold*, 130 N.H. 598, 547 A.2d 219 (1988); 4 Nichols' The Law of Eminent Domain § 12C.01[3] (rev. 3d ed. 1995). Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole. *Correia, supra.*

We also agree that the unit rule is applicable whenever the market data approach is employed, *Ellis, supra*, and that this rule requires that the value of improved property be considered as a whole, without the assignment of separate costs for the land and individual improvements, *Dept. of Transp. v. First Bank*, 260 Ill. App. 3d 490, 631 N.E.2d 1145 (1992). See, *Ellis, supra*; *Milwaukee & Sub. Transp. v. Milwaukee County*, 82 Wis. 2d 420, 263 N.W.2d 503 (1978); *Alaska State Housing Authority v. DuPont*, 439 P.2d 427 (Alaska 1968).

Although we have not heretofore adopted the unit rule by name, we have demonstrated a preference for valuing condemned property as a whole. See, *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975) (ordinarily, entire property involved is to be valued and damages to it assessed as a whole); *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952) (when land taken has valuable deposits of minerals, or contains sand, gravel, peat, or other

materials of value, or is covered with growing crops or trees capable of being converted into lumber, circumstances may be considered so far as they affect market value of land, but part of realty cannot be separately valued for its materials as an item additional to value of land for purpose of sale). In addition, our dicta have referred to the unit rule by name. *Pettijohn v. State*, 204 Neb. 271, 281 N.W.2d 901 (1979) (measure of value in suit by lessee for value of improvements sold by lessor not like unit rule in eminent domain proceedings).

However, as Westgate's appraiser used the reproduction cost method in assessing the value of Westgate's property, and as the unit rule is applicable only for the market data approach, the issue is not whether the unit rule was violated, but, rather, whether the appraiser was properly allowed to consider the cost of reproduction in giving his opinion as to the value of Westgate's property.

We have declared that methods of valuation other than the market data approach may be used in certain circumstances. In *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 47, 157 N.W.2d 887, 896 (1968), we held that "capitalization of income of rentals from a reasonably prospective use of the property is an acceptable method of arriving at the value of the property as a factor in the determination of its present market value . . . ." In *First Baptist Church v. State*, 178 Neb. 831, 836-37, 135 N.W.2d 756, 759-60 (1965), we observed in dicta:

> Where there is proof that there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, the general rule is that resort may be had to some other method of fixing the value of property. . . .
>
> Depending on the nature of the property, the authorities have supported different methods of determining value in these situations. Expert testimony as to reproduction or replacement cost, less depreciation, has been approved in many cases as competent foundation evidence to support an opinion as to valuation.

See, also, *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 114 N.W.2d 29 (1962).

It is generally held, and we agree, that the reproduction cost method as an independent test of value may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist. *Manchester Housing Auth. v. Reingold*, 130 N.H. 598, 547 A.2d 219 (1988); *Ellis v. City of Kansas City*, 225 Kan. 168, 589 P.2d 552 (1979); *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 377 N.E.2d 909 (1978); *Alaska State Housing Authority, supra*; *State v. Burnett*, 24 N.J. 280, 131 A.2d 765 (1957); *DURA v. Pogzeba*, 38 Colo. App. 168, 558 P.2d 442 (1976).

However, we agree as well with the observation of the New Hampshire Supreme Court in *Manchester Housing Auth.*, 130 N.H. at 602, 547 A.2d at 222, that there is no need

> to adopt a rigid rule limiting the use of reproduction cost evidence to cases involving indisputably "unique" buildings with special characteristics. Rather, where the trial court, in the exercise of its sound discretion, has permitted the jury to consider reproduction cost evidence in an eminent domain proceeding, we will find no error on review if the record documents either (1) the property's uniqueness, or (2) the presence of a number of alternative safeguards—for example, recourse to the reproduction cost method as a last resort, other appraisals, challenges to the evidence on cross-examination, and instructions to the jury on its duty to consider all of the evidence in determining value—that probably minimize the risk of excessive influence on the jury.

See, also, *Correia, supra* (although cognizant that cost reproduction data does not always reflect meaningful measure of value, trial judge should be allowed to exercise discretion in determining when special conditions exist so as to justify use of such data). We thus conclude that it would be imprudent to limit the use of the reproduction cost method in this state only to unique buildings, as improved property may exist in the midst of an expanse of vacant land, resulting in a lack of com-

parable sales which would make the use of the market data approach impossible.

We also agree with the Illinois Supreme Court's view that a finding of uniqueness or special use is proper " 'only when property has special capabilities which make it unmarketable at its true value due to unique improvements * * * .' " *People ex rel. Director of Finance v. YWCA*, 74 Ill. 2d 561, 569, 387 N.E.2d 305, 309-10 (1979). In that case, the condemner sought to condemn land and a building containing a swimming pool, among other things. The court found that the property was not of a special use and that the improvements were not of such a unique nature as to render use of the fair market standard unjust or determination of market value impossible. Here, too, the presence of the swimming facility does not make Westgate's property unique.

However, the lack of uniqueness is not alone determinative of whether use of the reproduction cost method is proper in this case. Westgate's appraiser, in discussing the market data approach, testified:

> Now, in the case of the Westgate pool, it was a major problem because there were no pools for sale, there is not a general market for pools; I could not [go] out and find sales of pools. So in this case, the market approach is not applicable in the sense of finding another pool for sale. There has been one pool sale that I had been aware of and in my opinion, it was not a market sale so there was no way I could use the market approach. So I considered the market approach and could not use it.
>
> . . . .
>
> I concluded [the income approach] was not appropriate because it's not an income property and it's not — was not built for nor run for income production.

Under that circumstance, the reproduction cost method was an available method to determine value. Thus, it cannot be said the trial court erred in admitting the appraiser's opinion merely because the opinion relied on the reproduction cost method.

The difficulty is that Westgate's appraiser also stated that the highest and best use of the land as vacant was commercial,

and as improved was recreational. In arriving at his opinion as to the value of the property, the appraiser valued it at $3 per square foot as if it were vacant commercial land and then included in his opinion of value the cost of the pool. It is this method to which the district objects.

As stated in 4 Nichols' The Law of Eminent Domain § 12B.11[1] at 12B-83 to 12B-85 (rev. 3d ed. 1995):

> The problem of the appraiser and of the court is to determine the extent to which the value of the land is enhanced (or, conversely, diminished) by the structure upon it. Implicit in the utilization of evidence of reproduction cost is the fact that the structure adds value. . . .
>
> The proper measure of just compensation is market value of the land with the buildings upon it, with the owner receiving nothing for the buildings unless they increase the market value of the land. Accordingly, evidence of the structural value of the buildings is not admissible as an independent test of value. When, however, it is shown that the character of the buildings is well adapted to the location, the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property.

The appraiser explained that he valued the land as commercial real estate because "the value of the land as unimproved is developed specifically for the cost approach. And it's saying if we had to replace this facility and buy land to replace it, what would that land be worth? That's the unimproved part." However, that is an incorrect statement regarding the replacement cost approach.

Therefore, an appraiser utilizing the reproduction cost method cannot include as a factor the value of existing improvements, unless the improvements enhance the value of the land. As noted previously, in this case Westgate's appraiser valued the land as commercial real estate, its highest and best use as vacant land. It was therefore erroneous to include the cost of replacing the pool, as this did not enhance the property's value as commercial real estate. The situation would be

otherwise if the highest and best use of the land were recreational, for then the existing improvements would enhance its value.

The question is not what it would cost the condemnee to go out and purchase similar property and construct the same type of improvements on that property; rather, the question is what is the value of the property owned by the condemnee as of the date of the taking. The replacement cost method allows a condemnee, when there are no comparable sales available, to value the land and the improvements separately to arrive at the fair market value so that any enhancement of the value of the land by the improvements will be taken into consideration. But where the highest and best use of the condemnee's land is valued in such a way, i.e., commercial real estate, the value of which is not enhanced by the existing improvements, it is illogical to factor in the replacement costs of the improvements. Since the existing improvements do not enhance the value of the land, the need to value them separately does not exist. See, *Ark. State Highway Comm. v. Richards*, 229 Ark. 783, 318 S.W.2d 605 (1958) (in absence of showing that cost of particular improvement aids in determining market value of whole estate, evidence of cost should be excluded); *Connecticut Printers, Inc. v. Redevelopment Agency*, 159 Conn. 407, 270 A.2d 549 (1970) (general rule is that proper measure of damages is not market value of land plus reproduction cost of improvements, but market value of property as improved, in view of all uses to which it is adaptable and available; structure or improvement may add little or nothing to value unless it is of such character that it is adapted to some prospective use which affects market value of land); *Commonwealth v. Stamper*, 345 S.W.2d 640 (Ky. App. 1961) (improvements should be considered only to extent they enhance value of land to which affixed; if owner builds expensive house on land in slum area, cost of house is not fair test of amount by which house enhances market value of property because, as practical matter, property will not be marketable for sum commensurate with cost of house).

In *Ark. State Hwy. Comm'n v. Toffelmire*, 247 Ark. 74, 444 S.W.2d 241 (1969), three witnesses for the condemnee all testified that the highest and best use of the entire property at

the time of the taking was commercial, yet they all intermingled residential and commercial values. One expert valued the land before the taking as commercial in the amount of $40,964 and the improvements as residential in the amount of $28,153. The Arkansas Supreme Court reversed the jury's award, stating:

> Clearly, in a commercial use evaluation, the value of the improvements, both before and after the taking, should [be] based on commercial worth. Our case of *Arkansas State Highway Comm'n v. Griffin*, 241 Ark. 1033, 411 S.W.2d 495 (1967), sets out the rule. There we said "a verdict rendered by a jury which was partially based on testimony relating to commercial value of the land, and partially based on testimony relating to the land's value for residential purposes, would not be proper . . . ."

247 Ark. at 75, 444 S.W.2d at 241-42.

A similar result was reached in *Matter of Co. of Nassau*, 43 A.D.2d 45, 51, 349 N.Y.S.2d 422, 429 (1973), wherein the court stated:

> By no approach, therefore, can consideration be given to the improvements on the land as an alternative to the highest and best use as vacant land available for residential purposes. Where, as here, the highest and best use is for the land to be employed for a different purpose, no substantial value can be accorded to the improvement which has to be torn down. In *Acme Theatres v. State of New York* (26 N Y 2d 385, 388-389) [258 N.E.2d 912, 914, 310 N.Y.S.2d 496, 499 (1970)], this principle was enunciated as follows: "This is abundantly clear when we consider that in order to achieve a use of the land for purposes other than a drive-in-theatre, it would be necessary to demolish the buildings located thereon, *whose existence is inconsistent with that highest and best use* [emphasis supplied]. It is illogical to award damages for buildings that must be destroyed to achieve the use contemplated in the award of damages for the land."

See, also, *Ark. State Hwy. Comm'n v. Pearrow*, 1 Ark. App. 289, 614 S.W.2d 695 (1981) (judgment reversed where expert

who valued land at $6,400 per acre for commercial purposes also assigned value of $31,040 to condemnees' dwelling which did not contribute to commercial use of property).

As we have determined that it was wrong to allow Westgate's appraiser to testify as to the value of the property including as a factor the cost of reproducing the pool facilities, the question becomes whether this error was prejudicial. Westgate contends that it was not, as the district's appraiser also used the reproduction cost method in arriving at the $190,259 value of the land taken, using comparable sales of commercial real estate. In the opinion of the district's appraiser, the highest and best use of the property was recreational. In order to determine the value of a portion of the land, the district's appraiser used comparison sales with land that had commercial, quasi-commercial, and industrial uses. To that value, and the value of the property in the floodway, he added the value of the improvements.

It is true that normally, an objection to inadmissible evidence is waived if the objecting party later introduces similar evidence. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). However, the rule does not apply where the objecting party introduces similar evidence solely for the purpose of meeting the adversary's case by explaining or rebutting the original evidence. *Id.* The evidence given by Westgate's appraiser and that given by the district's appraiser are not similar, notwithstanding that both used the reproduction cost method and comparable sales of commercial real estate to arrive at the value of the underlying land. The difference between the testimony of Westgate's appraiser and that of the district's appraiser is that while Westgate's appraiser valued the property as commercial and used comparison sales of other nearby commercial properties because of their similarities, the district's appraiser valued the property as recreational and used comparison sales of other properties, not because of their designation as commercial or industrial, but because of their similarities in location, zoning, and proximity to a floodway or flood plain.

The district's appraiser testified: "I searched for any kind of sales that had similarity with the subject; emphasizing again a property with portions in the floodway and floodway fringe

and also zoning. I tried to find as many as I could that had zoning that was similar to the subject." In addition, the expert looked for sales that had similar locations and similar sizes.

In contrast, Westgate's appraiser stated that "we have to evaluate the property as unimproved as part of the assignment. As for the unimproved portion of the assignment, I looked for comparable unimproved sales. The unimproved highest and best use was as commercial, and the comparable sales were commercial and they were largely unimproved." Westgate's appraiser went on to state that he looked for properties that had land in the floodway, in the flood plain, and in a location for similar commercial or potential commercial uses. Of the six comparison sales Westgate's appraiser considered, all had as their highest and best use, in his opinion, commercial use. Indeed, he emphasized the commercial aspects of each comparable sale, i.e., their locations with respect to Interstate 80 or major thoroughfares and their visibility from Interstate 80, in discussing why each sale was a proper comparison. Proximity to and visibility from Interstate 80 do not seem to be factors that would affect the value of property that is used for a recreational use in the way it would affect property that has a commercial use.

What is clearly lacking from the opinion of Westgate's appraiser is some foundation to show that the evidence of comparable sales of commercial real estate is material and relevant to the value of the recreational property, i.e., property with the pool facilities, so that they could be factored into the value of the whole estate. See *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983) (generally, evidence as to sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show evidence is material and relevant; foundation evidence should show time of sale, similarity or dissimilarity of market conditions, circumstances surrounding sale, and other relevant factors affecting market conditions at time). It was therefore error to receive the testimony of Westgate's appraiser.

While the amount of the verdict falls within the various value opinions, it is impossible to determine what effect the opinion of Westgate's appraiser had on the verdict. Where it

does not appear from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error. *Singles v. Union P. R.R. Co.*, 174 Neb. 816, 119 N.W.2d 680 (1963); *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956); *Lane v. Burt County Rural Public Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956).

Thus, the district was unfairly prejudiced by the opinion of Westgate's appraiser based on both the value of the land as commercial real estate and the value of the pool facility.

(iii) Repair Costs

While that determination in and of itself requires that this cause be remanded for a new trial, we consider the remaining claims of evidential error, as the issues are likely to arise again in the course of that proceeding.

The district challenges as well the trial court's receipt of evidence concerning the cost of repairs made to Westgate's improvements prior to the date of the taking. Westgate's president was allowed to testify as to an amount spent on pool repairs from 1982 to 1990. In addition, evidence of expenditures for materials for repairs accomplished from 1981 to the date of the taking was received.

Cost of repair is not synonymous with market value. See *Kinter v. United States*, 156 F.2d 5 (3d Cir. 1946). We held in *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965), that testimony as to the cost of remodeling the subject property 8 to 14 years previously was not competent evidence of market valuation because it was not relevant and was too remote in point of time.

Indeed, Westgate concedes that the cost of past repairs provides no evidence of the value of the property, but urges that in this case the evidence was admissible, as it rebutted the testimony of the district's appraiser that the pool facilities were half depreciated. The difficulty with this contention is that a review of the record reveals that Westgate adduced this evidence before the district's appraiser testified.

Thus, the evidence was inadmissible; again, as it cannot be determined how the improperly admitted evidence influenced the jury, its receipt must be considered prejudicial error.

(iv) Summary Documents

The district also contends that the trial court erred in receiving into evidence exhibits consisting of written summaries of the testimony given by the two appraisers called by Westgate.

One of the questioned exhibits is a one-page summary of Westgate's appraiser testifying as outlined in subparts (i) and (ii) above. The summary details this appraiser's opinion as to value in terms of the pool facilities and the land, the value of the remainder both before and after the taking, the damages to the remainder, and the total taking damages. The other questioned exhibit is a single-page cover letter from the other Westgate appraiser to Westgate's counsel, which summarizes the opinions that the appraiser expressed at trial as to the value of the property before the taking, the value of the part taken, the value of the remainder before the taking, the value of the remainder after the taking, the damages to the remainder, and the total compensation due Westgate.

The district urges that the summaries constituted inadmissible and prejudicial hearsay.

Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801(3) (Reissue 1995), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." While the statements contained in the written summaries substantially duplicated certain of the oral testimony given at trial by Westgate's appraisers, it cannot be said that the statements contained in the summaries were themselves made at trial. Inasmuch as the statements contained in the summaries were offered to prove the truth of the matters asserted therein, the summaries constituted hearsay and were improperly admitted. See, *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990) (written estimate of repair damage was hearsay); *Belitz v. Suhr*, 208 Neb. 280, 303 N.W.2d

284 (1981) (statements of third parties in officer's report hearsay).

As explained by the Virginia Supreme Court, the admission of evidence of this type is prejudicially erroneous because during its deliberations, the jury might place more weight on written summaries than on its collective recollection of the actual testimony. *Norfolk and Western Ry. Co. v. Puryear*, 250 Va. 559, 463 S.E.2d 442 (1995). Accord *Dept. of Transp. v. Benton*, 214 Ga. App. 221, 447 S.E.2d 159 (1994).

(c) Resolution

Because of the foregoing evidential errors, the second assignment of error is meritorious.

IV. JUDGMENT

For the foregoing reasons, the judgment of the trial court is, as first noted in part I, reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARY SWIFT, APPELLANT, V. DAIRYLAND INSURANCE COMPANY, APPELLEE.

547 N.W.2d 147

Filed May 10, 1996. No. S-94-312.

1. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
2. ____: ____. 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.
3. **Res Judicata: Appeal and Error.** An appellate court may raise the issue of res judicata sua sponte.
4. **Res Judicata: Judgments.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judg-

ment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

5. **Res Judicata.** Res judicata bars all of those issues which could have been raised in the prior proceeding upon the same facts sought to be presented in the subsequent action.
6. **Judgments: Insurance: Motor Vehicles.** It is not a prerequisite to recovery that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the insured motorist's liability carrier.
7. **Judgments.** A judgment rendered by a court of competent jurisdiction is conclusive upon the parties thereto, even though the judgment is erroneous.
8. **Demurrer: Pleadings: Appeal and Error.** A court's dismissal of a petition after sustaining a demurrer results in a final, appealable order.
9. **Judgments: Demurrer: Actions.** A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits, even though by amendments a good cause of action might be stated.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Siegfried H. Brauer, of Ross, Schroeder, Brauer & Romatzke, for appellant.

Jeffrey H. Jacobsen and Timothy M. Welsh, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiff-appellant, Mary Swift, initiated this action against defendant-appellee, Dairyland Insurance Company (Dairyland), seeking recovery under her automobile insurance policy issued by Dairyland. Dairyland moved for summary judgment, contending that it had received inadequate notice of Swift's lawsuit against the uninsured tort-feasor and therefore was not bound by the results of that litigation. The district court granted Dairyland's motion and Swift appeals.

Swift assigns the following errors: (1) The court erred in overruling Swift's motion for summary judgment and in sustaining Dairyland's motion for summary judgment; (2) the court erred in finding that Dairyland was entitled to notice of Swift's Dawson County lawsuit against the tort-feasor; (3) the court erred in finding that intervention had to be made available to Dairyland in the Dawson County lawsuit; (4) the court

erred in finding that Swift had failed to afford Dairyland procedural due process concerning the Dawson County lawsuit; (5) the court erred in failing to enter judgment for Swift in the amount of the uninsured motorist limits in her policy; and (6) the court erred in failing to award Swift attorney fees, prejudgment and postjudgment interest, and litigation costs. We affirm.

Swift was injured in an automobile accident when riding as a passenger. The other car involved in the accident was driven by Bruce DeMoss. DeMoss had no liability insurance and was therefore uninsured. As a result of the accident, Swift incurred injuries for which she was partially compensated by the insurance carrier for the vehicle in which she was riding. At the time of the accident, Swift had a policy with Dairyland which provided uninsured motor vehicle coverage with a $50,000 per person limitation. Swift made demand upon Dairyland for additional payments to compensate her for her injuries. However, the parties failed to reach an agreement.

Swift thereafter filed a petition against Dairyland seeking a declaratory judgment and damages. In her petition, Swift alleged that "[t]he accident was caused solely by the failure of Bruce L. DeMoss to stop at a red light" and that DeMoss was uninsured. Swift further alleged that Dairyland was in breach of the insurance policy because it had refused to pay under the policy's uninsured motorist provision. Swift prayed for "a declaration of her rights under the contract of insurance with the defendant, for a jury determination of all relevant factual disputes, for judgment in the amount of her damages occasioned by defendant's breach," and for prejudgment and postjudgment interest and costs.

In response to Swift's petition, Dairyland filed a demurrer, contending that

> said Petition does not state a cause of action against this defendant upon which relief can be granted, and in particular it appears that plaintiff is attempting to bring a direct action against an insurance company who may have some responsibility for the tortuous [sic] acts of another. Defendant contends that it is not a proper party defendant in this action.

On March 26, 1993, the court granted Dairyland's demurrer, concluding that it could not determine Dairyland's obligation to pay until the underlying liability of DeMoss was determined. In its order, the district court stated,

> The court further finds that the plaintiff shall have twenty days from this day to amend its [sic] petition and if the petition cannot be amended to reflect a legal obligation on the part of the defendant to pay proceeds at this time, then in that event, the instant matter will be dismissed by the court.

On March 31, after the demurrer was granted but prior to the dismissal of Swift's petition against Dairyland, Swift filed an action against DeMoss in Dawson County. Dairyland had no notice of this lawsuit at the time the petition was filed. On May 28, Swift received a default judgment against DeMoss on the issue of liability only.

On June 15, the district court dismissed Swift's petition against Dairyland because Swift had not amended her petition. The dismissal stated, in relevant part, "[T]he court finds that no amendments have been submitted in the instant matter and the court therefore finds pursuant to its prior order that the instant matter should be and is dismissed with the costs of this action being taxed to the plaintiff." Swift did not appeal from the district court's order dismissing her petition.

On July 1, Dairyland received notice of the default judgment against DeMoss and of Swift's intention to proceed to trial in the Dawson County suit on the issue of damages. Dairyland took no action and did not attempt to intervene in the litigation after it had received notice. On October 4, Swift obtained a judgment against DeMoss of approximately $93,000. After obtaining the money judgment against DeMoss, Swift again made demand upon Dairyland for payment under the insurance policy. Dairyland refused to pay.

Swift filed this breach of contract action seeking damages in the amount of $50,000, the uninsured motorist policy limit. Both parties moved for summary judgment. Swift sought a summary judgment to the extent of her uninsured motorist coverage with Dairyland for the damages established in her case against DeMoss. Dairyland sought summary judgment,

contending that it was not bound by the judgment against DeMoss because of Swift's failure to provide Dairyland adequate notice of her action against DeMoss.

The district court granted Dairyland's motion for summary judgment and dismissed Swift's petition. The court, relying on *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969), held that Swift was required to give Dairyland full notice of the pending litigation as a matter of procedural due process so Dairyland could exercise its right to intervene. Swift appeals the granting of Dairyland's summary judgment.

We find that the district court was correct in dismissing Swift's petition. However, we reach this conclusion based on different grounds than those of the district court. A proper result will not be reversed merely because it was reached for the wrong reasons. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). 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. *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995).

We conclude that this case should have been dismissed based on the grounds that Swift's second action against Dairyland was barred by the doctrine of res judicata. The district court's reasoning regarding whether Swift provided Dairyland adequate notice of her tort action was therefore unnecessary.

Dairyland did not raise the doctrine of res judicata. However, an appellate court may raise the issue of res judicata sua sponte. *Kirkland v. Abramson*, 248 Neb. 675, 538 N.W.2d 752 (1995).

The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Id.* Res judicata bars all of those issues which could have been raised in

the prior proceeding upon the same facts sought to be presented in the subsequent action. *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984).

There is no question in this case as to whether the same parties were involved or whether the court was of competent jurisdiction. However, whether the judgment was a final judgment on the merits of the case deserves more discussion.

The district court's orders sustaining the demurrer and dismissing the case were erroneous in light of this court's decision in *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). *Lane* involved a plaintiff seeking recovery under the uninsured motorist provision of her insurance policy for personal injuries resulting from an accident with an uninsured motorist. In her original petition, the plaintiff joined the insurance company and the uninsured motorist as defendants. The court sustained a demurrer of the insurance company, finding misjoinder. The plaintiff amended her petition, naming the insurance company as the only defendant and praying for a judgment "for 'all sums for which the insured, the plaintiff herein, shall be legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle in question . . . .' " *Id.* at 398, 308 N.W.2d at 506.

The insurance company then filed another demurrer, claiming that the plaintiff failed to state a cause of action. This was denied, and the jury subsequently determined the liability and damages of the insurer. The insurance company appealed, contending that the plaintiff needed to plead and prove a judgment against the uninsured motorist in order to sustain her cause of action against the insurance company. This court held, however, that "it is not a prerequisite to recovery that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the insured motorist's liability carrier." *Id.* at 406, 308 N.W.2d at 509.

In reaching its holding, the *Lane* court noted that this state's uninsured motorist statute, Neb. Rev. Stat. § 60-509.01 (Reissue 1993), imposes "no requirement whatsoever that a suit be brought and judgment obtained against the uninsured motorist as a precondition to an action against the insurance

carrier." *Id.* at 406, 308 N.W.2d at 509. The court, quoting the Supreme Court of Kansas, stated that

> "the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer the insured has the burden of proving that the other motorist was uninsured, that the other motorist is legally liable for damage to the insured, and the amount of this liability. . . ."

Id. at 405, 308 N.W.2d at 509 (quoting *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973)).

Pursuant to *Lane*, it follows that Swift did not need to procure a judgment against DeMoss. The district court therefore erred when granting the demurrer and dismissing the case based upon the finding that the obligation of Dairyland under the uninsured motorist provision of the policy could not be determined.

However, a judgment rendered by a court of competent jurisdiction is conclusive upon the parties thereto, even though the judgment is erroneous. *Morimoto v. Nebraska Children's Home Society*, 176 Neb. 403, 126 N.W.2d 184 (1964). Moreover, a court's dismissal of a petition after sustaining a demurrer results in a final, appealable order. See *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995). Also, a judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits, even though by amendments a good cause of action might be stated. *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963).

In this case, Dairyland filed its demurrer, contending that Swift failed to state a cause of action. The district court granted Dairyland's demurrer with leave to amend, concluding that Dairyland's liability could not be determined prior to a determination of liability on the part of the uninsured motorist, DeMoss. The court subsequently dismissed the action, finding that no amendment had been made to reflect liability on the part of Dairyland. This constitutes a final judgment on the merits.

In sum, Swift did not amend her petition. However, as *Lane* indicates, her original petition was sufficient to sustain a cause of action. Nonetheless, she failed to stand on her petition and appeal this erroneous order dismissing her petition. This order therefore became a final judgment on the merits, which now bars her from bringing the action that is the subject of the present appeal.

For the reasons stated above, we affirm the district court's order dismissing Swift's cause of action against Dairyland.

AFFIRMED.

JEFFREY CARTER WATTS, APPELLEE, V. VICTORIA LACHELL WATTS, NOW KNOWN AS VICTORIA LACHELL KILGORE, APPELLANT.

547 N.W.2d 466

Filed May 10, 1996. No. S-94-545.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
3. **Divorce: Time.** A divorce decree becomes final 6 months after it is entered; during this 6-month waiting period, the matrimonial tie between the parties is not dissolved.
4. **Marriage: Words and Phrases.** Marriages are void when either party has a husband or wife living at the time of the marriage.
5. ____: ____. When a marriage is void, it is, for most purposes, as if no marriage had taken place.
6. **Alimony.** A provision for termination of alimony upon remarriage of the recipient requires a valid remarriage, and a void marriage standing alone does not terminate alimony obligations.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed.

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

Gregory A. Pivovar for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On August 6, 1993, the district court for Sarpy County entered an order dissolving the marriage of Victoria Lachell Watts, now known as Victoria Lachell Kilgore, and Jeffrey Carter Watts. The divorce decree ordered Watts to pay alimony to Kilgore for a period of 5 years but also provided that alimony would cease upon Kilgore's remarriage. Within 6 months of the decree, on December 16, 1993, Kilgore participated in a marriage ceremony. Watts immediately stopped making alimony payments. Under the laws of the State of Nebraska, Kilgore's second marriage was void because the ceremony was conducted during the 6-month waiting period after her divorce from Watts. Kilgore's putative second husband left her within 3 months of the marriage ceremony. Kilgore then filed a garnishment action in the district court for Sarpy County seeking to collect unpaid alimony from Watts. Kilgore asserted that since her second marriage was void and of no legal effect, Watts had not been relieved of his obligation to pay alimony under the divorce decree. Watts requested a hearing regarding the garnishment and asserted that his obligation to pay alimony had been terminated. The district court held that although Kilgore's second marriage was void, the void marriage nonetheless terminated Watts' alimony obligations. The district court stated that Kilgore might have remedies against her putative second husband. The court quashed the garnishment summons and ordered that its own prior divorce decree be modified to terminate alimony. Kilgore appeals. We reverse the order of the district court quashing the summons and modifying the divorce decree.

BACKGROUND

The facts are brief and uncontested. Watts and Kilgore were married on October 10, 1981. The parties are the parents of

four minor children. After more than 11 years, Jeffrey Watts filed for a divorce in the district court for Sarpy County. The matter was heard before the court on June 15, 1993. The divorce decree dissolving the parties' marriage was entered August 6, 1993.

The court adopted the property and custody agreement of the parties in its decree. Joint custody of the children was awarded. Watts was ordered to pay $300 in child support per month. Alimony was awarded "in the amount of $250.00 per month commencing on [September 1], 1993, and continuing for a period of 60 months thereafter or until either [party] shall die or until [Kilgore] shall remarry . . . ."

On December 16, 1993, Kilgore participated in a marriage ceremony with William Metoyer. (Metoyer is referred to as "William Montoya" in the bill of exceptions.) Kilgore testified that she believed that her divorce became final 6 months after the date of the June 15 hearing. Kilgore believed that she had entered into a valid second marriage, and she thereafter lived with Metoyer as husband and wife. When Metoyer learned that the marriage was in fact void, he ended his relationship with Kilgore. Apparently, the parties discovered that the second marriage was void in or around March 1994, but the exact date is not disclosed in the record.

Watts had stopped making alimony payments in January 1994. In April, Kilgore filed a garnishment affidavit and praecipe and asserted $750 in unpaid alimony was due. The record indicates that a garnishment summons and interrogatories were served upon the garnishee, Watts' employer. The record does not contain the garnishee's answer.

Neb. Rev. Stat. § 25-1011(1) and (2) (Reissue 1995) requires that notice be served upon the judgment debtor when a garnishment summons and interrogatories are served upon the garnishee. Section 25-1011(4)(c) provides that the judgment debtor may request a hearing if the debtor believes the amount is not owed on the judgment.

The record indicates that Watts received a notice to the judgment debtor. Such notice informed Watts that a garnishment summons had been served upon his employer and that he had the right to request a hearing if he did not believe that he

owed the judgment. Watts timely requested a hearing regarding the garnishment proceeding.

The matter was heard on April 26, 1994. At the hearing, Kilgore was the only witness. Kilgore admitted that she had participated in a marriage ceremony in December. Kilgore stated that her attorney had informed her that she had to wait 6 months after the June 15 hearing to remarry.

The district court held that Kilgore's participation in the marriage ceremony constituted a marriage, albeit a void marriage. Since the divorce decree provided that alimony terminated upon remarriage, the district court ordered that the garnishment summons for the unpaid alimony be quashed because the summons was for a debt not owed. The district court also ordered that the divorce decree be modified to provide for the termination of alimony as of January 1, 1994. The court suggested that Kilgore might have some remedies against Metoyer.

Kilgore timely appealed the order to the Nebraska Court of Appeals. We moved the appeal to our docket.

ASSIGNMENTS OF ERROR

Kilgore asserts that the district court erred in failing to hold that her second marriage was void and therefore without legal effect. Kilgore also asserts that the district court erred in failing to find that a void marriage standing alone does not terminate an alimony award. Further, Kilgore asserts that the district court erred by terminating alimony accrued prior to the date of its order eliminating her right to receive alimony. Finally, Kilgore asserts that the district court erred by modifying its prior award and order to pay alimony without good cause shown.

STANDARD OF REVIEW

Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996); *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995); *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990).

On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Koterzina v. Copple Chevrolet, supra*; *Davis Erection Co. v. Jorgensen, supra.*

ANALYSIS

In Nebraska, a divorce decree becomes final 6 months after it is entered. Neb. Rev. Stat. § 42-372(1)(b) (Reissue 1993). During this 6-month waiting period, the matrimonial tie between the parties is not dissolved. *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984); *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961).

In this case, the divorce decree was entered on August 6, 1993, and therefore was not final until February 7, 1994. Marriages are void when either party has a husband or wife living at the time of the marriage. Neb. Rev. Stat. § 42-103 (Reissue 1993). Kilgore, being then married, was not free to enter into a marriage on December 16, 1993, and therefore, the ceremony on that date resulted in a void marriage.

The question before us is whether Kilgore's right to alimony from Watts under their divorce decree was terminated upon Kilgore's entry into a void marriage. Some courts have held that a void marriage has no effect on a former husband's obligations, while others have concluded that a void marriage terminates those obligations. See Annot., Annulment of Later Marriage as Reviving Prior Husband's Obligations Under Alimony Decree or Separation Agreement, 45 A.L.R.3d 1026 (1972).

We have previously addressed the issue of whether alimony can be revived after a *voidable* marriage was annulled. In *Ballew v. Ballew*, 187 Neb. 397, 191 N.W.2d 462 (1971), an ex-wife sought to have her alimony reinstated after her subsequent marriage was annulled. The second marriage was voidable, apparently because it was based on misrepresentation. Essentially, the ex-wife's argument was that a provision in the divorce decree terminating alimony upon her remarriage was not effective unless the remarriage was valid. Since her subsequent marriage was annulled, the ex-wife argued that the annulment related back to her second marriage and made it void, as if it had never occurred. We said:

> The issues have been considered by many courts. The most common basis for decision in this area seems to turn on the distinction between a void and a voidable remarriage. The great majority of courts have held that a wife's voidable remarriage terminates the prior husband's obligation for alimony, and that the termination of a voidable second marriage does not reinstate a right of support from the first husband merely because support is unavailable from the second [husband]. . . . Some states have held that where the second marriage was void as distinguished from voidable, the remarriage did not terminate the obligation of the first husband for alimony.

Id. at 399, 191 N.W.2d at 464.

"When a marriage is void it is (for most purposes) as if no marriage had taken place." *Peters v. Peters*, 214 N.W.2d 151, 155 (Iowa 1974). "A major difference between a void marriage and a voidable marriage is that the latter is treated as valid and binding until its nullity is ascertained and declared by a competent court, whereas the former does not require such a judgment." *Flaxman v. Flaxman*, 57 N.J. 458, 461, 273 A.2d 567, 569 (1971).

In Nebraska, we have generally refused to give a void marriage any legal effect. See, *Randall v. Randall, supra*; *Copple v. Bowlin, supra*. Although the parties in these cases had participated in marriage ceremonies, they did not attain a married status due to some defect which caused their marriages to be void.

"A provision for termination of alimony upon remarriage of the recipient requires a *valid* remarriage . . . ." (Emphasis supplied.) *Bowman v. Bowman*, 163 Neb. 336, 343, 79 N.W.2d 554, 560 (1956). Since Kilgore's 3-month marriage to Metoyer was a legal nullity, the void marriage standing alone cannot operate to terminate Watts' alimony obligations under the divorce decree. We leave for another day deciding what effect, if any, a void marriage which lasted for a longer time period would have on a prior husband's alimony obligations.

CONCLUSION

The order of the district court modifying the divorce decree by terminating Watts' alimony obligation and quashing Kilgore's garnishment summons is reversed.

REVERSED.

LANPHIER, J., concurring.

The majority concludes that because Kilgore's putative second marriage was void, it has no legal effect and does not terminate Watts' alimony obligation. The majority overlooks this court's recent adoption of the putative marriage doctrine.

> The putative marriage doctrine provides that, when a marriage is declared a nullity, the civil effects of a legal marriage will continue to flow to the parties who contracted the marriage in good faith. . . . In other words, a putative spouse will have many of the rights of an actual spouse. . . . The putative marriage doctrine enlists justice and equity to protect those who participate in a "marriage ceremony in the good faith belief that the marriage was valid and proper, when it was actually null due to some impediment."

Hicklin v. Hicklin, 244 Neb. 895, 901, 509 N.W.2d 627, 631 (1994) (quoting Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1 (1985)).

In *Hicklin*, the putative wife entered into the marriage in good faith. The marriage lasted approximately 8 years and produced two children. When the marriage ended, the putative husband sought to avoid any responsibility to provide spousal support solely because the marriage was void. We held that although the parties' marriage was void, the putative wife was entitled to be compensated as in the case of the dissolution of marriage under Neb. Rev. Stat. § 42-378 (Reissue 1993) and in accord with the putative marriage doctrine.

Therefore, *Hicklin* provides that void marriages do have a legal effect between the parties contracting the marriage if the marriage was entered into in good faith by at least one putative spouse. The void-voidable marriage distinction, relied upon by the majority, is no longer valid in that context. I question whether the void-voidable marriage distinction should be given any validity in this context. Further, the majority opin-

ion undermines our holding in *Hicklin*, which was mandated by statute.

In a similar context, the Supreme Court of Iowa, in questioning whether alimony obligations are terminated by the ex-wife's participation in a void marriage, rejected the use of the void-voidable marriage distinction as positing an inflexible rule in derogation of ordinary principles of equity. *Peters v. Peters*, 214 N.W.2d 151 (Iowa 1974).

The draconian effect of an inflexible rule can been seen in a review of Nebraska cases.

For example, in *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961), a woman participated in a marriage ceremony 1 day before her divorce from her first husband became final. The second marriage lasted 6 years and produced one child before the husband died in a work-related accident. Since the marriage was void, the woman was not entitled to workers' compensation benefits.

In another case, the voidness of her marriage deprived a woman of any right to alimony or a portion of the marital estate despite the fact that the putative marriage had lasted for approximately 20 years. *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984). However, even under the putative marriage doctrine, the woman would not have been granted any relief, because she knew her husband's 6-month waiting period had not expired when she participated in a marriage ceremony in Mexico with him. Therefore, the essential element of good faith required by *Hicklin* would not have been met.

In *Peters v. Peters, supra*, the Iowa Supreme Court, after rejecting the inflexible void-voidable distinction, adopted a practical approach which begins with an inquiry into the intent of the dissolution court as revealed by the divorce decree. The Iowa court would also examine equitable and public policy considerations. I believe that the *Peters* approach is in accord with the direction this court took when it adopted the putative marriage doctrine in *Hicklin v. Hicklin, supra*.

Although I respectfully depart from the majority for the foregoing reasons, I concur in the result as to modification of the divorce decree. The scant evidence before us in this case

suggests that Kilgore participated in the ceremony with Metoyer with the good faith belief that she was free to contract a valid marriage. It is therefore possible under the putative marriage doctrine that Kilgore has some remedies against Metoyer. However, the proceeding below was a garnishment action, and the issue of Kilgore's remedies against Metoyer was not before the court—more importantly, neither was the issue of modifying the divorce decree between Watts and Kilgore.

GERRARD, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. LLOYD R. TRACKWELL, JR., APPELLANT.

547 N.W.2d 471

Filed May 10, 1996. No. S-95-278.

1. **Records: Appeal and Error.** It is incumbent upon an appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
2. ____: ____. In reviewing the decision of a lower court, an appellate court considers only evidence included within the record.
3. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
4. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
5. **Pleas.** Absent some evidence of physical or mental coercion, whatever stress a defendant perceives from litigation alone cannot invalidate his plea.
6. ____. A guilty plea is not compelled and invalid when it is motivated by the defendant's desire to accept the probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction.
7. ____. Before accepting a plea of guilty, the court must inform the defendant of the nature of the charge, the right to assistance of counsel, the right to confront adverse witnesses, the right to trial by jury, and the privilege against self-incrimination.
8. **Criminal Law: Right to Counsel.** A criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented.

9. **Right to Counsel: Waiver.** Where retained counsel has not withdrawn or moved to withdraw, a defendant's comments that he is running out of money do not, without more, raise an inference that the defendant is about to waive involuntarily his right to counsel.
10. **Constitutional Law: Right to Counsel.** The presence of a defendant at trial with no representation whatsoever is a red flag to a trial court that some inquiry may be necessary as to why he is unrepresented; the clear response of a defendant that he has no attorney because he cannot afford to hire private counsel is a plain warning that a Sixth Amendment violation may be underway.
11. **Constitutional Law: Attorney and Client.** While it may be private counsel's professional duty to apprise a defendant of his rights, it is not his constitutional duty; it is, however, the state's constitutional duty to inform a defendant of his rights, and the trial court acts as the representative of the state in discharging that duty.

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

David L. Kimble for appellant.

Lloyd R. Trackwell, Jr., pro se.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Aggrieved by his conviction for attempted second degree sexual assault upon a no contest plea, Lloyd R. Trackwell, Jr., asks this court to find that the trial court accepted his plea despite that it was allegedly neither knowing nor voluntary. We disagree, and affirm.

The conviction from which Trackwell appeals resulted from his third trial for one offense. Trackwell was charged with first degree sexual assault on June 2, 1992. The first trial of this charge ended in a jury verdict finding Trackwell guilty as charged; he was sentenced to not less than 10 nor more than 50 years' imprisonment. This court reversed that verdict, finding that the prosecutor had made improper comments in her closing argument that amounted to prejudicial error. See *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). The sec-

ond trial ended when the trial court declared a mistrial because the jury was unable to reach a verdict.

Trackwell began his third trial maintaining the defense he had proffered at the earlier trials: that he was not guilty because the victim had consented to sexual intercourse, subsequently demanded payment for her services, and then fabricated sexual assault charges when Trackwell refused to pay. The State called the victim as its first witness; after the first day of her testimony, Trackwell decided to plead no contest to the lesser offense of attempted second degree sexual assault. The trial court accepted Trackwell's plea and sentenced him to imprisonment for not less than 20 months nor more than 5 years. Trackwell was to serve this sentence consecutively to his sentence for another, unrelated conviction.

After Trackwell began serving his sentence for the other conviction, he requested and received appointed counsel to appeal his conviction in this case. His attorney, the Seward County public defender, filed a brief assigning two errors: that Trackwell's sentence was excessive and that the trial court erred in accepting Trackwell's plea without informing Trackwell of his right to counsel and without examining Trackwell to ensure that he understood that right. Dissatisfied with the public defender's effort, Trackwell fired him, complaining that due to Trackwell's present difficulties, he did not trust any attorney from Seward County. In particular, Trackwell criticized the refusal to assign certain errors that Trackwell considered meritorious.

Trackwell, acting pro se, then submitted a series of revised briefs in lieu of his former attorney's brief, which was stricken. The most recent brief assigns eight errors. Three errors concern the decision of the trial court to allow the reading of prior sworn testimony of an unavailable witness during Trackwell's second trial, and one error concerns the trial court's decision to limit cross-examination of a defense witness during the second trial. Given that the second trial resulted in a mistrial and given that Trackwell decided to plead no contest early in the third trial before either of those particular witnesses was called, whatever error might have inhered in those decisions has no bearing on the trial that resulted in

Trackwell's conviction. Those assigned errors are without merit.

Trackwell also assigns a host of errors that allege misconduct on the part of the trial judge and prosecutor. Specifically, Trackwell claims that "[t]he Seward County Attorney violated Disciplinary Rules by intentionally ignoring ongoing criminal activity on the part of the district court judge . . . thereby prejudicing the appellant's rights to a fair impartial trial." In support of this error, Trackwell includes in the transcript a number of newspaper articles reporting allegations of misconduct against the trial judge. Trackwell does not offer evidence of how such allegations affected the outcome of his case, other than to argue in his brief that the allegations against the trial judge "create[d] a question of viability of his view of the wrongful actions of someone else in a case involving sexual misconduct." Pro se supplemental brief for appellant at 26.

This falls far short of a sufficient basis for this court to find that the trial judge deliberately "threw" the outcome of Trackwell's case. It is incumbent upon an appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). As the record does not support Trackwell's theories of the judge's motives for ruling as he did, we dismiss this assignment of error.

Trackwell alleges that the county attorney knew of the allegations against the trial judge and failed to either request him to recuse himself or "investigate and inform opposing counsel of the situation." Pro se supplemental brief for appellant at 25. Trackwell further alleges that the county attorney deviously used her knowledge of the allegations against the trial judge to extort rulings in her favor throughout the litigation of Trackwell's case. In particular, Trackwell argues that

> [i]n light of some of the questionable decisions the court made in the prosecution's favor there is created the impression that perhaps the county attorney had informed the judge of the complaints against him and utilized such information to her advantage by persuading the court to rule in the State's favor.

Id.

In reviewing the decision of a lower court, this court considers only evidence included within the record. *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993). We find absolutely no evidence in the record, other than Trackwell's bare allegations in his third revised pro se supplemental brief, to support this allegation. The assignments of error alleging misconduct by the trial judge and the county attorney are dismissed.

Trackwell has also assigned as error the quality of appointed counsel's representation on appeal. Trackwell argues that in refusing to include the above-listed assignments of error alleging misconduct by the trial judge and the county attorney, appointed counsel erred; Trackwell is wrong. He further argues that the public defender hired another party to compose his brief; this is unsupported by the record and, even if true, is irrelevant.

We are left, then, with one assignment of error worthy of discussion: whether the trial court erred in accepting Trackwell's no contest plea. This court has held that the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991). Trackwell alleges that his defenses remain viable, because his plea was not knowingly and voluntarily entered. This argument seems to include three allegations, the first of which derives from the presence of the jury during Trackwell's plea hearing. Trackwell argues that the jury would have been irredeemably tainted and unable to continue its impartial receipt of the evidence in the event that the trial judge would refuse Trackwell's plea; accordingly, Trackwell ostensibly was pressured to plead in light of this apparent sign that the trial judge had already decided to accept the plea before the plea hearing.

We cannot consider the validity of this contention in light of the fact that Trackwell not only acceded to the jury's presence, but in fact requested the jury's presence. When Trackwell's trial counsel informed the trial court that Trackwell wished to plead no contest, the following colloquy occurred:

> [Counsel]: Your Honor, at this time, we would move the Court to withdraw the earlier plea of not guilty to the previous information, we would waive the 24-hour notice and a formal reading of the amended information, and are prepared to enter a plea of no contest to the amended information which is . . . attempted second degree sexual assault, a Class IV felony.
>
> THE COURT: Very well, let's bring the jury in, I think we'll do this in front of the jury, they're entitled to know.
>
> [Trackwell]: Can they be here, can they sit in the audience?
>
> THE COURT: Anyone can be here, Mr. Trackwell.
>
> [Trackwell]: Because I'd like to say something then about this whole thing.
>
> THE COURT: Certainly. They will not be required to be here, but they may be here.
>
> [Trackwell]: Can I ask them to be here, if they would?
>
> THE COURT: Better discuss that with counsel, they are under no obligation to be here. You may bring them in.

Trackwell also requested the jury's presence during sentencing:

> THE COURT: Well, as soon as we can get the old [presentence investigations] collected and take a look at those, we'll have sentencing. I — I can tell you it won't be yet this morning, but we'll try to have it ready for you at 1:30.
>
> [Trackwell]: Can — Can we ask the jury to come back and listen to it in the audience, because I have something to say to Seward County.

A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Brock*, 245 Neb. 315, 512 N.W.2d 389 (1994). Trackwell's desire to have the jury present during his plea hearing, and again during sentencing, is unambiguous. Accordingly, while the propriety of jury presence during a plea hearing might otherwise be questionable, the jury's presence in this case does not require reversal.

Trackwell's second allegation is that his plea was not voluntary because his will had been overborne by the taxing experience of being thrice tried for the same offense. Trackwell claims that some of his statements to the court during the plea colloquy should have indicated to the trial court that he was pleading for reasons other than moral resignation to the consequences of his actions. Specifically, Trackwell stated in response to the question of whether he had discussed defenses with his attorney that "I tried to defend this three trials, I — I'm barking up a tree that I can never overcome." In response to the question of whether Trackwell had questions about the rights he waived in pleading, Trackwell stated that "I just say if you want me, you got me, here I am. I plead to whatever."

The stress of enduring criminal litigation is considerable for any defendant, guilty or innocent. That Trackwell endured litigation three separate times, however, is the result of one concerted effort to convict Trackwell and one instance of continuing jeopardy: the State did not oppress Trackwell unfairly in pursuing a conviction for this serious felony charge. Absent some evidence of physical or mental coercion, whatever stress a defendant perceives from litigation alone cannot invalidate his plea. See *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (holding that fear of greater punishment cannot constitute kind of coercion that renders plea involuntary).

In *Brady*, the U.S. Supreme Court considered the question of whether a defendant's plea is truly voluntary when, in part, the plea is motivated by a fear of the greatest possible punishment. The Court noted that a decision to plead guilty may derive from several motivations:

> For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsi-

> bility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

397 U.S. at 750.

Like the *Brady* Court, we decline to hold that a guilty plea is compelled and invalid when it is motivated by the defendant's desire to accept the probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction. Accordingly, we hold that the voluntariness of Trackwell's plea is not called into question by the mere fact that Trackwell perceived a certainty of harsh punishment upon conviction for the greater charge.

Trackwell's third and final allegation concerns his right to counsel under the Sixth Amendment to the federal Constitution. Before accepting a plea of guilty, the court must inform the defendant of the nature of the charge, the right to assistance of counsel, the right to confront adverse witnesses, the right to trial by jury, and the privilege against self-incrimination. *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991). The court must examine the defendant in order to determine whether he or she understands that information. *Id.*

In its examination of Trackwell during the plea hearing, the trial court advised Trackwell of his right to the presumption of innocence and that he could plead guilty, not guilty, or no contest, and the legal significance of each plea. He was advised of the nature of the charges against him and of his rights to a trial by jury, to confront his accusers, to subpoena and present witnesses, to remain silent and not incriminate himself, and to require the State to prove his guilt beyond a reasonable doubt. The court did not, however, advise Trackwell that he had a right to counsel.

This court has held that a criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented. *Biernacki, supra.* In *Biernacki*, we upheld the conviction of a defendant who was represented by counsel at the time of her guilty plea, notwithstanding the trial court's failure to advise her that her right to counsel remained

intact if she chose to plead not guilty. The record in *Biernacki* reflected that the defendant in that case had at all times in every proceeding been represented by counsel.

Trackwell was represented by private counsel in all three trials and in the appeal of the conviction in the first trial; the record reveals no instance that Trackwell appeared without counsel. Notwithstanding this, Trackwell argues that the court should have inferred from his comments in the plea colloquy that he was in need of appointed counsel. Trackwell had stated that he had run out of money to contest the charges against him:

> THE COURT: Mr. Trackwell, under the law you're entitled to a trial by jury, as you know. If I accept your plea, that will complete this trial and you will be waiving any further trial that you may have. Do you understand that?
>
> [Trackwell]: Yes, I can't afford any more.
>
> . . . .
>
> THE COURT: Has anyone connected with law enforcement or anyone else made any threat to you, directly or indirectly, used any force, held out any promises to you —-
>
> [Trackwell]: No, I have — nobody's threatened me. I've ran out of money. I can't handle this anymore.
>
> THE COURT: Well, let me finish my question, Mr. Trackwell. Has anyone done any of that to get you to waive and do without any of these rights we've been talking about?
>
> [Trackwell]: No.

These comments alone do not raise an inference that a defendant is about to waive involuntarily his right to counsel. Like the defendant in *Biernacki*, Trackwell stated in the plea colloquy that he was satisfied with his representation by his private counsel and that he considered private counsel to be competent. Trackwell did not state that his attorney was preparing to withdraw or that he was otherwise in danger of hazarding the remainder of the trial by himself. Nor, for that matter, did Trackwell's private counsel move to withdraw or otherwise state that his representation of Trackwell would be

in any way affected by Trackwell's depleting financial resources. Trackwell's comments were not enough to place the court on notice that there may have been a change in the financial or economic condition which would alter Trackwell's indigency status.

This case is distinguishable from *State v. Sondag*, 214 Neb. 659, 335 N.W.2d 306 (1983), wherein we reversed the conviction of a defendant who had indicated that he was indigent, but whom the trial court did not advise of his right to appointed counsel. The defendant in *Sondag* had appeared without counsel at trial; in response to the court's questions of whether he wished to proceed pro se, the defendant stated that he had formerly declined appointed counsel on the erroneous assumption that he could afford private counsel and that he was proceeding pro se because he could not afford an attorney. We found that the trial judge should have made reasonable inquiry to determine the defendant's financial condition when the defendant stated that he could not afford an attorney.

The presence of a defendant at trial with no representation whatsoever is a red flag to a trial court that some inquiry may be necessary as to why he is unrepresented; the clear response of a defendant that he has no attorney because he cannot afford to hire private counsel is a plain warning that a Sixth Amendment violation may be underway. The circumstances of Trackwell's case fall short of such clear notice. Trackwell was represented by counsel and although he indicated that he was running out of money, did not indicate that his attorney would abandon him if the trial proceeded. The trial court did not err in failing to gather from Trackwell's comments that Trackwell was in immediate need of advice of his right to appointed counsel.

Notably, the State argues without citing authority that "the obligation to explain [the right to appointed counsel to Trackwell] rested primarily with his retained counsel, not the court." Brief for appellee at 11. This contention is categorically wrong. Our acceptance of this contention as the basis for our holding would violate expressly the holding of the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 89 S.

Ct. 1709, 23 L. Ed. 2d 274 (1969). In *Boykin*, the Court held that

> [w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought [citations omitted], and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

395 U.S. at 243-44. Neither *Boykin* nor any other decision of the U.S. Supreme Court or of this court places this burden on private counsel so as to exonerate the state from this basic duty.

We know of no practice or custom within any court system of the United States wherein private counsel is responsible for creating a record, satisfactory under *Boykin*, of the accused's understanding of his rights. While it may be private counsel's professional duty to apprise a defendant of his rights, it is not his constitutional duty; it is, however, the state's constitutional duty to inform a defendant of his rights, and the trial court acts as the representative of the state in discharging that duty. The court would have been charged with the duty of apprising Trackwell of his right to appointed counsel had Trackwell given the trial court adequate notice of his indigency. It is because Trackwell did not do so that we find no violation of his right to counsel, and accordingly, we affirm his conviction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEREMY P. OSBORN, APPELLANT.

547 N.W.2d 139

Filed May 10, 1996. No. S-95-721.

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. **Search and Seizure.** Determinations of whether there was a seizure and, if so, whether it was unreasonable are both factual questions.
3. **Motions to Suppress: Courts: Records.** Henceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress.
4. **Search and Seizure.** One who voluntarily accompanies the police for questioning has not been seized.
5. ____. One's initially consensual encounter with the police may be transformed into a seizure or detention by subsequent events.
6. **Confessions: Proof.** To be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight.

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

J. William Gallup, of Gallup & Schaefer, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Jeremy P. Osborn appeals his convictions in the Douglas County District Court for first degree murder and use of a weapon in the commission of a felony. The primary issue raised is whether Osborn's confession should have been suppressed as the poisonous fruit of an illegal seizure. Osborn maintains that he was subjected to illegal seizure and custody without probable cause and that the confession was the result of same. Osborn also asserts that his confession should be sup-

pressed because it was not freely and voluntarily made. The district court denied Osborn's motion to suppress his confession. The confession was introduced into evidence at the bench trial. Osborn's sole assignment of error is that the district court erred in overruling the motion to suppress. We affirm.

BACKGROUND

On December 13, 1993, Laura Gogan was found dead in her southwest Omaha apartment by her roommate. Gogan was a 19-year-old student at the University of Nebraska at Omaha. Gogan had suffered multiple lacerations and stabs to her neck. Her death was caused by asphyxiation in association with those wounds. The autopsy revealed that Gogan had engaged in sexual relations prior to her death.

The Omaha Police Division launched an extensive investigation into the crime. Gogan's friends and neighbors in the apartment complex were interviewed. Osborn lived with his father, Michael Osborn, in the same apartment complex as Gogan. At the time, Jeremy Osborn was a 19-year-old student attending Metropolitan Community College in Omaha.

Officers James Wilson and William Jadlowski, detectives with the Omaha Police Division, received information that Michael Osborn was concerned that his son might be connected with the murder. Wilson testified that they were unable to verify this information through the source, so they decided to interview the father and son directly. The officers began trying to contact the Osborns on Friday, December 17, and continued to attempt to contact them throughout the following weekend.

The officers had learned that the father had a job with a construction company. They decided to try to contact the Osborns early Monday morning in order to catch them before the father went to work. The officers did not have a warrant for Osborn's arrest because they did not believe that they had probable cause to charge him with Gogan's murder.

Officers Wilson and Jadlowski knocked on the Osborns' door at 6:30 a.m. The father answered the door, and the detectives identified themselves as police officers. The officers told

the father that they wanted to speak to him and his son in regard to the Gogan murder. The officers asked the father if he and his son would come to Omaha police headquarters to be interviewed. The father said that his son was sleeping, but that he would wake him up.

Osborn testified that his father woke him up and told him that they were going to go to the police station to talk about Gogan's murder. The father testified that his son did not voice any objection to going to the police station. The Osborns followed Wilson and Jadlowski to the police station in their own car.

Osborn admitted that he went to the police station voluntarily and that he was willing to cooperate with the police at that time.

At police headquarters, Officers Wilson and Jadlowski showed the Osborns where to park and then met them at the front door. The officers took the Osborns to the criminal investigation bureau, located on the fourth floor. The officers told the Osborns that they wanted to interview both of them, beginning with the father. Jadlowski testified that they routinely interview people separately so that one person's answer does not influence the other person's response. At approximately 7 a.m., Wilson placed Osborn in a small interview room by himself and Jadlowski led the father to another interview room.

Officers Wilson and Jadlowski began interviewing the father at approximately 7:10 a.m. The father confirmed that he was suspicious about his son's possible involvement in the homicide. Upon learning that the father had discussed his suspicions with Paula Powell, his former wife and his son's mother, the police contacted Powell and asked her to come to police headquarters. Both parents were questioned until about 10 a.m. At that point, the officers told the parents that they were ready to interview their son.

While his parents were being interviewed, Osborn had remained in his interview room. The interview room was approximately 10 by 12 feet and contained a table and several office chairs. Osborn's testimony regarding his 3-hour wait in the interview room differs substantially from that of the

Omaha police officers who were responsible for monitoring him.

Officer Wilson testified that when he placed Osborn in the interview room, he left the door open. Lt. Donald Thorson testified he had instructed his staff that witnesses and suspects should not be locked into interview rooms unless they had been placed in custody. Thorson produced an internal memo dated October 13, 1993, and the minutes of a staff meeting conducted on October 21. These documents disclose that the locked door policy was announced and discussed. In order to enforce this policy, the locks on the interview room doors were taped over.

Lieutenant Thorson instructed his staff that they were to document all contacts they had with a witness or suspect. The staff was further instructed to check on people waiting in interview rooms about every 20 to 30 minutes and offer an opportunity to use the restroom and to have something to drink. Thorson had a log developed so that the officers could record such contacts.

Sgt. Michael Butera testified that he checked on Osborn periodically on the morning of December 20. Butera recorded each of his visits in a small spiral notebook. According to his notes, Butera checked on Osborn at 7:55, 8:05, 8:10, 8:20, 8:40, 9, and 9:20 a.m. Butera stated that at 7:55, another officer had just finished recording Osborn's biographical data and that the door to the interview room was open. Butera testified that he offered Osborn the opportunity to use the restroom and to have something to drink each time he went to check on Osborn. Butera testified that Osborn generally appeared to be resting or sleeping, with his head down on top of his crossed arms. Butera testified that he closed the door each time he checked on Osborn, because the hallway tended to be somewhat noisy. Butera stated that the interview room was not locked.

Officer Kathryn Hearn testified that she interviewed Osborn from 7:15 to 7:40 a.m. in order to obtain background information, such as date of birth, employment, school, et cetera. Hearn testified that she checked on Osborn at 8:15, 8:45, and 9:30 a.m. Hearn stated that she left the interview room door

open after her 8:15 check, but that at 8:45, she found the door closed. Hearn testified that the door was never locked and that it was impossible to lock the door because the deadbolt had been taped over. Hearn also stated that she walked past the room several times and observed Osborn sleeping with his head down on the table.

Lieutenant Thorson produced the logsheet which purported to document the number of times that Osborn was checked on during his 3-hour wait in the interview room. The log indicates that Officer Hearn obtained Osborn's biographical data from 7:15 to 7:40 a.m. The log also states that Hearn checked on Osborn at 8:15, 8:45, and 9:30 a.m. The log does not contain any record of Sgt. Butera's visits. Butera admitted that he had violated department policy requiring him to use the official log to document checks on witnesses and suspects waiting in interview rooms.

Osborn testified that after Officer Wilson placed him in the interview room, Wilson shut the door. Osborn said that Officer Hearn came in shortly after 7 a.m. and obtained biographical information. Osborn said that this was the only time during the 3 hours that he was in the room that the door was opened. Osborn testified that he was tired and spent the time trying to sleep. Osborn testified that after being in the room for some time, he wanted to use the restroom, but found that he had been locked in. Osborn said that he did not feel like he was free to leave, because the door was locked. Osborn admitted that the police did nothing to make him feel uncomfortable other than purportedly lock him in the interview room.

As stated above, Officers Wilson and Jadlowski finished their interviews with Osborn's parents at around 10 a.m. At that point in time, Wilson still did not believe that probable cause existed to arrest Osborn.

Officer Wilson testified that he went to the interview room where Osborn was waiting, found the door open, and then escorted Osborn to another interview room. Wilson told Osborn that he wanted to talk to him about Gogan's death. Wilson then read Osborn the standard *Miranda* rights advisory form. Osborn was advised that he had the right to remain

silent, that anything he said could and would be used against him in court, that he had the right to consult with a lawyer and have a lawyer present during questioning, and that a lawyer would be appointed if he could not afford one.

Osborn testified that when Officer Wilson came to get him, he did not ask to use the restroom, although he had earlier testified that he had wanted to during his 3-hour wait. Osborn testified that Wilson had read him his *Miranda* rights and that he understood those rights. Osborn testified that he agreed to cooperate and to talk with the police, freely and voluntarily. Osborn testified that no use of force, threats, or trickery was employed.

Officers Jadlowski and Wilson testified that Osborn appeared coherent, polite, and cooperative when he was read his rights. At first, Osborn denied killing Gogan. Then Osborn began to get nervous and cry. Jadlowski testified that Wilson put his arm around Osborn and told him it would be better for Osborn to talk about it. Wilson said something to the effect that Osborn was a victim of circumstances and that this thing just happened. Osborn then confessed to the murder.

At 11:08 a.m., Osborn was read his *Miranda* rights a second time and he was asked to give a formal, taped interview. In the interview, Osborn stated that he had encountered Gogan in the apartment complex's parking lot on December 13 and claimed that she asked him up to her apartment. Osborn stated that he and Gogan engaged in consensual sex, but that when they were finished, Gogan became upset and threatened to report him for rape. Osborn went into the kitchen, got a butcher knife, and stabbed Gogan in the neck several times. Osborn put the knife in the dishwasher and started the wash cycle. Osborn took some tuna, soda, and Pop-Tarts from the kitchen and left.

Evidence taken from the crime scene contradicted some of Osborn's testimony. First, the door to Gogan's apartment appeared to have been pried open. Second, after the murder, Gogan's roommate was asked to look around the apartment to see if anything was missing. The roommate discovered that some of Gogan's underwear had been placed in the room-

mate's underwear drawer and that her underwear had been riffled through and unfolded.

Osborn was charged with murder in the first degree, Neb. Rev. Stat. § 28-303 (Reissue 1995). The information alleged that he did purposely and with deliberate and premeditated malice, or during the perpetration of, or attempt to perpetrate, a sexual assault in the first degree or burglary, kill Gogan. The information also charged Osborn with a violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), the offense of use of a knife to commit a felony.

Osborn entered a plea of not guilty and waived his right to a speedy trial. On September 16, 1994, Osborn filed a motion to suppress his statements and all evidence derived from those statements. In his motion to suppress, Osborn asserted:

> The Defendant moves the Court for an order suppressing the statements taken from him by Omaha Police Officers and all evidence derived from those statements for the reason that the Defendant was placed in a locked room at the Omaha Police Station without any probable cause and held for two (2) hours prior to being questioned; that the locking of the Defendant in a room without an arrest warrant and without any probable cause constituted an illegal arrest; and all the statements taken subsequent to that arrest and all evidence derived from those statements are inadmissible due to the initial illegal arrest and illegal detention of the Defendant.

The hearing on the motion to suppress was conducted on September 28 and November 2, 1994. On November 16, the district court entered a summary order overruling Osborn's motion to suppress. In its entirety, the order states, "Defendant's motion to suppress is overruled."

Osborn waived his right to a jury trial, and trial before the bench was conducted on January 12, 1995. The defense entered into a stipulation allowing the admission of police reports and witness statements. The defense objected to the admissibility of Osborn's confession "for the reasons made to the Court prior to trial and repeated here; specifically, that the statement was involuntary; that it was a fruit of an illegal

arrest and other reasons advanced prior to trial." The district court overruled the defense's objections.

On January 13, 1995, the court announced its verdict. The court found Osborn guilty of count I, first degree murder, and count II, use of a knife in the commission of a felony. Sentencing before a three-judge sentencing panel was set. On June 15, the panel sentenced Osborn to life imprisonment for count I, the crime of murder in the first degree. The district court individually imposed a sentence of not less than 10 nor more than 15 years' incarceration for count II, such sentence to run consecutively to the life sentence. On June 28, Osborn timely filed his intent to appeal the judgments and sentences.

ASSIGNMENT OF ERROR

Osborn asserts that the district court erred in overruling his motion to suppress his statements.

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. 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. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). See, also, *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995); *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

Determinations of whether there was a seizure and, if so, whether it was unreasonable are both factual questions. *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986).

ANALYSIS

Osborn Not Seized

Osborn argues that he was seized within the meaning of the Fourth Amendment to the U.S. Constitution when he was placed in the locked interview room for 3 hours before being

interrogated. Osborn states that in view of all the circumstances surrounding the incident, a reasonable person would not have believed that he or she was free to leave.

Osborn states that he was a 19-year-old with no prior experience with law enforcement officers. Osborn asserts that he was awakened at 6:30 a.m., locked in a room, and given no opportunity to consult with his parents, although they were in an adjoining room. Osborn highlights the failure of Sgt. Butera to log his checks on the interview room as required by department policy and asserts that the testimony of Butera and Officer Hearn regarding the open/shut door was inconsistent. No one advised him that he was free to leave; therefore, Osborn concludes that he was not free to leave. For the foregoing reasons, Osborn asserts that he was illegally detained prior to giving his confession and that such confession is inadmissible as "fruit of the poisonous tree."

Although Osborn concedes that his assertion that he was locked in the interview room is contradicted by all other evidence, he asserts that his testimony was credible, because he had no reason to lie. Defense counsel asserts that Osborn was not aware of the legal ramifications of the locked door and that the term "probable cause" meant as much to Osborn "as the formula $E=MC^2$ means to O.J. Simpson." Brief for appellant at 10-11. Osborn's brief concludes with the statement that "[c]ounsel for the appellant still thinks that appellant's version of the facts, supported by other evidence, is as honest, truthful and trustworthy as the supplications of a monk bent over a Bible illuminated by flickering candles. The confession should have been suppressed." Brief for appellant at 15.

Under our standard of review, we will not overturn the district court's factual findings unless they are clearly wrong. Here, Osborn invites this court to judge the honesty and credibility of the witnesses despite the fact that our standard of review precludes us from reweighing the evidence or resolving conflicts in the evidence.

Appeals can be quickly, and are more likely to be accurately, resolved when the trial court's order regarding motions to suppress contains specific findings of fact. However, there is no statutory or other requirement that a court make specific

findings of fact and conclusions of law in an order denying or granting a motion to suppress. We have held that Neb. Rev. Stat. § 25-1127 (Reissue 1995), which requires that upon request a court "state in writing the conclusions of fact found separately from the conclusions of law," does not apply to criminal cases. See, *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992). However, we have also stated that faced with a timely request, a judge sitting as a trier of fact may state in writing the conclusions of fact separately from the conclusions of law. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

Neither Osborn nor the State requested any specific findings of fact or conclusions of law. The fact that no statute may require an articulation of the factual conclusions and legal reasoning upon which the denial of a motion to suppress is based does not mean that other considerations demand that such be done.

A review of several recent cases demonstrates how essential findings of fact have been in the conduct of our review. See, e.g., *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994); *State v. Harris*, 244 Neb. 289, 505 N.W.2d 724 (1993). In other cases, we found that certain findings of fact were implicit in the lower court's decision. See, e.g., *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993) (although no specific finding was made regarding location of controlled substance in relationship to defendant, that finding was unimportant because either alternative finding supported conclusion that defendant was in possession of controlled substance); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993) (implicit in trial court's denial of motion to suppress is that court would have had to find certain fact); *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993) (stating that district court must not have believed defendant's testimony).

Such findings of fact may be indispensable to a proper appellate review. See, 5 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.2(e) (3d ed. 1996); *United States v. Brown*, 716 F.2d 457 (7th Cir. 1983); *State v. Johnson*, 16 Or. App. 560, 519 P.2d 1053 (1974). Without

guidance, we might not know whether the trial court rejected a defendant's factual contentions or had acted on some legal basis. Under our standard of review, we would not know the basis of the trial court's judgment. A different standard of review applies to each. Henceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary, of course, from case to case.

Nonetheless, our review of this matter can proceed on the record before us. Osborn's motion to suppress expressed one contention: that the locking of Osborn in a room without an arrest warrant constituted an illegal seizure. By denying Osborn's motion to suppress, the district court rejected Osborn's contention. Our review is framed by the factual findings and legal conclusions implicit in the district court's decision regarding Osborn's argument, and we find no clear error.

The trial court clearly found the testimony of the police officers that the interview room door was unlocked and that the door was generally open to be more credible than Osborn's testimony. However, the question of the locked door does not fully resolve the issue of whether Osborn was illegally seized for 3 hours. Locked or unlocked, if the circumstances surrounding the encounter were such that a reasonable person would not have felt free to leave, Osborn might have been illegally seized.

"It has been determined that one who voluntarily accompanies the police for questioning has not been seized. It has also been said, however, that one's initially consensual encounter with the police may be transformed into a seizure or detention by subsequent events." *State v. LaChappell*, 222 Neb. 112, 117, 382 N.W.2d 343, 347 (1986). See, also, *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986).

Osborn testified that he voluntarily went to the police station at his father's request. During the drive to the station, Osborn could have protested or requested his father's assistance. Osborn was not seized at the time he entered the police station. We next address whether Osborn withdrew his volun-

tary agreement to be questioned by the police at the police station.

In *State v. Beard, supra*, Beard arrived at the scene of a murder while police officers were beginning their investigation of the crime. Beard was identified as the victim's boyfriend. Although the officers had no reason to suspect Beard, he was asked to come to the police station for questioning. Beard made no complaint and was driven to the police station by an officer. Beard was not handcuffed, and he rode in the front seat. Once at the police station, Beard was read his *Miranda* rights. Although Beard initially denied any involvement in the crime, he confessed after approximately 4 hours of questioning that he had killed the victim.

We affirmed in *Beard* the trial court's implicit factual finding that Beard had voluntarily accompanied police to police headquarters. The fact that Beard considered himself not free to leave after he arrived at the station was immaterial because it is not necessary that police tell a suspect that he or she has the right not to accompany police in order for the suspect to know that he or she may refuse. We further held that while it is true that an initially consensual encounter with the police may be transformed into an unreasonable seizure or detention by subsequent events, Beard never manifested any indication that he sought to revoke his initial consent.

Similarly, Osborn willingly went to the police station and never manifested any indication that he had withdrawn his consent. After Osborn arrived at the police station, he never asked to leave or talk to his father. Osborn admitted that he was generally comfortable in the room and that only the purportedly locked door made him believe that he was not free to leave. The totality of these factual circumstances supports the trial court's conclusion that Osborn's confession was not the fruit of an illegal seizure.

Osborn's Voluntary Confession

Osborn also asserts that his confession was not freely and voluntarily made and, therefore, was not admissible. Osborn asserts that when Officer Wilson consoled Osborn, he induced the confession.

"[T]o be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight." *State v. Bronson*, 242 Neb. at 937, 496 N.W.2d at 889.

Officer Wilson promised nothing to Osborn in exchange for his confession. Wilson merely told Osborn that he would feel better if he talked and stated something to the effect that Osborn might be a "victim of circumstances."

At the suppression hearing, Osborn testified on cross-examination regarding his confession as follows:

> Q. At that point in time, then, you did, in fact, cooperate with the police during this interview; is that true?
>
> A. Yes.
>
> Q. And you answered their questions?
>
> A. Yes.
>
> Q. Okay. They didn't do anything in this interview to force you to answer the questions; is that true?
>
> A. No.
>
> Q. And they didn't promise you anything in return for making a statement?
>
> A. No.
>
> Q. They didn't threaten you in any manner to get you to make a statement; is that true?
>
> A. No.
>
> Q. The statement that you gave the police, was that something that you gave freely and voluntarily to them?
>
> A. Yes.
>
> Q. And they didn't trick you into saying anything or coerce you in any way, did they?
>
> A. No.
>
> Q. And at least at that point you wanted to cooperate with them and tell them your version of what happened; is that true?
>
> A. Yes.

Based on the facts and Osborn's own testimony, we find that the confession was freely and voluntarily made.

CONCLUSION

The convictions and sentences imposed are affirmed.

AFFIRMED.

RODNEY A. KERKMAN, APPELLANT, V. WEIDNER WILLIAMS ROOFING CO., INC., APPELLEE.

547 N.W.2d 152

Filed May 10, 1996. No. S-95-921.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
3. ____: ____. When the record in a workers' compensation case presents conflicting medical testimony, the appellate court will not substitute its judgment for that of the compensation court.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
5. **Workers' Compensation: Appeal and Error.** The determination of causation is, ordinarily, a matter for the trier of fact, whose factual findings will not be set aside unless clearly wrong.
6. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
7. **Proximate Cause: Proof.** An independent intervening cause, as the proximate cause of an injury, is a matter of defense and, as such, must be proved by the party asserting that defense.
8. **Workers' Compensation: Attorney Fees.** Where there is no reasonable controversy, Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes the award of attorney fees.

9. ____: ____. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.
10. **Workers' Compensation: Attorney Fees: Words and Phrases.** A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part.
11. **Workers' Compensation: Attorney Fees.** To avoid the payment of attorney fees assessable under Neb. Rev. Stat. § 48-125 (Reissue 1993), the employer must have a reasonable basis in law or in fact for disputing the employee's claim and refraining from payment of compensation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

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

CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Rodney A. Kerkman appeals an order of dismissal entered by the Workers' Compensation Court. The court found that certain chiropractic treatments received by Kerkman were not reasonable or necessary as a result of 1987 work-related injuries, and it therefore dismissed his petition requesting payment of these expenses by the employer's workers' compensation insurance carrier. Finding sufficient competent evidence in the record to support the Workers' Compensation Court's conclusion, we affirm.

FACTUAL BACKGROUND

In 1987, Rodney A. Kerkman was injured in two separate automobile accidents while operating a vehicle owned by his employer, Weidner Williams Roofing Co., Inc. (Weidner). As a result of these accidents, he filed a petition in Workers'

Compensation Court in 1989 and was awarded temporary total disability benefits for a period of $4^{1}/_{7}$ weeks. Furthermore, the court found that he sustained a 10-percent permanent partial disability. Kerkman was awarded benefits of $235 per week for $4^{1}/_{7}$ weeks for his temporary total disability and $25 per week for $295^{6}/_{7}$ weeks for his 10-percent permanent partial disability. However, the court denied Kerkman's request for vocational rehabilitation, and Kerkman applied for rehearing on the basis of this denial.

The Workers' Compensation Court panel found on rehearing that Weidner should pay Kerkman temporary total disability benefits of $235 per week for $6^{4}/_{7}$ weeks and thereafter $25 per week for $293^{3}/_{7}$ weeks for his 10-percent permanent partial disability. Weidner was ordered to pay an outstanding medical expense to a K mart pharmacy. However, the review panel declined to award Kerkman vocational rehabilitation, finding that "the plaintiff has a minimal physical impairment with no requirement for any future surgery or other definitive care."

On May 7, 1992, Kerkman filed another petition in the Workers' Compensation Court alleging that Travelers Insurance Company (Travelers) had repeatedly refused to pay medical bills submitted by him for chiropractic care. Weidner answered, claiming that it had been "unable to determine through various medical providers what relationship, if any, the tendered medical bills have with [Kerkman's] alleged accident and injuries of November 27, 1987 and October 2, 1987." Although Weidner was ordered to pay all medical expenses to date, the trial court found that Kerkman's condition had stabilized and any further chiropractic treatment would be maintenance and not compensable. On review, the Workers' Compensation Court review panel determined that the trial court had used the wrong standard by determining whether the chiropractic care would be maintenance or therapeutic, but concluded that the question of future chiropractic care should be decided when a real dispute was presented with regard to chiropractic treatment.

On July 6, 1994, Kerkman again filed a petition in Workers' Compensation Court claiming that Travelers refused to pay costs for prescriptions and medical treatment, specifically chi-

ropractic care. Weidner argued that the chiropractic bills were not related to the accidents of November 27 and October 2, 1987, and that the treatments were not necessary as a result of Kerkman's 1987 work-related injuries. The trial court found for Weidner by concluding that the chiropractic treatments received by Kerkman were neither reasonable nor necessary as a result of the accidents, and it dismissed Kerkman's petition. The Workers' Compensation Court review panel affirmed upon review. Kerkman appeals.

ASSIGNMENTS OF ERROR

Summarized, Kerkman's assigned errors are that the court erred (1) by requiring Kerkman as an injured worker to prove that without the care in question he would "be at risk of grave danger or injury" (emphasis omitted) before the care was compensable under Neb. Rev. Stat. § 48-120 (Cum. Supp. 1992); (2) in finding that Kerkman's current symptoms of headache, neck and back pain, stiffness, and increased disability were not caused by the 1987 accidents; (3) in finding that the chiropractic treatments were not reasonable and necessary and were therefore not compensable under § 48-120; and (4) in interpreting Neb. Rev. Stat. § 48-125 (Reissue 1993) to require a finding of a lack of reasonable controversy before attorney fees can be awarded even when medical treatment is the disputed benefit, and if this is a requirement, in finding that a reasonable controversy existed as to Kerkman's right to workers' compensation benefits.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636

(1996); *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995).

Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

ANALYSIS

Grave Danger or Injury

Kerkman claims that the Workers' Compensation Court erred by requiring Kerkman to show that without the chiropractic treatments he would be at risk of grave danger or injury. Kerkman argues that the trial court used this standard to determine compensability because it relied upon the opinion of Dr. Kurtis M. Hoppe, who defined the term "medically necessary" as "that without providing that kind of therapy, that I would inflict upon Mr. Kerkman grave danger or injury."

In fact, the trial court relied upon a number of medical experts in arriving at its conclusion. The order of dismissal states:

> There is conflicting medical testimony as to *whether said chiropractic treatments were reasonable and necessary as a result of said 1987 injuries as provided in §48-120.* Dr. Rogge opines per Exhibit 8 that "[t]he chiropractic and physiotherapy treatments provided at this office help to maintain Mr. Kerkman's mobility, decrease his pain and speed his return to work, and otherwise these treatments are necessary to help Mr. Kerkman function on a day to day basis." Dr. Curtis [sic] Hoppe examined the plaintiff on May 5, 1994 and opines per Exhibits 16 and 17 that further chiropractic intervention is not medically necessary and a home exercise program consisting of cervical range of motion and stretching is recommended. As set forth in Exhibit 17, Dr. Hoppe opines that "Chiropractic treatment is no longer indicated. In fact, given the patient's continued neck symptomology, previous chiropractic treatment was essentially

> inefficacious and probably not medically necessary, except perhaps for a few sessions to treat brief neck pain exacerbations." In addition, Dr. Robert E. Cox, Jr., a chiropractor, reviewed medical and chiropractic records on the plaintiff and opined per Exhibit 13 that "Chiropractic care, at least from the point of Dr. Hoppe's exam, would not be medically/chiropractically reasonable or necessary as a result of the 1987 auto accidents." Dr. Cox further states in his report of November 11, 1994 (Exhibit 13) that further chiropractic care would not relieve pain, hasten or promote the plaintiff's restoration to health or employment as a result of the accidents in 1987. *Having considered all of the evidence submitted by the parties, the Court finds for the defendant on this issue.*"

(Emphasis supplied.)

Obviously, the trial court relied upon more than merely Dr. Hoppe's opinion in arriving at its conclusion. When the record in a workers' compensation case presents conflicting medical testimony, the appellate court will not substitute its judgment for that of the compensation court. *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). The trial court acknowledges Dr. Deanna J. Rogge's opinion that chiropractic care is reasonable and necessary. Nevertheless, the trial court includes the conclusions of Dr. Robert E. Cox, Jr., that further chiropractic care would be neither reasonable nor necessary as a result of the 1987 accidents and would neither relieve pain nor hasten Kerkman's restoration to health or employment. In fact, the order of dismissal indicates that the trial court properly applied the standard provided in § 48-120 which provides:

> The employer shall be liable for all reasonable medical, surgical, and hospital services . . . which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . subject to the approval of and regulation by the Nebraska Workers' Compensation Court, not to exceed the regular charge made for such service in similar cases.

The trial court indicated its use of the standard set forth in § 48-120 at the beginning of the discussion on compensability by stating that "[t]here is conflicting medical testimony as to whether said chiropractic treatments were reasonable and necessary as a result of said 1987 injuries as provided in §48-120." There is no indication that the trial court used Dr. Hoppe's definition of medically necessary in arriving at its conclusion.

We conclude that there is no indication in the trial court's order that Kerkman had to prove that without the chiropractic treatments that he would be at risk of grave danger or injury, and thus, the court did not err by applying an improper standard.

Reasonable and Necessary

We must now determine whether there is sufficient competent evidence in the record to support the court's finding that the chiropractic treatments were neither reasonable nor necessary as a result of the 1987 accidents. Section 48-120 requires a finding that the medical treatment be "required by the nature of the injury and . . . relieve pain or promote and hasten the employee's restoration to health and employment."

Kerkman cites *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978), for the proposition that the temporary alleviation of pain alone is sufficient to require a treatment to be covered by the Workers' Compensation Act. We held in *Spiker* and in *S & S LP Gas Co. v. Ramsey*, 201 Neb. 751, 272 N.W.2d 47 (1978), that an employer may be held liable for the care of a totally and permanently disabled employee after the time when maximum cure and rehabilitation have been achieved. However, *Spiker* and *Ramsey* are distinguishable from the facts of the case at bar, as both involved employees who suffered permanent total disability.

Furthermore, in *Spiker* we recognized a number of cases that stated that an employer's liability to furnish reasonable medical and hospital services and medicines ceases when further medical, hospital, and surgical services would not definitely improve the condition of the injured employee. See, *Halbert v. United States F. & G. Co.*, 185 Neb. 775, 178

N.W.2d 781 (1970); *Peek v. Ayres Auto Supply*, 155 Neb. 233, 51 N.W.2d 387 (1952).

As noted in the order of dismissal, Dr. Hoppe opined that "further chiropractic intervention [was] not medically necessary." Furthermore, Dr. Cox stated in his letter dated November 2, 1994, that "[i]n my professional opinion, it can be stated with a reasonable degree of chiropractic certainty, further chiropractic care would not be reasonable and necessary as a result of the 1987 auto accidents." He further states that

> [a]ny lifting, bending, or twisting would most likely aggravate the condition that was caused by the 1987 auto accidents.
>
> There are many missed appointments as the treatment program progressed with Dr. Rogge, and approximately a six month gap in care from 3-19-93 to 10-06-93. This would indicate to me that the patient is able to function without chiropractic intervention.
>
> . . . .
>
> After reviewing Dr. Rogge's daily notes, it is apparent to me that the patient did feel better after receiving Dr. Rogge's treatment program. One visit the patient would feel good, the next visit the patient would be in pain. Some of these visits seem to be very close in proximity. This would indicate to me that after numerous visits to a chiropractor, this care is no longer benefiting the patient. After reviewing the daily notes from Dr. Rogge and the material given to me from Dr. Hoppe, I come to the conclusion that the patient has reached maximal medical improvement in my opinion.

We note that findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). Furthermore, in testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.

Aken v. Nebraska Methodist Hosp., 245 Neb. 161, 511 N.W.2d 762 (1994); *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

Examining Dr. Cox's testimony in the light most favorable to the prevailing party, Weidner, we conclude that it was not clearly erroneous for the Workers' Compensation Court to find that further chiropractic treatment would not hasten Kerkman's restoration to health and employment as required by § 48-120. We conclude that there was sufficient competent evidence in the record for the trial court to find that relieving pain and muscle stiffness would not be considered reasonable and necessary as a result of the 1987 accidents, because it would not improve Kerkman's condition. We therefore determine that there was sufficient competent evidence in the record to support the Workers' Compensation Court's finding that the chiropractic treatments were neither reasonable nor necessary.

CAUSATION

Kerkman argues that the trial court erred by finding that his current symptoms were not caused by the 1987 accidents. Kerkman claims that because the experts agreed that Kerkman suffered permanent damage in the 1987 accidents which left him vulnerable to episodes of pain, muscle tightness, numbness in his arm and hand, and headaches, therefore, he established causation for the current symptoms. However, the determination of causation is, ordinarily, a matter for the trier of fact, whose factual findings will not be set aside unless clearly wrong. *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992); *Liberty v. Colonial Acres Nsg. Home*, 240 Neb. 189, 481 N.W.2d 189 (1992).

While the experts agree that Kerkman's symptoms are consistent with the type of injury he received, they do not agree on the cause of his current symptoms. The trial court is entitled to accept the opinion of one expert over another. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Toombs v. Driver Mgmt., Inc.*, 248 Neb.

1016, 540 N.W.2d 592 (1995). Dr. Cox attributed the injury to an intervening cause.

An independent intervening cause, as the proximate cause of an injury, is a matter of defense and, as such, must be proved by the party asserting that defense. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). While Kerkman correctly cites *Mendoza* for the proposition that the "mere possibility" of an independent intervening cause does not relieve an employer from liability for an employee's otherwise compensable claim, the facts in this record establish more than a mere possibility.

In his second letter, dated November 11, 1994, Dr. Cox states, after reviewing further records:

> [A]fter reviewing Dr. Blair's notes, I noticed again an incident that occurred on 5-22-92. I noticed a complaint of sharp pain in the back caused by tearing forms off concrete and falling. This incident for a patient who has a pre-existing back condition certainly constitutes an aggravation and/or reinjury. Mr. Kerkman's condition from 5-22-92 on, in my opinion, is more likely a result of that aggravation, and not a natural continuation of his 1987 injuries.

Dr. Cox concludes that "further chiropractic care would not relieve pain, hasten or promote Mr. Kerkman's restoration to health or employment, as a result of the accidents in 1987." There was conflicting evidence on the issue of whether Kerkman "aggravated" or "re-injured" his back while picking up the concrete forms, however, findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. See, *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). We conclude that there is sufficient evidence in the record to support a finding that the incident involving picking up the concrete forms was an intervening cause for Kerkman's current symptoms.

Reasonable Controversy

We have consistently held that where there is no reasonable controversy, § 48-125 authorizes the award of attorney fees. *Mendoza v. Omaha Meat Processors, supra*; *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988); *McDonald v. Lincoln U-Cart Concrete Co.*, 232 Neb. 960, 442 N.W.2d 892 (1989). Whether a reasonable controversy exists pertinent to § 48-125 is a question of fact. *Mendoza v. Omaha Meat Processors, supra*.

In *Mendoza*, we set forth the test for determining whether a reasonable controversy exists. We said that

> a reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part.

Mendoza, 225 Neb. at 784-85, 408 N.W.2d at 288.

More simply, to avoid the payment of attorney fees assessable under § 48-125, the employer must have a reasonable basis in law or in fact for disputing the employee's claim and refraining from payment of compensation. *Mendoza v. Omaha Meat Processors, supra*. Because there was some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the Workers' Compensation Court. Under our *Mendoza* test, this indicates the presence of a reasonable controversy. Therefore, Kerkman is not entitled to an award of attorney fees.

CONCLUSION

We conclude that there was sufficient competent evidence in the record to warrant the Workers' Compensation Court's finding that Kerkman's chiropractic treatments were not reasonable or necessary medical expenses required by the nature of

his 1987 injuries. Additionally, we determine that a reasonable controversy existed as to the compensability of the treatments and that no attorney fees are allowed to Kerkman. We therefore affirm.

AFFIRMED.

WHITE, C.J., and LANPHIER, J., not participating.

NEBCO, INC., APPELLANT, V. BOARD OF EQUALIZATION OF CITY OF LINCOLN, NEBRASKA, AND CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

547 N.W.2d 499

Filed May 17, 1996. No. S-94-263.

1. **Special Assessments: Appeal and Error.** An appeal from a board of equalization's levy of special assessments is heard in the district court as in equity and without a jury.
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.
3. **Special Assessments: Improvements: Words and Phrases.** Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.
4. **Special Assessments: Improvements.** The foundation for a local assessment lies in the special benefits conferred by the improvement upon the property assessed, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and, therefore, illegal.
5. **Special Assessments.** The amount of the special assessment cannot exceed the amount of benefit conferred.
6. ____. An assessment may not be arbitrary, capricious, or unreasonable, but the law does not require that a special assessment correspond exactly to the benefits received. The most any officer or any tribunal can do in this regard is to

estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information.

7. **Special Assessments: Presumptions.** Absent evidence to the contrary, it will be presumed that a special assessment was arrived at with reference only to the benefits which accrued to the property affected.
8. ____: ____. The validity of an assessment is further aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part.
9. **Special Assessments.** Reasonable prospective uses of the property may be considered in determining whether the property has benefited.
10. **Special Assessments: Proof.** A party challenging a special assessment has the burden of establishing its invalidity.
11. **Special Assessments: Improvements.** It is a question of fact whether a property which has been specially assessed has or will benefit from an improvement project.
12. **Courts: Appeal and Error.** When the trial court has viewed the premises, the appellate court is required to consider any competent and relevant facts revealed by the view and any findings made by the trial court, provided that the record contains competent evidence to support the findings.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

James W. Hewitt for appellant.

William F. Austin, Lincoln City Attorney, and Don W. Taute for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Plaintiff, NEBCO, Inc., appeals a decision of the district court for Lancaster County which affirmed a paving assessment against unimproved property made by the Lincoln City Council sitting as a board of equalization.

NEBCO owns approximately 150 acres of farmland on the northern edge of Lincoln. The property is unimproved, undivided, and unplatted farmland zoned "agricultural."

On July 2, 1990, the Lincoln City Council passed ordinance No. 15603, which created paving district No. 2561, established the boundaries of the paving district, designated the property to be benefited by the paving improvement, and provided for the payment of the cost thereof.

In 1991, north 70th Street, a section of which abuts the NEBCO property, was paved as part of paving district No. 2561. The easterly 183 feet of the NEBCO property, which included 33 feet of the right-of-way of 70th Street, was assessed $48,681.09 by the board to pay for the paving. NEBCO appealed to the district court, pursuant to Neb. Rev. Stat. § 15-1205 (Reissue 1991). That court affirmed the decision and overruled NEBCO's motion for new trial. NEBCO timely appealed the decision. We removed the case from the Nebraska Court of Appeals' docket under our power to regulate the dockets of the lower courts.

BACKGROUND

In its opinion, the district court found:

> The plaintiff [NEBCO] is the owner of the East 350 feet of the South Half of the Northeast Quarter, Section 33, Township 11 North, Range 7 East, Lancaster County, Nebraska [the plaintiff's real estate]. On July 2, 1990, the City Council adopted Ordinance No. 15603, which created Paving District No. 2561. Ordinance No. 15603 authorized the paving of North 70th Street, Lincoln, Nebraska, from approximately 2,130 feet north of Fletcher Avenue to Salt Creek and specifically designated various properties which would be benefitted by the paving of North 70th Street, including a part of the plaintiff's real estate. Additionally, Ordinance No. 15603 provided that the cost of paving North 70th Street would be paid for through the imposition of special assessments against the properties within the paving district boundaries, in proportion to the benefits conferred upon the properties.
>
> Subsequent to the construction of the paving of North 70th Street, pursuant to Paving District No. 2561, the Board of Equalization, on April 6, 1992, assessed the cost thereof, based upon benefit, against various properties. A part of the plaintiff's real estate was assessed $48,681.09.
>
> . . . .

> The plaintiff's real estate is zoned "Agricultural," is unimproved and is currently farmed by a tenant. . . .
>
> Exhibit 5 is an aerial photograph of the area included within Paving District No. 2561 and the surrounding area. It shows industrial development east and in the vicinity of the plaintiff's real estate. In addition, as part of its viewing of the area, the court noted that a new truck sales and service business has been constructed on a parcel of real estate located on, or contiguous to, the northwest corner of the real estate located within Paving District No. 2561. The real estate on which this new business is located had its zoning changed to "Industrial" from "Agricultural."
>
> . . . In this case, the plaintiff's expert testified that it would be over ten years before the area would develop industrially; however, development to the north has occurred and, according to the defendants' witnesses, is projected within the foreseeable future.
>
> The court finds that the plaintiff's real estate has received benefit from Paving District No. 2561. Also, the court finds that the plaintiff has not presented evidence sufficient to rebut the presumption that the amount of the assessment levied correlated with the amount of the benefit the plaintiff's real estate received from Paving District No. 2561.

NEBCO filed a motion for new trial and in doing so alleged for the first time that the splitting off, or severance, of its property by the board was improper. In overruling the motion, the district court stated that "[t]o adhere to the plaintiff's argument would result in either the entire tract being assessed or none of the tract being assessed. The court finds neither of the alternatives to be reasonable."

ASSIGNMENTS OF ERROR

NEBCO assigns as error:

> (1) The court erred in allowing a small parcel of a farm that is farmed as a total unit to be split off from the whole for the purpose of determining benefits resulting from the 70th Street paving[.]

(2) The court erred in finding that any present or future benefit accrued either to the small severed parcel or to the farm as a whole.

(3) The court erred in finding that NEBCO did not present sufficient evidence to rebut any presumption that the amount of cost it was assessed was equivalent to the benefit to the property.

STANDARD OF REVIEW

An appeal from a board of equalization's levy of special assessments is heard in the district court as in equity and without a jury. § 15-1205. 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. *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *City of Lincoln v. Townhouser, Inc.*, 248 Neb. 399, 534 N.W.2d 756 (1995); *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995); *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995).

ANALYSIS

Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. *Bennett v. Board of Equal. of City of Lincoln*, 245 Neb. 838, 515 N.W.2d 776 (1994); *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989); *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977).

The foundation for a local assessment lies in the special benefits conferred by the improvement upon the property assessed, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and,

therefore, illegal. *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980).

The amount of the special assessment cannot exceed the amount of benefit conferred. *Bennett, supra*. See Neb. Rev. Stat. §§ 15-701 through 15-701.02 (Reissue 1991) (authorizing cities of primary class, such as Lincoln, to pave and improve streets and to assess cost of such improvements, proportionate to benefits conferred, on property benefited).

> "An assessment may not be arbitrary, capricious, or unreasonable but the law does not require that a special assessment correspond exactly to the benefits received. . . . The most any officer or any tribunal can do in this regard is to estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information."

Bennett, 245 Neb. at 842, 515 N.W.2d at 779 (quoting *Bitter v. City of Lincoln*, 165 Neb. 201, 85 N.W.2d 302 (1957)).

Absent evidence to the contrary, it will be presumed that a special assessment was arrived at with reference only to the benefits which accrued to the property affected. *Bennett, supra*; *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). The validity of an assessment is further aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part. *Bennett, supra*; *Bitter, supra*.

Reasonable prospective uses of the property may be considered in determining whether the property has benefited. *Brown, supra*. See, also, *Grube v. City of Ogallala*, 223 Neb. 640, 392 N.W.2d 380 (1986).

A party challenging a special assessment has the burden of establishing its invalidity. *Bennett, supra*; *Brown, supra*; *Grube, supra*; *Bitter, supra*. It is a question of fact whether a property which has been specially assessed has or will benefit from an improvement project. *Bennett, supra*; *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *North Platte, Neb. Hosp. Corp., supra*; *Grube, supra*. See, also, *Nebco, Inc., supra*.

The record does not contain evidence which would suggest that the board's action was arbitrary, capricious, or unreasonable. Unreasonableness can be shown if the board, in its assessment, treats similarly situated people differently. See *Bennett, supra*. However, the evidence in this case does not reflect that the Lincoln City Council treated the landowners along the paved portion of 70th Street unequally.

NEBCO argues that the board presented little evidence as to the reasonableness and validity of its actions. A party is not required to prove a fact when a presumption of the existence of that fact is in its favor. To the contrary, the challenging party is required to put forward sufficient evidence to rebut the presumption. The burden is on NEBCO to rebut the presumption that the assessment was valid. See, *Bennett v. Board of Equal. of City of Lincoln*, 245 Neb. 838, 515 N.W.2d 776 (1994); *Brown, supra*; *Grube, supra*; *Bitter, supra*.

The court's finding during its view of the property, documented in its orders, was that industrial development had occurred and was occurring adjacent to the NEBCO property. When the trial court has viewed the premises, the appellate court is required to consider any competent and relevant facts revealed by the view and any findings made by the trial court, provided that the record contains competent evidence to support the findings. *Riha v. FirsTier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995); *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991).

Based on our de novo review of the findings of the court compiled from the record and made during its view of the property, we find that NEBCO did not rebut the presumption that the assessment levied pursuant to the creation of paving district No. 2561 benefited NEBCO's real estate in the amount of the assessment.

NEBCO further argues that the court erred in allowing the board to sever a small portion of the property in order to assess the land for the benefit conferred. We agree with the trial court that to adopt NEBCO's argument would force the board to assess the whole tract or none of it. This result would be unacceptable. Further, § 15-701.02 specifically states, in relevant part:

> The city council may fix the depth to which property may be charged and assessed for benefits, and to a greater depth than the lots fronting on the street, streets, alley, alleys, public grounds, public way or ways so improved and the determination thereof by the city council shall be conclusive.

In light of this explicit statutory authority, we find NEBCO's assignments of error on this issue without merit.

CONCLUSION

NEBCO did not introduce sufficient evidence to rebut the presumption in favor of the validity of the assessment. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurs in the result.

GLENN H. SHIPLEY, APPELLANT, V. ALEXANDER A. BAILLIE ET AL., APPELLEES.

547 N.W.2d 711

Filed May 17, 1996. No. S-94-656.

1. **Summary Judgment.** Summary judgment is proper 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. ____. 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts: Principal and Agent: Liability.** The authorized employment of a subservant or other subagent does not thereby subject the principal to contractual liability to the subagent.

5. **Contracts: Principal and Surety: Words and Phrases.** Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal.
6. **Contracts: Principal and Surety.** The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal.
7. **Contracts: Principal and Surety: Consideration.** To be binding, a promise to be surety for the performance of a contractual obligation (1) must be in writing, (2) must be signed by the obligor, and (3) must recite a purported consideration.

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

Vicki L. Boone, of Gunderson Law Offices, for appellant.

Gregory G. Barntsen, of Smith Peterson Law Firm, for appellee Federal Kemper Life Assurance Company.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Glenn H. Shipley filed this action against Alexander A. Baillie, Professional Diversified Services, Inc. (PDS), and Federal Kemper Life Assurance Company (Kemper), seeking an accounting of, and damages for, alleged unpaid commissions for the sales of Kemper insurance policies. The district court granted Kemper's motion for summary judgment and dismissed Shipley's action as against Kemper. Shipley appeals.

Shipley assigns as error: The district court erred in finding that no genuine issue of material fact existed as to Kemper's obligation to Shipley, and in determining that Kemper was entitled to judgment as a matter of law.

PDS was the general agent for Kemper. Pursuant to an agreement with Kemper, PDS was authorized to recruit subagents to sell Kemper products. The agreement between Kemper and PDS also authorized PDS to request that commissions be paid directly to the selling agents rather than to PDS. According to Kemper's policies and procedures, direct payment meant making the check payable to the particular agent entitled to the commission, but still sending the check to

the general agent for disbursement. Specifically, the agreement stated:

> You may contract directly with approved Agents or Brokers under agreements suitable for governing solicitation of insurance as authorized by us. In the event you request us to pay commissions earned by your Agents or Brokers directly to them or to provide you with separate checks for the commissions earned by them, then you shall use the printed forms of AGENT'S, BROKER'S, AND SINGLE CASE AGREEMENTS furnished by us. None of these AGREEMENTS shall be in force until we receive notice of your intention to use them and the notice has been acknowledged in writing by an officer of [Kemper].

This agreement between Kemper and PDS stated, in regard to PDS' position, "You shall be deemed to be an independent contractor and nothing contained in this AGREEMENT shall be deemed to make you, your Agents, Brokers or any of your employees an employee of ours."

On August 3, 1990, Shipley, president of GSA, Inc., and Baillie, president of PDS, executed an agreement procuring the services of Shipley and his agents, referred to as the "GSA unit," to sell Kemper life and annuity insurance products. This agreement stated that it was only between PDS and GSA, Inc. The "compensation" section of this agreement stated:

> The level of compensation received by GSA will be determined by a MA26 level Kemper contract executed this day by and between GSA and Kemper, a copy of which is attached and hereby made a part of this agreement. The difference between the agent level and the MA26 level will be the applicable commission percentage that should be paid by Kemper directly to GSA for business issued and paid for by agents in the GSA unit. A copy of the contract is attached and hereby made a part of this agreement.

This agreement was signed by only Shipley and Baillie.

Attached to this agreement was a commission authorization form dated August 1, 1990, in which PDS authorized Kemper to pay commissions directly to members of the GSA unit pur-

suant to a commission schedule. The top of this authorization contained the Kemper insignia. Shipley testified that this commission authorization was the MA26 contract referred to in the PDS/GSA agreement. The authorization provided in pertinent part: "I hereby authorize Federal Kemper Life Assurance Company and or Fidelity Life Association to pay the following Agent(s)/Broker(s) commissions according to the schedule indicated. This agreement can be cancelled by the Company or me by written notice at any time."

Baillie, as a representative of PDS, was the only party to sign the commission authorization form. It was not signed by a Kemper official. Kemper contends that it did not receive this commission authorization until the lawsuit was filed. Kemper, however, acknowledges receiving a fax from GSA in October 1990 containing a list of agents to receive direct commissions but not containing the authorization.

Prior to Shipley's agreement with PDS, Shipley had been a general agent for Kemper for approximately 4 years. Shipley testified in his deposition that he had a general understanding of Kemper's policies and procedures.

Kemper paid commissions to PDS, and some of these commissions were then paid to Shipley and his agents. It is not entirely clear from the record whether the commission checks issued by Kemper were directly made out to Shipley and his agents as payees, or whether the checks were made out to PDS.

Shipley filed a petition against Baillie, PDS, and Kemper seeking an accounting of these commissions and damages. He alleges in his petition that the defendants failed to comply with the terms of the PDS/GSA agreement and the commission authorization form. In his deposition, Shipley testified that he believed that Kemper had paid all commissions to PDS that were due to the GSA unit. Shipley testified, however, that PDS failed to pay Shipley all commissions to which he believed he and his agents were entitled.

Kemper moved for summary judgment. The district court concluded that Kemper had paid all amounts to PDS that might be due to Shipley, and determined that Kemper was not a party to the PDS/GSA contract. The court granted Kemper's

motion for summary judgment and dismissed Shipley's petition as against Kemper.

In regard to this court's standard of review, summary judgment is proper 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

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. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Zion Wheel Baptist Church, supra.*

Shipley contends that Kemper is not entitled to judgment as a matter of law because, as PDS' principal, Kemper is liable for its general agents' actions. Restatement (Second) of Agency § 458 (1958) addresses this issue. Section 458 at 378 provides, in pertinent part: "The authorized employment of a subservant or other subagent does not thereby subject the principal to contractual liability to the subagent . . . ." Comment *a.* to § 458 expands on this principle, stating at 378:

> If an agent employs a subagent, the agent is the employing person, and the principal is not a party to the contract of employment, except where, by express promise or otherwise, he becomes a surety. He is not, therefore, subject to pay the agreed compensation, nor is he subject to contractual liability to indemnify the subagent, to maintain friendly relations with him, or to keep accounts. On the other hand, a subagent has the same rights to indemnity as an agent has [citations omitted] and the same right as agents have against their principals for conduct constituting a tort.

Therefore, according to § 458, a principal that authorizes a general agent to employ subagents is not contractually liable to the subagent under the contract executed between the general agent and the subagent.

The Restatement view, however, runs contrary to the case *Equitable Life Assurance Co. v. Brobst*, 18 Neb. 526, 26 N.W. 204 (1886). *Brobst* involved a subagent selling policies for a general agent of Equitable Life pursuant to an agreement between the general agent and the subagent. The subagent filed an action against Equitable Life to recover for his services rendered for the company. The court, finding that he was entitled to damages from Equitable Life, held: "[T]he acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him." *Id.* at 528, 26 N.W. at 204.

This court accepts the view as set forth in the Restatement, *supra*, and overrules *Brobst* to the extent it contravenes § 458. Applying § 458, Shipley's action is not based on tort principles, but, instead, on the alleged failure of the defendants to honor the terms of the PDS/GSA contract and commission authorization. The general agent's agreement between Kemper and PDS authorized the employment of subagents. The commission authorization, however, was not signed by any representative of Kemper. Rather, it was signed only by Baillie. Pursuant to § 458, Kemper was not a party to the PDS/GSA agreement or commission authorization form and is not contractually liable to Shipley.

Shipley also contends that summary judgment was improper because a genuine issue of material fact exists as to whether Kemper was a surety, therefore creating an exception to § 458 stated above. He contends that in the case at bar, the positioning and conduct of the parties created an implied suretyship on the part of Kemper and that Kemper was therefore liable to Shipley.

Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the prin-

cipal. *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 89 N.W.2d 258 (1958). The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. *Id.* To be binding, a promise to be surety for the performance of a contractual obligation (1) must be in writing, (2) must be signed by the obligor, and (3) must recite a purported consideration. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

Shipley does not contend that the commission authorization form was sufficient to create a valid express suretyship on the part of Kemper. Rather, Shipley contends that a suretyship should be implied under the circumstances of this case. He cites 72 C.J.S. *Principal and Surety* § 33 (1987) in support of his implied surety theory. Section 33 at 191 provides in relevant part that

> a suretyship, known as "involuntary suretyship," may arise, without any contract being expressed in positive terms of suretyship, or any actual intent to form that relationship, out of a contract whose chief object is to accomplish some purpose other than that of becoming liable for the debt, default, or miscarriage of another, but which, by implication of law incidentally, has that effect, by reason of the position which the parties have assumed toward each other or toward the property out of which the debt or obligation due to the obligee is paid.

Nebraska case law has never addressed the issue of implied surety. Rather, Shipley urges this court to adopt the theory of implied surety based on the circumstances of this case.

The parties' actions and relationship to each other in this case do not give rise to a suretyship by implication of law. Kemper's actions did indicate that it was acknowledging that it had an obligation for the payment of commissions. This obligation, however, was a direct obligation to PDS rather than a collateral obligation to that of PDS. Kemper fulfilled its obligation through payment to PDS of all commissions due. Moreover, both PDS and Shipley understood Kemper's policy that all payments went to PDS for disbursement to the subagents, either in the form of a check to a specific agent or

merely as an unapportioned commission check. Lastly, the commission authorization could be canceled at any time by Kemper or by Baillie upon notice. We decline to apply the doctrine of implied surety to the circumstances of this case.

In sum, no genuine issue of material fact exists as to Kemper's obligation to Shipley. The district court properly granted Kemper's motion for summary judgment, finding no liability on the part of Kemper, and properly dismissed Shipley's petition as against Kemper.

AFFIRMED.

WHITE, C.J., dissenting.

The majority holds that the authorized employment of a subagent by a general agent does not subject the principal to contractual liability to the subagent, overruling *Equitable Life Assurance Co. v. Brobst*, 18 Neb. 526, 26 N.W. 204 (1886). *Brobst* held that "the acts of a general agent with reference to the subject of the agency will bind his principal." *Id.* at 528, 26 N.W. at 204. Since I do not believe that *Brobst* should be so lightly overruled, I respectfully dissent.

Kemper's agreement with PDS provided PDS with the express authority to hire subagents to sell insurance policies for Kemper. Although Kemper has made payments to PDS on commissions due to the subagents, it has not ensured that the subagents receive these commissions from its general agent. Kemper is allowed to reap the benefits of the sales by these subagents without ensuring that these subagents are paid. In sum, Kemper gave its general agent express permission to enter contracts in pursuit of Kemper business opportunities and, therefore, should be held liable for its general agent's breaches of these contracts.

Since the majority's holding provides an insurance company contractual immunity from contracts which directly benefit the company by merely acting through a general agent, I respectfully dissent.

CAPORALE and FAHRNBRUCH, JJ., join in this dissent.

MABEL F. MCARTHUR AND DENNING D. MCARTHUR, JR., TRUSTEES, ET AL., APPELLEES, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT.

547 N.W.2d 716

Filed May 24, 1996. No. S-94-191.

1. **Appeal and Error.** To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
2. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert under Neb. Evid. R. 702, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Eminent Domain: Witnesses.** An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation.
7. **Trial: Expert Witnesses.** Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of the trial court's determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
8. **Trial: Eminent Domain: Witnesses.** In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar not only with the property in question, but also with the state of the market.
9. **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.
10. **Trial: Eminent Domain: Evidence.** In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties.

11. ____: ____: ____. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.
12. **Rules of Evidence: Expert Witnesses: Hearsay.** Rule 703 of the Nebraska Evidence Rules allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion.
13. **Expert Witnesses: Witnesses.** The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true.
14. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
15. **Eminent Domain: Evidence: Valuation: Proof.** In condemnation proceedings where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land.
16. **Eminent Domain: Valuation: Offers to Buy or Sell: Words and Phrases.** The fair market value is the value of the property if offered for sale upon the open market as between one who is ready and willing to sell but is not compelled to sell, and one who is ready, able, and willing to buy but is not required to buy.
17. **Expert Witnesses.** When an expert's opinion does not have a sound and reasonable basis such that the expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the opinion should be stricken.
18. **Eminent Domain: Evidence: Valuation.** The capitalizing of an estimate of the net rents from a probable use of the property is an accepted method of valuation.
19. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded for a new trial.

Paul F. Peters and Kathleen C. Vance, of Schmid, Mooney & Frederick, P.C., for appellant.

Tyler B. Gaines, of Gaines, Mullen, Pansing & Hogan, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

In this condemnation action, Papio-Missouri River Natural Resources District (NRD), the condemner, appeals from a jury verdict in favor of the condemnee owners, Mabel F. McArthur and Denning D. McArthur, Jr., et al. The jury awarded the condemnees $135,146 as compensation for the taking of a 61.43-acre tract in Washington County.

We reverse the judgment of the trial court and remand the cause for a new trial because the trial court abused its discretion in admitting certain testimony of an expert containing the valuation of the 61.43 acres which was not grounded upon a reasonable basis and was premised upon guess and conjecture.

ASSIGNMENTS OF ERROR

Restated and summarized, NRD assigns as error that the trial court erred in permitting Neale Shaner, over objection, to testify as an expert, in not striking the testimonies of Shaner and Russell Nelsen, and in refusing NRD's requested jury instruction. NRD also assigned as error, but did not argue in its brief, the overruling of its motion for a new trial. To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). Therefore, we need not address the issue of NRD's motion for a new trial.

STANDARD OF REVIEW

A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert under Neb. Evid. R. 702, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992). A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991).

FACTS

This action arises from the July 3, 1991, NRD taking of 61.43 acres of real estate adjoining the Missouri River in Washington County. NRD acquired the property for the purpose of revitalizing the Missouri River environment and developing public recreation along the river.

The county court appointed appraisers who reported that the total damages to the condemnees for the 61.43 acres was $101,437.

The record reflects that the condemnees were Mabel and Denning McArthur, who held in trust an undivided half interest in the 61.43 acres. Penelope Sue and David N. Shaner and Laura M. Shaner, as custodian for Jeffrey A. Shaner, a minor, owned the other undivided half interest.

The condemnees appealed the award of the court-appointed appraisers to the district court for Washington County. The condemnees alleged that damages resulting from the taking were substantially in excess of the amount awarded by the court-appointed appraisers.

At trial, Neale Shaner (Shaner), husband of Laura Shaner and father of Penelope, David, and Jeffrey Shaner, was called by the condemnees to testify as an expert, as was Russell Nelsen, a licensed real estate appraiser and broker.

The trial court overruled NRD's objections to Shaner testifying as an expert and NRD's motions to strike the opinions of Shaner and Nelsen. The trial court also refused NRD's requested jury instruction that

> [a]ny decrease or increase in the fair market value of real property prior to the date of valuation, caused by the likelihood that the property would be acquired for the public improvement for which such property is acquired, other than an increase or decrease due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property.

The jury returned a verdict in favor of the condemnees for $135,146. NRD appealed to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, we removed the appeal to this court's docket.

ANALYSIS

Testimony of Shaner

At the time of the taking, Shaner not only lived on the land adjoining the 61.43 acres but also, for 30 years, had farmed the land which included the 61.43 acres. Shaner stated he was well acquainted with the 61.43 acres. As an employee in the trust department of the Omaha National Bank for 13 years, Shaner managed real estate which included farmland and land similar to that being condemned in this litigation. As part of his duties, he determined the highest and best use of the property he managed.

Shaner, who earned a juris doctor degree from the University of Nebraska, testified that he was trained through trust administration schools and continuing legal education courses in property evaluation and had 13 years' experience in determining the value of real property. Shaner testified that he was also familiar with determining the highest and best use of real property. He further testified that he was familiar with the real estate market in Washington County as it existed at the time of the taking involved in this litigation. In particular, Shaner testified that he was familiar with the real estate market in Washington County as it pertains to recreational uses.

Shaner's valuation of the 61.43 acres was based upon a comparable sale approach. According to Shaner, the highest and best use of the 61.43 acres would be for recreational purposes such as a Missouri River park area. He testified that Harlan Rohrberg, operator of recreational property in Glenwood, Iowa, told him that the 61.43 acres was similar to the property that Rohrberg was using for recreational purposes and that such a use would be feasible on the property in question.

Shaner compared the 61.43 acres to a 95-acre sale of agricultural land northeast of Blair, 19 acres of which was treed riverfront similar to the 61.43 acres in question. The 95 acres sold for $160,000. Shaner determined the fair market value of the 75 acres of agricultural land as $1,400 per acre, subtracted the total value of the 75 acres from $160,000, and divided the remaining 19 acres into the remainder of the purchase price to determine the value of the recreational property on the comparable land. Shaner valued the comparable 19 acres at $60,000, or slightly more than $3,000 per acre. Shaner testified that at the time of the taking, the condemnees' 61.43 acres was worth $180,000.

NRD claims that the trial court erred in allowing Shaner to testify as to the highest and best use of and the value of the 61.43 acres.

NRD, relying upon *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982), contends that because Shaner was not the owner of the property, he was not entitled to a presumption of being a competent witness as to the value of the taken property. In *Langfeld*, we held that an owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation.

NRD interprets *Langfeld* too narrowly. While Shaner did not have title as owner of the 61.43 acres, his children and wife did, and he resided on land adjoining the 61.43 acres and had farmed the land which had included the 61.43 acres for 30 years. In *Johnson's Apco Oil Co. v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979), we held that a stockholder of a

corporation could testify as to the value of property owned by the corporation. In doing so, we stated:

> While it is true that with stock ownership alone one does not become an owner of property held by a corporation in the sense of the word when applied to an individual owner, yet, do our decisions permitting a resident owner who is familiar with his property and knows its worth to testify as to its value without further foundation rest upon the mere fact that the owner holds legal title to the property? We think not. Rather, our decisions rest upon the owner's familiarity with the property's characteristics, its actual and potential uses, and his experience in dealing with it. This is what qualifies him to testify as to value.

Id. at 400, 282 N.W.2d at 594. The record reflects Shaner's familiarity with the condemned land's characteristics and uses as well as his experience farming that land. Based upon the record, Shaner was qualified as an "owner" to testify as to the property's value for its current use without further foundation.

Shaner's valuation is based upon the highest and best use of the property being recreational. The property at the time of taking was not being used for recreational purposes. Therefore, the condemnees needed to establish foundation for Shaner's expertise in the area of determining highest and best use, as well as expertise to determine the value of the 61.43 acres for recreational purposes.

Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of the trial court's determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993).

The record reflects that Shaner received training and had employment experience with real estate values generally and in determining highest and best use of real property. The

record specifically reflects that Shaner was experienced with the Washington County real estate market's agricultural and recreational properties and with land similar to that being condemned in this litigation. In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must be familiar not only with the property in question, but also with the state of the market. *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975). The trial court did not clearly err in finding that sufficient foundation was laid for Shaner to testify as an expert as to the highest and best use and as to the value of the 61.43 acres.

NRD considered Shaner's testimony incredible. NRD's experts testified that the 61.43 acres involved here were not feasible for recreational purposes. It is noted that in its condemnation pleadings, NRD stated that among the uses for which it needed the 61.43 acres involved here was for public recreation purposes within "the corridor." NRD's experts also disputed Shaner's valuation of the land. 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. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

NRD contends that Shaner's value of the 95-acre comparable sale was speculative. We disagree. The record reflects that Shaner determined the value of the 19 acres of recreational property by determining how much of the $160,000 sale price went to the 76 acres of agricultural land. Determining a value of recreational property by noting and adjusting for the differing value in agricultural property is not speculative.

In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties. *Thacker v. State, supra.* Whether the properties the subject of other sales are sufficiently similar to the property condemned to

have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982). Shaner testified as to the similarity in location and character of the property. It cannot be said that the trial court abused its discretion in allowing Shaner to testify as to the comparability of the 95-acre sale price and the value of the 19 acres of treed riverfront.

NRD claims that the trial court erred in allowing Shaner to testify that Rohrberg informed him of the feasibility of adapting the 61.43 acres to recreational purposes. Rule 703 of the Nebraska Evidence Rules allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). The trial court did not abuse its discretion in allowing Shaner to take into consideration Rohrberg's statements regarding the feasibility of recreational use as a highest and best use for the property in question.

NRD's argument that the trial court erred in not striking Shaner's testimony is meritless.

Testimony of Russell Nelsen

Nelsen, a licensed real estate appraiser and broker, conducted an appraisal of the 61.43 acres. Nelsen determined that the highest and best use of the property was passive recreation, such as camping, picnicking, fishing, hiking, and birdwatching.

Nelsen utilized a comparable sale approach and income approach method to appraise the 61.43 acres. Nelsen based his comparable sale upon a 26.66-acre tract of land north of Blair which Nelsen stated sold for $300,000 through an installment contract. According to Nelsen, the $60,000 downpayment on the installment contract represented the "cash equivalency" of the sale price. Nelsen divided the $60,000 by the 26.66 acres

to determine that the comparable land sold for $2,250 per acre for that part of the 26.66 acres which was nonagricultural treed land along the river. Nelsen acknowledged that the $60,000 was not the total amount paid. Nelsen stated that he did not know what amount was paid in the installments and that "a common appraisal practice is to arrive at an exact amount of cash that exchanged hands." Nelsen testified that using this method, he valued the 61.43 acres at $123,600.

Nelsen, using the income approach method, also concluded that the 61.43 acres was worth $123,600. Nelsen relied upon information gathered from Rohrberg, whose Iowa property earned an income of $10 per front foot. Nelsen capitalized projected net income, relying upon the $10 per front footage rental receivable by Rohrberg and discounting that to $8 per lineal foot. Nelsen made adjustments for a projected $3,000 capital expenditure. He estimated that the 61.43 acres, as a recreational project, would net $14,240 per year less an estimated 20 percent from vacancies, expenses, and capital expenditures over the first several years of startup.

Nelsen testified that the 20-percent figure represents a long-term estimate derived from an 8-percent expense figure used by Rohrberg and an additional 12 percent added by Nelsen to account for "other expenses" and interest. Under cross-examination, Nelsen stated that any projections as to occupancy rate would be guesswork on his part.

The NRD offered the testimony of James Grove, a real estate appraiser. Grove stated that he would not use the downpayment on a land contract as a reliable indication of the price paid for the real estate because the $300,000 land contract sale was never completed. Grove analyzed the 61.43 acres as wet chute and timber, waste from an agricultural standpoint, and valued the 61.43 acres at $39,200, or $637.52 per acre.

NRD contends that the trial court erred in allowing Nelsen to testify as to the sale price of a purported comparable piece of property. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. *Langfeld v. Department of Roads*, 213 Neb.

15, 328 N.W.2d 452 (1982). Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983). In condemnation proceedings where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land. *Timmons v. School Dist.*, 173 Neb. 574, 114 N.W.2d 386 (1962).

We do not agree with Nelsen's suggestion that one can place a fair market value of land at $60,000 because that is how much the buyer gave as downpayment on a $300,000 installment contract. The buyer and seller did not agree on the mere downpayment as the fair market value of the 26.66 acres.

The fair market value is the " 'value of the property if offered for sale upon the open market as between one who is ready and willing to sell but is not compelled to sell, and one who is ready, able and willing to buy but is not required to buy.' " *Schmailzl v. State*, 176 Neb. 617, 623, 126 N.W.2d 821, 825 (1964). Installment contracts should be carefully scrutinized before admitted as evidence because they may reflect terms at variance with custom and usage and it is common knowledge that deferred payment sales eventually cost the buyer more than if the buyer purchased upon a fair cash market value. See, *Gradison v. State et al.*, 260 Ind. 688, 300 N.E.2d 67 (1973); *Redfield v. Iowa State Hgwy. Commission*, 252 Iowa 1256, 110 N.W.2d 397 (1961).

The record suggests that the buyer never paid the full $300,000 obligation of the installment contract. Nelsen testified that he used the downpayment because he did not know how much the buyer eventually expended. The knowledge that Nelsen needed in order to lay the foundation for a comparable sale, i.e., how much the buyer was actually ready and able to spend and the seller willing to accept, was the precise knowl-

edge that Nelsen lacked. Nelsen's testimony did not establish the existence of the supposed comparable sale that his valuation of the 61.43 acres relied upon. When an expert's opinion does not have a sound and reasonable basis such that the expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the opinion should be stricken. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994). To admit into evidence such a valuation to the trier of fact was an abuse of discretion on the part of the trial court.

Nelsen's capitalized projected net income was premised upon discounting the projected income by 20 percent each year for several years based upon startup expenses and vacancies.

The capitalizing of an estimate of the net rents from a probable use of the property is an accepted method of valuation. *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968). NRD claims that Nelsen's use of a 20-percent discount in arriving at his estimate of net rents is mere speculation. Nelsen informed the jury that the 20-percent discount over several years is his estimation of startup costs, extraneous expenses, and vacancies over a long-term period. Although Nelsen could not know the occupancy ratio in the first years that the 61.43 acres would be used for recreational purposes, he based his long-term estimation regarding vacancies upon the Rohrberg recreational property. Thus, Nelsen based the 20 percent upon data he found as comparable from the Rohrberg property adjusted upward for additional capital expenditures. This is not mere speculation. Furthermore, the jury was provided with Nelsen's explanations of his methodology and NRD's attacks upon that methodology. The weight of Nelsen's credibility is reserved for the jury. See *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

Refused Jury Instruction

NRD contends that the trial court erred in refusing its offered instruction that any decrease or increase in the fair market value of real property prior to the date of valuation caused by the likelihood that the property would be acquired for the public improvement for which such property is

acquired, other than due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation of the property.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). NRD contends that the instruction was necessary because Shaner and his mother deeded the property to Shaner's children in anticipation of the taking of the 61.43 acres. NRD's argument establishes neither prejudice nor that the instruction is warranted by the evidence. The record does not reflect, and NRD does not guide us to where in the record it would reflect, any increase or decrease in the value of the property caused by the likelihood of the acquiring of the property for public improvement.

CONCLUSION

We hold that the trial court abused its discretion by admitting into evidence Nelsen's testimony regarding the contract sale of a claimed comparable land. As the error was prejudicial to the proceeding, we vacate the jury's verdict, reverse the judgment of the trial court, and remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

LAWRENCE E. DAVID, APPELLEE, V. EDITH DeLEON, APPELLANT.

547 N.W.2d 726

Filed May 24, 1996. No. S-94-416.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that the tendered instruction is the correct statement of law, that the tendered instruction is warranted by the evidence, and that the appellant was prejudiced by the court's refusal to give the tendered instruction.
3. ____: ____: ____. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
4. **Negligence: Damages.** The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease.
5. **Jury Instructions: Negligence: Damages: Liability.** Where causation is not an issue, a jury instruction stating that the defendant is liable for all damages in the event that the jury cannot separate preexisting conditions from damages caused by the tortious act is not erroneous.
6. **Actions: Negligence: Damages: Proof.** The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. The plaintiff is not, however, required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all.
7. **Negligence: Damages: Liability.** A wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.
8. **Negligence: Damages: Proximate Cause: Proof.** Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Waldine H. Olson and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., for appellant.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This is an appeal from a jury verdict awarding the plaintiff, Lawrence E. David, damages for injuries sustained in a motor vehicle collision. Edith DeLeon, the defendant, alleges that she was prejudiced by the trial court's refusal to give a tendered jury instruction. We disagree and affirm.

The facts of the collision are not disputed. On May 1, 1988, DeLeon ran a stop sign at the intersection of 29th Street and St. Mary's Avenue in Omaha and struck broadside a vehicle driven by David. DeLeon contested liability through trial. The trial court directed a verdict on the issue of liability in favor of David and submitted the issue of damages to the jury. The jury returned a verdict awarding David $45,571.74. DeLeon has not assigned error to the order directing a verdict on liability, nor has she claimed that the damages awarded were excessive. DeLeon's sole assignment of error concerns the trial court's instruction to the jury regarding David's preexisting physical condition. Prior to the collision, David had suffered from mild generalized arthritis in his back and knees.

Certain damages claimed by David were immediately visible from the moment of the collision: David lost consciousness, sustained a concussion, and had no memory of the accident. He also suffered a fractured rib and multiple contusions to his head, ear, shoulder, and left knee, as well as a hematoma of the scalp. David was hospitalized for 2 days for these injuries.

After his hospitalization, David sought and received treatment from several physicians for a number of collision-related maladies. From May 2 through June 1, 1988, David was treated by a surgeon, Dr. Lewis Hanisch, for the concussion and hematoma. Dr. Hanisch also ordered x rays of two separate views of David's chest on May 10 to compare with the chest and spine x rays taken on the date of the accident.

David sought and received treatment for his knees in June and October 1988 from Dr. John Hurley, a rheumatologist who had treated David's arthritis since December 1987. In

June, Dr. Hurley noted effusion of David's left knee, aspirated the knee, and injected steroids. David returned to Dr. Hurley in October 1988 for further treatment of the injured left knee; Dr. Hurley again injected the knee with steroids.

In July 1991, David sought diagnosis and treatment from a neurologist, Dr. Joel Cotton, for neck pain experienced since the collision. Prior to the collision, David had not experienced significant neck pain, despite the presence of mild arthritis up and down his back. At Dr. Cotton's request, David underwent an MRI on July 17 and then returned to Dr. Cotton's office on July 22. At DeLeon's request, David saw Dr. Michael O'Neil on March 30, 1993, for an independent medical examination. David also saw an orthopedist, Dr. Michael Morrison, on October 1, 1991.

David's injuries, as diagnosed by the physicians, fell into three categories: aggravation of his preexisting knee condition, aggravation of cervical spine disease, and numbness and tingling in his feet. David admits his preexisting arthritic condition and spinal stenosis, and he further admits that each of those conditions can be naturally degenerative over time even in the absence of trauma. The question posed of each expert was to what extent David's current physical maladies could be causally related to the collision.

With respect to David's left knee injuries, each expert testified that the trauma of the collision aggravated David's preexisting arthritic condition. Dr. Hurley, the first physician to treat David's left knee following the collision, noted David's "long history of generalized osteoarthritis" but testified that David's left knee pain "was certainly aggravated by his motor vehicle accident." Dr. Cotton noted that while David had a preexisting condition of spinal stenosis, that condition was asymptomatic in David's legs before the trauma of the collision caused that condition to flare up. Dr. O'Neil, the independent medical examiner, opined that "the knee complaints were aggravation of his pre-existing degenerative arthritis documented in Dr. Hurley's medical records," although he could not state with reasonable medical certainty what percentage of the knee complaints were caused by the collision trauma.

The experts found some common ground on the issue of David's cervical spine complaints. Dr. Cotton opined that David sustained cervical spine injuries in the collision and that those injuries were superimposed over David's preexisting condition of arthritis. Specifically, Dr. Cotton diagnosed an unusually rapid degeneration of David's neck structure from its preexisting condition and causally related this rapid degeneration to the collision. Similarly, Dr. O'Neil was of the opinion, with reasonable medical certainty, that David sustained injuries to his cervical spine and agreed that those injuries were superimposed over his preexisting condition to cause "an aggravation of his pre-existing degenerative arthritis." Dr. O'Neil further agreed that David's impairment rating was causally related to the auto accident. Dr. O'Neil's findings were in part predicated on the diagnosis of Dr. Morrison that the collision aggravated David's preexisting condition.

It was only on the issue of David's tingling feet that the experts disagreed as to whether a causal link existed. Whereas Dr. O'Neil opined that the tingling was a natural progression of preexisting spinal stenosis, Dr. Cotton noted that David had not experienced tingling or any other symptoms of spinal stenosis prior to the collision and opined that the collision caused David's spinal stenosis to become symptomatic for the first time. David testified that the tingling was not painful and did not impede his activity in any way.

The tingling in David's feet, at any rate, was not a factor in his 7- to 7½-percent permanent impairment ratings. Nor, for that matter, did David's knee difficulties factor into his impairment ratings. Drs. Cotton, O'Neil, and Morrison agreed that the proper permanent impairment rating for David was between 7 and 7½ percent to the whole body as a result of David's preexisting and aggravated cervical spine symptoms. Accordingly, the only symptoms on which the experts disagreed as to causation were immaterial to the impairment rating by which David ultimately sought recovery.

At trial, DeLeon tendered proposed jury instruction No. 1 on damages, which represents only the first paragraph of NJI2d Civ. 4.09 and reads as follows:

> There is evidence that the plaintiff had degenerative disc disease of the cervical spine (also called spondylosis), spinal stenosis of the lumbar spine, and degenerative arthritic changes in the knees prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident.

The trial court rejected this instruction and gave instead David's proposed jury instruction No. 11, which represents both the first and second paragraphs of NJI2d Civ. 4.09:

> There is evidence that the plaintiff had pre-existing back and joint conditions prior to the date of the accident. The defendant is liable only for any damages found to be proximately caused by the accident.
>
> If you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages.

The trial court explained that its use of jury instruction No. 11 was supported by this court's decision in *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969), wherein this court held that the fact that a plaintiff suffered from a preexisting illness or injury prior to the tortious act cannot preclude recovery for those damages—including aggravation of the preexisting condition—that proximately resulted from the tortious act. DeLeon objected to and bases her appeal on this decision.

Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995). To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that the tendered instruction is the correct statement of law, that the tendered instruction is warranted by the evidence, and that the appellant was prejudiced by the court's refusal to give the tendered instruction. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

In *McCall v. Weeks, supra*, this court adopted the theory of the "eggshell-skull" plaintiff, whom the negligent defendant must take as he finds. The plaintiff's decedent in *McCall* suffered from emphysema at the time he was injured in a motor vehicle collision. The trial court had instructed the jury that the defendant must be liable for the entire amount of damages if the jury was unable to apportion the damages caused by the collision and the preexisting condition. This court affirmed the verdict for the plaintiff that resulted from that instruction, holding that

> [t]he proper rule is set out in 22 Am. Jur. 2d, Damages, § 122, p. 173: "In an action for damages for personal injuries caused by a wrongful act or omission, the injured person is entitled to recover full compensation for all damage proximately resulting from the defendant's act, even though his injuries may have been aggravated by reason of his pre-existing physical or mental condition, rendered more difficult to cure by reason of his state of health, or more serious, because of a latent disease, than they would have been had he been in robust health. The defendant cannot invoke the previous condition of the person injured for the purpose of escaping the consequences of his own negligence or reducing the damages for which he is liable. . . ."

Id. at 750, 164 N.W.2d at 210. The *McCall* court noted that the defendant in that case had failed to present evidence that established the extent of either the preexisting condition or the alleged aggravation of that condition.

Under *McCall*, the right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease. This holding served as authority in this case for the decision of the trial court to issue the entirety of NJI2d Civ. 4.09 as its instruction on damages. We find that this instruction was the correct statement of the law and that it did not misstate the burden of proof: the instruction does not permit a jury to assess damages in any amount unless the plaintiff first proves proximate cause. David adduced evidence

that the collision proximately caused an aggravation of his mild arthritic condition. Had the jury found that no part of his present condition was proximately caused by the collision, it could not have awarded David any damages.

The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. The plaintiff is not, however, required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all. Such a holding would fly in the face of the rule that "the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him." *Vosburg vs. Putney*, 80 Wis. 523, 530, 50 N.W. 403, 404 (1891). The trial court did not err by relying on *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969). Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

DeLeon failed to make that apportionment. Her experts agreed that the collision aggravated David's preexisting injuries. In addition, Dr. O'Neil, DeLeon's independent medical examiner, was unable to state with reasonable medical certainty what portion of David's difficulties was caused—or was not caused—by the collision, although he agreed that some part of David's injuries was indeed causally linked. Thus, DeLeon's reliance on *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994), as support for her tendered jury instruction is misplaced.

In *Macholan*, this court upheld a decision to reject an instruction that shifted the burden of apportioning damages for a case in which issues remained as to causation of the alleged injuries. The plaintiff in *Macholan* was not hurt badly enough in the collision to cause him any pain at that time, and no physician, including the plaintiff's own expert, could find any empirical evidence of injury to support the plaintiff's own complaints. The *Macholan* jury returned a verdict for the defendant.

In the instant case, without the admonition that the defendant is liable for all damages if the jury cannot apportion, the instruction would have failed to address the event in which a jury finds that damages were proximately caused by a collision, but is unable to determine precisely what quantum of those damages was not preexisting. This instruction prevents the result of a jury finding that damages were proximately caused by the tortious act, but failing to award damages because it cannot demarcate preexisting illnesses from new losses. David's jury was properly instructed as to the law on the apportionment of damages, and as such, we will not disturb its verdict.

AFFIRMED.

WRIGHT, J., not participating.

RHONDA S. BARRY, APPELLANT, V. CHRISTOPHER TANNER AND GREATWAY INSURANCE COMPANY, APPELLEES.

547 N.W.2d 730

Filed May 24, 1996. No. S-94-442.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
3. **Insurance: Motor Vehicles: Words and Phrases.** Under the initial permission rule, if permission to use the automobile is initially given, recovery may be had regardless of the manner in which the automobile is subsequently used; only the first "use" must be with permission, and later deviations are immaterial.
4. **Insurance: Motor Vehicles: Liability.** Where initial permission to use an insured vehicle has been given by one having proper authority to give permission to the person operating it at the time of an accident, for purposes of lia-

bility coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated.

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

Daniel P. Chesire and Conal L. Hession, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Robert D. Mullin, Jr., and Aaron A. Clark, of McGrath, North, Mullin & Kratz, P.C., for appellee Greatway Insurance Co.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

This is an appeal from a judgment of the Douglas County District Court determining that Christopher Tanner was not a permissive user of a vehicle owned by insured Joseph Dervin and dismissing garnishment proceedings against Greatway Insurance Company (Greatway), Dervin's insurer. Rhonda S. Barry appealed this judgment to the Nebraska Court of Appeals, and the matter was transferred to this court upon our own motion. We conclude that Tanner qualifies as an "insured" under the insurance policy of Dervin and, therefore, reverse the judgment and remand the matter to the district court with directions.

FACTUAL BACKGROUND

On July 1, 1991, Barry was involved in a three-car accident. A vehicle driven by Tanner traveling east on Maple Street in Omaha, Nebraska, entered the 90th Street intersection, where it struck a vehicle driven by Jodie Mosher. As a result of the force of the collision, Mosher's vehicle struck that of Barry, causing property damage and personal injury to Barry. Subsequently, it was determined that the vehicle driven by Tanner, a 1984 station wagon, was owned by Dervin, who had delivered the vehicle to Tanner, a self-employed auto body specialist, for some minor rust repair and paint work. Tanner had

used Dervin's vehicle to go to Kentucky Fried Chicken to purchase dinner and was returning to his auto body shop when the accident occurred.

Barry filed a negligence action against both Tanner and Mosher. Mosher was dismissed from the action, but a default judgment in the amount of $25,000 was entered against Tanner. Tanner was uninsured at the time of the accident, so Barry commenced a garnishment proceeding in district court against Dervin's insurer, Greatway, in an effort to collect the judgment. Barry asserted that Tanner qualified as an "insured" under Dervin's insurance policy due to Tanner's being a "permissive user" of Dervin's vehicle. In answers to garnishment interrogatories, Greatway denied that it held any money, or owed any money, on behalf of the judgment debtor because Tanner was not a "permissive user" of Dervin's vehicle.

At trial before the district court, the evidence established that Dervin was in the business of buying used cars for resale or personal use. Sometimes Dervin would purchase such vehicles on his own, while other times he would purchase vehicles in conjunction with a friend of his, Brian Workman, who also bought and resold used vehicles.

In 1991, Dervin and Workman began to bring some of their vehicles to Tanner for minor repairs prior to resale. When cars were delivered, the keys would be left therein to allow Tanner to move the vehicles if necessary. Tanner never asked permission to use the vehicles for personal use or otherwise, and neither Dervin nor Workman expressly authorized Tanner to drive the vehicles delivered for repair. However, on one prior occasion, Workman had instructed Tanner to meet him at a carlot, drive a vehicle to his shop for repair, and return the vehicle to Workman in repaired condition. On another occasion, Tanner was reprimanded by Workman for sleeping in a van that had been delivered for repair. There is no evidence that either Dervin or Workman ever expressly told Tanner not to drive the 1984 station wagon which had been delivered for repair. Both Tanner and Workman testified that the only substantive discussions between the parties at the time of the delivery of the vehicle concerned rust repair and the timeframe for the repair. Dervin testified that either at the time of the delivery of the

1984 station wagon or on a previous occasion, "[I]t was implied that [Tanner] was not to be using my car for any personal and/or business-related errands." Tanner, on the other hand, testified that he previously had driven both Dervin's and Workman's vehicles with their permission, and he assumed it was acceptable to do so on this occasion.

Based on these facts, the district court found that Tanner did not qualify as a permissive user of the vehicle and that Tanner's use of the vehicle to drive to a restaurant to purchase his dinner was not related to the purposes for which the vehicle had been delivered to him. The garnishment proceeding against Greatway was dismissed, and this appeal followed.

ASSIGNMENTS OF ERROR

Barry asserts that the district court erred in (1) finding that Tanner did not have permission to use Dervin's vehicle and (2) finding that Tanner's permission to use the car was limited to paint repair and moving the car about the repair shop.

STANDARD OF REVIEW

Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Watts v. Watts, ante* p. 38, 547 N.W.2d 466 (1996); *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996).

On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Watts v. Watts, supra*; *Koterzina v. Copple Chevrolet, supra*.

ANALYSIS

Greatway carried standard automobile liability coverage on the vehicle owned by Dervin and driven by Tanner. The liability policy provides coverage for "damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** resulting from the ownership, maintenance or use . . . of a car . . . ." (Emphasis in original.) The omnibus clause in this standard liability policy defined "insured person" as "**[a]**ny person while using [the] **insured['s] car** with [the insured's] permission . . . ."

(Emphasis in original.) It is undisputed that the 1984 station wagon involved in the accident was a covered vehicle under Dervin's insurance policy. The fact that Dervin's vehicle was delivered to Tanner with the keys left therein implies, at a minimum, that Tanner had been granted permission to drive the vehicle for purposes of completing the repair job. The sole issue to be decided is whether there is coverage under the omnibus clause of this standard automobile liability policy, when initial permission to use the vehicle was given, but for a presumably restricted purpose (i.e., rust repair), and the restriction was violated.

There should be no doubt that this court adopted the "liberal or initial permission" doctrine in *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969). See, also, *Hull v. Allstate Ins. Co.*, 187 Neb. 130, 187 N.W.2d 650 (1971). Prior to adopting the "initial permission" rule, we recognized and considered two other interpretations of an omnibus clause, such as the one presented in this case, in *Arndt v. Davis*, 183 Neb. at 728-29, 163 N.W.2d at 887-88, when we stated:

> It appears, generally speaking, that three different rules have been followed. The first is the so-called strict or conversion rule to the effect that the exact use of the automobile at the time and place of the accident must have been with the express or implied permission of the employer. The second is the moderate or minor deviation rule which permits recovery when the deviation from the permission granted is of a minor nature. The third is the liberal or initial permission rule to the effect that if permission to use the automobile was initially given, recovery may be had regardless of the manner in which the automobile was thereafter used. Proponents of this rule justify it on the ground that it is good public policy to protect persons injured in automobile accidents against uninsured motorists. They further justify the rule on the theory that the purpose of the omnibus clause is to broaden the coverage of the policy to cover all persons operating the insured automobile with the knowledge and consent of the insured owner and insist that once the owner has placed the automobile in the possession of the

> driver and consented to his operating the automobile, any deviation from the purposes for which the automobile was entrusted to the operator is immaterial.

We adopted the liberal or initial permission rule. The position of this court on the initial permission doctrine reflects the view that automobile liability insurance is for the benefit of the public as well as insureds. Litigation as to the scope of the permission—the purpose, the time, or place of use—and similar issues should not be permitted or encouraged.

Of the various doctrines dealing with the issues of permission, this court's interpretation has been closest to the "hell or high water" rule. That rule, in *Hull v. Allstate Ins. Co.*, 187 Neb. at 132, 187 N.W.2d at 651, has been stated to be that

> "if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated." 7 Appleman, Insurance Law and Practice, § 4366, p. 308.

In spite of our previous holdings, Greatway relies upon language in the case of *MFA Ins. Companies v. Mendenhall*, 205 Neb. 430, 437, 288 N.W.2d 270, 274 (1980), for the proposition that "permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances." Greatway's reliance upon the *Mendenhall* case is misplaced. *MFA Ins. Companies v. Mendenhall, supra*, refers to a situation where no specific permission was granted from the insured to the user of the insured's vehicle, and this court examined the facts to determine whether or not "implied initial permission" was granted by the insured so as to activate coverage under the omnibus clause. The instant case does not involve a situation where there was a lack of "initial permission" from the insured to Tanner and is therefore distinguishable from *Mendenhall*.

In the case before us, there can be no serious dispute that Tanner had initial permission to use the vehicle.

Notwithstanding Dervin's testimony that it was somehow "implied" that Tanner was not to be using Dervin's vehicle for personal or business errands, there is only one logical conclusion to be drawn when Dervin's vehicle was delivered to Tanner for repair with the keys left therein. Tanner had obviously been given initial permission, either express or implied, to move and use the vehicle for purposes of completing the rust repair. The only dispute is whether that permission should be strictly limited to the exact scope of the use expressly or tacitly authorized (i.e., move the vehicle for repair purposes). We find no compelling reasons to constrict our interpretation so rigidly or to alter our consistent application of the initial permission rule. The policy reasons for applying the initial permission rule are as persuasive and viable today as they were 27 years ago when first announced in *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969).

We hold that where initial permission to use an insured vehicle has been given by one having proper authority to give permission to the person operating it at the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated. As we stated in *Hull v. Allstate Ins. Co.*, 187 Neb. 130, 187 N.W.2d 650 (1971), where a named insured has given permission to another to operate an insured vehicle, liability insurance coverage ought not to depend on whether the operator is complying with or violating the conditions or terms placed upon his operation and use of the vehicle by the insured.

CONCLUSION

Accordingly, we conclude that Tanner qualified as an "insured" under the insurance policy of Dervin and, therefore, reverse the judgment and remand the matter to the district court with directions to enter judgment on behalf of Barry and against Greatway in the sum of $25,000, plus interest and court costs as determined by the trial court upon remand.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF ARCHIE C., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. ARCHIE C. AND FRIEDA C., APPELLEES, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

547 N.W.2d 913

Filed May 24, 1996. No. S-95-638.

1. **Statutes: Appeal and Error.** Statutory construction presents a question of law in connection with which an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below.
2. **Actions: Parties: Standing.** Before one is entitled to invoke a court's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy.
3. ____: ____: ____. The purpose of a standing inquiry is to determine whether one has a legally protected interest or right in the controversy that would benefit by the relief to be granted.
4. **Juvenile Courts: Standing.** The Department of Social Services acquires standing under the terms of Neb. Rev. Stat. § 43-285(4) (Reissue 1993) only after a juvenile has been placed in its care.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge, and DONALD J. HAMILTON, District Judge, Retired. Appeal dismissed.

Don Stenberg, Attorney General, Royce N. Harper, and Shawn Elliott, Special Assistant Attorney General, for appellant.

Jeffrey A. Wagner and Christopher Kelly for appellees Archie C. and Frieda C.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

The separate juvenile court of Douglas County placed the subject juvenile, Archie C., in the custody of the Department of Social Services (DSS). Upon the juvenile court's overruling of DSS' motions for a new trial and for a vacation of that custody order, DSS appealed to the Nebraska Court of Appeals. We subsequently removed the matter to our docket.

Then Deputy County Attorney Elizabeth G. Crnkovich filed a petition alleging that the subject juvenile had killed Jennifer Martin and that he thus, under the provisions of Neb. Rev. Stat. § 43-247(2) (Reissue 1993), was subject to the jurisdiction of the juvenile court as a juvenile who had committed a felonious act. Thereafter, the juvenile court, through Juvenile Court Judge Joseph W. Moylan, committed the juvenile to the care of the Department of Public Institutions, which placed him in the Lincoln Regional Center. Deputy Crnkovich participated in the hearings resulting in the aforesaid adjudication and disposition.

Later, Deputy County Attorney Ray W. Daniel filed another petition, alleging that the juvenile was now in need of supervision as a juvenile who was "homeless or destitute, or without proper support through no fault" of his mother, Frieda C., and thus fell within the ambit of § 43-247(3)(a). In addition, Deputy Daniel filed a motion for temporary custody which Juvenile Court Judge Donald J. Hamilton granted, placing temporary custody of the juvenile in DSS. Deputy Daniel subsequently filed a motion to rescind that order. Recognizing that there was then no need for placing custody of the juvenile with DSS, as the juvenile was at the regional center, Judge Hamilton granted this motion.

During this same time period, Deputies Crnkovich and Daniel both participated in meetings with DSS officials to discuss future placement options for the juvenile. DSS made it known at those meetings that it opposed having the juvenile committed to its care, as DSS thought its programs did not fit the juvenile's needs.

A pretrial conference was subsequently held, during which a joint motion for a continuance to make further applications for appropriate placement was granted by Judge Hamilton.

By the time the matter again came up for a pretrial hearing, Deputy Crnkovich had become Juvenile Court Judge Crnkovich. Neither DSS nor the Department of Public Institutions was a party to this proceeding. Because of the unavailability of Judge Hamilton, Judge Crnkovich presided. Judge Crnkovich began the proceeding by informing the guardian ad litem and counsel for the juvenile's mother of

Judge Crnkovich's prior involvement in the case. Both parties expressly waived any conflicts presented by Judge Crnkovich's participation in this specific proceeding. Judge Crnkovich did not directly ask Deputy Daniel whether the State consented to her participation, but he neither objected nor otherwise spoke to the matter.

Judge Crnkovich thereafter ordered the juvenile placed in the temporary custody of DSS. DSS then filed the motions described earlier. Before these motions were decided, Judge Crnkovich entered an order on her own motion, transferring all future hearings to the judge to whom the matter had been originally assigned or another juvenile court judge.

Judge Hamilton then overruled DSS' motions and ordered that the juvenile remain in the custody of DSS.

DSS assigns the overruling of its motions as error, urging that the participation of Judge Crnkovich in the pretrial hearing prevented a fair trial. As a matter controlled by statute, this appeal presents a question of law, in connection with which an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

Before one is entitled to invoke a court's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). The purpose of a standing inquiry is to determine whether one has a legally protected interest or right in the controversy that would benefit by the relief to be granted. *Id.*

Neb. Rev. Stat. § 43-285(4) (Reissue 1993) provides:

> When the court awards a juvenile to the care of the [Department of Social Services] then the department . . . shall have standing as a party to file any pleading or motion, to be heard by the court with regard to such fil-

ings, and to be granted any review or relief requested in such filings consistent with the Nebraska Juvenile Code.

Thus, under the terms of the foregoing statute, DSS acquires standing only after a juvenile has been placed in its care. At the time of the pretrial hearing at which Judge Crnkovich presided, the juvenile had not yet been ordered to the care and custody of DSS. As a consequence, DSS lacks standing to contest Judge Crnkovich's custody order. It is true that DSS' motions were filed after the entry of Judge Crnkovich's custody order, but they related to matters which had occurred prior to the entry of that order.

This appeal must therefore be dismissed.

APPEAL DISMISSED.

MARGARET V. SHUCK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MELODY J. HOPPER, DECEASED, APPELLEE, V. STEVEN M. JACOB, APPELLANT.

548 N.W.2d 332

Filed May 31, 1996. No. S-92-687.

1. **Summary Judgment.** Summary judgment is proper 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Collateral Estoppel.** One of the conditions for the doctrine of collateral estoppel to apply is that there must have been a judgment on the merits which was final.
4. **Convictions: Sentences: Judgments: Appeal and Error.** A conviction and sentence are not considered final judgments until after an appeal, if there is indeed an appeal.
5. **Summary Judgment: Records: Appeal and Error.** 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.

6. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed.
7. ____: ____. Once the appellant has made an adequate request, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the reporter to properly fulfill this request.
8. **Records: Rules of the Supreme Court.** The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by the Nebraska Supreme Court.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Lancaster County, WILLIAM D. BLUE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Steven M. Jacob, pro se.

Thomas E. Zimmerman, of Jeffrey, Hahn, Hemmerling & Zimmermann, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiff-appellee, Margaret V. Shuck, brought this personal injury suit against defendant-appellant, Steven M. Jacob, after Jacob allegedly shot and killed Shuck's daughter, Melody J. Hopper. Jacob was convicted of first degree murder for the killing of Hopper. In the instant case, Shuck relied on the criminal conviction to support a motion for partial summary judgment as to liability in her civil action. The district court granted the motion for partial summary judgment as to liability. A jury subsequently awarded a money judgment to Shuck. Jacob appealed the judgment to the Nebraska Court of Appeals. His murder conviction was reversed by this court while his civil appeal was pending. The Court of Appeals affirmed the district court, and we granted Jacob's petition for further review.

Jacob assigns one error, that the Court of Appeals, by holding that Jacob's record on appeal and praecipe requesting the record were "insufficient," erred in affirming the district court. Shuck contends that the Court of Appeals erred (1) in

finding that the conditions precedent for using Jacob's criminal conviction as collateral estoppel on the issue of liability were not fulfilled and (2) in overruling a praecipe for supplemental transcript filed by Shuck requesting proof of Jacob's murder conviction from his retrial on the criminal charges.

Jacob allegedly shot Hopper on August 2, 1989, and as a result, she died on August 7. On August 4, Hopper filed this personal injury civil action against Jacob based on the same facts as the criminal action. Shuck, the special administrator of Hopper's estate, was substituted as plaintiff after Hopper's death.

Jacob was subsequently found guilty and convicted of first degree murder. He appealed his criminal conviction to this court. On September 20, 1990, before this court ruled on the criminal appeal, Shuck filed a motion for partial summary judgment as to liability in the civil action. Shuck's counsel filed an affidavit in support of the motion for partial summary judgment which stated,

> Upon information and belief, Affiant states that the above-named Defendant was found guilty of Murder in the First Degree in the death of Melody J. Hopper by a jury of his peers, constituting a collateral estoppel upon the issue of liability as set forth in the pleadings in the above-captioned action.

Jacob filed a plea in abatement in response to the motion, contending that his criminal conviction had been appealed and therefore was not a final judgment for purposes of collateral estoppel.

Three exhibits were received at the hearing on the motion for partial summary judgment. These exhibits are not contained in the record that was provided on appeal, nor are they described. The district court granted Shuck's motion for partial summary judgment as to liability and overruled the plea in abatement. In this regard, the judge stated in the trial court minutes,

> [Motion] of [plaintiff] for partial summary judgment. . . . The Court finds that there are no genuine issues of fact re: the issue of liability and that the [plaintiff] is entitled to judgment as a matter of law on issue of liability as set

> forth in the pleadings. Filing #5, [plaintiff's motion] for partial summary judgment is therefore sustained and judgment is hereby entered in favor of [plaintiff] and against [defendant] on the issue of liability as set forth in the pleadings. Filing #6, [defendant's] plea in abatement is overruled. [Attorneys] notified by letter.

A jury subsequently awarded Shuck the sum of $734,704.

Jacob appealed the court's civil judgment pro se. While his civil appeal to the Court of Appeals was pending, the criminal conviction was reversed by this court, and remanded for a new trial. See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

The Court of Appeals held that the conditions precedent for applying collateral estoppel were not fulfilled at the time the motion for partial summary judgment was granted. *Shuck v. Jacob*, 95 NCA No. 33, case No. A-92-687 (not designated for permanent publication). The Court of Appeals concluded that because the conviction was being appealed, the criminal conviction was not a final judgment.

The Court of Appeals found, however, that the bill of exceptions failed to indicate whether Jacob's criminal conviction was the sole evidence in support of the motion for partial summary judgment and held that, based on the insufficient bill of exceptions, it could not conclude that the district court erred in granting the motion for partial summary judgment. The Court of Appeals, affirming the district court's judgment, concluded that Jacob's record and praecipe on appeal were insufficient.

Specifically, the Court of Appeals found that Jacob's request was too imprecise in nature to enable Jacob to obtain the exhibits concerning the partial summary judgment hearing. The Court of Appeals stated, "In sum, the praecipe is not specific enough to enable us to say that the record which we need, but find to be missing, was requested by Jacob. The fault lies in the imprecise nature of the praecipe, not because the court reporter did not produce what Jacob requested." 95 NCA No. 33 at 4.

Summary judgment is proper 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

Because Shuck contends that Jacob's criminal conviction was sufficient to invoke the doctrine of collateral estoppel for purposes of granting the motion for partial summary judgment, we address this issue before addressing the sufficiency of the record and Jacob's praecipes. We affirm the Court of Appeals' holding that a criminal conviction being appealed cannot be used to invoke the doctrine of collateral estoppel as to the defendant's liability in a civil suit.

One of the conditions for the doctrine of collateral estoppel to apply is that there must have been a judgment on the merits which was final. *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995). A conviction and sentence are not considered final judgments until after an appeal, if there is indeed an appeal. *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995). As the Court of Appeals correctly noted, Jacob's conviction, which was being appealed at the time the motion for partial summary judgment was granted, could not be used for invoking the doctrine of collateral estoppel as to the issue of liability.

Shuck also contends that because Jacob has been convicted a second time on retrial, the issue of whether the first conviction could not be used for collateral estoppel is moot, because his liability is evident from his second conviction. We need not address whether this argument is meritorious because Jacob has appealed this second conviction, which is docketed as case No. S-95-885. Therefore, the conviction is not a final judgment.

We also agree with the Court of Appeals' holding that the record on appeal is insufficient to determine whether it was

error for the district court to grant Shuck's motion for partial summary judgment. "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." *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 191, 465 N.W.2d 472, 475 (1991).

However, we disagree with the Court of Appeals' holding that Jacob's original and supplemental praecipes were not specific enough to impose an obligation on the court reporter to create a record of the summary judgment proceedings. It is true that it is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). However, once the appellant has made an adequate request, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the reporter to properly fulfill this request. See *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988).

The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by this court. See Neb. Rev. Stat. § 25-1140 (Reissue 1995). The applicable rule of practice states, in pertinent part,

> The request shall specifically identify each portion of the evidence and exhibits offered at any hearing which the party appealing believes material to issues to be presented to the Supreme Court for review. The court reporter shall prepare only those portions specified in the request for preparation of the bill of exceptions.

Neb. Ct. R. of Prac. 5A(2) (rev. 1989), now at 5B(1)b (rev. 1995).

Jacob's original praecipe made the following request: "The transcript should include: all orders and rulings on motions filed, the partial summary judgement and the Final judgment, a transcript of all hearings held and all testimony given before the judge or the jury, all filings by any of the parties and the verdict . . . ."

When analyzing whether this request was sufficient, the Court of Appeals stated, "Although the [praecipe] might be broad enough to sweep in part of the summary judgment proceedings, i.e., what the judge, Jacob, and Shuck's lawyer said, it is insufficient because it does not request the evidence, exhibits, or affidavits used at the partial summary judgment hearing." 95 NCA No. 33 at 4.

As the Court of Appeals noted, Jacob's praecipe entitled him to a record of what was discussed by the attorneys and the district court judge at the hearing on the motion for partial summary judgment. Although the bill of exceptions contained proceedings of the trial on damages, it failed to contain any documentation of the hearing concerning the partial summary judgment motion. The transcript also did not contain the order granting the motion for partial summary judgment, as requested by Jacob.

Jacob's praecipe for supplemental transcript made a request for "[a]ll exhibits entered into evidence." This praecipe includes a request for the exhibits received at the partial summary judgment hearing, because it requests all exhibits entered into evidence. The court reporter, however, failed to include these requested items in the record. The record consisted of only the evidence regarding the trial on damages held subsequent to the hearing on the partial summary judgment motion.

Shuck contends that because the request was for a "transcript" rather than a bill of exceptions, the court reporter had no obligation to put the omitted requested items in a bill of exceptions. The reporter, however, complied with several of Jacob's requests from his praecipes. Even though Jacob requested a transcript, the reporter placed 191 pages of testimony and 38 exhibits into a bill of exceptions pertaining to the trial on damages. The reporter evidently did not deny Jacob's request based on the formality that he requested a transcript rather than a bill of exceptions; neither will we make such an interpretation. The substance of Jacob's praecipes indicates that he requested all exhibits entered into evidence and a record of the summary judgment proceedings.

In sum, Jacob was entitled to the evidence requested, and the court reporter had an obligation to fulfill this request pursuant to rule 5 of the Nebraska Supreme Court Rules of Practice and Procedure.

Based on the foregoing, this court issued an order dated April 1, 1996, instructing the court reporter to prepare a supplemental bill of exceptions containing both those exhibits admitted into evidence and a verbatim record of the proceedings of the February 14, 1991, hearing on Shuck's motion for partial summary judgment. The court has received this supplemental bill of exceptions.

The supplemental record of the hearing on the motion for partial summary judgment reflects that three exhibits were admitted into evidence. These exhibits were described in detail by the parties' counsel when being offered into evidence at the hearing.

Shuck's counsel offered two exhibits into evidence at the hearing. Shuck's counsel, referencing exhibit 1, described it as follows:

> This is an affidavit in support of this motion. It is meant as a follow-up to an affidavit which was attached to the initial motion. The first affidavit set forth the conviction of the defendant on charges of first degree murder in the death of Melody Hopper. The second which I have just handed to you as Exhibit 1 is an affidavit which sets forth the certified copy of the sentencing order in the matter.

In this affidavit, Shuck's counsel stated:

> Upon information and belief, Affiant states that the above-named Defendant was found guilty of murder in the first degree in the death of MELODY J. HOPPER by a jury of his peers, and has since such time been sentenced by the Honorable William D. Blue to two consecutive life terms in the State Penitentiary.

Attached to the affidavit was the sentencing order for Jacob's murder conviction.

The second exhibit admitted into evidence at the hearing was the court file of Jacob's criminal proceeding. The third exhibit is an affidavit of Jacob's counsel at the time of the partial summary judgment hearing. In this affidavit, Jacob's

counsel stated, in regard to the criminal proceeding, that "Affiant is familiar with the status of said proceeding, and has examined the files contained therein, and that a timely notice of appeal was filed in said proceeding and the appeal perfected to the Supreme Court of Nebraska by paying of the necessary docketing fees."

The record from this partial summary judgment hearing indicates that all of the matters discussed and all of the evidence admitted pertained only to Jacob's criminal conviction. The court clearly granted partial summary judgment as to civil liability based solely on the grounds that Jacob was convicted and sentenced for the murder of Hopper. Because, as previously noted, Jacob's conviction and sentence were not final at the time the district court considered the motion for partial summary judgment, the district court erred in applying the doctrine of collateral estoppel and granting Shuck's motion for partial summary judgment as to liability.

Therefore, we reverse and remand this action to the Court of Appeals, with directions to reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

FAYE MARTING AND WEST A LIQUOR, INC., A NEBRASKA CORPORATION, APPELLEES AND CROSS-APPELLANTS, AND CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES AND CROSS-APPELLEES.

548 N.W.2d 326

Filed May 31, 1996. No. S-94-695.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Under Neb. Rev. Stat. § 53-1,116 (Reissue 1984), review by the Nebraska Supreme Court of decisions of the Nebraska Liquor Control Commission is de novo on the record.

2. ____: ____: ____. Under Neb. Rev. Stat. § 53-1,116(5) (Reissue 1984), the district court may not disturb the decision of the Nebraska Liquor Control Commission unless the decision was arbitrary and unreasonable.
3. **Constitutional Law: Statutes.** When an amendatory act is invalid, the previous statute on the subject remains in full force and effect.
4. **Pleadings.** Matters contained in pleadings are judicial admissions only insofar as the adversary is concerned.
5. **Evidence.** Where evidence is admitted as an admission against interest against one defendant, that evidence is not ordinarily admissible against a codefendant.

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

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellant.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellees Marting and West A Liquor.

J. Michael Rierden for appellee J Mart.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

The appellant and local governing body, City of Lincoln, and the appellees and cross-appellants and protestants, West A Liquor, Inc., and Faye Marting, seek review of the judgment of the district court affirming the grant of a liquor license by the appellee Nebraska Liquor Control Commission to the appellee and applicant, J Mart, Inc.

FACTS

On September 23, 1993, J Mart, a convenience store located in the West A Shopping Center at Lincoln, Nebraska, filed an application for a license permitting it to sell beer, and only beer, for consumption off its premises (designated by the Nebraska Liquor Control Act as a class B license). See Neb. Rev. Stat. § 53-124 (Reissue 1993). The city council held public hearings on J Mart's application, at the conclusion of which the city council recommended that the commission deny the application, and passed a five-point resolution, declaring that

> 1. . . . the existing population of the City of Lincoln and the projected population growth of the City of Lincoln and within the area proposed to be served were inadequate to support the proposed license.
>
> 2. . . . the existing licenses, and the class of such licenses, including one Class "D", within a one-mile radius from the proposed location, were adequately serving the area.
>
> 3. . . . the license was not compatible with the nature of the neighborhood.
>
> 4. . . . the applicant had not demonstrated that the issuance of the license is and will be consistent with the public interest.
>
> 5. The issuance of the license will not be required by the present or future public convenience and necessity.

The commission then held a public hearing on November 10, 1993, at which J Mart presented evidence that its sole shareholder had extensive experience in the retail liquor industry and had never been cited for a license violation. As proof of the public need and convenience, J Mart presented a petition with 174 signatures in support of its application. In addition, J Mart represented that the license was necessary in order to allow it to compete with other convenience stores in the city.

Protestant Marting, the manager of West A Liquor, which is located approximately 50 feet from J Mart in the same shopping center, stated that traffic flow into the shopping center from the east is congested because of the location of J Mart's gas pump island. Marting also submitted a petition containing 177 signatures opposing J Mart's application and a letter she had written to the city council in which she declared that the shopping center was adequately served by her establishment and Keegan's Pub.

West A Liquor urged the commission to find, based upon the recommendation of the city council and citizen protests, that there was insufficient evidence of public need and convenience. It also disputed J Mart's testimony that this license was necessary to allow J Mart to compete in the convenience store

market, as the convenience stores closest to J Mart's location did not possess liquor licenses.

In rebuttal, J Mart submitted letters in support of the application from two other tenants in the shopping center. In addition, it offered an aerial photograph of the shopping center, showing a lack of congestion, and the testimony of an employee, who stated that there was sufficient clearance around J Mart's gas pump island to allow normal vehicle flow into the shopping center. J Mart concluded by introducing evidence that other shopping centers in Lincoln had multiple liquor licenses.

At the conclusion of the hearing, the commission's chairperson, although bemoaning what he characterized as the law stripping "the Commission of the authority to deny liquor licenses on a reasonable basis," nonetheless moved for the approval of J Mart's application. The motion passed unanimously; however, the commission did not enter its written order until December 7, 1993.

The district court affirmed the decision of the commission, concluding that the proceeding before it was controlled by Neb. Rev. Stat. § 53-1,116 (Reissue 1984), which provided, in relevant parts:

> (5) Any decision of the commission granting . . . a license . . . for the sale of alcoholic liquors, including beer, may be reversed, vacated, or modified by the district court of Lancaster County on appeal by any party to the hearing or rehearing before the commission. . . .
>
> . . . .
>
> (8) The appeal, provided for or referred to in [subsection] (5) . . . shall be heard and tried by the court without a jury on the record of the commission.

The district court reasoned therefrom that its review was limited to one on the record made before the commission to determine whether the commission's decision was arbitrary and unreasonable. The district court also concluded that the factors to be considered by the commission in determining whether the license should issue were as set forth in Neb. Rev. Stat. § 53-132 (Reissue 1984):

> (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 . . . (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 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 . . . ;
>
> (c) The existing population of the city, village, or county, as the case may be, 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 . . . is and will be consistent with the public interest.

From the record before the commission, the district court found that because J Mart's sole shareholder had operated other licensed facilities for more than 10 years without a violation, the conditions in § 53-132(2)(a) through (c) were satisfied. The district court discounted the city council's recom-

mendation of denial, finding it to be conclusory, not supported by the record, and inconsistent with the law.

ASSIGNMENTS OF ERROR

The city and protestants assign eight errors to the district court, which combine to assert that the district court erred in applying a wrong standard of review; failing to find that the commission erred in granting the license not only because the commission did not properly consider the appropriate criteria, but because J Mart did not demonstrate a present or future need; and failing to find that the commission issued the license before entering its order.

STANDARD OF REVIEW

While there is disagreement among the parties as to the appropriate standard of review, all of the parties maintain that it is gleaned from § 53-1,116 (Reissue 1984). In *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993), we ruled that Neb. Rev. Stat. § 53-134 (Cum. Supp. 1990), as amended by 1989 Neb. Laws, L.B. 781, was unconstitutional on a variety of grounds, including the vagueness of the criteria a local governing body was to consider in recommending to the commission whether to approve or deny a liquor license. Finding the other provisions of L.B. 781 inseparable, we held that the entire enactment must fail. In addressing our standard of review in that circumstance, we wrote:

> We have addressed similar issues in the recent cases of *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993), *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993), and *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992), where we held that decisions under the authority of the Commission are to be reviewed by appeal. In the case of appeal, the matter is reviewed de novo on the record. *Gas 'N Shop, supra*; *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988). However, the above cases addressed only applications which were filed between the time when § 53-1,116(5) (Reissue 1984) was in effect and the time

1989 Neb. Laws, L.B. 780, and L.B. 781 became effective. Section 53-1,116(5)(b) (Cum. Supp. 1986), which was enacted between that time, was determined to be unenforceable by *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), which declared § 53-134 (Cum. Supp. 1986) to be an unconstitutional delegation of power and, accordingly, declared the entire enactment to be unenforceable. Legislation which attempted to cure the constitutional infirmities of the enactment was also declared invalid by *Gas 'N Shop*, so the previous statute on the subject was applied.

Such is also the case here. We have determined that § 53-134, as amended by L.B. 781, is unconstitutionally vague and unconstitutionally delegates legislative power. Without the delegation, no part of the enactment is workable, and, consequently, the entire enactment is unenforceable. "When an amendatory act is invalid, the previous statute on the subject remains in full force and effect." *Gas 'N Shop*, 241 Neb. at 900, 492 N.W.2d at 9. See, *State v. Anderson*, 188 Neb. 491, 197 N.W.2d 697 (1972); *State v. Greenburg*, 187 Neb. 149, 187 N.W.2d 751 (1971). Thus, the controlling language is found in § 53-1,116(5) (Reissue 1984): "Any decision of the commission . . . refusing to grant . . . a license . . . may be reversed, vacated, or modified by the district court of Lancaster County on appeal . . . ." Consequently, Kwik Shop invoked the jurisdiction of the proper district court.

The next step is to determine the scope of our review. As § 53-1,116 (Cum. Supp. 1990) is unenforceable, we turn to the previous statute on the subject—§ 53-1,116 (Reissue 1988). However, that version and the 1986 version have also been declared unenforceable by this court in *Bosselman, Inc.* As noted above, the controlling language is found in § 53-1,116(5) (Reissue 1984), which provides that decisions of the commission are to be reviewed by appeal. In the case of appeal, the matter is reviewed de novo on the record. Accordingly, we review the Council's decision de novo on the record.

Kwik Shop, 243 Neb. at 187-89, 498 N.W.2d at 109. We did not in *Kwik Shop* address the standard of review of the district court. That question was determined in the prior case of *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988), wherein we held that for appeals arising under § 53-1,116(5) (Reissue 1984), the district court may not disturb the decision of the commission unless the decision was arbitrary and unreasonable.

However, § 53-1,116(5) was subsequently amended by 1993 Neb. Laws, L.B. 183. Because the Legislature declared an emergency to exist, the amendment became effective the day the Governor approved the bill, February 15, 1993, a period of more than 7 months before J Mart filed the subject application. See, *Read v. City of Scottsbluff*, 179 Neb. 410, 138 N.W.2d 471 (1965); Neb. Const. art. III, § 27.

Although L.B. 183 contains provisions substantially similar to those previously held to be unconstitutional in L.B. 781, see *Kwik Shop, supra*, the constitutionality of the 1993 legislation has not been raised at any point in these proceedings by any party.

This court confronted a like situation in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992). One of the issues therein was where venue lay. Section 53-1,116(5) (Reissue 1984) provided for review in the district court for Lancaster County. However, a 1986 amending act, L.B. 911, provided for review in the district court in which the local governing body was located. We had held in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), that L.B. 911 was unconstitutional because a portion of it made local governing body decisions binding upon the commission. We accordingly ruled that all of L.B. 911 was invalid, and, therefore, the law reverted to the prior enactment, making § 53-1,116(5) (Reissue 1984) the relevant venue statute.

The local governing board in *Gas 'N Shop* argued that 1988 Neb. Laws, L.B. 1089, an amendatory act enacted after the adoption of L.B. 911, placed venue in the district court where the local governing board was located, and, thus, notwithstanding *Bosselman, Inc.*, L.B. 1089 should control venue. We, however, reasoned that as L.B. 1089 had been enacted

prior to the *Bosselman, Inc.* decision, it could not cure the constitutional infirmity found in *Bosselman, Inc.* Moreover, L.B. 1089 contained the same unconstitutional provision found in *Bosselman, Inc.* We thus found L.B. 1089 to be invalid and held the controlling statute to be § 53-1,116 (Reissue 1984).

Kwik Shop v. City of Lincoln, 243 Neb. 178, 498 N.W.2d 102 (1993), was decided on April 9, 1993, almost 2 months after L.B. 183 became effective. Following the *Gas 'N Shop* reasoning, "in no sense can the statutory changes . . . be said to have been an effort to cure the constitutional infirmities addressed" therein. *Gas 'N Shop*, 241 Neb. at 900, 492 N.W.2d at 9. As the pertinent language of § 53-1,116 (Reissue 1993), as amended by L.B. 183, is substantially similar to that found to be unenforceable in *Kwik Shop*, and the statutory change was not made in response to this court's opinion in *Kwik Shop*, it follows that § 53-1,116 (Reissue 1993) is also unenforceable.

When an amendatory act is invalid, the previous statute on the subject remains in full force and effect. *Kwik Shop, supra*; *Gas 'N Shop, supra*. Therefore, the previous statute, § 53-1,116 (Reissue 1984), is the relevant statute, and the scope of review announced in *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988), governs this case; that is, the commission's decision may not be disturbed unless it is arbitrary and unreasonable. Therefore, the district court did not apply an erroneous standard of review.

CRITERIA AND BURDEN OF PROOF

It is next asserted by West A Liquor that the district court erred in affirming the commission's decision because the commission did not properly consider the appropriate criteria and because J Mart did not carry its burden to prove that the requested license is required by the present or future public need.

The city and protestants first urge that the commission chairperson's statement demonstrates that the commission abdicated its responsibility and did not consider the required statutory criteria.

However, we have previously noted that as statements made reflecting the reasons behind a commissioner's vote were not part of the record considered by the commission, they did not constitute part of the record before us. *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993). Thus, in order for West A Liquor's argument to have merit, it is the record as a whole which must show that the commissioners as a group failed to consider the statutory criteria for issuance of a license. We therefore move on to determine whether the record so establishes.

Notwithstanding that § 53-132 was amended by L.B. 183, for the reasons discussed earlier, the 1984 version controls this assignment of error. In that regard, we have previously held that where an applicant has a history of operating licensed premises in a lawful manner, the conditions specified in § 53-132(2)(a) through (c) (Reissue 1984) are satisfied. *American Drug Stores v. City of Lincoln*, 243 Neb. 548, 501 N.W.2d 278 (1993); *Kwik Shop, supra*; *Hy-Vee Food Stores, supra*. In this case, the record indicates that J Mart has operated licensed retail alcohol premises without a violation since 1983. Therefore, § 53-132(2)(a) through (c) (Reissue 1984) is satisfied.

The remaining element is proof that issuance of the license is or will be required by the present or future public convenience and necessity. An applicant for a liquor license has the burden of showing this element. *American Drug Stores, supra*.

With the exception of § 53-132(3)(a) (Reissue 1984), every consideration listed militates in J Mart's favor. Although there were protests against issuance of J Mart's license, most were forwarded by those with a business interest adverse to J Mart's. Moreover, there were as many letters and petition signatories in favor of the application as there were against it. There is nothing in the record which would indicate that issuance of the license would be adverse to current zoning restrictions or sanitation of the premises. The projected growth of the city does not weigh against issuance of the license, nor is the nature of the neighborhood contrary to issuance. In addition, the type of business to be operated in conjunction with the license is consistent with the public interest.

We do not overlook that included in the record is a letter in opposition to the issuance of all new liquor licenses, signed by the former chief of police of Lincoln. But we have previously found such evidence to be of no probative value with respect to the issue of whether issuance of a specific license is in the public interest. See, *Whitehead Oil Co. v. City of Lincoln*, 243 Neb. 312, 498 N.W.2d 793 (1993); *Hy-Vee Food Stores, supra*. We have similarly rejected evidence of blanket claims of adequate service by existing licensees similar to those forwarded by the city and protestants in this case as not being probative. See, *Whitehead Oil Co., supra*; *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993); *Hy-Vee Food Stores, supra*.

The city and protestants did offer testimony claiming that the existing motor vehicle traffic in the area around J Mart's gas pump island was congested. However, J Mart rebutted this evidence with an aerial photograph showing that traffic in that area was not congested.

The only consideration which weighs against J Mart's application is that the local governing body recommended denial of the application. However, the reasons given for the recommendation are essentially similar to those we have previously rejected. Arbitrary and conclusory claims that the existing and future population of Lincoln is inadequate to support issuance is of no value to our inquiry. See *B & R Stores, supra*. Although the city as the local governing body claimed that issuance of a license to J Mart is incompatible with the nature of the neighborhood, two other liquor licenses have previously been issued to premises in the same mall. Finally, the "conclusory statement that 'public convenience and necessity would not indicate that this license should be issued' is as little help to our inquiry" as it was in other cases. *B & R Stores*, 242 Neb. at 767, 497 N.W.2d at 657.

Therefore, not only does the record not show that the commissioners as a group failed to properly consider the appropriate criteria, the record on de novo review convinces us that J Mart sustained its burden of proof. Consequently, this assignment of error fails.

PREORDER ISSUANCE

The last assignment of error rests on the complaint of West A Liquor that the license was issued unlawfully, in that it was issued before entry of the commission's written order of December 7, 1993.

The record does not contain the license, nor for that matter is there any evidence of when or if a license was issued to J Mart. It is true that the amended petition on appeal to the district court alleges that a license was issued to J Mart on November 18, 1993, and the commission's answer admits that allegation. But the record contains neither an admission nor a denial of this allegation by J Mart. J Mart cannot be held to the admission of the commission, for matters contained in pleadings are judicial admissions only insofar as the adversary is concerned. See, *Cook v. Beermann*, 202 Neb. 447, 276 N.W.2d 84 (1979); *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956) (where evidence is admitted as admission against interest against one defendant, that evidence is not ordinarily admissible against codefendant). See, also, *ITT Continental Baking Co. v. Ellison*, 370 A.2d 1353 (D.C. App. 1977); *Kluger v. Gallett*, 288 Minn. 11, 178 N.W.2d 900 (1970); *Feldmiller v. Olson*, 75 Wash. 2d 322, 450 P.2d 816 (1969); *Morrissey v. City of New York*, 634 N.Y.S.2d 185 (N.Y. App. Div. 1995); *McAtee v Guthrie*, 182 Mich. App. 215, 451 N.W.2d 551 (1989); *Bell v. United Parcel Services*, 724 S.W.2d 682 (Mo. App. 1987); *Barclays American v. Haywood*, 65 N.C. App. 387, 308 S.E.2d 921 (1983); *Indiana State Highway Com'n v. Vanderbur*, 432 N.E.2d 418 (Ind. App. 1982); *Freestone County Title & Abstract v. Johnson*, 594 S.W.2d 817 (Tex. Civ. App. 1980); *National American Bank of New Orleans v. Davis*, 239 So. 2d 493 (La. App. 1970).

In short, the record fails to sustain this assignment of error.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLEE, V. EUGENE BIERSCHENK ET AL., APPELLANTS, AND RICHARD CLEMANS AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEES.

548 N.W.2d 322

Filed May 31, 1996. No. S-94-874.

1. **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 conclusion irrespective of the determination made by the court below.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to that question.
3. **Insurance: Contracts: Intent: Appeal and Error.** In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made.
4. **Insurance: Contracts.** Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. It should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
5. ____: ____. When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
6. ____: ____. Ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract.
7. **Insurance: Contracts: Parties.** 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.
8. **Appeal and Error.** Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Affirmed.

John Thomas for appellants.

C.J. Gatz, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellee Farm Bureau Ins. Co.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

In an action for declaratory judgment, Farm Bureau Insurance Company of Nebraska (Farm Bureau) sought to

enjoin its insureds, Eugene and Darlene Bierschenk (Bierschenks), and their son, Lynn E. Bierschenk, from claiming any right to relief from Farm Bureau as a result of an automobile accident that occurred after the due date and before payment on the renewal premium of the automobile liability policy issued to the Bierschenks.

Upon stipulated facts, the trial court ruled in favor of Farm Bureau and enjoined the Bierschenks and Lynn Bierschenk from claiming any rights under Farm Bureau's insurance policy which is involved in this action. The Bierschenks and Lynn Bierschenk appealed to the Nebraska Court of Appeals. We removed this case to our docket pursuant to our power to regulate the caseloads of the lower courts.

We affirm the decision of the district court for Pierce County because Farm Bureau was not contractually obligated to insure the Bierschenks or Lynn Bierschenk for an automobile accident which occurred while the renewal premium was more than 10 days past due.

ASSIGNMENT OF ERROR

Restated, the Bierschenks and Lynn Bierschenk claim that the trial court erred in holding that the Farm Bureau automobile liability policy issued to the Bierschenks did not insure them at the time of the automobile accident in question.

STANDARD OF REVIEW

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 conclusion irrespective of the determination made by the court below. *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995).

When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to that question. *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995).

FACTS

Farm Bureau petitioned the trial court for a declaratory judgment which also sought to enjoin its insureds, the Bierschenks, and Lynn Bierschenk from claiming any right, title, or interest against Farm Bureau or from asserting any claim against Farm Bureau arising from an automobile accident which occurred 3 days before Farm Bureau received payment on a past-due renewal premium on the automobile liability insurance policy Farm Bureau had issued to the Bierschenks. It was stipulated that Farm Bureau received the renewal premium from the Bierschenks 15 days after payment was due.

The parties stipulated the following facts: Farm Bureau issued to the Bierschenks an automobile liability insurance policy with a policy period of September 11, 1989, to March 11, 1990. The renewal premium on the policy was due March 11, 1990. The Bierschenks mailed the renewal premium on March 20. On March 23, Lynn Bierschenk, operating an automobile owned by the Bierschenks and insured under the Farm Bureau automobile liability insurance policy, was involved in a one-car automobile accident along with his passenger, Richard Clemans. On March 26, 15 days after the renewal premium due date, Farm Bureau received and accepted the Bierschenks' payment on the renewal premium. The envelope in which the Bierschenks' payment was mailed is postmarked March 24. On March 29, the Bierschenks filed a claim with Farm Bureau regarding the March 23 accident, which claim Farm Bureau denied because of the nonpayment of premium until after the time of the accident. On February 25, 1993, Clemans filed a lawsuit against the Bierschenks and Lynn Bierschenk to recover damages for injuries Clemans sustained as a result of the March 23, 1990, accident, which Clemans alleged was caused by negligence on the part of Lynn Bierschenk.

The Farm Bureau policy issued to the Bierschenks states:

> If *you* pay the renewal premium more than 10 days, but less than 30 days after the expiration date of the previous policy period and *we* accept it, *we* shall reinstate the policy for the balance of the policy period for which the pay-

ment was made. The premiums shall be fully earned at the end of such period.

When the premium is paid more than 10 days after the expiration date of the previous policy period, we shall not be liable for any accident, occurrence, or loss that takes place between the expiration date of the previous policy period and the date we received and accepted the renewal premium.

(Emphasis supplied.)

The trial court found that the above policy language clearly and unambiguously excluded coverage for incidents arising before Farm Bureau received and accepted payment for the policy renewal. The trial court ruled in favor of Farm Bureau's action for declaratory judgment and injunction.

ANALYSIS

In appellate review of an insurance policy, the policy must be construed as any other contract and effect must be given to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995). It should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993). When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). Ambiguity will not be read into insuring language which is plain and unambiguous in order to construe it against the preparer of the contract. *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

We have previously upheld an automobile liability insurance contract which denied coverage until the insurer received and accepted the past-due renewal premium. See *Sampson v. State Farm Mut. Ins. Co.*, 205 Neb. 164, 286 N.W.2d 746 (1980). The Farm Bureau automobile liability policy issued to the Bierschenks is plain and unambiguous. It provided unequivo-

cally that if the renewal premium was received and accepted by Farm Bureau more than 10 days but less than 30 days after the previous policy period expired, Farm Bureau would not be liable for accidents that had taken place between that expiration date and the date that Farm Bureau accepted the renewal premium. Farm Bureau received the Bierschenks' renewal premium 15 days after the previous policy period expired. The accident occurred 3 days before Farm Bureau received the premium. According to the plain language of the insurance contract, Farm Bureau could not be held liable for any claims arising from the accident in question. 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. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996).

The Bierschenks argue that the Farm Bureau clause violates public policy because the insurer is charging a premium and not providing coverage. This argument lacks merit. In *Houston v. Farmers & Merchants' Ins. Co.*, 64 Neb. 138, 89 N.W. 635 (1902), we reviewed a contract in which the failure to pay the premium when due suspended the insurance policy until the date at which full payment of the premium was made. In holding that the insurance contract was enforceable, we stated:

> It is but fair and just that while the insured is in default of the payment of his note, the company should not be liable for loss, when the parties have so agreed. We have no right to make a new contract for them, or refuse to enforce the one they have made.

Id. at 142-43, 89 N.W. at 636. There is no public policy to be served by ignoring the insurance contract agreed upon by Farm Bureau and the Bierschenks. In the realm of insurance, courts must be especially careful when basing their decisions on public policy, because insurance is a matter of contract, not sympathy. *Howard v. Blue Cross Blue Shield, supra.* Moreover, in an area so pervasively regulated, it is not the function of the judiciary to second-guess the wisdom, policy, or expediency of legislative enactments. See *State Farm Mut. Auto Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993)

(Shanahan, J., concurring), quoting *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991).

Finally, the Bierschenks argue that Farm Bureau's insurance contract violates Neb. Rev. Stat. § 60-302 (Reissue 1988). The record does not reflect that this argument was presented to the trial court. Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal. *Preisendorf v. Mettenbrink*, 232 Neb. 558, 441 N.W.2d 203 (1989). In any event, § 60-302 has no relevance to the case at bar because it requires proof of financial responsibility or evidence of insurance, which includes policy effective dates, in order to register a motor vehicle.

CONCLUSION

Pursuant to the plain language of the insurance contract, Farm Bureau is not liable for claims arising from an accident which occurred before Farm Bureau received and accepted the renewal premium from the claimants which was past due more than 10 days beyond the expiration of the previous policy. The trial court's decision is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. BRENT A. BOWERS, APPELLANT.

548 N.W.2d 725

Filed May 31, 1996. No. S-94-1243.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld 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. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Motor Vehicles.** Pursuant to Neb. Rev. Stat. § 60-323 (Reissue 1993), except as otherwise specifically provided, no person shall operate, drive, or park a motor vehicle on the public highways unless such vehicle at all times has displayed one number plate on the back thereof and one number plate on the front thereof.
4. ____. Pursuant to Neb. Rev. Stat. § 60-320 (Reissue 1993), a statutory exemption from the mandate that license plates must be displayed in order to lawfully operate a motor vehicle is provided to purchasers of new or used vehicles.
5. ____. Pursuant to Neb. Rev. Stat. § 60-320.01 (Reissue 1993), one can lawfully operate an unregistered motor vehicle for 30 days without display of license plates or in-transit tags after purchasing the vehicle from a nonlicensed seller, provided one can produce the proper documentation upon demand.
6. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
7. **Investigative Stops: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
8. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Statutes.** Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes.
9. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** There may be some circumstances in which wholly lawful conduct might justify the suspicion that criminal activity is afoot; the purpose of an investigative stop is to clarify ambiguous situations, and even if it is equally probable that the vehicle or its occupants are innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it is their duty to prevent.
10. **Police Officers and Sheriffs: Investigative Stops.** The proper focus of an inquiry is not whether specific conduct is criminal or noncriminal, but whether a police officer's suspicion is reasonably related to the activity observed, criminal or noncriminal.
11. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops.** Even if an observed conduct is otherwise lawful, if the police officer has a particularized and objective basis under an assessment of the totality of the circumstances coupled with suspicion drawn through his or her experience and training that criminal activity has been or is about to be engaged in, an investigatory stop may be constitutionally proper.
12. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** When an officer observes a vehicle without license plates or in-tran-

sit tags, a particularized and objective basis exists to justify a reasonable, articulable suspicion that the driver may be criminally avoiding the motor vehicle registration statutes, thereby supporting a brief investigatory stop.

13. **Constitutional Law: Criminal Law: Miranda Rights: Self-Incrimination: Waiver.** The protection of the privilege against self-incrimination requires certain warnings regarding rights and a voluntary, knowing, and intelligent waiver of those rights before incriminating responses to custodial interrogation can be admissible in evidence in a criminal proceeding.

14. **Miranda Rights: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** Persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda*; there must be some further action or treatment by the police to render the driver "in custody" and entitled to *Miranda* warnings.

Petition for further review from the Nebraska Court of Appeals, HANNON, MILLER-LERMAN, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of Court of Appeals affirmed.

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

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Following a bench trial in the county court for Lancaster County, Brent A. Bowers was convicted of driving under the influence (DUI), in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992), and of failure to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1995). Bowers appealed to the district court and asserted that the county court erred in denying his motion to suppress evidence which was secured following the stop of his vehicle, because the basis for the stop was unconstitutional. Bowers also asserted that the county court erred in failing to suppress statements made by him while in custody and prior to his being informed of his right to remain silent. The statements Bowers sought to suppress

were his verbal responses to routine field sobriety testing. The district court affirmed the judgment of the county court. Bowers appealed to the Nebraska Court of Appeals, which affirmed the county court's orders denying Bowers' motions to suppress and the DUI conviction and sentence. *State v. Bowers*, 95 NCA No. 50, case No. A-94-1243 (not designated for permanent publication). The Court of Appeals set aside Bowers' conviction and fine for failure to appear, a matter that is not before us in this review. We granted Bowers' petition for further review of his DUI conviction and sentence. We affirm the lower court holdings that the investigatory stop of Bowers' was constitutionally proper and that the statements Bowers sought to suppress were not elicited during a custodial interrogation for purposes of the *Miranda* rule.

BACKGROUND

On March 18, 1993, at approximately 1:45 a.m., Nebraska State Patrol Trooper Jeffrey Ward observed a 1989 Chevy Camaro with no license plates and no in-transit tags. Ward did not observe any driving errors such as speeding or swerving. Ward testified that he stopped the vehicle solely because it did not have license plates or in-transit tags.

When Ward approached the vehicle, he noticed the smell of alcohol. Bowers was unable to produce a driver's license. Bowers' license had just been reinstated, but he had not yet taken the driver's license test. However, Bowers did have the proper paperwork for the car, showing that he had purchased the vehicle from a private individual within the past 2 weeks.

Ward was unable to ascertain whether the smell of alcohol emanated from Bowers or from Bowers' passenger. Ward asked Bowers to accompany him back to his police cruiser in order to verify his story regarding his driver's license and in order to determine if the alcohol smell emanated from Bowers. As Bowers sat in the front passenger seat of the cruiser, Ward smelled alcohol and noticed that Bowers' eyes were bloodshot and that his speech was slurred.

Ward had Bowers perform some routine field sobriety tests. First, Ward asked Bowers to perform the horizontal nystagmus test. The record does not indicate whether Bowers performed

this test satisfactorily. Ward then asked Bowers to recite the alphabet. Ward testified that Bowers skipped the letter "B." Bowers was then asked to count backward and failed to do so correctly. Because it was snowing and windy, Ward did not ask Bowers to perform any other field sobriety tests such as walking heel-to-toe.

Bowers performed and failed a preliminary breath test. Ward placed Bowers under arrest and transported him to a Lancaster County correctional facility. A subsequent Intoxilyzer test showed Bowers to have .14 grams of alcohol per 210 liters of breath.

On April 13, 1993, Bowers filed a motion to suppress all physical evidence, statements, visual and auditory observations, and any other evidence seized from the defendant after the stop of his vehicle. Bowers asserted that Ward had no probable cause or articulable suspicion to justify the stop of his vehicle and that such investigatory stop violated his 4th and 14th Amendment rights under the U.S. Constitution, and as guaranteed by the Nebraska Constitution. The evidence sought to be suppressed resulted from the stop.

After several continuances and failures to appear, a hearing was conducted on the motion to suppress on September 29, 1993. At the hearing, Bowers argued that under the holding of this court in *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), *cert. denied* 508 U.S. 940, 113 S. Ct. 2415, 124 L. Ed. 2d 638, a constitutional investigatory stop cannot be based solely on a police officer's desire to verify compliance with motor vehicle registration statutes. Therefore, Bowers argued Ward lacked a reasonable suspicion, supported by articulable facts, that criminal activity existed in order to justify the stop of Bowers' vehicle simply because his vehicle did not display either license plates or in-transit tags.

On January 21, 1994, the county court denied Bowers' motion to suppress. On March 9, Bowers filed a second motion to suppress.

In his second motion to suppress, Bowers requested that any statements made by him after being taken into custody be suppressed as fruit of the poisonous tree. Bowers asserted that he was taken into custody after he was stopped by Ward and

placed in the police cruiser. Bowers stated that since he had not yet been read the *Miranda* warnings, any statements obtained from him after he was placed in custody were obtained in violation of his rights guaranteed by the 4th, 5th, 6th, or 14th Amendment to the U.S. Constitution and guaranteed by the Nebraska Constitution. Specifically, the statements that Bowers sought to suppress were his verbal responses to the routine field sobriety tests. On March 28, 1994, the county court overruled Bowers' motion to suppress his statements.

After a bench trial, the county court found Bowers guilty of second-offense DUI and sentenced him to 45 days in jail, imposed a $500 fine, and suspended his driver's license for 1 year. Bowers was found guilty of failure to appear and was fined $75.

Bowers appealed to the district court, which affirmed the judgment of the county court.

Bowers then appealed to the Court of Appeals, which affirmed Bowers' conviction and sentence for DUI, but reversed his conviction and sentence for failure to appear. We granted Bowers' petition for further review of his DUI conviction and sentence.

ASSIGNMENTS OF ERROR

Bowers asserts that the Court of Appeals erred in finding that it is constitutionally proper for a law enforcement officer to stop a vehicle solely because the vehicle does not have visible license plates or in-transit tags. Second, Bowers asserts that the Court of Appeals erred in finding that verbal field sobriety tests are not testimonial in nature and do not require *Miranda* warnings.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld 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. Osborn, ante* p. 57, 547 N.W.2d 139 (1996); *State v. Veiman*,

249 Neb. 875, 546 N.W.2d 785 (1996); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996); *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

ANALYSIS

Investigatory Stop

Ward testified that he pulled Bowers over on March 18, 1993, solely because Bowers' 1989 Chevy Camaro displayed no license plates and no in-transit tags. Bowers argues that Ward did not have a reasonable or articulable suspicion that Bowers had been, or was about to become, involved in any criminal activity; therefore, the stop was not constitutionally proper. Before we address Bowers' argument, we will summarize the statutory provisions currently in effect governing the registration of motor vehicles and the display of license plates and in-transit tags.

"No motor vehicle . . . unless otherwise expressly provided, shall be operated or parked on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3." Neb. Rev. Stat. § 60-302 (Reissue 1993). The Department of Motor Vehicles furnishes two license plates to every person whose motor vehicle is registered. Neb. Rev. Stat. § 60-311 (Reissue 1993). "Except as otherwise specifically provided, no person shall operate, drive, or park . . . a motor vehicle on the public highways unless such vehicle at all times has displayed one number plate on the back thereof and one number plate on the front thereof." Neb. Rev. Stat. § 60-323 (Reissue 1993). A violation of the motor vehicle registration statutes is a Class III misdemeanor, unless otherwise provided. Neb. Rev. Stat. § 60-348 (Reissue 1993).

A statutory exemption from the mandate that license plates must be displayed to lawfully operate a motor vehicle is provided to purchasers of new or used vehicles. Currently, one has 30 days to register a newly purchased vehicle, Neb. Rev.

Stat. § 60-320 (Reissue 1993), although previously one had only 15 days, § 60-320 (Reissue 1988).

Purchasers of new or used vehicles from licensed dealers are provided in-transit decals or tags by the dealer to display in lieu of license plates. § 60-320(3)(b) (Reissue 1993). "Such transit decal shall allow such owner to operate the motor vehicle . . . for a period of thirty days in order to effect proper registration of the new or used motor vehicle . . . ." *Id.* However, § 60-320(3)(b) also provides that on demand of proper authorities, the operator must produce the proper documentation, such as a duly executed bill of sale, a certificate of title, or other satisfactory evidence of the right of possession.

Dealer issued in-transit tags must conform to the form and numbering system prescribed by the Department of Motor Vehicles. In-transit tags contain the words "In Transit" and the date upon which the 30-day grace period expires. Dealers are required to keep a record of each set of in-transit tags issued. § 60-320(3)(b).

There is no statute providing for the issuance of in-transit tags to purchasers of vehicles from sellers other than licensed dealers. When one purchases a vehicle from a nonlicensed dealer,

> [s]uch purchaser may operate such motor vehicle without registration for a period not to exceed thirty days. Upon demand of proper authorities, there shall be presented by the person in charge of such vehicle, for examination, a certificate showing the date of transfer and the certificate of title to such vehicle with assignment thereof duly executed.

Neb. Rev. Stat. § 60-320.01 (Reissue 1993). Bowers purchased his automobile from a private individual and was able to produce the necessary documents.

Pursuant to § 60-320.01, one can lawfully operate an unregistered motor vehicle for 30 days without display of license plates or in-transit tags after purchasing the vehicle from a nonlicensed seller, provided one can produce the proper documentation upon demand. Bowers testified that he called the sheriff's department regarding in-transit tags and was told that

he did not need any because he had bought his vehicle from a private seller. Thus, Bowers was in full compliance with the motor vehicle licensing laws. However, from outward appearances, his vehicle looked no different from an unregistered vehicle. Some people who operate motor vehicles without license plates or in-transit tags clearly do so in an unlawful attempt to escape the requirements of the motor vehicle registration statutes.

Ward testified that he knew that private sellers cannot issue in-transit tags in Nebraska. Ward testified that if a vehicle did not have license plates or in-transit tags, it could be that the vehicle was purchased from a private seller and that it was being legally operated. In *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), *cert. denied* 508 U.S. 940, 113 S. Ct. 2415, 124 L. Ed. 2d 638, a vehicle displaying dealer in-transit tags was stopped solely because the trooper wanted to check if the vehicle was within the in-transit period. We stated:

> "[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten*, 238 Neb. 13, 18, 469 N.W.2d 112, 116 (1991). Accord, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *State v. Staten*, 238 Neb. at 18, 469 N.W.2d at 116-17.
>
> Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes.

State v. Childs, 242 Neb. at 433, 495 N.W.2d 479-80.

Given that the presumption of innocence, which though unarticulated, is inherent in the criminal justice system, a constitutional investigatory stop cannot be made solely to check a motorist's documentation when the vehicle is properly displaying in-transit tags. *Id.*

Dealer issued in-transit tags are a visible badge that the motorist is in compliance with motor vehicle registration statutes and is engaging in wholly lawful conduct. Here, Bowers' operation of his vehicle was wholly lawful, yet there was no visible display that he was in compliance with motor vehicle registration statutes. That differs from the situation in *Childs*. Bowers urges us to apply our holding in *Childs* to these facts and conclude that the investigatory stop was constitutionally impermissible.

"[T]here may be some circumstances ' "in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." ' " *Id.* at 434, 495 N.W.2d at 480. Accord *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992).

> Because the purpose of an investigative stop "is to clarify ambiguous situations, 'even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.' "

State v. Bridge, 234 Neb. 781, 784, 452 N.W.2d 542, 545 (1990). Accord 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.8 (1984) (quoting *United States v. Holland*, 510 F.2d 453 (9th Cir. 1975), *cert. denied* 422 U.S. 1010, 95 S. Ct. 2634, 45 L. Ed. 2d 674).

In this circumstance, the ambiguous, but potentially lawful, conduct of driving without license plates or in-transit tags might justify the suspicion that criminal activity, to wit driving an unlicensed vehicle, was afoot. Unlike *Childs*, there was no outward manifestation of compliance. The "proper focus of an inquiry is not whether specific conduct is criminal or noncriminal, but whether a police officer's suspicion is reasonably related to the activity observed, criminal or noncriminal." *State v. Thomas*, 240 Neb. at 559, 483 N.W.2d at 537. Therefore, even if the conduct observed is otherwise lawful, if

the police officer has a particularized and objective basis under an assessment of the totality of the circumstances coupled with suspicion drawn through his or her experience and training that criminal activity has been or is about to be engaged in, an investigatory stop may be constitutionally proper. *State v. Thomas, supra*; *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

When an officer observes a vehicle without license plates or in-transit tags, a particularized and objective basis exists to justify a reasonable, articulable suspicion that the driver may be criminally avoiding the motor vehicle registration statutes. The State's interest in enforcing its registration laws supports a brief investigatory stop to ascertain whether the driver possesses the necessary documentation to establish that he or she is within the 30-day grace period to register the vehicle.

Privilege Against Self-Incrimination

In Bowers' second motion to suppress, he asserted that his constitutional rights were violated when he was allegedly taken into custody and asked to perform field sobriety tests prior to being informed of his *Miranda* rights.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court held that the protection of the privilege against self-incrimination required certain warnings regarding rights and a voluntary, knowing, and intelligent waiver of those rights before incriminating responses to custodial interrogation can be admissible in evidence in a criminal proceeding. See, also, *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

Miranda implicates only statements that are both testimonial in nature and elicited during custodial interrogation. The U.S. Supreme Court has held that persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

In *Berkemer*, a highway patrol officer observed the defendant's car weaving in and out of its traffic lane. The officer stopped the defendant and asked him to get out of his vehicle. The defendant had difficulty standing, and the officer con-

cluded at that point that the defendant would be arrested for a traffic violation. At the roadside, the defendant was required to perform field sobriety tests and was questioned regarding his use of intoxicants.

Despite the significant curtailment of "freedom of action," the *Berkemer* Court held that routine traffic stops do not exert upon the detained person pressures that sufficiently impair the person's free exercise of the privilege against self-incrimination as to require that the person be informed of his or her constitutional rights. Traffic stops are presumptively temporary and brief. Motorists are generally obliged to answer a few questions and to wait while the officer checks license and registration. Most motorists are allowed to continue on their way, perhaps with a citation. Traffic stops may make a motorist uncomfortable, but are a comparatively nonthreatening detention and are generally not subject to the dictates of *Miranda*. *Berkemer v. McCarty, supra.*

We adopted the holding of *Berkemer* in *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). Holman was stopped after she ran two stop signs and because her vehicle did not have a front license plate. The officer could see four new truck tires in the open trunk of Holman's vehicle. While she sat in her car, Holman gave the officer her license and registration and was asked about the ownership of the tires. The officer asked Holman to step out of her vehicle and then placed her in the backseat of his cruiser while he ran a driver's history check, a check for warrants, and a registration check. While in her car and while in the cruiser, Holman was questioned about the tires. Holman repeatedly stated that the tires were not hers, but that she knew who the owner was. Holman declined to identify the owner. Holman was arrested after the routine checks revealed that there was an outstanding warrant for her arrest and that her driver's license had been suspended. The tires later proved to be stolen, and Holman was charged with theft by receiving stolen property. Holman sought to suppress her statements regarding the tires as violative of her right against self-incrimination.

Applying *Berkemer* to the facts in *Holman*, we concluded that Holman was not in custody when she was questioned

regarding the ownership of the tires and that there was no violation of Holman's Fifth Amendment rights. When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver "in custody" and entitled to *Miranda* warnings.

The facts in this case do not justify Bowers' contention that his statements should have been suppressed. Ward was justified in stopping Bowers' vehicle because it lacked license plates and in-transit tags, a possible violation of the motor vehicle registration statutes. After verifying that Bowers had the proper documentation to show he was in compliance with motor vehicle licensing laws, Ward asked Bowers to come back to his police cruiser in order to verify Bowers' story as to why he was driving without a driver's license. In the cruiser, Ward asked Bowers to recite the alphabet and to count. Bowers asserts that his failure to recite the alphabet and to count correctly should be suppressed as violative of the privilege against self-incrimination. There is nothing in these facts that indicates any action or treatment by Ward that escalated this routine traffic stop to a level of custody so as to implicate *Miranda*.

Having held that Bowers was not in custody at the time he performed the field sobriety tests, we need not decide whether any aspect of the sobriety tests were testimonial in nature.

CONCLUSION

Finding no Fourth or Fifth Amendment violations as claimed, the judgment of the Court of Appeals affirming Bowers' DUI conviction and sentence is affirmed.

AFFIRMED.

LAURA TORRISON AND PHIL TORRISON, NEXT FRIENDS AND PARENTS OF MATTHEW TORRISON, A MINOR, APPELLANTS, V. RONALD OVERMAN AND MYRTLE E. OVERMAN, APPELLEES. LAURA TORRISON AND PHIL TORRISON, NEXT FRIENDS AND PARENTS OF JACOB TORRISON, A MINOR, APPELLANTS, V. RONALD OVERMAN AND MYRTLE E. OVERMAN, APPELLEES.

549 N.W.2d 124

Filed June 7, 1996. Nos. S-94-256, S-94-257.

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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute.
4. **Garnishment: Statutes.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
5. **Actions: Pleadings.** In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
6. **Garnishment: Pleadings: Liability.** In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue.
7. **Garnishment: Statutes: Legislature.** Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.
8. **Garnishment: Pleadings: Liability: Judgments: Debtors and Creditors.** In an application to determine garnishee liability, the garnishor may controvert or traverse the garnishee's response or may allege facts demonstrating that the garnishee owes a debt to the judgment debtor or that the garnishee holds property or a credit of the judgment debtor. By the application the garnishor frames the issue: Does the garnishee owe a debt to the judgment debtor or hold property, funds, or credits of a judgment debtor?
9. **Actions: Assault: Negligence.** There is no such cause of action as negligent assault and battery.
10. **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.

11. **Actions: Parties.** Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.
12. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellants.

Joseph E. Jones and Michael J. Mooney, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Laura and Phil Torrison, as parents and next friends, obtained two identical judgments against Ronald Overman for damages arising out of the sexual abuse of the Torrisons' two minor children. The Torrisons and Overman entered into a stipulation for consent to entry of a judgment against Overman, and the Douglas County District Court entered judgments against Overman. The Torrisons filed garnishment proceedings against State Farm Fire and Casualty Company (State Farm), Overman's homeowner's insurance carrier. State Farm and the Torrisons each moved for summary judgment. The district court granted summary judgment in favor of State Farm, and the Torrisons appeal.

SCOPE 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. *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996).

FACTS

The Torrisons' two minor children were sexually abused by Overman, their maternal grandfather. The Torrisons filed identical lawsuits against Overman on behalf of each child (docket 911, No. 510, and docket 911, No. 511). The lawsuits set forth the same causes of action on behalf of each child and the parents. The petitions alleged that Overman engaged in sexual acts with the children against their will, which acts continued until approximately January 1992, and alleged that as a result of the repeated and prolonged physical and sexual abuse, severe and permanent psychological and emotional injuries were sustained by the children.

The Torrisons alleged that Overman was a mentally disordered sex offender and was predisposed to repeated commission of sexual offenses which were likely to cause substantial injury to the health of others. It was further alleged that because of Overman's mental disorder, he was unable to formulate the requisite intent to cause the foreseeable harm to the children and that his acts were and should be considered negligent acts. As another theory of recovery, the petition alleged that despite the knowledge of his pedophilic tendencies and despite recommendations to continue counseling, Overman negligently failed to seek treatment for his mental disorder and that as a direct and proximate result of his negligence, Overman continued to be alone with the young boys so that when his uncontrollable pedophilic urge came upon him, he would cause injury to them.

As a second cause of action, the Torrisons alleged that they had suffered severe emotional distress and psychological injuries as bystanders who had gained knowledge of the serious injuries of their children which were proximately caused by, and were a reasonably foreseeable consequence of, Overman's negligence.

On August 3, 1993, the Douglas County District Court entered two separate judgments against Overman based upon a "Stipulation and Agreement for Consent to Entry of Judgment." The court found that Overman engaged in sexual acts with the minor children against their will, which acts continued until approximately January 1992. The court found that

Overman knew he was a pedophile and had been so diagnosed by medical authorities, that he was a mentally disordered sex offender, and that due to the disorder, he was predisposed to repeated commission of sexual offenses which were likely to cause substantial injury to the health of others. Pursuant to the stipulation between the Torrisons and Overman, the court found that due to Overman's mental disorder, he was at all times relevant thereto unable to form the requisite intent to cause foreseeable harm to the children, that his acts were and should be considered negligent acts, and that despite knowledge of his pedophilic tendencies and despite recommendations to continue counseling, Overman negligently failed to seek treatment for his mental disorder and negligently allowed himself to be in unsupervised situations with minors.

Based upon the above stipulation, the district court found in each case that Overman was negligent in failing to seek professional help or failing to avoid situations where he would be left alone with children and would be able to act on his uncontrollable pedophilic desires. In each case, $100,000 was awarded to the child under the first cause of action and $100,000 was awarded to the parents under the second cause of action as a fair and reasonable amount in light of the nature and extent of their injury and damages. The total amount of the judgments was $400,000. The court found that State Farm had denied coverage under Overman's homeowner's policy for the claims alleged by the Torrisons in the lawsuits.

Having obtained judgments against Overman, the Torrisons proceeded to attempt collection of the judgments via a provisional remedy set forth in chapter 25, article 10, of the Nebraska Revised Statutes. In each case, the Torrisons filed an "Affidavit and Praecipe for Summons in Garnishment After Judgment." Garnishment interrogatories were then served upon State Farm. In summary, State Farm answered no to the interrogatories regarding wages, stating that it did not owe Overman any money for wages. State Farm also answered no 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?" Although State Farm filed answers to the garnishment inter-

rogatories in docket 911, No. 511, only, it was stipulated by the parties that the answers should be considered to have been filed in both cases. The Torrisons then filed in each case an "Application to Determine Garnishee Liability Pursuant to Neb. Rev. Stat. §25-1030." The contents of this application are as follows:

> COMES [sic] NOW the Plaintiffs, Laura Torrison and Phil Torrison, next friends and parents of . . . a minor, hereinafter referred to collectively as ("Plaintiffs"), and respectfully make Application to the Court for determination of the liability of the Garnishee, State Farm Fire & Casualty Company, pursuant to Neb. Rev. Stat. §25-1030, and in support hereof state as follows:
>
> 1. On the 3rd day of August, 1993, judgment was entered against the Defendant Ronald Overman in the above-captioned matter in the total amount of $200,000.00 [to be allocated $100,000.00 to the child on the Plaintiff's First Cause of Action and $100,000.00 to the parents on the Plaintiff's Second Cause of Action] with taxable costs;
>
> 2. On the 8th day of September, 1993, Plaintiffs filed an Affidavit and Praecipe for Summons in Garnishment After Judgment, for service of garnishment interrogatories upon the Garnishee, State Farm Fire & Casualty Company, hereinafter referred to as ("Garnishee");
>
> 3. Summons in Garnishment was issued on September 8, 1993, sent by Certified Mail, to Garnishee on September 10, 1993, and actually received by and delivered to Garnishee on September 13, 1993, as evidenced by the return receipt filed herein. That pursuant to said Garnishee Summons, Garnishee was required to answer certain Interrogatories on or before the 18th day of September, 1993;
>
> 4. Garnishee filed its Answers to such Interrogatories herein on September 17, 1993, which Answers Plaintiffs hereby controvert and allege that Garnishee failed to make full, complete and satisfactory disclosure with regard to the properties and credits due Defendant in Garnishee's possession or under its control, and, in par-

ticular, as to insurance policies issued by Garnishee (State Farm) to Defendant.

WHEREFORE, Plaintiff moves the Court for an Order pursuant to Neb. Rev. Stat. §25-1030, determining the liability of Garnishee and entering judgment against the Garnishee in the full amount of Plaintiffs' claim, together with attorney's fees pursuant to Neb. Rev. Stat. §44-359, and setting the time for a hearing and directing the manner of notice upon the Garnishee herein.

In docket 911, No. 511, State Farm filed a "Reply to Plaintiffs' Application to Determine Garnishee Liability." The contents of the reply are set forth as follows:

1. [State Farm] [a]dmits that a judgment may have been entered against Defendant Ronald Overman in the above-captioned matter, but affirmatively asserts that said judgment was entered as the result of collusion and not entered in good faith, and the Consent Judgment entered herein is not binding upon State Farm or conclusive of the coverage issues under State Farm's insurance policy.

2. State Farm acknowledges that it has received Garnishment Interrogatories and filed Answers thereto; State Farm further alleges that Defendant Ronald Overman does possess a homeowner's insurance policy through State Farm, but that there is no coverage under said policy for the claims made against Mr. Overman.

3. State Farm denies any liability to the Plaintiffs in this garnishment proceeding.

The Torrisons then filed motions to strike State Farm's reply for the reason that Neb. Rev. Stat. § 25-1030 (Reissue 1995) permits only two pleadings: the answer of the garnishee, if one has been filed, and the application for determination of the garnishee's liability. The motions further alleged that if State Farm was permitted to file a reply, it should not be permitted to introduce new causes of action, and that said reply constituted an impermissible collateral attack on the judgments in favor of the Torrisons. The record does not reflect whether the reply was also filed in docket 911, No. 510. The district court directed that the parties file a stipulation stating that the

reply applied to that case, but no such stipulation appears in the record.

The Torrisons filed motions for summary judgment. State Farm moved to amend its answers to the garnishment interrogatories, alleging, inter alia, that it would be an abuse of discretion to deny such amendments and that State Farm should be allowed to amend its answer to include issues of fraud, collusion, and bad faith. State Farm also filed motions for summary judgment.

On February 17, 1994, the district court overruled the Torrisons' motions to strike and motions for summary judgment. The court sustained State Farm's motions to amend its garnishment answers and sustained its motions for summary judgment. The court found that State Farm was not bound to defend a suit based on a claim outside the coverage of the policy, that State Farm proffered there was no such cause of action as negligent assault and battery, and that Overman's sexually abusive acts were intentional as a matter of law, citing *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). The court found as a matter of law that Overman intended to inflict bodily injury on the minor children, that his acts and any damage caused thereby were excluded from coverage under his homeowner's policy, and that State Farm had no obligation to defend any civil suit or to pay damages caused by Overman's intentional acts. The Torrisons appeal.

ASSIGNMENTS OF ERROR

The Torrisons assert that the district court erred (1) in sustaining State Farm's motions for summary judgment; (2) in allowing State Farm to collaterally attack the final judgments; (3) in failing to hold that State Farm was barred from assailing the underlying judgments via collateral estoppel; (4) in allowing State Farm to amend its answers to interrogatories; (5) in allowing State Farm to file a reply, contrary to the clear language of § 25-1030; and (6) in overruling the Torrisons' motions for summary judgment.

ANALYSIS

We first consider what pleadings are permitted in a garnishment action. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995). In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995).

Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985).

The Torrisons claim that § 25-1030 limits the pleadings to the garnishee's answer to interrogatories and the garnishor's application for determination of liability and that a reply is not a proper pleading and, as a matter of law, may only be filed by a plaintiff in response to an answer. They argue that there is no authority for allowing the filing of a reply to supplement one's own answers; that it is not the province of a reply to introduce new causes of action, theories of recovery, or defenses; and that State Farm has improperly attempted to raise the issues of noncoverage, collusion, and fraud for the first time in its proffered reply.

State Farm asserts that its answers to garnishment interrogatories were sufficient to raise the issues that the Torrisons claim could not be raised by an amended answer to the interrogatories or by a reply. In the alternative, State Farm claims that it was properly allowed to amend its answers to garnishment interrogatories and to reply to the Torrisons' application to determine garnishee liability. State Farm points out that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. See

McCurry v. School Dist. of Valley, 242 Neb. 504, 496 N.W.2d 433 (1993).

State Farm also relies upon *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992), as authority that a reply may be filed in a garnishment proceeding. We note at this point that *Carlson* does not control our decision in this case because in *Carlson* the issue of whether the garnishor could file a reply was not considered. The reply filed by the garnishor had nothing to do with our decision in *Carlson*.

Neb. Rev. Stat. § 25-1010 (Reissue 1995) provides that upon the filing of an affidavit containing the necessary allegations, the court may direct the clerk of the court to issue a summons and order requiring the garnishee to answer written interrogatories. The garnishee is then required to answer under oath all the interrogatories put to the garnishee. Neb. Rev. Stat. § 25-1026 (Reissue 1995). If the garnishee's answers are not satisfactory to the plaintiff, the plaintiff may file an application for determination of the garnishee's liability. This application for determination of liability and the answers of the garnishee are the pleadings upon which trial of the issue of liability of the garnishee shall be had. § 25-1030.

As we review the garnishment statutes, we conclude that in a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. See, § 25-1030; *NC+ Hybrids v. Growers Seed Assn., supra*. "Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature." *NC+ Hybrids*, 219 Neb. at 302, 363 N.W.2d at 366. An answer to interrogatories which states that the garnishee has no property, money, or credit due and owing to the judgment debtor acts as a denial of all issues presented by the application to determine garnishee liability filed by the garnishor. Thus, the court erred in allowing the reply. We do not reach the issue of whether the court should have permitted an amendment to the answers to interrogatories because the amendment to the answers is not necessary for our decision.

Under the facts of this case, we do not imply that State Farm was limited in formulating its answers to the garnishment interrogatories to merely checking a box marked yes or no. Upon receipt of the summons in garnishment, State Farm was advised that judgments totaling $400,000 had been entered against Overman. Having issued a policy of insurance to Overman, State Farm was placed on notice that the Torrisons were claiming State Farm owed a debt or had property, namely, a policy of insurance, belonging to Overman. As noted by the trial court, the preferred practice would be for State Farm to be more circumspect in regard to court filings. Nevertheless, we find under the facts of this case that the answer "no" by State Farm served as a denial to the issues which were subsequently raised by the Torrisons' application to determine garnishee liability.

State Farm's assertion that it did not have property belonging to Overman or credits or moneys owing to him required the Torrisons to set forth why State Farm was indebted to or held property, funds, or credits belonging to Overman. The Torrisons were required to frame the issues in the garnishment proceedings.

> In the application the garnisher may controvert or traverse the garnishee's response or may allege facts demonstrating that the garnishee owes a debt to the judgment debtor or that the garnishee holds property or a credit of the judgment debtor. By the application the garnisher frames the issue: Does the garnishee owe a debt to the judgment debtor or hold property, funds, or credits of a judgment debtor?

NC+ Hybrids v. Growers Seed Assn., 219 Neb. 296, 300, 363 N.W.2d 362, 366 (1985).

The Torrisons' application asserted that State Farm had a policy of insurance issued to Overman and that judgment had been entered against Overman in the amount of $400,000. Paragraph 4 of the application stated: "Garnishee failed to make full, complete and satisfactory disclosure with regard to the properties and credits due Defendant in Garnishee's possession or under its control, and, in particular, as to insurance policies issued by Garnishee (State Farm) to Defendant."

Therefore, the issue before the district court was whether State Farm held property of Overman's based on State Farm's policy of insurance issued to Overman.

We next consider whether the district court properly granted summary judgments in favor of State Farm. The district court stated:

> The Garnishee further proffers that there is "no such cause of action as negligent assault and battery . . . [and that Ronald Overman's] sexually abusive acts [to the Plaintiffs'] [sic] were intentional as a matter of law." *State Farm Fire and Cas. Co. v. Van Gorder, 235 Neb. 355, 358-360 (1990).* The policy herein has the exact same language as the *Van Gorder* case i.e. an exclusion for "bodily injury or property damage which is expected or intended by the insured". *Van Gorder* supra p. 358. As was stated by a unanimous Nebraska Supreme Court: ". . . as a matter of law, [Ronald Overman] intended to inflict bodily injury on [these Plaintiffs], [his] acts and any damage caused thereby are excluded from coverage under his homeowner's policy. State Farm has no obligation to defend any civil suit or pay damages by reason of [Ronald Overman's] intentional acts." *Van Gorder, supra p. 360 and Exhibits 9, 10 and 11.*

In *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 358, 455 N.W.2d 543, 545 (1990), we held:

> Regardless of the label John Doe affixes to the sexual abuse toward him, van Gorder's sexually abusive acts with John Doe were intentional as a matter of law. There is no such cause of action as negligent assault and battery. An assault and battery is an intentional act, whereas negligence is unintentional. . . . Likewise, sexually abusive acts are intentional. Consequently, as a matter of law, John Doe's petition succeeds in merely alleging damages resulting from van Gorder's intentional acts of sexual abuse upon John Doe.

If State Farm was bound by the underlying judgments because Overman's negligence proximately caused the damage to the Torrisons and their children, then the case at bar would be factually distinguishable from our decision in *van Gorder*

because Overman's acts would be viewed as not being intentional. The Torrisons argue that State Farm cannot collaterally attack the court's findings that Overman, being a mentally disordered sex offender, was unable to formulate the requisite intent to cause the foreseeable harm and that his acts were negligent. The Torrisons claim that the judgments against Overman are binding on State Farm because of the doctrine of collateral estoppel. In the alternative, the Torrisons assert that the "Consent to Entry of Judgment," the "Stipulation and Agreement for Consent to Entry of Judgment," and the "Order and Judgment" create a genuine issue of material fact which precludes summary judgment in favor of State Farm.

Instead of an action for declaratory judgment, the Torrisons brought a garnishment action as the remedy by which they would attempt to establish State Farm's liability. See *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979). Therefore, the Torrisons are limited to the issues that were framed by the application to determine garnishee liability and the answers to interrogatories. The Torrisons had the burden to establish why State Farm had property belonging to Overman. Unless the doctrine of collateral estoppel applied to State Farm, it was entitled to a judgment as a matter of law based upon our decision in *van Gorder*. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996).

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. *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995).

We first consider whether State Farm was in privity with Overman. In noting that there is no definition of "privity" which can be applied to all cases involving collateral estoppel,

we stated in *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 505, 500 N.W.2d 566, 573 (1993), that " '[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same.' "

State Farm asserts that it was not in privity with Overman because it had no duty to defend Overman. We agree. Since State Farm had no legal duty to defend because sexual assault is an intentional tort, there is no privity between State Farm and Overman. "[O]ne is not estopped or barred by a prior adjudication if he was not a party to such action and does not stand in the relation of privy to one who was a party." *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 27, 230 N.W.2d 99, 106 (1975).

We point out that nothing in the Torrisons' application raised the issue of collateral estoppel, nor did the Torrisons establish that State Farm was in privity with Overman. In the judgments in the underlying actions against Overman, the court found that State Farm had denied coverage under Overman's homeowner's policy for the claims alleged by the Torrisons. It was therefore incumbent upon the Torrisons to raise the issue of collateral estoppel in the garnishment proceedings and establish the conditions necessary for collateral estoppel. Because the Torrisons failed to do so, we do not consider the issue on appeal. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Farm Credit Bank v. Stute, supra.*

CONCLUSION

The parties to a garnishment proceeding are limited to the answers to interrogatories and the application to determine garnishee liability as the only pleadings for disposition of the liability issue. The Torrisons had the burden to establish why State Farm had property belonging to Overman, the judgment debtor. Because the Torrisons failed in their burden, State Farm is entitled to judgment as a matter of law. For the reasons set forth herein, the judgments of the district court granting summary judgment to State Farm are affirmed.

AFFIRMED.

CAPORALE, J., concurring.

I write separately because the appeal can be addressed in much simpler terms than those applied in the majority opinion. The sole issue framed by the pleadings was whether State Farm possessed any property belonging to Overman. Under our holding in *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990), the Torrisons' petition did not make allegations which came within the coverages provided by State Farm. As a consequence, State Farm did not have a duty to defend the Torrisons' suit, see *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993), and *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 283 N.W.2d 56 (1979), and therefore had no property belonging to Overman. Accordingly, State Farm was entitled to judgment as a matter of law on the issue as framed by the garnishment pleadings, and the district court's entry of summary judgment on behalf of State Farm was correct.

LANPHIER, J., concurring.

Although I concur in the result, I believe that the majority incorrectly applies both insurance law and garnishment procedures.

As the majority states, the Torrisons sued Overman for negligent sexual assault of their two minor children. Overman's insurance company, State Farm, refused to defend Overman. Overman entered into a stipulation with the Torrisons and consented to the entry of judgments against him which were subsequently entered by the district court. The Torrisons filed garnishment proceedings against State Farm to collect the amount of the judgments. The majority holds that the Torrisons had the burden to establish in their garnishment action that State Farm had property belonging to Overman and that the Torrisons should prevail unless the doctrine of collateral estoppel prevents State Farm from attacking the consent judgment. The majority then holds that the Torrisons failed to meet their burden, since they failed to raise the issue of collateral estoppel and failed to establish that State Farm was in privity with Overman.

I would apply the legal analysis found in *Sims v. Illinois Nat. Cas. Co. of Springfield*, 43 Ill. App. 2d 184, 193 N.E.2d 123 (1963). The facts are strikingly similar. The injured party, Ruark, was hurt while riding in a truck owned by his employer, Sims. Ruark sued Sims. Sims' insurance company refused to defend because employees were excluded from coverage. A jury verdict was entered against Sims in favor of Ruark. Ruark then commenced a garnishment action against the insurance company to collect the amount of the judgment.

The *Sims* court stated that as a general rule, the duty of a liability insurer under a policy provision requiring it to defend an action brought against its insured by a third party is to be determined by the allegations of the complaint in such action. This is the rule in Nebraska. See, *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 283 N.W.2d 56 (1979).

Ruark's petition stated a cause of action. Nothing in the petition's allegations suggested an exclusion from the policy. "[I]n such a situation the insurer is obligated to defend if there is, *potentially*, a case under the complaint within the coverage of the policy." (Emphasis in original.) *Sims*, 43 Ill. App. 2d at 192-93, 193 N.E.2d at 127. The insurance company had a duty to defend Sims, and by refusing to do so, it breached its insurance contract.

We have previously held that there is no cause of action for negligent assault and battery and that an insurance company has no duty to defend an action where such a claim is made. *State Farm Fire and Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). Here, the Torrisons' petition did not state a cause of action and was not within the policy's coverage. State Farm had no duty to defend. See, *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, *supra*; *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, *supra*.

Assuming, arguendo, that the Torrisons' complaint had stated a case that was potentially within the policy's coverage, State Farm would have had a duty to defend. See *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

The *Sims* court examined the procedural aspects using a garnishment proceeding to recover a judgment from an insurer after a wrongful refusal to defend. The *Sims* court relied upon a previous case, *Kinnan v. Hurst Co.*, 317 Ill. 251, 148 N.E. 12 (1925), involving an action on a creditor's bill. The *Sims* court stated that the same rules applied to a garnishment proceeding, since it was designed to accomplish the same basic purpose.

In *Kinnan*, the insurer had wrongfully refused to defend its insured. Upon wrongful refusal to defend, a cause of action arose in favor of the insured against its insurer. At that point, the liability of the insurer became fixed and was liquidated when the injured party obtained a judgment against the insured. The injured party

> had a right to have the indebtedness which gave rise to this cause of action applied to the payment of his judgment, not because of any privity between [the injured party and the insurer], but because of the right of any judgment creditor, under such circumstances, to have the property of his judgment debtor applied to the payment of his debts.

Kinnan, 317 Ill. at 261, 148 N.E. at 16. This concept clarifies the majority's reference in this case to the lack of privity between Overman and State Farm. State Farm had no property belonging to Overman because its refusal to defend was not wrongful. Privity therefore is not an issue.

The *Sims* court addressed the garnishment pleadings to determine if the issues were properly raised. In its answers to the interrogatories, the insurer denied that it had property of the insured and raised an affirmative defense that its policy excluded coverage for employees. The court held such allegations to be immaterial. Pursuant to the Illinois rule, wrongful refusal to defend estops the insurer from later attacking the judgment.

Apparently, there is a split among jurisdictions as to whether an insurer in breach of its duty to defend is precluded from taking the position that the judgment or settlement did not involve a covered risk. 7C John A. Appleman, Insurance Law and Practice § 4689 (1979 & Supp. 1995); *Sentinel Ins.*

v. First Ins. of Hawai'i, 76 Haw. 277, 875 P.2d 894 (1994). The Hawaii Supreme Court characterized the *Sims* approach as utilizing a form of estoppel as a punitive measure against insurers for wrongful breach of a contractual duty to defend and rejected its blanket application to all cases.

Implicitly, the majority follows the Illinois rule, but does so using a collateral estoppel analysis. Although the underlying principles are related, collateral estoppel is improperly applied by the majority.

WHITE, C.J., joins in this concurrence.

BUFFALO COUNTY, NEBRASKA, APPELLEE, V. RICHARD G. KIZZIER AND YVONNE A. KIZZIER, HUSBAND AND WIFE, ET AL., APPELLEES, AND MACK TRUCKS, INC., APPELLANT.

548 N.W.2d 757

Filed June 7, 1996. No. S-94-489.

1. **Pleadings: Time.** As a general rule, the granting or withholding of permission to file a late pleading rests in the discretion of the trial court.
2. ____: ____. 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.
3. **Courts: Judgments: Judicial Notice.** When cases are interwoven and interdependent, and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the former action.
4. **Actions: Liens: Equity.** An action to determine the priority of liens is grounded in equity.
5. **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, however, that 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.
6. **Statutes: Limitations of Actions.** Neb. Rev. Stat. § 25-1515 (Reissue 1995) is a statute of limitations.

7. **Pleadings: Limitations of Actions.** When it is not apparent from the face of the initiating pleading that the action is barred by the statute of limitations, the period of limitations is an affirmative defense which must be raised in the responsive pleading.
8. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded.
9. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the courts below.
10. **Statutes: Legislature: Intent.** In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
11. ____: ____: ____. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
12. **Motions for New Trial: Time: Appeal and Error.** Under the provisions of Neb. Rev. Stat. §§ 25-1914 and 25-1916 (Reissue 1995), once a timely motion for new trial is filed, there no longer exists an appealable judgment, decree, or other order.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed as modified.

Patrick J. Nelson and Timothy M. Welsh, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Kenneth C. Fritzler II for appellee Kizzier Realty & Investment Co., Inc.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellee, Buffalo County, sought to enforce a number of tax sale certificates by foreclosing the interests of a number of parties in the underlying real estate, including those of the defendants-appellees Richard G. Kizzier, Yvonne A. Kizzier, Kizzier Realty and Investment Company, Inc., and City of Kearney, and those of the defendant-appellant and counterclaimant and cross-claimant, Mack Trucks, Inc., which

asserted that it possessed a judgment lien. Determining that Mack Trucks' lien had been destroyed, the district court dismissed its counterclaim and assigned first priority to the county, second priority to the city, and third priority to Kizzier Realty. Mack Trucks thereupon appealed to the Nebraska Court of Appeals, claiming, in summary, that the district court erred in (1) permitting Kizzier Realty to file a belated answer and present evidence thereunder, (2) finding that Kizzier Realty possessed a valid lien, (3) invalidating Mack Trucks' lien, and (4) denying Mack Trucks' application for a supersedeas bond. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed this matter from the Court of Appeals' docket to our own. We now modify the judgment of the district court and, as modified, affirm it.

II. FACTS

In counterclaiming and cross-claiming, Mack Trucks alleged, and the record establishes, that it had obtained a county court judgment against Richard and Yvonne Kizzier on January 11, 1984, in the amount of $7,901.17 plus court costs of $25 with interest accruing at the rate of 14 percent per annum; that the judgment was transcribed to the district court; that the judgment constituted a lien against the underlying real estate; and that the judgment remained unpaid.

Not until the matter came on for trial did Kizzier Realty file an answer which alleged that it had an interest in the underlying real estate stemming from a written promissory note and a corresponding real estate mortgage. Kizzier Realty's answer further alleged that the note and mortgage were in default and that as a result, there was due and owing $500,000 on the principal and $890,739.72 in accrued interest.

Mack Trucks objected to Kizzier Realty's answer and participation in the trial because of the lateness of the answer, but did not ask for a continuance. The district court took the objection under advisement and allowed Kizzier Realty to present evidence.

The district court thereafter entered its decree of foreclosure and found that Mack Trucks' lien had become dormant, as a

consequence of which Mack Trucks had no judgment lien upon which its counterclaim and cross-claim could be predicated. In view of its dismissal of Mack Trucks' claim and the lack of objection from the other answering parties, the district court permitted the filing of Kizzier Realty's answer and found that Kizzier Realty had established a mortgage lien interest in the subject property in the total amount of $1,390,732.72 on a promissory note and mortgage executed in its favor on December 23, 1982.

After its motion for new trial was overruled, Mack Trucks applied for an order fixing the amount of a supersedeas bond. The district court rejected the application on the ground that although it was filed within 30 days from the overruling of Mack Trucks' motion for new trial, it was filed more than 30 days from the entry of the decree to which the motion for new trial was directed, and was therefore out of time.

III. ANALYSIS

1. Belated Answer and Trial Participation

As to the first assignment of error, claiming that the district court erred in accepting Kizzier Realty's untimely answer and in permitting it to participate in the trial, the record reveals that Kizzier Realty was served with summons and a copy of the county's petition on August 28, 1993, and that it did not file its answer until February 10, 1994.

Neb. Rev. Stat. § 25-821 (Reissue 1995) provides that "[t]he answer . . . of the defendant shall be filed within thirty days after service of the summons and petition . . . ." Thus, Kizzier Realty's answer was clearly out of time.

However, Neb. Rev. Stat. § 25-822 (Reissue 1995) provides that "[t]he court . . . for good cause shown, may extend the time for filing an answer or reply upon such terms as may be just." We have held as a general rule that the granting or withholding of permission to file a late pleading rests in the discretion of the trial court. *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991). We have also 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. *In re Application of*

Jantzen, 245 Neb. 81, 511 N.W.2d 504 (1994). See, also, *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959).

Kizzier Realty's answer admitted all of the allegations in the county's petition and asserted that it had an interest by virtue of a promissory note and real estate mortgage. In this sense, the answer pled a meritorious defense to the county's petition, which prayed that Kizzier Realty be foreclosed of all equity of redemption, claim, right, title, and interest upon or in the underlying real estate.

Thus, it cannot be said the district court abused its discretion in permitting Kizzier Realty to file a belated answer. Moreover, as Mack Trucks did not insist upon an immediate ruling on its objection to the untimely answer, see *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995), and did not ask for a continuance, neither can it be said the district court abused its discretion in permitting Kizzier Realty to adduce evidence at the scheduled trial, see *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995).

2. Kizzier Realty's Lien

Mack Trucks next claims that there was no competent evidence establishing Kizzier Realty's lien.

The promissory note and mortgage were received into evidence, and pursuant to Kizzier Realty's request, the district court took judicial notice of a previous case involving the same parties as are involved in the instant case. In that case, the county sought to foreclose on two tax sale certificates on the same real estate as is involved here. In the course thereof, Kizzier Realty claimed an interest by virtue of the same promissory note and upon which mortgage it now relies. The trial court in the previous case found that Kizzier Realty had a second priority lien in the total amount of $1,236,082.19.

Although Mack Trucks states in its brief that it objected to the district court's taking judicial notice of the previous case, it does not argue that taking such notice was error, or at least it does not base this assignment of error on such a claim. Instead, Mack Trucks contends that "[r]egardless of what was decided in [the previous case], it does not prove the existence

or amount of a current lien held by Kizzier Realty on the subject property." Brief for appellant at 19.

But irrespective of either contention, it was not error for the district court to have taken judicial notice of the prior case. The applicable rule is that when cases are interwoven and interdependent, and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the former action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

Contrary to Mack Trucks' position, producing the promissory note and mortgage upon which the present claimed lien is based and having the district court take judicial notice of the fact that it has previously determined the existence of a lien based on those documents are perhaps the best, if not the only, ways to prove the existence of the lien.

As for the amount thereof, Kizzier Realty introduced into evidence a document showing the principal amount of the note, the interest thereon, the credit received as payment from the previous case, and the total amount outstanding.

As an action to determine the priority of liens, this case is grounded in equity. *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (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, however, that 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. *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995); *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

We, on our de novo review of the evidence relating to the issues presented by this assignment of error, independently

conclude that Kizzier Realty proved the existence of a lien in its favor and the amount thereof as determined by the district court.

3. Mack Trucks' Lien

The third assignment of error rests on the district court's conclusion that Mack Trucks' lien had been destroyed because its execution had not been levied thereon for a period of more than 5 years.

Neb. Rev. Stat. § 25-2721 (Reissue 1995) provides:

> (2) Any person having a judgment rendered by a county court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this state. When the transcript is so filed and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed . . . .

Neb. Rev. Stat. § 25-1515 (Reissue 1995) provides:

> If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.

We have held that a

> "judgment lien is created by statute, and is destroyed by statute if an execution thereon is not taken out within five years from the date of the judgment, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of taking out of another execution thereon. If execution is not taken out in the time limited by the statute, the judgment becomes dormant, and the judgment lien is destroyed. . . ."

Glissmann v. Happy Hollow Club, 132 Neb. 223, 226, 271 N.W. 431, 432 (1937), quoting *Halmes v. Dovey*, 64 Neb. 122, 89 N.W. 631 (1902).

The counterclaim and cross-claim filed by Mack Trucks did not recite the date of the last execution on the judgment, and, thus, it was not apparent on the face of the pleading that the lien had become dormant.

Section 25-1515 is a statute of limitations, *Reed v. Occidental Bldg. & Loan Ass'n.*, 122 Neb. 817, 241 N.W. 769 (1932), which issue neither the county, Kizzier Realty, nor any of the various other defendants raised in any way. When it is not apparent from the face of the initiating pleading that the action is barred by the statute of limitations, the period of limitations is an affirmative defense which must be raised in the responsive pleading. See *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994).

The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244 (1994); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985). The failure to raise the issue of the possible dormancy of Mack Trucks' lien amounts to an admission that the lien was valid. See *Circle 76 Fertilizer, supra*. Mack Trucks' burden in this case was to prove each element of its counterclaim and cross-claim which was not expressly or impliedly admitted by the other parties. As the limitations issue had not been raised, there was no need for Mack Trucks to disprove the dormancy of its lien. See *id.*

The district court thus erred as a matter of law in ruling on an issue not presented by the pleadings and finding Mack Trucks' lien to be dormant.

4. Supersedeas Bond

That brings us to the last assignment of error, which is based on the county court's refusal to set a supersedeas bond. The date by which an unsuccessful litigant who wishes to provide a supersedeas bond must do so is controlled by statute.

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the courts below. *In re Interest of Archie C., ante* p. 123, 547 N.W.2d 913 (1996); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996). In performing that task, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

With those rules in mind, we turn our attention to Neb. Rev. Stat. § 25-1914 (Reissue 1995), which provides that, with an exception not relevant to this analysis, a party undertaking an appeal to this court

> shall, within thirty days after the rendition of the judgment or decree or the making of the final order sought to be reversed, vacated, or modified or within thirty days from the overruling of a motion for a new trial in such cause, (1) file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him or her in the appellate court, or (2) make a cash deposit with the clerk of at least seventy-five dollars for the same purpose. If a supersedeas bond is executed, no bond for costs shall be required.

Neb. Rev. Stat. § 25-1916 (Reissue 1995) provides:

> No appeal in any case shall operate as a supersedeas unless the appellant or appellants within thirty days after the rendition of such judgment or decree or the making

> of such final order execute to the adverse party a bond with one or more sureties . . . or in lieu thereof make a cash deposit with the clerk for the benefit of the adverse party . . . .

Neb. Rev. Stat. § 25-1912(2) (Reissue 1995) provides that the timely filing of a motion for new trial terminates the "running of the time for filing a notice of appeal . . . as to all parties . . . ."

A reading of those statutory provisions together makes clear that once a timely motion for new trial is filed, there no longer exists an appealable judgment, decree, or other order. Consequently, if no motion for new trial is timely filed, a party who wishes to file a supersedeas bond must do so within 30 days of the entry of the judgment, decree, or other final order sought to be reversed, vacated, or modified. If, however, a timely motion for new trial is filed, the ruling thereon becomes the appealable final order sought to be reversed, vacated, or modified. In such a circumstance, the supersedeas bond must be filed within 30 days of the ruling on the motion for new trial rather than the judgment, decree, or other order to which the motion for new trial was directed.

In so ruling, we are not unmindful that *First Nat. Bank v. Gates*, 104 Neb. 230, 176 N.W. 726 (1920), suggests otherwise. In that case, the issue was whether a party appealing from a judgment in a law action must have filed a supersedeas bond within 20 days after the entry of judgment or within 20 days after the overruling of a motion for new trial. We wrote that at that time,

> [a] judgment or decree in an equity case may be treated as final, so as to give a right of appeal, immediately upon its rendition, but in a law action the character of finality which a judgment must possess in order to be reviewable in this court does not attach until the overruling of a motion for a new trial. If the time for filing a supersedeas bond begins to run from the day the judgment is entered, it might operate so as to require the execution of this instrument while the motion for a new trial was still pending, while the judgment was not yet subject to

> review by this court, and while it was still uncertain whether an appeal would be necessary.

Id. at 231, 176 N.W. at 726-27. We thus held that for actions at law, the time did not begin to run until the motion for new trial was overruled. By implication, this would mean that in equity actions, the time began to run when judgment was entered, as a motion for new trial was not necessary for equity actions to be final and reviewable on appeal.

However, Neb. Rev. Stat. § 25-1912.01 (Reissue 1995) has superseded *Gates* by providing that, except in a limited number of circumstances, "[a] motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." Thus, with respect to those actions at law in which a motion for new trial is no longer required, the reasoning in *Gates* no longer obtains.

Consequently, the district court erred in refusing to set the amount of a supersedeas bond for Mack Trucks. It is an error, however, which is moot at this point.

IV. JUDGMENT

In view of the analysis in subpart 3 above, there exists a lien in favor of Mack Trucks in the amount of $21,521.43 as of the date of this opinion, which shall accrue interest at the rate of $3.03 per day thereafter. Because Mack Trucks obtained its judgment after Kizzier Realty obtained the mortgage in its favor, Mack Trucks is granted a fourth priority.

AFFIRMED AS MODIFIED.

FARMERS AND MERCHANTS BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. LEROY GRAMS, APPELLANT, AND ROBERT GRAMS, TRUSTEE OF THE HARRY A. GRAMS TRUST, DOING BUSINESS AS D & C CATTLE CO., APPELLEE.

548 N.W.2d 764

Filed June 7, 1996. No. S-94-491.

1. **Summary Judgment: Final Orders: Appeal and Error.** Except when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore is not appealable.
2. **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.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial 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.
4. **Jury Instructions.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in the instructions actually given.
5. **Replevin: Proof.** The burden is on the plaintiff in replevin to establish facts necessary to recover, and these must be shown to have existed at the time the action was commenced.
6. **Replevin.** The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
7. **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.
8. **Jury Instructions: Appeal and Error.** It is error to submit to the jury an issue which is not pleaded in the case, for it is more than a mere probability that an instruction on a matter not an issue in the litigation distracts the jury in its effort to answer legitimate, factual questions raised during trial.
9. ____: ____. Jury instructions are subject to harmless error analysis; an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
10. **Appeal and Error.** Plain error cannot be predicated on an action the party has invited the court to take.
11. ____. Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.

12. **Judgments: Verdicts.** On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the evidence.
13. **Judgments: Verdicts: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained.
14. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the 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.
15. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
16. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Dundy County: DONALD E. ROWLANDS II, Judge. Affirmed.

Susan C. Williams, of Murphy, Pederson, Waite & Williams, for appellant.

G. Peter Burger, of Burger, Bennett & Green, P.C., for appellee Robert Grams.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

In this replevin action, the district court, pursuant to verdict, entered a judgment for the delivery of 54 head of cattle by the defendant-appellant, Leroy Grams, and the defendant-appellee, Robert Grams, trustee of the Harry A. Grams Trust, doing business as D & C Cattle Co., to the plaintiff-appellee, Farmers and Merchants Bank. Leroy Grams appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in failing to (1) sustain his motion for summary judgment, (2) direct a verdict in his favor at the close of Farmers and Merchants' evidence, (3) properly instruct the

jury, and (4) enter judgment in his favor notwithstanding the verdict or grant a new trial. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the appeal to this court. We now affirm the judgment of the district court.

II. FACTS

On February 5, 1988, Harry Grams and his son Leroy Grams opened checking account No. 59-820-1 with the bank in the name of D & C Cattle. Both of them were authorized to draw checks on the account, and the father indicated to the loan officer that he and Leroy Grams wanted to purchase cattle through D & C Cattle.

Five days later, on February 10, 1988, the father signed a note in the amount of $2,500 in the name of D & C Cattle. He also signed a financing statement in the name of D & C Cattle which was secured by all of D & C Cattle's livestock. The proceeds of that loan were placed in the newly opened checking account.

Additional loans were made to D & C Cattle on a need basis, whether daily or when checks were being charged to the account. When new loans were needed, the loan officer would contact either the father or Leroy Grams. In every instance but one, the father signed the notes. The proceeds of the new loans would always be placed in checking account No. 59-820-1. On April 3, 1992, the notes were refinanced and rolled into one note, and on February 10, 1993, the financing statement was continued.

None of the checks written on the account were signed by the father; there was only one checkbook, and it was in Leroy Grams' possession. The first few checks in Leroy Grams' possession were not printed with his name and address, although three of them had "D & C Cattle Co." typed in the upper left-hand corner. On one occasion, Leroy Grams wrote "D/C Cattle Co" in the upper left-hand corner of a check written to purchase cattle.

After these checks had been written, Leroy Grams began using checks he had ordered through the bank, bearing the name "Fantasy Acre Ranch" in the upper left-hand corner.

However, the checking account number remained 59-820-1. Fantasy Acre Ranch was the trade name Leroy Grams began using in February 1988. Twenty-three checks were written to purchase cattle between February 6, 1988, and August 14, 1992.

The signature card on file with the bank authorizing both the father and Leroy Grams was never changed, but beginning in October 1988, bank statements on the account were sent to "Fantasy Acre Ranch, c/o Leroy Grams." No notes were ever signed by Fantasy Acre Ranch; all loan proceeds placed in checking account No. 59-820-1 were from notes signed on behalf of D & C Cattle. In addition to the loan proceeds, funds from a variety of sources were deposited into the account. Items other than cattle were purchased with checks drawn on the account.

On May 1, 1991, the bank obtained D & C Cattle's financial statement signed by both the father and Leroy Grams which listed as assets of D & C Cattle 63 stock cows, 19 heifers, 6 bulls, and 59 calves. On April 3, 1992, the bank obtained another D & C Cattle financial statement; it also was signed by both the father and Leroy Grams and listed as assets of D & C Cattle 65 stock cows, 30 heifers, 4 bulls, and 30 calves. On March 10, 1993, the bank obtained a document entitled "Review of Credit" signed by Leroy Grams and listing as assets of D & C Cattle 71 stock cows, 13 calves, 40 feeders, and 3 bulls.

On March 30, 1993, the father died. His other son, Robert Grams, is his successor in interest as trustee of a trust created by the father before his death. After the father's death, the D & C Cattle note went into default and was accelerated. Leroy Grams failed to honor the bank's demanded payment, and this suit followed.

III. ANALYSIS

1. Summary Judgment

In the first assignment of error, Leroy Grams urges it was error to have overruled his motion for summary judgment. But it has long been the rule that except when adverse parties have each moved for summary judgment and the trial court has sus-

tained one of the motions, *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990), the denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore is not appealable, *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993), and *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991). Accordingly, the denial of the motion in question is not appealable.

2. Motion for Directed Verdict

In the second assignment of error, Leroy Grams claims the district court erred by failing to sustain his motion for directed verdict made at the close of the bank's evidence. But the record establishes that after this motion was overruled, Leroy Grams adduced evidence. The rule is that 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. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). Leroy Grams therefore waived any error in the ruling on his motion for a directed verdict made at the close of the bank's evidence.

3. Jury Instructions

In his third assignment of error, Leroy Grams asserts that the district court erred in not giving his proposed jury instructions on joint ventures and partnerships, trade names, and gifts of bank accounts.

To establish reversible error from a trial 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. *David v. DeLeon, ante* p. 109, 547 N.W.2d 726 (1996); *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995); *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994).

(a) Joint Ventures and Partnerships

Concerning joint ventures and partnerships, the district court instructed as follows:

> A partnership is an association of persons organized as a separate entity to carry on a business for profit. The existence of a partnership requires an agreement of two or more parties, and their intention to create a partnership is to be ascertained from all the evidence and circumstances. A partnership is a contract of two or more persons to place their money, effects, labor, skill or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
>
> A joint venture is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly but engage in a common enterprise for their mutual benefit. To constitute a joint venture, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agency used therein, though one party may entrust performance to another. The principal distinction between a partnership and a joint venture is that the latter may relate to a single transaction.
>
> The burden of establishing the existence of either a partnership or joint venture is upon the party asserting that the relationship exists.

Leroy Grams complains that the instruction did not include his proposed language that "[t]he absence of a mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist" and that "[t]he mere pooling of property, money, assets, skill or knowledge does not create the relationship." He concludes that the absence of this language minimized the importance of the information reflected in his and his father's tax returns and that the jury was misled into thinking that as the father and Leroy Grams both had access

to the checking account, a joint venture or partnership must have existed.

But it is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in the instructions actually given. *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The substance of the language proposed by Leroy Grams regarding joint ventures and partnerships was contained in the instruction actually given.

However, something more regarding the issue of joint ventures and partnerships needs to be written. The burden is on the plaintiff in replevin to establish facts necessary to recover, and these must be shown to have existed at the time the action was commenced. *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986). The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time. *Id.* The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property replevied at the commencement of the action. *Id.* It was therefore incumbent upon the bank to prove that it was entitled to immediate possession of the cattle in question. Proving the existence of a joint venture or partnership is not one of the elements that needs to be proved. The bank presented evidence that D & C Cattle had signed a financing statement and note, that the proceeds of the note were placed in a checking account with a signature card on file with the name "D & C Cattle," that the note was secured by all livestock of D & C Cattle, that checks had been drawn on the account to purchase cattle and the account had been set up in order for D & C Cattle to purchase cattle, and that the note was in default and demand had been made.

We must also observe that no partnership or joint venture issue was pled by the parties. However, the district court concluded that evidence was lacking as to what specific cattle in the possession of Leroy Grams were owned by the father doing

business as D & C Cattle, and therefore, it instructed the jury on the law relating to such entities.

It is axiomatic that 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. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). Jury instructions are to be confined to the issues presented by the pleadings and supported by the evidence. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). It is error to submit to the jury an issue which is not pleaded in the case. *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994). It is more than a mere probability that an instruction on a matter not an issue in the litigation distracts the jury in its effort to answer legitimate, factual questions raised during trial. *Long, supra.*

On the other hand, jury instructions are subject to harmless error analysis, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *David v. DeLeon, ante* p. 109, 547 N.W.2d 726 (1996); *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

In *Long, supra*, the appellant unsuccessfully objected to the reasonable care portion of a jury instruction at trial. On appeal, he assigned not only that portion of the instruction as error, but also the portion concerning the law of efficient intervening cause. We noted that because the appellant had failed to object at trial to that portion of the instruction, he could not, absent plain error, raise the issue for the first time on appeal. We wrote:

> Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.

Id. at 554-55, 520 N.W.2d at 201. We then ruled that the instruction constituted plain error.

Here, Leroy Grams objected to the instruction, not on the basis that it dealt with issues which were not pled, but because he wanted his own version of an instruction on the law of partnerships and joint ventures. In such a circumstance, there can be no plain error; it can hardly be said that a substantial right of Leroy Grams was prejudiced by the giving of an instruction on an issue he desired the jury to consider, albeit in another form. While in hindsight, because of the problem with identifying the collateral, Leroy Grams may have been better served by objecting to any instruction on partnerships and joint ventures, he certainly did not think so at the time.

Just as a party cannot complain of error which the party has invited the court to commit, *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994), and *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994), neither can plain error be predicated on an action the party has invited the court to commit.

(b) Trade Names and Gifts

The only discussion in Leroy Grams' brief concerning the instructions pertaining to trade names and gifts of bank accounts is that the instructions he offered in that regard were correct statements of the law and should have been given. That statement, however, falls far short of sustaining his burden to show that the district court's failure in that regard prejudiced him. Moreover, not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); Neb. Ct. R. of Prac. 9D(1)d (rev. 1996).

(c) Resolution

For the foregoing reasons, this assignment of error is also without merit.

4. Judgment Notwithstanding Verdict or New Trial

In the fourth assignment of error, Leroy Grams asserts that the district court erred in not entering judgment in his favor notwithstanding the verdict or granting a new trial. He urges

that as a matter of law, there could not be a joint venture or partnership between himself and his father.

(a) Judgment Notwithstanding Verdict

On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the evidence. *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995); *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *Melcher, supra.*

The financial statements and review of credit signed by Leroy Grams carry with them an inference that the cattle in his possession were those of D & C Cattle. The fact that his father signed 45 notes on behalf of D & C Cattle and that the proceeds were deposited into a bank account to which Leroy Grams had access and which he used to purchase cattle carries an inference that a partnership or joint venture with the father existed. While Leroy Grams' income tax returns show that he claimed the income and losses on the cattle in his possession, they also show that he was making very little, if any, money during the time period in question, yet was able to purchase thousands of dollars' worth of cattle during that same period. These circumstances support an inference that D & C Cattle was financing the purchases, not Leroy Grams.

In order to sustain a motion for judgment notwithstanding the 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. *Critchfield, supra.* In this case, more than one conclusion could be drawn from the evidence; thus, it was not error for the district court

to overrule Leroy Grams' motion for judgment notwithstanding the verdict.

(b) New Trial

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Hartley, supra*; *Grover, Inc. v. Papio-Missouri Riv. Nat. Res. Dist.*, 247 Neb. 975, 531 N.W.2d 531 (1995); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

Leroy Grams does not indicate how his rights were prejudiced, other than referring back to his previous assignments of error and the fact that the errors complained of appeared in the record and objections were made thereto.

(c) Resolution

This assignment of error is as meritless as are the ones which precede it.

IV. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court is affirmed.

AFFIRMED.

BERNADETTE RED CHERRIES WALKSALONG, APPELLANT, V. WARREN MACKEY, APPELLEE.

549 N.W.2d 384

Filed June 7, 1996. No. S-94-635.

1. **Constitutional Law: Foreign Judgments: States: Collateral Attack.** The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter of the case.
2. **Judgments: Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous.
3. **Indian Child Welfare Act: Child Custody.** The Indian Child Welfare Act is inapplicable to a case involving a custody dispute between parents in which one of the parents has physical custody of the child.
4. **Foreign Judgments: States.** Under the Uniform Enforcement of Judgments Act, the term "foreign judgment" is limited to a judgment, decree, or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state.
5. **Foreign Judgments: States: Jurisdiction.** In connection with the Uniform Enforcement of Foreign Judgments Act, while Nebraska courts are prohibited from reviewing the merits of a foreign judgment, Nebraska courts may examine whether the foreign judgment was rendered with proper jurisdiction and may refuse to register and enforce a foreign judgment rendered without jurisdiction over the parties or the subject matter.
6. **Foreign Judgments: States: Jurisdiction: Child Custody.** In the absence of a court's having subject matter jurisdiction in proceedings affecting custody of a child, a foreign custody judgment is not entitled to full faith and credit and, consequently, is not entitled to be registered in Nebraska under the Uniform Enforcement of Foreign Judgments Act.

Appeal from the District Court for Knox County: RICHARD P. GARDEN, Judge. Affirmed.

John M. Peebles, of Peebles & Evans, P.C., for appellant.

Thomas A. Fitch, of Fitch & Tott Law Firm, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

This is an appeal from a judgment of the district court for Knox County, which found that an order of the Northern

Cheyenne Tribal Court of Montana granting Bernadette Red Cherries Walksalong, the mother, custody of the minor child, Nancy Mackey, was not entitled to registration in Nebraska under the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587 et seq. (Reissue 1989) (now codified at Neb. Rev. Stat. § 25-1587.01 et seq. (Reissue 1995)). The district court found that the tribal court order was not entitled to full faith and credit because the tribal court did not have jurisdiction over the child at the time of the custody determination. The mother appealed the district court decision to the Nebraska Court of Appeals, and the case was transferred to this court upon our own motion. Because we conclude that the tribal court lacked subject matter jurisdiction in this case, we affirm the district court ruling denying full faith and credit to the tribal court order.

FACTUAL BACKGROUND

Nancy Mackey was born December 10, 1988, at Billings, Montana. Her parents are Bernadette Red Cherries Walksalong, a member of the Northern Cheyenne Tribe of Montana, and Warren Mackey, a member of the Santee Sioux Tribe of Nebraska. The child is $^{9}/_{32}$ Santee Sioux and $^{7}/_{32}$ Northern Cheyenne. At the time of the birth, the father was living on the Santee Sioux Reservation in Nebraska, while the mother and child resided in Lame Deer, Montana, part of the Northern Cheyenne Reservation. The child lived with the mother or various relatives on the Montana reservation until she was approximately 5 months old, at which time the mother requested the father to temporarily take the child, pending her location of permanent housing on the reservation. Prior to obtaining custody of the child, and without the mother's consent, the father filled out an application to have the child admitted as a member of the Santee Sioux Tribe. The father picked up the child in Montana on April 7, 1989, and returned to the Santee Sioux Reservation in Nebraska. The child was accepted into the Santee Sioux Tribe in May 1989 and has continued to reside with the father on the Santee Sioux Reservation. The mother testified at trial that she has requested the return of the child many times, but that the

father has refused. The mother has only seen the child twice since physical custody was transferred; she asserts she has requested visitation on other occasions, but her requests have been denied.

In November 1990, the mother filed a petition for guardianship in the Northern Cheyenne Tribal Court. After various address corrections were made to the petition, the father was served with a copy of the amended petition and summons on August 15, 1991, by certified mail, for which he signed. The father did not file an answer, and he did not appear at the tribal guardianship proceeding. On December 20, an order was issued by an associate judge of the tribal court, granting full custody of the child to the mother.

On June 28, 1993, the mother filed a petition for registration of foreign judgment in the district court for Knox County, seeking to register the tribal court order. The father was served with notice of the petition and filed an answer asserting as affirmative defenses that the tribal court was without jurisdiction to decide the custody of the child because the child was a member of the Santee Sioux Tribe prior to entry of the tribal court order, the child resided with the father on the Santee Sioux Reservation at the time of the court order, and the tribal court failed to properly serve notice of the proceedings on the father. A trial was held, and the district court found that the tribal court order was not entitled to full faith and credit because the tribal court lacked jurisdiction over the child. The mother's petition was dismissed, and this appeal followed.

ASSIGNMENT OF ERROR

The mother asserts that the district court erred in finding that the Northern Cheyenne Tribal Court lacked jurisdiction over the child at the time of the custody order.

STANDARD OF REVIEW

The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter

of the case. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous. *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995).

ANALYSIS

As an initial matter, we note that the Indian Child Welfare Act (ICWA) is inapplicable to this case, as this matter involves a custody dispute between parents in which one of the parents has physical custody of the child. See, Neb. Rev. Stat. § 43-1503(1) (Reissue 1993) (defining "child custody proceeding" for purposes of ICWA); Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (1979) (providing that child custody disputes arising in the context of divorce, separation, or other similar domestic relations proceedings are not covered by ICWA so long as custody is awarded to one of the parents); *In re Custody of Sengstock*, 165 Wis. 2d 86, 477 N.W.2d 310 (Wis. App. 1991) (stating that ICWA concerns cases where custody of a Native American child is to be given to someone other than either one of the parents); *Application of Defender*, 435 N.W.2d 717 (S.D. 1989) (stating that placement of the child involved therein with either of her natural parents did not fit within the definition of custody proceeding and thus did not implicate ICWA).

This action was brought by the mother pursuant to the Uniform Enforcement of Foreign Judgments Act in effect at the time, § 25-1587 et seq. (Reissue 1989). The statutes provide for registration and enforcement of a foreign judgment in Nebraska. However, the term "foreign judgment" as set forth in the act is limited to "any judgment, decree or order of a court of the United States or of any state or territory *which is entitled to full faith and credit in this state*." (Emphasis supplied.) § 25-1587. The district court found that the judgment of the Northern Cheyenne Tribal Court was not entitled to full

faith and credit due to a lack of jurisdiction, and, therefore, it was not a "foreign judgment" entitled to be registered and enforced in Nebraska.

It is clear that in connection with the Uniform Enforcement of Foreign Judgments Act, while Nebraska courts are prohibited from reviewing the merits of a foreign judgment, Nebraska courts may examine whether the foreign judgment was rendered with proper jurisdiction and may refuse to register and enforce a foreign judgment rendered without jurisdiction over the parties or the subject matter. *Miller v. Walter, supra*; *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991); *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980). Thus, the district court was authorized to examine the jurisdiction underlying the tribal court order awarding custody of the child to the mother. It is this determination of jurisdiction, or lack thereof, which is now before the court for review.

The district court made the following findings of fact: The child has resided on the Santee Sioux Reservation in Nebraska with her father since April 7, 1989; the child was an enrolled member of the Santee Sioux Tribe prior to the tribal court order; the child was not an enrolled member of the Northern Cheyenne Tribe; the child was not domiciled on the Northern Cheyenne Reservation; and the mother voluntarily gave custody of the child to the father in April 1989. These facts were not in dispute at trial, and, obviously, the district court's findings were not clearly erroneous.

The Northern Cheyenne Tribal Court Domestic Relations Code, which was received in evidence, provides:

> A. The Northern Cheyenne Reservation Court has jurisdiction to make a child custody determination by initial or modification decree if:
>
> 1. The Northern Cheyenne Reservation:
>
> a. Is the home of the child at the time of commencement of the proceedings in Reservation Court; or
>
> b. Has been the child's home within six (6) months before commencement of proceedings and the child is absent from this home because of his removal or retention by a person claiming custody or for other reasons,

and a parent or person acting as parent continues to live within the Northern Cheyenne Reservation;

2. It is in the best interest of the child that the Court assumes jurisdiction because:

a. The child and his parents or the child and at least one contestant have a significant connection with the Northern Cheyenne Reservation; and

b. There is substantial evidence concerning the child's present or future care, protection, training, and personal relationships available to the Court;

3. The child is physically present within the Reservation; and:

a. Has been abandoned; or

b. It is necessary in an emergency to protect him because he has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

4. No state or other tribal government has jurisdiction under provisions substantially in accord with this Code, or another state or reservation has declined to exercise jurisdiction on the grounds that the Northern Cheyenne Reservation is the more appropriate forum to determine custody of the child.

B. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody in the Northern Cheyenne Court.

Chapter 3, § 8-3-1. These provisions are very similar to the jurisdictional provisions of the Nebraska Child Custody Jurisdiction Act (NCCJA). See Neb. Rev. Stat. § 43-1203 (Reissue 1993). Both the provisions of chapter 3, § 8-3-1, and the NCCJA are primarily concerned with subject matter jurisdiction and not personal jurisdiction. Submission of a person to jurisdiction of the court does not alone confer jurisdiction under the Uniform Child Custody Jurisdiction Act. *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983). The jurisdictional standards of the act are designed to achieve both certainty and predictability in the enforcement of child custody decrees while assuring that a court which assumes jurisdiction acts in the child's best interests. *Mace v. Mace, supra*. See, also, *Slidell v. Valentine*, 298 N.W.2d 599 (Iowa 1980).

The Northern Cheyenne Tribal Court did not exercise jurisdiction under subsection A(1) or (3) of chapter 3, § 8-3-1, because it is undisputed that the child was not residing on the Northern Cheyenne Reservation at the time of the tribal court proceeding or within 6 months before the proceeding. Similarly, subsection A(4) of chapter 3, § 8-3-1, does not control the tribal court's determination of jurisdiction because the Northern Cheyenne Tribal Court did not have exclusive jurisdiction over the child, since the ICWA was inapplicable, and no state or reservation had declined to exercise jurisdiction on the grounds that the Northern Cheyenne Tribal Court was the more appropriate forum. Under provisions substantially in accord with the Northern Cheyenne Tribal Court Domestic Relations Code, a district court of Nebraska would have at least concurrent jurisdiction, as Nebraska clearly was the child's home state at the time of the tribal proceeding.

The only possible provision of chapter 3, § 8-3-1, that could provide tribal court jurisdiction over the child is subsection A(2); and this section shall be analyzed in light of the facts adduced at trial. Subsection A(2) requires a finding that the child and at least one of the parents have a significant connection with the Northern Cheyenne Reservation, *and* a finding that substantial evidence concerning the child's present or future care, protection, training, and personal relationships is available to the Northern Cheyenne Tribal Court. The mother had significant contacts with the Northern Cheyenne Reservation in that the mother had lived on the reservation during various periods of her life and was domiciled there at the time of the tribal court proceedings.

The child's contacts with the Northern Cheyenne Reservation, however, were much less significant. While the child resided on the reservation for the first 5 months of her life, the child had no subsequent contact with the reservation. The child has lived on the Santee Sioux Reservation in Nebraska since April 1989. Therefore, substantial evidence as to the child's care, protection, training, and personal relationships, both presently and in the future, is most readily available in Nebraska, rather than the Northern Cheyenne Reservation in Montana.

Furthermore, the Northern Cheyenne Tribal Court Domestic Relations Code provides that in determining the best interests of the child, the court may look at the interaction and relationship of the child with her parent or parents, siblings, extended family, and other significant parties; the child's adjustment to her home, school, and community; and whether the child has been incorporated into the home of one of the parents. Chapter 3, § 8-3-2. In this case, the child had very little interaction with the mother subsequent to the first 5 months of the child's life. There were allegations by the mother that visitation efforts were frustrated by the father, who testified that he did nothing to hinder visitation and, in fact, provided visitation on two occasions when the mother was in the Santee area. The record is silent regarding what steps, if any, were taken by the mother or anyone on her behalf to rectify the alleged visitation problem.

In contrast to the limited interaction with the mother, prior to the tribal court proceeding, the child had been living with the father and his family in Nebraska for more than $2^1/_2$ years. The evidence revealed that the child was well adjusted to her home and environment on the Santee Sioux Reservation in Nebraska. The child had been fully incorporated into the home of the father. Thus, awarding custody of the child to the mother was not in the best interests of the child. Therefore, subsection A(2) does not provide a proper basis for tribal court jurisdiction.

We hold that, in the absence of a court's having subject matter jurisdiction in proceedings affecting custody of a child, a foreign custody judgment is not entitled to full faith and credit and, consequently, is not entitled to be registered in Nebraska under the Uniform Enforcement of Foreign Judgments Act. When applying the provisions of chapter 3, § 8-3-1, of the Northern Cheyenne Tribal Court Domestic Relations Code to the facts of this case, we conclude that the Montana tribal court had no basis for asserting subject matter jurisdiction in the guardianship proceedings. Because the Montana tribal court did not have subject matter jurisdiction in the guardianship proceedings, the tribal court order was not entitled to full faith and credit and, consequently, was not entitled to be reg-

istered in Nebraska under the Uniform Enforcement of Foreign Judgments Act.

CONCLUSION

The district court so found, and its judgment is affirmed.

AFFIRMED.

RODNEY D. WHITTEN, APPELLANT AND CROSS-APPELLEE, V. CAROL ANN WHITTEN, APPELLEE AND CROSS-APPELLANT.

548 N.W.2d 338

Filed June 7, 1996. No. S-94-658.

1. **Limitations of Actions: States: Appeal and Error.** Whether the statute of limitations of a sister state or Nebraska's statute of limitations applies in a given case is a question of law which an appellate court must decide independently of the conclusion reached by the trial court.
2. **Parties: Actions: States.** Although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum.
3. **Limitations of Actions: Statutes.** Generally, laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights.
4. **Limitations of Actions: Waiver.** A statute of limitations does not create or extinguish a right, but only places a limitation on a remedy which may be tolled or waived.
5. **Limitations of Actions.** An action for an injury to the rights of the plaintiff, not arising on contract, can only be brought within 4 years.
6. **Judgments: Appeal and Error.** When 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 Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Richard M. Fellman, of Fellman, Moylan, Natvig, Steichen & Kelly, for appellant.

James W. Knowles, Jr., of Knowles Law Office, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

On June 11, 1992, the plaintiff, Rodney D. Whitten, sued the defendant, Carol Ann Whitten, in the district court for Sarpy County for injuries he received which he claimed were caused by the negligent operation of a motor vehicle by the defendant in the State of Colorado on June 29, 1986.

Following trial, a jury returned a verdict in favor of the defendant, and the trial court dismissed the plaintiff's lawsuit. The plaintiff has appealed from that judgment. Claiming that the lawsuit was barred by Nebraska's statute of limitations, the defendant has cross-appealed.

Because the record reflects that the plaintiff filed his petition in Nebraska beyond the 4-year time limitation set forth in Neb. Rev. Stat. § 25-207 (Reissue 1995), the judgment of the district court in favor of the defendant is affirmed.

ASSIGNMENTS OF ERROR

The plaintiff claims the trial court erred in overruling his motion for a new trial when the record evidences that (1) he sustained a fractured vertebra in the accident, entitling him to damages for pain and suffering, and (2) he was forced into early retirement as a result of the accident, resulting in an economic loss of over $92,000.

In her cross-appeal, the defendant claims that the trial court erred in (1) failing to sustain her demurrer to the plaintiff's petition, because the lawsuit was barred by Nebraska's statute of limitations, and (2) failing to apply Nebraska's automobile guest statute.

STANDARD OF REVIEW

Whether the statute of limitations of a sister state or Nebraska's statute of limitations applies in a given case is a question of law which an appellate court must decide independently of the conclusion reached by the trial court. See, *Central States Resources v. First Nat. Bank*, 243 Neb. 538,

501 N.W.2d 271 (1993); *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993).

FACTS

On June 29, 1986, the plaintiff and the defendant, who at that time were husband and wife, were involved in a one-vehicle accident which the plaintiff alleged occurred in the State of Colorado. It is undisputed that the defendant was the driver and the plaintiff was a passenger of the vehicle involved.

On June 11, 1992, the plaintiff filed suit in the district court against the defendant. In his petition, the plaintiff alleged that he sustained $3,570,866 in special damages due to injuries directly and proximately resulting from the defendant's negligent operation of the motor vehicle. Both in a demurrer which was overruled and in her answer, the defendant claimed that the plaintiff's lawsuit was barred by the 4-year statute of limitations set forth in § 25-207.

Because the alleged situs of the accident was in Colorado, the trial court applied Colorado's statute of limitations. Colorado has a 6-year statute of limitations. Following the trial, a jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, which motion was overruled.

ANALYSIS

We need only address the defendant's claim that the plaintiff's lawsuit was barred by Nebraska's statute of limitations.

Although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum. *Calvert v. Roberts Dairy Co., supra*. Generally, laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights. See *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979). A statute of limitations does not create or extinguish a right, but only places a limitation on a remedy which may be tolled or waived. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990).

Because application of the statute of limitations is a procedural matter, Nebraska's statute of limitations governed, rather than that of Colorado, the state where the cause of action

allegedly arose. An action for an injury to the rights of the plaintiff, not arising on contract, can only be brought within 4 years. § 25-207. The record reflects that the plaintiff brought this negligence action more than 5 years after the date that he alleged the accident occurred. As a result, his lawsuit against the defendant was barred by Nebraska's statute of limitations.

We need not address the remaining assigned errors of either the plaintiff or the defendant, which concern the merits of the lawsuit, because the plaintiff's lawsuit was not timely filed in the district court.

CONCLUSION

The plaintiff's lawsuit was not brought within the time prescribed by the statute of limitations, § 25-207. Although the trial court erred in failing to sustain the defendant's position that Nebraska's statute of limitations applied, the jury returned a verdict in the defendant's favor. When 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. *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOGAN J. BUNDY, APPELLANT.

549 N.W.2d 122

Filed June 7, 1996. No. S-94-660.

1. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Criminal Law: Property: Liens: Prisoners: Time.** Neb. Rev. Stat. § 29-2407 (Reissue 1995) provides that judgments for fines and costs in criminal cases shall be a lien upon the property of the defendant within the county, except in

such cases where the convict is sentenced to a Department of Correctional Services adult correctional facility for a period of more than 2 years.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

James C. Stecker, of Robak & Stecker, for appellant.

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

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Logan J. Bundy was convicted of eight felony offenses. The district court for Platte County ordered that personal property seized from Bundy's residence during the investigation be sold and that the proceeds be applied to the costs of the action. Bundy sought to use his statutory civil exemptions to have this property returned to him, but the district court held that the exemptions were inapplicable. Bundy appeals. We reverse the judgment and remand the cause with directions.

SCOPE OF REVIEW

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995).

FACTS

Bundy was convicted of two counts of first degree sexual assault, two counts of use of a deadly weapon to commit a felony, two counts of burglary, and two counts of false imprisonment. Bundy was sentenced by the court to the Nebraska Department of Correctional Services adult correctional facility as follows: count I, 16 years 8 months to 50 years; count II, 6 years 8 months to 20 years, consecutive to the sentence served on count I; count III, 2 to 5 years, consecutive to the sentences served on counts I and II; count IV, 20 months to 5 years, concurrent with the sentence served on count I; count V, 16 years 8 months to 50 years, consecutive to the sentences

served on counts I, II, III, and IV; count VI, 6 years 8 months to 20 years, consecutive to the sentence served on count V; count VII, 2 to 5 years, consecutive to the sentences served on counts V and VI; and count VIII, 20 months to 5 years, concurrent with the sentence served on count V.

During the investigation of the crimes, a search was conducted of Bundy's residence, and personal property was confiscated. Items obtained during the search included Bundy's computer system and $417 in cash. These items were later found to be unrelated to the charges against Bundy.

Following trial, the State filed a motion for the release and disposition of evidence. Bundy moved that the computer system and cash be returned to him, arguing that he was entitled to this property because he qualifies for the statutory personal exemption granted to criminal defendants who are sentenced to the Department of Correctional Services adult correctional facility for more than 2 years.

At a hearing, the court received Bundy's claim of exemption in lieu of homestead. The court denied Bundy's motion and held that the statutory exemptions did not apply. The court ordered the sheriff to sell the computer system to the highest bidder at auction. The proceeds from the sale, as well as the $417 in cash, were to be applied to the costs of the proceeding. Bundy appeals.

ASSIGNMENT OF ERROR

Bundy asserts that the district court erred in failing to correctly apply Neb. Rev. Stat. § 29-2407 (Reissue 1995).

ANALYSIS

Bundy argues that since he was sentenced to more than 2 years in prison, he is entitled to the statutory exemptions allowed under § 29-2407. This section provides that judgments for fines and costs in criminal cases shall be a lien upon the property of the defendant within the county, except in such cases where the convict is sentenced to a Department of Correctional Services adult correctional facility for a period of more than 2 years. Pursuant to § 29-2407, Bundy is entitled to the same exemptions that are provided by law for civil cases.

Neb. Rev. Stat. § 25-1556 (Reissue 1995) allows an exemption of $1,500 for the immediate personal possessions of the debtor. Neb. Rev. Stat. § 25-1552 (Reissue 1995) provides a further exemption of $2,500 in personal property to persons without a homestead.

Bundy's claim of exemption in lieu of homestead listed the computer system valued at $400 and $417 in cash, for a total property exemption of $817. It is undisputed that these items were unrelated to the crimes for which Bundy was convicted, and Bundy's request is within the statutory limit. Therefore, the district court erred.

The judgment of the district court is reversed, and the cause is remanded with directions that the $417 in cash and the computer system, or the money collected from the sale of the computer system, be returned to Bundy.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., participating on briefs.

PAUL BALTENSPERGER, APPELLANT, V. UNITED STATES DEPARTMENT OF AGRICULTURE ET AL., APPELLEES.

548 N.W.2d 733

Filed June 7, 1996. No. S-94-778.

1. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

3. **Summary Judgment: 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.
4. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. ____: ____. Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
6. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
7. **Judgments: Attorney Fees.** A court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
8. **Attorney Fees.** Courts may assess attorney fees and costs upon the motion of any party or the court itself.
9. ____. The grant of attorney fees is subject to the discretion of the court upon consideration of such factors as provided by Neb. Rev. Stat. § 25-824.01 (Reissue 1995).

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Thomas J. Monaghan, U.S. Attorney (District of Nebraska), and Sally R. Johnson for appellees U.S. Department of Agriculture, Farmers Home Administration, and United States of America.

Donald R. Witt and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee First National Bank of Syracuse.

Richard H. Hoch, of Hoch & Steinheider, for appellees Baltensperger and Kreifels.

William F. Davis for appellees Stukenholtz and Volkmer.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This is a quiet title action wherein appellant, Paul Baltensperger, seeks to recover eight parcels of land which he formerly owned and which were subject to a successful mortgage foreclosure in the district court for Otoe County in 1987. The appellees are lienholders involved in the foreclosure and individuals who purchased the land at the foreclosure sale. In the prior foreclosure action, Baltensperger and his wife Beverly (the Baltenspergers) appealed the order of the district court confirming the foreclosure sale to this court and asserted that the court allowed the foreclosure sale in contravention of the automatic stay imposed by their having filed petitions in the bankruptcy court. In the present quiet title action filed by Baltensperger, he now asserts the same argument in support of his contention that the foreclosure sale was void. The appellees moved for summary judgment and contended that the doctrine of res judicata barred the quiet title action. The district court sustained the motions and dismissed Baltensperger's petition. We hold that the issue presented in this action was conclusively settled by our affirmance of the judgment of the district court in the prior action and that the doctrine of res judicata applies. As there exists no genuine issue of material fact and the appellees are entitled to judgment as a matter of law, we affirm the district court's judgment.

BACKGROUND

MORTGAGE FORECLOSURE ACTION

On April 23, 1985, The Travelers Insurance Company (Travelers) filed a petition in the district court for Otoe County to foreclose a mortgage it held to secure a loan to the Baltenspergers. Travelers named several junior lienholders as defendants, including appellee First National Bank of Syracuse (First National) and appellee the United States, by and through the Small Business Administration and the Farmers Home Administration. Appellees Edward D. Baltensperger and

Hannelore E. Baltensperger intervened and stated that they had an interest in one of the parcels due to a written purchase option. First National filed a cross-petition seeking to foreclose its second mortgage on the Travelers land and to foreclose its first lien on two additional parcels. Ultimately, the foreclosure action involved eight parcels of land in Otoe County.

A decree was entered in the foreclosure action on February 21, 1986, finding that all eight parcels of land were subject to valid liens and providing for the sale of all eight parcels to satisfy the liens.

The Baltenspergers filed a Chapter 11 bankruptcy petition on May 9, 1986, and the automatic stay prevented the foreclosure sale from proceeding. However, the Baltenspergers entered into a stipulation with Travelers on July 30, consenting to the release of the eight parcels of land from the automatic stay.

On October 15, 1986, the U.S. Bankruptcy Court for the District of Nebraska entered an order which stated: "Upon written stipulation of the Baltenspergers and The Travelers Insurance Company ("Travelers") filed in this proceeding on the 9th day of October, 1986, it is hereby ORDERED that relief is granted from the automatic stay with respect to Real Estate described as [the eight parcels of land]."

With relief from the stay, an order of sale was entered on February 6, 1987. On March 13, the "Baltensperger Farm Partnership" filed a Chapter 11 bankruptcy petition. That same day, the Baltenspergers filed a suggestion of bankruptcy in the Otoe County District Court, and the foreclosure sale was again stayed.

Upon motions for relief from the automatic stay by Travelers and First National, the bankruptcy court entered an order granting relief on May 29, 1987, as to the eight parcels. The bankruptcy court's order stated that the Baltensperger Farm Partnership Chapter 11 filing was an apparent attempt to delay a sheriff's sale in a pending foreclosure action.

On November 6, 1987, the Otoe County District Court entered an order allowing Travelers and First National to proceed with the sheriff's sale. The sale was completed on

December 21. Purchasers included appellees Larry and Carol Volkmer, John and Rita Stukenholtz, LeRoy and Velda Kreifels, and Edward D. and Hannelore Baltensperger. In their brief, appellees Clint and Kim Kreifels state that they obtained their interest in the land from LeRoy and Velda Kreifels.

On January 27, 1988, Travelers filed an amended motion to confirm the sale. In its motion, Travelers stated that the sale was in all respects conducted in conformity with the law.

Acting pro se, the Baltenspergers filed a resistance to the amended motion to confirm the sale. The Baltenspergers asserted: Travelers failed to foreclose the debtors in possession, and therefore, the real estate remained in the bankruptcy estate; the order lifting the automatic stay as to Travelers failed to release the property from the bankruptcy estate; First National failed to receive an order lifting the automatic stay; and the Otoe County District Court lacked jurisdiction. The Baltenspergers asserted numerous other objections, such as unclean hands and fraud.

The district court confirmed the sale on February 9, 1988, and held that the sale was in all respects fairly conducted and in conformity with the law. The Baltenspergers appealed the district court's order overruling their resistance to the confirmation of the sale to this court.

When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). We take judicial notice of our records of the Baltenspergers' first appeal, which was affirmed without opinion. *Travelers Ins. Co. v. Baltensperger*, 229 Neb. xxii (case No. 88-206, June 16, 1988).

Continuing to act pro se, the Baltenspergers perfected their appeal and assigned six errors. Inter alia, the Baltenspergers asserted that the Otoe County District Court lacked jurisdiction to conduct the foreclosure sale. The Baltenspergers argued

that the real estate was still part of the bankruptcy estate because relief from the automatic stay had not been granted to all lienholders.

In conformance with our court rules in existence at that time, the Baltenspergers requested a prehearing conference. The prehearing conference was attended by Paul Baltensperger and several of the appellees. At the prehearing conference, the issue of whether the real estate was released from the bankruptcy estate was specifically addressed. The hearing officer concluded that once the automatic stay was lifted, the foreclosure sale properly proceeded in the district court. The hearing officer rejected all of the Baltenspergers' other assignments of error and arguments.

After conducting our review, we summarily affirmed the order of the district court confirming the sale pursuant to Neb. Ct. R. of Prac. 7A(1) (rev. 1987) and dismissed Baltenspergers' appeal. Then and now, rule 7A(1) provides, in part, that an appeal can be summarily dismissed when the judgment is based on findings of fact which are not clearly erroneous or no error of law appears. See rule 7A(1) (rev. 1996).

Quiet Title Action

This action began when Paul Baltensperger filed a petition in the Otoe County District Court seeking to quiet title to the same eight parcels of land involved in the foreclosure action. The operative pleading is Baltensperger's amended petition filed on October 26, 1993. In his petition, Baltensperger alleged that only Travelers obtained relief from the automatic stay, and therefore, the district court lacked jurisdiction to decree the foreclosure. Baltensperger named as defendants the various purchasers and lienholders described above.

On November 3, 1993, appellees Kreifels and Edward and Hannelore Baltensperger jointly moved for summary judgment. The Kreifels and Edward and Hannelore Baltensperger argued that the quiet title action was a collateral attack on a previous order of the court, that the issue was res judicata, and that the quiet title action was frivolous.

The district court granted the Kreifels and Edward and Hannelore Baltenspergers' motion for summary judgment. The court held that the foreclosure sale was not in violation of the automatic stay. The court further stated that even if the sale was in violation of the stay, the foreclosure sale was a voidable rather than void judgment and therefore not subject to collateral attack.

All of the other appellees then moved for summary judgment and also argued that the quiet title action constituted a collateral attack on the previous order of the court, that the issue was res judicata, and that the quiet title action was frivolous. On July 20, 1994, the court sustained summary judgment in favor of all the appellees.

Paul Baltensperger filed a notice of appeal to the Nebraska Court of Appeals on August 18, 1994. We removed the appeal to our docket.

ASSIGNMENTS OF ERROR

Baltensperger asserts that the district court erred by granting the appellees' motions for summary judgment and by failing to find that all of its orders in the foreclosure action were void because the appellees did not obtain relief from the automatic stay. Baltensperger also asserts that because the appellees did not have relief from the automatic stay, the district court lacked jurisdiction over the subject matter and parties.

STANDARD OF REVIEW

Summary judgment is proper 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. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

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. *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995); *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995).

ANALYSIS

RES JUDICATA

The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995); *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

The Otoe County District Court, a court of competent jurisdiction, entered a final judgment confirming the foreclosure sale. All of the parties or their privies present in this action were involved in the prior action. The district court ruled on the merits of Baltensperger's resistance to the confirmation of the sale and held such sale was entirely in conformance with the law. Baltensperger appealed to this court, and we summarily dismissed such appeal pursuant to Neb. Ct. R. of Prac. 7A(1) (rev. 1987), thus indicating that our decision reached the merits of the appeal although we did not deem the issues worthy of an opinion.

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Lincoln Lumber Co. v. Fowler, supra*; *Commercial Fed. Sav. & Loan Assn. v. Matt*, 232 Neb 26, 439 N.W.2d 463 (1989).

In the prior foreclosure action and appeal, Baltensperger asserted that because relief from the automatic stay was never granted to any of the appellees, but only to Travelers, then the district court lacked jurisdiction to decree the foreclosure or confirm the sale. Baltensperger takes precisely the same position in his quiet title action. This issue was conclusively settled by our affirmance of the judgment of the district court in the prior action and the doctrine of res judicata bars the present action.

As there exists no genuine issue of material fact and the appellees are entitled to judgment as a matter of law, the district court correctly dismissed Baltensperger's petition by sustaining the appellees' motions for summary judgment.

ATTORNEY FEES

The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Lincoln Lumber Co. v. Fowler, supra*; *Kuskie v. Adams Bank & Trust of Madrid*, 248 Neb. 18, 531 N.W.2d 921 (1995); *Hangman v. Bruening, supra*.

In *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985), the appellant flagrantly ignored the doctrine of res judicata and pursued a second action and appeal. We stated that the appellant and his attorneys simply chose to ignore a fully binding adverse final judgment. We noted that such a tactic engenders disrespect for the law and unnecessarily burdens the judicial system. Accordingly, we taxed the appellees' attorney fees to the appellant.

In *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988), the city of Omaha brought a second action against Lutheran Medical Center which was essentially identical to a prior action. The facts and issues involved in the second action were legally indistinguishable from the first action, the parties were the same, and the law had not changed. We held the city's second action demonstrated a disdain for common law and common sense and awarded attorney fees to the medical center.

Baltensperger and his attorney flagrantly ignored the fully binding adverse final judgment rendered in the prior foreclo-

sure action when they filed this quiet title action and pursued this appeal.

> [The] court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Neb. Rev. Stat. § 25-824(2) (Reissue 1995). Courts may assess attorney fees and costs upon the motion of any party or the court itself. § 25-824(4). The grant of attorney fees is subject to the discretion of the court upon consideration of such factors as provided by Neb. Rev. Stat. § 25-824.01 (Reissue 1995). For example, a court may consider the extent to which any effort was made to determine the validity of a claim before the action was asserted. § 25-824.01(1).

Only appellees Edward and Hannelore Baltensperger and the Kreifels have raised the issue in this appeal that the action was frivolous and taken in bad faith. No affidavit accompanied that motion. The record does not indicate that any motion for attorney fees was made in the district court by any party. Therefore, this appeal presents nothing for us to review regarding an attorney fee allowable in the district court. *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). Moreover, any person who claims the right to an attorney fee in a civil case appealed to this court or the Court of Appeals must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought for services in the appellate court before our mandate issues. Neb. Ct. R. of Prac. 9F (rev. 1996). The appellees have not yet done so.

CONCLUSION

The judgment of the district court dismissing Baltensperger's petition by sustaining the appellees' motions for summary judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN BYRON NEWMAN, APPELLANT.

548 N.W.2d 739

Filed June 7, 1996. No. S-94-833.

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. **Criminal Law: Identification Procedures.** Whether identification procedures in connection with photographic arrays were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of all the circumstances surrounding the procedures.
4. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, protect against unreasonable searches and seizures by the government.
5. **Search and Seizure: Warrants: Probable Cause.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable.
6. **Constitutional Law: Search and Seizure.** Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions.
7. **Arrests: Search and Seizure.** Inventory searches after an arrest are permissible.
8. **Search and Seizure.** The propriety of an inventory search is judged by a standard of reasonableness, and such a search must be conducted in accordance with standard operating procedures.
9. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Property: Prisoners.** The purpose of an inventory exception is not to avoid the requirements of the Fourth Amendment to the U.S. Constitution, but, rather, to advance legitimate governmental interests which include (1) protecting the property of an arrestee in custody, (2) protecting the police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining the security of a detention facility by preventing the introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity.
10. **Convictions: Appeal and Error.** Not all trial errors, even those of constitutional magnitude, entitle an accused to a reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
11. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial dis-

cretion, except in those instances in which the rules make judicial discretion a factor.

12. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to prove that the person acted in conformity with that character.
13. ____: ____. The list of acceptable uses recited in Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is illustrative and not meant to be exclusive.
14. ____: ____. Evidence which is otherwise admissible under Neb. Rev. Stat. § 27-404(2) (Reissue 1995) may be excluded under Neb. Rev. Stat. § 27-403 (Reissue 1995) if its probative value is substantially outweighed by other considerations.
15. **Rules of Evidence: Other Acts: Appeal and Error.** In reviewing the admission of evidence of other acts under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), 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.
16. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of a trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discretion.
17. **Trial: Words and Phrases.** An abuse of judicial discretion means that the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
18. **Evidence: Words and Phrases.** Relevant evidence means any evidence having a 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.
19. **Evidence.** Determining the probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues in the case.
20. **Constitutional Law: Self-Incrimination: Testimony.** The Fifth Amendment privilege against self-incrimination protects only against compulsion to engage in testimonial self-incriminating activity.
21. **Constitutional Law: Self-Incrimination.** The Fifth Amendment privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.
22. **Evidence.** A defendant may be compelled to produce a voice exemplar.
23. **Constitutional Law: Self-Incrimination: Evidence.** Due process principles of reciprocity permit an otherwise admissible voice exemplar to be introduced by

a defendant without waiving his or her Fifth Amendment privilege against self-incrimination.

24. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, 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; 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.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Webb E. Bancroft for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

After the jury found the defendant, John Byron Newman, guilty of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1989), the district court held an enhancement hearing at which it was determined that this was not Newman's first such conviction. In accordance with the provisions of Neb. Rev. Stat. § 28-105 (Reissue 1989) and § 28-319(2) and (3), the district court then sentenced Newman to imprisonment for a period of not less than 25 nor more than 50 years, without the possibility of parole. Newman thereupon appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) not suppressing certain evidence, (2) other evidential rulings, and (3) finding the evidence sufficient to support the conviction. The Court of Appeals affirmed the district court's judgment. *State v. Newman*, 4 Neb. App. 265, 541 N.W.2d 662 (1996). Newman

then successfully petitioned this court for further review. We now affirm the judgment of the Court of Appeals.

II. FACTS

At approximately 11 p.m. on the evening of March 21, 1993, the victim fell asleep with her 3-year-old son while watching television in the living room of the Lincoln, Lancaster County, Nebraska, apartment in which they lived. During the early morning hours of March 22, she was awakened by a knock at the living room door. She got up and looked through the peephole and, seeing nothing, opened the door slightly. Now noticing a man outside, she asked if he had the wrong apartment. Replying that he did not, the man forced his way inside. As she backed away, the victim started hitting and kicking, and asked what he was doing. The man kept coming toward her and eventually pushed her down on the couch.

At this point, the victim was lying lengthwise on the couch with the man between her legs. As she threatened to scream, the man grabbed her by the throat and told her that if she did so, he was going to "bash [her] fucking head in." He then began squeezing her throat as he unfastened her belt and removed her clothing, which consisted of a green shirt, bra, jean shorts, underwear, shoes, socks, and a white T-shirt. The man then opened his pants, pulled them down past his buttocks, and unsuccessfully tried to insert his penis into the victim's vagina.

The man next picked the victim up in a "bear hug" and carried her into a bedroom. Once there, he threw her on the bed and again attempted coitus. Being again unsuccessful, he inserted a finger into the victim's vagina. At this point, although she had never seen him and did not know him, the man spoke the victim's name and told her that he had wanted to do this for awhile. The man then attempted to muffle the sound of the victim's cries by putting a pillow over her face.

After awhile, he got up, turned on the lights, and threw a blanket and pillow over the victim's face so she could not see. He again made an attempt to copulate; when this effort also failed, the man asked the victim to "more or less jack him off." She refused and started hitting him with her fist. The

man then suddenly stood up, turned off the light, and began to say repeatedly, " 'This didn't happen.' " The man next began putting on his clothes, all the while making sure that the blanket still covered the victim's face.

After the man had left the room, the victim stayed where she was until she heard a door shut. As she began to get up from the bed, the man came back into the bedroom and said, " 'I told you not to move.' " He then pushed her back down onto the bed, covered her head with a pillow, and left the room. The victim remained in the bedroom until she heard the man moving around and the door shut again. She then got up and went into the living room to check on her son and tried to call the police, but discovered that the line to that telephone had been cut. She also found that the clothing her attacker had removed from her had disappeared.

The victim called the Lincoln police from another telephone in the kitchen. She was still on the telephone with the dispatcher when the police arrived. The victim described her attacker as a Hispanic male between 5 feet 6 and 5 feet 8 inches tall, with an olive complexion, dark brown or black hair, and a mustache, and as wearing a white T-shirt, black pants, and a black leather jacket. She also told the police that she thought her attacker had a slight Hispanic accent "because he was short with the words and things" and sounded different than what she was accustomed to hearing.

Using a dog to track the trail of the suspect leading from the victim's apartment, the police were led to a dumpster where they recovered the victim's missing clothing. At trial, the victim identified the recovered items as the clothing she was wearing on the night of the assault.

After giving the police an account of the events, the victim was taken to a hospital where she was examined. Sometime later, she went to the police station, gave a statement, and with the aid of a computer created a composite sketch of her attacker.

While at the police station, the victim was shown a photographic array which did not contain Newman's picture and was asked if she could identify her attacker from among the six photographs she was presented. Although the victim did not

identify anyone as her attacker, she did point out that some of the men depicted had features similar to those of her attacker.

On March 23, 1993, the victim was shown a second set of six photographs which did not include Newman and again was asked if she could identify her attacker. She did not identify anyone depicted in the array as her attacker.

Two days later, on March 25, 1993, the victim was shown a third set of six photographs. The police officer who presented the photographs told the victim to take her time in examining them. However, the victim testified that she "knew immediately who it was, what number it was," and selected photograph No. 4, a picture of Newman.

After the victim had identified Newman as her attacker, the police determined that Newman had taken an Amtrak train to Las Vegas, Nevada. The Nevada police were notified, and pursuant to a fugitive arrest warrant, Newman was arrested at the Amtrak train station in Las Vegas. Immediately upon being arrested, Newman was frisked and handcuffed. The police discovered no contraband or weapons upon his person.

Newman had three dark-colored, soft-sided suitcases with him. Without attempting to first open the suitcases, the police put them in the trunk of their vehicle and transported Newman and the suitcases to a detention center. When Newman arrived at the detention center at approximately 8:50 a.m. on March 26, 1993, the processing officer asked Newman if he had any valuables to declare. Newman responded that he did and listed on an "Inmate's Property Inventory and Release" form a black wallet, two watches, a necklace, a $20,000 cashier's check, and bulk property composed of the three suitcases.

Later that morning, at around 10:30 a.m., the Nevada police contacted a Lincoln police detective and informed him that Newman was in custody. The detective asked if Newman was wearing a black leather jacket and white tennis shoes when he was arrested. Upon being told that he was not, the detective informed the police that the jacket and tennis shoes were needed as evidence. At approximately 11:15 a.m., two Nevada police officers went to the detention center property room and retrieved the requested items from one of Newman's suitcases.

On April 8, 1993, a Lancaster County deputy sheriff traveled to Las Vegas to pick up Newman. He logged Newman and his possessions, including the black leather jacket and white tennis shoes, into the Lancaster County jail on April 9. The deputy sheriff testified that he spoke with Newman during the trip, and it was his opinion that Newman had a Hispanic accent.

Newman filed a motion to suppress his identification in the photographic lineup and also filed a motion to suppress the jacket and tennis shoes.

At the suppression hearing, Newman and the State stipulated to the events following Newman's arrest. They also stipulated that it was the policy of the detention center to look through the suitcases for contraband, weapons, or explosives if they had not been searched by law enforcement officers prior to arriving at the detention center, but that no further inventory would be made before the suitcases were placed in the police property room. No warrant was sought or obtained to search the suitcases, and to Newman's knowledge, they were not opened or searched for inventory purposes. The district court overruled both of Newman's motions.

Although at trial the State did not offer the white tennis shoes into evidence, the black leather jacket was offered and received over Newman's objection. In addition, at trial, the victim identified Newman as her attacker and identified the leather jacket seized from Newman as being similar to the jacket her attacker was wearing the night of the assault.

Newman also filed a motion in limine to bar the prosecution from offering the testimony of Russell Grady and Julie Denny, on the ground that their testimony was more prejudicial than probative. The district court denied Newman's motion, and the testimony of both witnesses was admitted at trial over Newman's objections.

Grady testified that on March 22, 1993, at about 12:15 a.m., he was sitting in his automobile waiting to pick up a friend. Grady observed that a woman was being followed about a quarter of a block behind by a man Grady later identified as Newman. Grady stated that Newman was wearing a black leather jacket and white tennis shoes. Grady saw the

woman enter an apartment complex, after which Newman ran to the complex doors and looked in. Newman then walked back to the sidewalk and watched the building. When a light went on in an apartment in the right top corner of the building, Newman walked away.

Thinking Newman's behavior was unusual, Grady followed him and saw Newman walk to a building approximately two blocks from the victim's apartment. Grady drove around the block and continued to keep track of Newman. After approximately 45 minutes from the time he had initially seen Newman, Grady flagged down a patrol vehicle and reported what he had seen to the police. Grady also gave the police a description of Newman and then left.

After a couple of days, a detective visited Grady at work and asked him if he could pick out the man he saw from a set of photographs. Grady did not select any of the photographs shown to him. A few days later, Grady was shown a second set of photographs at his home. This time, Grady selected Newman's photograph and at trial identified Newman as the man he saw on March 22, 1993. Grady also identified the leather jacket seized from Newman's suitcase as similar to the jacket he saw Newman wearing that night.

Denny testified that she saw Newman on the night of March 22, 1993. Denny left work at approximately 10:15 p.m. and drove to her home approximately eight blocks from the victim's apartment. When Denny got to her residence, she thought she heard something dragging under her automobile, so she pulled into her apartment parking lot and looked to see if there was anything lodged underneath. When she stood up, there was a man behind her. He was wearing a black leather jacket and white tennis shoes. He asked Denny whether she knew a certain couple living in the building and then followed her to some stairs. Denny testified that the man also asked her if she was married or had a boyfriend. Denny continued walking and then went up the stairs to her apartment. The next evening, she reported her encounter with the man to the police.

Approximately 2 days later, Denny went to the police station and attempted to produce a composite drawing of the man

she saw. Several days after that, a police officer went to Denny's apartment and asked her if she could identify the man she saw from an array of photographs. Denny identified Newman in photograph No. 4 as that man. On cross-examination, Denny testified that the man who spoke to her that night did not have a Hispanic accent.

The prosecution also offered the testimony of Rev. Stewart Firnhaber. Firnhaber testified that he had met Newman in March 1993 when Newman went to Firnhaber's home for dinner. On that occasion, Newman was wearing a black leather jacket, a white shirt, and white tennis shoes. Firnhaber testified that Newman told him that he planned to travel by train to the west coast and then fly to the Philippines and on to Germany. Firnhaber testified that Newman did not have a Hispanic accent.

At the close of the prosecution's case in chief, Newman unsuccessfully moved for a directed verdict. He then attempted to introduce a voice exemplar by reading a "fairly neutral" statement to establish that he did not have a Hispanic accent. The State objected on the ground that the conditions under which Newman spoke to the victim could not be reproduced. The district court sustained the State's objection, ruling that Newman could "testify in any voice" he wished, provided that he did so under oath and subjected himself to cross-examination. Newman elected not to present any evidence.

III. ANALYSIS

1. Suppression of Evidence

In the first assignment of error, Newman asserts that the district court wrongly failed to suppress the pretrial and in-court identifications of him, as they were tainted by impermissible suggestions, and that the district court wrongly overruled his motion to suppress the evidence seized from his suitcases.

(a) Scope 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. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996).

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. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

(b) Application of Law to Facts

(i) Identification

In urging in the first part of this assignment of error that the district court should have suppressed the identification testimony, Newman argues that the police employed unconstitutionally suggestive identification techniques. He maintains that the photographic array shown to the victim was impermissibly suggestive and that the police made statements to her which led her to pick his photograph. Newman argues that as a result, the district court should have suppressed not only the victim's pretrial identification, but her in-court identification as well.

Whether identification procedures in connection with photographic arrays were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of all the circumstances surrounding the procedures. See, *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991); *State v. Price*, 229 Neb. 448, 427 Neb. 81 (1988).

Newman maintains that because his photograph was newer than the other photographs in the array, a subtle message was conveyed to the victim that he was the person who had most recently had contact with the law. Newman also maintains that out of the six photographs in the array, his was distinctive because it clearly portrayed him as the shortest and smallest of the men, a fact of no small significance in view of the victim's description of her attacker as a short man. In addition, Newman argues that the officer who showed the photographic array to the victim improperly influenced her because he told her that she did not "have to pick one out real fast." According to Newman, such a statement implied to the victim

that she did in fact have to pick one of the photographs from the array.

An examination of the photographic array fails to support Newman's contentions. There is no apparent difference in the age of the photographs in the array, and we are unable to discern the relative heights of the suspects depicted in the photographs. Nor was the officer's statement suggestive. We do not understand how any reasonable person would understand the statement, "Take your time. You don't have to pick one out real fast," to mean that a suspect had to be identified. The statement would be more reasonably understood to mean that one should take one's time in examining the photographs. The pretrial identification not being unduly suggestive and conducive to an irreparably mistaken identification, it could not have improperly tainted the victim's in-court identification of Newman.

(ii) Seizure

In the second part of this assignment of error, Newman argues that the evidence seized from his suitcase was obtained in violation of U.S. Const. amend. IV and Neb. Const. art. I, § 7. Both the Fourth Amendment and article I, § 7, protect against unreasonable searches and seizures by the government. *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable. *Id.* " '[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). These exceptions are " 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' " 403 U.S. at 455.

As no warrant was sought or obtained to search the contents of Newman's suitcases, the State has the burden of showing that the search falls within one of the established exceptions to the warrant requirement.

The State argues that the search was proper under the inventory exception and the "plain view" doctrine. According to the State, at the time Newman was processed into the detention center, he indicated that he had certain items of value in his suitcases which should be inventoried. Then, "[a]pparently, both as a result of Newman's statement, and as a result of their own policy to search the baggage for contraband, the luggage confiscated along with Newman was inventoried." Brief for appellee at 27. During the inventory search, the Nevada police discovered that the Lincoln police had requested the items and thus seized them as evidence. The State maintains that the seizure of the jacket and the shoes was permissible under the plain view doctrine because the police had a right to be in the suitcases as a result of the inventory search and because the items were in plain view with their incriminating nature immediately apparent due to the information from the Lincoln police.

The State's argument, however, is premised on a gross mischaracterization of the record. First, the record nowhere reflects that Newman told the authorities at the detention center that his suitcases contained items of value which should be inventoried. It is true that Newman listed his valuables on a form provided him, but he did not indicate that the three suitcases contained valuables which needed to be inventoried. The suitcases were merely listed on the form as bulk property. Second, although it was the policy of the detention center to conduct an inventory search of the suitcases for contraband, weapons, or explosives before placing them in the property room, that policy was not followed in this case. The suitcases were inventoried as bulk property and not opened before being stored in the property room. It was only after the Lincoln police told the Nevada police that certain items were needed as evidence that Newman's suitcases were opened and searched.

Thus, in turning our attention to the applicability of the inventory exception to the challenged search, we consider the evidence as it is, not as the State misstates it to be.

Both the U.S. Supreme Court and we have consistently held that inventory searches after an arrest are permissible. *Illinois*

v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983). However, the propriety of an inventory search is judged by a standard of reasonableness, and such a search must be conducted in accordance with standard operating procedures. *Filkin, supra*. As we noted in *Filkin*, the reason for requiring standardized criteria or an established routine to regulate inventory searches is that

> "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime . . . .' "

Id. at 282, 494 N.W.2d at 549, citing *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).

The purpose of the inventory exception, therefore, is not to avoid the requirements of the Fourth Amendment, but, rather, to advance legitimate governmental interests which include (1) protecting the property of an arrestee in custody, (2) protecting the police from groundless claims that an arrestee's property has not been properly safeguarded, (3) protecting or maintaining the security of a detention facility by preventing the introduction of weapons or contraband into the facility, and (4) ascertaining or verifying an arrestee's identity. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

The suitcase search conducted here was not a routine inventory search. The officers were clearly engaged in a purposeful search for incriminating evidence identified by the Lincoln police. Because the search does not fall within the boundaries of the inventory exception to the warrant requirement, the district court erred in denying Newman's motion to suppress.

However, not all trial errors, even those of constitutional magnitude, entitle an accused to a reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot

be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

Of those items that were unconstitutionally seized from Newman's suitcases, only the black leather jacket was admitted into evidence at trial. While the State would have been well advised to have left it out, the record reveals that this bit of physical evidence was cumulative. The victim gave a detailed description of her attacker which matched Newman's physical characteristics. She later identified Newman from a photograph in which Newman was not wearing a black leather jacket. Grady and Denny also gave detailed descriptions of Newman's physical characteristics and were able to identify him from a photograph in which he was not wearing a black leather jacket. In addition, all of these witnesses identified Newman at trial when he was not wearing a jacket. Thus, absent the jacket, the evidence that Newman perpetrated the crime was overwhelming. As a consequence, the erroneous receipt of the jacket into evidence was harmless beyond a reasonable doubt.

(c) Resolution

For the foregoing reasons, the first assignment of error fails.

2. Other Evidential Rulings

In the second assignment of error, Newman challenges the district court's receipt of the testimony of witnesses Grady and Denny and its effective ruling that admitting the exemplar of Newman's voice would waive Newman's Fifth Amendment privilege against self-incrimination and subject him to cross-examination.

(a) Scope of Review

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances in which the rules make judicial discretion a factor. *Floyd v. Worobec*,

248 Neb. 605, 537 N.W.2d 512 (1995); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

(b) Applicability of Law to Facts

(i) Testimony

Newman first argues that Grady and Denny's testimony should have been excluded because it was offered for an improper purpose and not for one of the purposes listed in Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404(2) (Reissue 1995), which provides:

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

In addition, Newman argues that even if the evidence was admissible under § 27-404(2), it was more prejudicial than probative and thus should have been excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), which reads, in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

It has been firmly established that § 27-404(2) is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to prove that the person acted in conformity with that character. *Carter, supra*; *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994); *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992); *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991). The list of acceptable uses recited in the statute is illustrative and not meant to be exclusive. *Carter, supra*; *Perrigo, supra*. 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. *Wood, supra*.

Therefore, we review the admission of evidence of other acts under § 27-404(2) by considering (1) whether the evi-

dence 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. *Carter, supra*; *Wood, supra*; *Martin, supra*.

It is within the discretion of a trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of discretion. *Wood, supra*; *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). An abuse of judicial discretion means that the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996); *Carter, supra*; *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

With these standards in mind, we turn to consider whether Grady and Denny's testimony was properly admitted at trial.

We first consider the relevancy of the testimony. Relevant evidence means any evidence having a 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 1995); *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995).

The testimony was relevant because it placed Newman in the area where the sexual assault occurred near the time it occurred. That being so, we must next determine whether the testimony was admitted for a proper purpose. It is clear that the purpose of the testimony was to place Newman at the time and place of the crime. This is a permissible purpose under § 27-404(2) because the evidence tends to show that Newman had the opportunity to commit the crime in question. There is therefore no merit to Newman's contention that the testimony was admitted for an improper purpose.

The question thus becomes whether the testimony should have been excluded because it presented a danger of unfair prejudice. For the purposes of this rule, the probative value of evidence involves a measurement of the degree to which the

evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues in the case. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *Perrigo, supra*. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *Eona, supra*; *Perrigo, supra*.

The testimony clearly had probative value. Grady's testimony placed Newman just a couple of blocks from the crime scene a few hours before the sexual assault occurred. Denny's testimony established that later on the same day as the sexual assault, Newman was approximately eight blocks from the victim's apartment. Any improper inferences that the jury might have drawn from the testimony of the two witnesses simply do not substantially outweigh the considerable probative value of their testimony. We also note that the district court gave a limiting instruction which admonished the jury that the testimony was to be received for the limited purpose of placing Newman in the area and no other.

Because the evidence admitted was relevant, had a proper purpose, had probative value outweighing its unfair prejudice, and was accompanied by a limiting instruction, the district court did not abuse its discretion in admitting the evidence at trial.

(ii) Voice Exemplar

Newman next contends that the district court erred when it in effect held that he would waive his Fifth Amendment privilege against self-incrimination and be subject to cross-examination if he presented a voice exemplar to the jury. Newman maintains that the court's ruling denied him due process of law because he was effectively precluded from offering the voice exemplar in his defense.

It is well established that the Fifth Amendment privilege against self-incrimination protects only against compulsion to engage in testimonial self-incriminating activity. *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Both state and federal courts have usually held that the privilege "offers no protection

against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber*, 384 U.S. at 764. See, also, *State v. Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976).

Thus, a defendant may be compelled to produce a voice exemplar because

> [t]he results of voice identification tests fall within the category of real or physical evidence. . . . In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent, and word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.

People v. Ellis, 65 Cal. 2d 529, 533-34, 421 P.2d 393, 395, 55 Cal. Rptr. 385, 387 (1966). See, also, *Wade, supra* (compelling defendant to produce voice exemplar did not violate Fifth Amendment). The U.S. Supreme Court has also held that there is no constitutional bar to compelling a grand jury witness to read transcripts of intercepted conversations into a recording device. *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973).

Newman urges that as the State could have compelled him to produce a voice exemplar without infringing on his Fifth Amendment privilege, due process principles of reciprocity demand that he be allowed to present a voice exemplar to the jury without waiving his privilege and becoming subject to cross-examination.

Other courts which have addressed this issue have held that due process reciprocity would allow an otherwise admissible voice exemplar to be introduced by a defendant without waiving his or her Fifth Amendment privilege against self-incrimination. *People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728,

530 N.Y.S.2d 83 (1988); *United States v. Esdaille*, 769 F.2d 104 (2d Cir. 1985), *cert. denied* 474 U.S. 923, 106 S. Ct. 258, 88 L. Ed. 2d 264. However, these courts have emphasized that the nontestimonial nature of a voice exemplar does not automatically require its admission into evidence. The defendant must still show that the voice exemplar is relevant and reliable.

We conclude that if relevant and reliable, a voice exemplar may be offered into evidence by a criminal defendant without waiving his or her Fifth Amendment privilege against self-incrimination.

Thus, the district court erred in effectively ruling that Newman's offer of a voice exemplar would waive his Fifth Amendment privilege and subject him to cross-examination. However, this does not necessarily mean that Newman was prejudiced by the district court's ruling, for the ruling may have been correct for other reasons.

The question is whether the voice exemplar was relevant and possessed sufficient reliability to be admitted. The central issue at trial was the identity of the perpetrator of the crime. The victim testified she thought that her attacker had a slight Hispanic accent. The other witnesses disagreed about whether Newman had an accent. The deputy sheriff who transported Newman back from Nevada testified that Newman spoke with an accent. But Denny and Firnhaber both testified that Newman did not speak with an accent. Thus, the presentation of a voice exemplar would have been relevant evidence going to the issue of identity.

That determination brings us to the question of the reliability of the proffered exemplar. For most exemplar or demonstrative evidence to be admissible, the proponent must show that the proffered evidence is reliable. In that regard, as other courts have noted, voice exemplar evidence by its very nature is different from other common types of exemplar or demonstrative evidence. *Scarola, supra*; *Esdaille, supra*. For example, the defendant in *People v. Shields*, 81 A.D.2d 870, 438 N.Y.S.2d 885 (1981), attempted to display a 14- to 16-inch scar on his abdominal region that the complaining witness, a rape victim, did not mention. Since the *Shields* defendant proffered hospital records showing that the scar had predated

the crime, there was no possibility of the scar's lack of authenticity. The same rationale has been applied to tattoos on a defendant's body. If a defendant can demonstrate that the tattoos predated the crime and that the crime victim would have had reason to notice the tattoos during the incident, it would be proper to permit the defendant to exhibit the tattoos to the jury without being subject to cross-examination. *Scarola, supra.*

In contrast, voice exemplar evidence is relatively easy to feign. An accent can be exaggerated or muted through a person's conscious efforts, such as avoiding particular words that one cannot pronounce without an accent. Since Newman made no offer to establish the genuineness of the exemplar, it would have been properly excluded as irrelevant. That is to say, in the words of the State's objection, the conditions under which Newman spoke to the victim could not be reproduced.

(c) Resolution

Thus, the second assignment of error also fails.

3. Sufficiency of Evidence

In the third and final assignment of error, Newman claims the district court mistakenly concluded that the evidence is sufficient to support his conviction.

(a) Scope of Review

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, 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; 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. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). See, also, *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

(b) Application of Law to Facts

At the time in question, § 28-319(1) provided, in relevant part, that one "who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion . . . is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-318 (Reissue 1989) defined "sexual penetration" as including not only "sexual intercourse in its ordinary meaning," but "any intrusion, however slight, of any part of the actor's . . . body . . . into the genital . . . openings of the victim's body . . . . Sexual penetration shall not require emission of semen . . . ."

Thus, the State had the burden to prove beyond a reasonable doubt that at the time and place in question, Newman overcame the victim by force, or the express or implied threat thereof, and that he sexually penetrated her, no matter how slightly. See, *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986).

We have previously determined that except for the harmless erroneous admission of Newman's black leather jacket, the district court made proper evidential rulings. The properly admitted evidence detailed previously, viewed in the light most favorable to the State, amply supports findings that at the time and place in question, Newman overcame the victim by force and that he sexually penetrated her, if in no other way, by inserting one of his fingers into her vagina.

(c) Resolution

Accordingly, the third and last assignment of error fails as well.

IV. JUDGMENT

As first noted in part I, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

BUFFALO COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. RICHARD G. KIZZIER AND YVONNE A. KIZZIER, HUSBAND AND WIFE, ET AL., APPELLEES, AND MACK TRUCKS, INC., APPELLANT AND CROSS-APPELLEE.

548 N.W.2d 753

Filed June 7, 1996. No. S-94-926.

1. **Judicial Sales: Appeal and Error.** As a general rule, confirmation of judicial sales rests largely within the discretion of the trial court, and consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion.
2. **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 conclusion irrespective of the determination made by the court below.
3. **Judicial Sales: Police Officers and Sheriffs: Time.** As the language of Neb. Rev. Stat. § 77-1912 (Cum. Supp. 1994) requires that the proceeds be paid by the sheriff to the clerk of the district court immediately following the judicial sale, the sheriff is required to collect the entire bid price.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed as modified.

Patrick J. Nelson and Terri S. Harder, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Andrew W. Hoffmeister, Chief Deputy Buffalo County Attorney, for appellee Buffalo County.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Following the entry of the foreclosure decree described in *Buffalo County v. Kizzier, ante* p. 180, 548 N.W.2d 757 (1996), the underlying real estate was sold at a sheriff's sale pursuant to order of the district court which then, over the objection of the defendant-appellant, Mack Trucks, Inc., confirmed the sale. In appealing to the Nebraska Court of Appeals, Mack Trucks asserted that the district court erred in (1) confirming the sale and (2) calculating the amount of attorney fees awarded the plaintiff-appellee, Buffalo County. The

county cross-appealed, claiming that the district court erred in approving the filing of a supersedeas bond by Mack Trucks, preventing the county from collecting back taxes on the underlying real estate. Under our authority to regulate the caseloads of the Court of Appeals and of this court, we, on our own motion, removed the matter to this court. We now dismiss the county's cross-appeal, modify the district court's decree, and as so modified, affirm same.

II. SCOPE OF REVIEW

It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. *Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 431 N.W.2d 613 (1988). However, to the extent statutory interpretation is involved, that aspect of the matter presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *In re Interest of Archie C., ante* p. 123, 547 N.W.2d 913 (1996); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

III. FACTS

The underlying real estate sold for $52,100, on which the sheriff collected $7,815, or 15 percent of the total bid price. Upon confirming the sale, the district court awarded attorney fees to the county in the amount of $1,661.18, representing 10 percent of the taxes it had foreclosed and interest thereon.

The district court next entered an order setting the amount of the supersedeas bond to be filed by Mack Trucks at $75,000. The execution of the supersedeas bond and the sufficiency of the surety therein were then approved by the clerk of the district court.

IV. ANALYSIS OF MACK TRUCKS' APPEAL

1. Confirmation of Sale

Mack Trucks claims in the first assignment of error that as the sheriff did not demand and receive the full bid price at the time of the sale, the district court erred in entering its order

of confirmation. The claim rests upon Neb. Rev. Stat. § 77-1912 (Cum. Supp. 1994), which provides, in part, that in a sheriff's sale pursuant to foreclosure proceedings, "[t]he sheriff shall sell the real property in the same manner provided by law for a sale on execution and shall at once pay the proceeds thereof to the clerk of the district court."

In urging that the sale in this case was proper, the county argues that we have implicitly approved the collection at a sheriff's sale of only a percentage of the bid price. Specifically, the county cites to *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984) (*Travelers I*); *Travelers Indemnity Co. v. Heim*, 223 Neb. 75, 388 N.W.2d 106 (1986) (*Travelers II*); *Conservative Sav. & Loan Assn. v. Karp*, 218 Neb. 217, 352 N.W.2d 900 (1984); and *Holferty v. Wortman*, 135 Neb. 732, 283 N.W. 855 (1939). However, these cases are inapposite.

In the *Travelers* cases, the highest bidder at the sheriff's sale on the foreclosure of a mortgage paid only 15 percent of its bid. In affirming the confirmation of the sale, we rejected a number of complaints made by the mortgagor, but the question of whether a downpayment of 15 percent of the bid price was proper was not in issue. In *Travelers II*, the mortgagor contended that as the full amount of the purchase price was not paid until after it became evident that the winter wheat crop was successful, the highest bidder had waived and abandoned the purchase, and, thus, the real estate should be resold. We rejected that contention, but again there was no issue as to whether accepting less than the full bid price at the sheriff's sale was erroneous.

In *Conservative Sav. & Loan Assn.*, the plaintiff sought to foreclose a deed of trust. At the sheriff's sale, the successful bidder paid 10 percent of the bid price. The issue presented concerned the payment of real estate taxes and the possession of rent proceeds. In that connection, we wrote:

> Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents

> accruing from the date of sale until the balance of the bid is paid.

218 Neb. at 222, 352 N.W.2d at 903. Again, no issue was presented as to the lawfulness of the sheriff not requiring immediate payment of the full bid price.

In *Holferty*, the return of the order of sale showed that the premises had been sold to the highest bidder for $6,000, " 'upon confirmation of sale and possession.' " 135 Neb. at 733, 283 N.W. at 856. The appellant objected to the return, arguing that the bid was conditioned upon possession of the property. Ruling that the bid was in conformity to the notice and decree of the court and that the sale was conducted substantially as prescribed by the notice and in accordance with the decree, we affirmed confirmation of the sale.

Of these cases, only *Holferty* dealt with the foreclosure of a tax lien; the *Travelers* cases concerned the foreclosure of a real estate mortgage, and *Conservative Sav. & Loan Assn.* concerned the foreclosure of a deed of trust. Not only was the propriety of collecting an amount less than the bid price not an issue before us in *Conservative Sav. & Loan Assn.*, *Travelers*, and *Holferty*, we did not construe § 77-1912 in *Holferty* because that statute was not enacted until 1943.

As the language of § 77-1912 requires that the proceeds be paid by the sheriff to the clerk of the district court immediately following the judicial sale, the sheriff is required to collect the entire bid price.

However, as Mack Trucks does not allege that the price received was inadequate or that the sale was otherwise defective or that it was in any way injured by the manner in which the total sale price was collected, in this instance, the sheriff's error was not material, and the district court therefore did not abuse its discretion in confirming the sale.

Under that circumstance, we need not concern ourselves with what the sheriff's liability might be should the successful bidder not be able to pay the bid price upon confirmation.

2. Attorney Fees

In its second assignment of error, Mack Trucks asserts that the district court erred in calculating the amount of attorney

fees due the county. Mack Trucks argues that the attorney fees awarded are greater than that allowed by law or in the decree of foreclosure, in that the sum awarded on the order of confirmation included interest and costs.

Neb. Rev. Stat. § 77-1909 (Cum. Supp. 1994) provides:

> In its decree, the court shall ascertain and determine the amount of taxes, special assessments, and other liens, interest, and costs chargeable to each particular item of real property and award to the plaintiff an attorney's fee, unless waived by the plaintiff, in an amount equal to ten percent of the amount due which shall be taxed as part of the costs in the action and apportioned equitably as other costs.

It is apparent from the foregoing language that interest and costs are to be included in awarding an attorney fee. However, in this case, the district court did not include such in its foreclosure decree.

In entering its confirmation order, the district court noted its earlier error and sought to correct it by including in its confirmation order an award of attorney fees in accordance with the request the county had made in its petition, that is, 10 percent of the taxes and interest. The difficulty is that the award of attorney fees is to be made in the decree of foreclosure, not in the order confirming the sale. See § 77-1909. Moreover, because the county did not appeal from the decree awarding it attorney fees in a lesser amount than that to which it was entitled, the erroneous award became final.

It was thus error for the district court to attempt to correct in its confirmation order the award of attorney fees it had previously ordered in its foreclosure decree.

V. ANALYSIS OF COUNTY'S CROSS-APPEAL

In its cross-appeal, the county asserts that the district court erred in the approval of a supersedeas bond enjoining it from the collection of back taxes on the subject real estate. However, the record does not contain enough information upon which this assignment of error can be addressed. While the record contains the supersedeas bond filed by Mack Trucks, it does not contain the district court's order regarding the bond.

Neither is there any showing that the county objected to the district court setting the amount of the bond. Nor does the record disclose what precise actions of the county were stayed.

It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

We must therefore dismiss the county's cross-appeal.

VI. JUDGMENT

For the foregoing reasons, we, as first noted in part I, dismiss the county's cross-appeal and modify the district court's decree by striking therefrom the award of attorney fees to the county. As so modified, we affirm the decree of the district court.

AFFIRMED AS MODIFIED.

CENTRAL PLATTE NATURAL RESOURCES DISTRICT, APPELLANT, V. CITY OF FREMONT ET AL., APPELLEES, APPLICATIONS A-16948 THROUGH A-16954 OF THE CENTRAL PLATTE NATURAL RESOURCES DISTRICT.

549 N.W.2d 112

Filed June 7, 1996. No. S-95-629.

1. **Administrative Law: Waters: Appeal and Error.** In an appeal from the Department of Water Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.
2. **Administrative Law: Waters: Statutes: Appeal and Error.** On questions of law, which include the meaning of statutes, a reviewing court is obligated to

reach its conclusions independent of the legal determinations made by the director of the Department of Water Resources.

3. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
4. ____: ____. 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.
5. ____: ____. The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.
6. **Constitutional Law: Waters.** Neb. Const. art. XV, § 6, is not self-executing.
7. **Legislature: Endangered Species: Public Purpose.** The Legislature has declared that it is in the public interest to preserve, protect, perpetuate, and enhance nongame, threatened, and endangered species of this state through preservation of a satisfactory environment and an ecological balance. Neb. Rev. Stat. § 37-432.01 (Reissue 1993).
8. **Legislature: Statutes: Public Purpose.** While a legislature may not, under the guise of regulating in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory, whether legislation is in the public interest is generally a question for legislative determination.

Appeal from the Department of Water Resources. Affirmed.

James E. Doyle IV, of Cook, Wightman & Doyle, for appellant.

Dean Skokan, Fremont City Attorney, for appellee City of Fremont.

Glen A. Murray for appellees National Audubon Society and Nebraska Chapter of Sierra Club.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Following an evidential hearing, the director of the Department of Water Resources denied each of the seven applications presented by the applicant-appellant, Central Platte Natural Resources District, for permits allowing it to divert certain waters in order to develop its Prairie Bend II project, as described in part III hereinafter. The district assigns six errors to the director, which may be summarized

as claiming (1) that the director's order of denial is contrary to and not supported by competent and relevant evidence and is therefore arbitrary, capricious, and unreasonable, and (2) that in any event, the director did not consider the issues in the proper sequence. We affirm.

II. SCOPE OF REVIEW

In an appeal from the department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994); *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993) (Landmark Project), *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). However, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. See *Central Platte NRD, supra*.

III. BACKGROUND

Through seven applications dealing with various segments of the project, the district seeks to divert waters from the Platte River and a tributary of Prairie Creek in order that it might store the diverted waters and thus replenish the supplies of irrigation waters now being withdrawn from the ground water sources underlying the project lands and to improve water quality for municipal, domestic, and livestock uses through such ground water recharge. The applications would require the withdrawal of waters at various times during the year at the Prairie Diversion Dam near Kearney, Nebraska. The main supply canal would deliver the waters from that point to a main storage reservoir, the North Prairie Reservoir, and to four smaller reservoirs. Waters stored in the North Prairie Reservoir and the smaller reservoirs would then be moved through canals and pipelines to 24 recharge ponds. The reservoirs and storage ponds would leak the stored waters into the ground water aquifer underlying the project area.

IV. ANALYSIS

With that brief background, we turn our attention to the summarized assignments of error and supply such additional facts as the issues require.

1. Evidential Support for Order

We begin our study of the evidential support for the director's order of denial questioned in the first summarized assignment of error by noting that while one of the applications identifies a "Tributary to Prairie Creek" as the source of the waters sought to be diverted, the director concluded that because the evidence focused "almost exclusively upon the Platte River valley," that application must be denied for a lack of evidential support. In urging that contrary to the director's finding the record does in fact contain competent and relevant evidence concerning the Prairie Creek tributary, the district refers us to the testimony of a hydrologist and to several exhibits. Although it is true that the hydrologist's testimony concerns the subject application individually, it does not provide enough information to assess the application. A review of the exhibits reveals that they concern not the subject application individually, but the entire project as a whole. These circumstances lead us to conclude that notwithstanding the director's somewhat confusing observation concerning the need for a separate denial of the Prairie Creek application, he nonetheless correctly ruled that the applications are to be considered "as a single package."

The district next asserts that the director's order is arbitrary, capricious, or unreasonable because there is no competent and relevant evidence which supports his findings, including the finding that the project would jeopardize the continued existence of the whooping crane, an endangered and threatened species.

A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990) (Long Pine Creek). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a deci-

sion is apt to change suddenly; it is freakish, whimsical, humorsome. *Id.* The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Id.*

The evidence demonstrates that the Department of Water Resources requested formal consultation regarding these applications with the Nebraska Game and Parks Commission. The consultation was devoted to evaluating the effects of the project on 11 endangered and threatened species, including the whooping crane. The commission thereafter issued an opinion that "[t]he project will not jeopardize the continued existence of the whooping crane [assuming] that the exact site of the diversion structure will be determined so as to ensure that whooping crane roosting habitat will not be adversely affected." The testimony of one of the authors of the foregoing opinion further made clear that the conclusion that the project would not jeopardize the whooping crane was based on the assumption that the diversion structure for the project would not be located in any whooping crane roosting habitat.

The record establishes that there were 20 confirmed sightings of whooping cranes in the Platte River Valley from April 4, 1943, through April 4, 1988, and the director noted a biologist had personally observed whooping cranes in the immediate vicinity of the Prairie Bend diversion dam. The director further observed that the proposed diversion dam is in the same location as crane-watching blinds operated by the U.S. Fish and Wildlife Service. Additionally, a letter from the acting field supervisor of the Nebraska-Kansas Field Office of the U.S. Fish and Wildlife Service to the acting regional director of the Bureau of Reclamation stated in part:

> A remaining concern, which only recently came to light, is the resolution of the proposed location for the Prairie Diversion Dam. This location, which has been discussed with members of your Grand Island staff, needs further evaluation because of recent whooping crane sightings in the vicinity and land acquisition by the State of Wyoming. In November of 1986, three whooping cranes roosted in the Platte River channel about

> 1,800 feet upstream of the proposed dam site. Furthermore, the dam currently would be sited within the property recently purchased by the Wyoming Water Development Commission for the purpose of offsetting whooping crane roosting habitat impacts attributable to the proposed Deer Creek project. For these reasons, we believe the diversion dam as proposed may need to be relocated.

The director further noted that although the water depth for whooping crane roosting sites should be less than 12 inches, a hydrologist testified that the depth of the waters which would pond behind the dam structure would be 4 feet and that upstream approximately one-half mile, the depth would be 1 to 2 feet. In 1978, the U.S. Department of the Interior designated a 3-mile-wide, 58-mile-long reach from Lexington to Denman, Nebraska, "whooping crane critical habitat." This area includes the proposed damsite.

Although others might weigh this evidence differently, under that state of the record, it cannot be said that the director's finding that the proposed project would jeopardize the endangered whooping crane is not supported by competent and relevant evidence. Because the analysis which follows in part IV(2) hereof establishes that this evidentially supported finding in and of itself makes the director's order a reasoned one and thus not one which fairly can be characterized as arbitrary, capricious, or unreasonable, we must conclude that the first summarized assignment of error is without merit.

2. Sequence of Consideration

In the second summarized assignment of error, the district contends that the director erred in failing to consider the issues in the proper sequence. The district first argues that the Nebraska Constitution and Neb. Rev. Stat. § 46-235 (Reissue 1993) "plainly require, as a first step in the analysis of an application, the determination of whether there is unappropriated waters." Brief for appellant at 13. According to the district, as the director made no finding concerning the presence or absence of unappropriated waters, he could not have reached the constitutionally required consideration of the pub-

lic interest, and the director's order must, on that basis alone, be reversed.

Even if we assume for the purposes of this analysis that the director's order does not implicitly find the existence of unappropriated waters, it must be noted that Neb. Const. art. XV, § 6, provides, in part, that "[t]he right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest." Section 46-235(1) implements that constitutional provision as follows:

> For applications other than those to appropriate public waters for induced ground water recharge, if there is unappropriated water in the source of supply named in the application, if such application and appropriation when perfected are not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the Department of Water Resources shall approve the application . . . .

It is clear that neither article XV, § 6, nor § 46-235(1) requires that the director engage in a particular sequential consideration of the issues presented by an application. The constitutional right to divert waters is not absolute; only unappropriated waters are subject to that right and then only if the public interest does not demand that the application to divert such waters be denied. Thus, if the director determines that the public interest demands that an application be denied, it matters not whether the waters sought to be diverted were or were not appropriated. In either case, the director is empowered to deny the application. Neb. Rev. Stat. § 46-234 (Reissue 1993) ("[i]f there is no unappropriated water in the source of supply . . . the Department of Water Resources may refuse such application"); § 46-235.

The district's second argument in regard to this summarized assignment of error is that the director made no finding that the public interest demanded denial of the applications. But that is simply not so; as set forth in part IV(1) above, the director specifically and reasonably found that the project will jeopardize the continued existence of the endangered and threatened whooping crane.

The question is whether this finding satisfies the constitutional and statutory requirement that the denial of the applications be "demanded by the public interest." In other words, the crucial inquiry at this point becomes what is meant by the phrase "public interest" and the term "demanded." Neither expression is defined by the Constitution. And while the Legislature has provided various factors for the director to take into consideration in determining whether the public interest demands that the right to appropriate waters should be denied in the context of instream appropriations and interbasin transfers, it has not done so for the type of appropriation involved here. Compare § 46-235(1) with Neb. Rev. Stat. §§ 46-289 and 46-2,116 (Reissue 1993).

Nonetheless, the Legislature has given considerable guidance as to what is in the public interest so far as the appropriation of waters generally is concerned.

Neb. Rev. Stat. § 37-432 (Reissue 1993) provides, in part:

> (1) That it is the policy of this state to conserve species of wildlife for human enjoyment, for scientific purposes, and to insure their perpetuation as viable components of their ecosystems;
>
> (2) That species of wildlife and wild plants normally occurring within this state which may be found to be threatened or endangered within this state shall be accorded such protection as is necessary to maintain and enhance their numbers;
>
> (3) That this state shall assist in the protection of species of wildlife and wild plants which are determined to be threatened or endangered elsewhere pursuant to the Endangered Species Act by prohibiting the taking, possession, transportation, exportation from this state, processing, sale or offer for sale, or shipment within this state of such endangered species and by carefully regulating such activities with regard to such threatened species.

Moreover, Neb. Rev. Stat. § 37-435(3) (Reissue 1993) provides, in pertinent part:

> All other state agencies shall, in consultation with and with the assistance of the commission, utilize their

> authorities in furtherance of the purposes of the [Nongame and Endangered Species Conservation] act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. For purposes of this subsection, state agency shall mean any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.

In upholding the constitutionality of § 37-435(3) against the claim of the Upper Big Blue Natural Resources District that the statute impermissibly limited or altered the substantive right to divert unappropriated waters for irrigation purposes, we recognized that article XV, § 6, was not self-executing. See *In re Applications A-16027 et al.*, 243 Neb. 419, 499 N.W.2d 548 (1993) (Landmark Project). Determining that our task in that case was to determine whether the challenged statute permissibly implemented and effectuated the policies found in the relevant constitutional provisions, specifically the language found in article XV, § 6, we wrote:

> In the legislative declaration to the Nongame and Endangered Species Conservation Act (NESCA), of which § 37-435(3) is a part, the Legislature stated that "nongame, threatened, and endangered species have need of special protection and . . . it is *in the public interest* to preserve, protect, perpetuate, and enhance such species of this state through preservation of a satisfactory environment and an ecological balance." (Emphasis supplied.) . . . The stated legislative intent behind NESCA is to conserve wildlife species for human enjoyment, for scientific purposes, and to ensure their perpetuation as viable components of their ecosystems, as well as to

> assist in the protection of endangered species pursuant to the federal Endangered Species Act. . . .
>
> . . . Section 37-435(3) provides for the establishment and implementation of conservation programs to effectuate the protection of endangered species as a public interest. The Legislature's determination of a public interest and the corresponding implementing statutes are not unreasonable, arbitrary, discriminatory, or confiscatory. The limitations that § 37-435(3) places on the diversion of unappropriated waters permissibly effectuate the provisions of Neb. Const. art. XV, §§ 4, 5, and 6.

(Emphasis in original.) *In re Applications A-16027 et al.*, 243 Neb. at 424, 499 N.W.2d at 552.

We have held that while a legislature may not, under the guise of regulating in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory, whether legislation is in the public interest is generally a question for legislative determination. *In re Applications A-16027 et al., supra.* Given that rule and our determination that the Legislature acted constitutionally in declaring the protection of endangered or threatened species to be in the public interest, the question becomes whether this public interest demanded that the district's applications be denied.

As the Department of Water Resources is a state agency within the meaning of the Nongame and Endangered Species Conservation Act, § 37-435(3), the issuance of a permit through its director would qualify as an "action" taken by a state agency. The director therefore may not issue permits which would jeopardize the continued existence of an endangered or threatened species, or result in the destruction or modification of their habitat. *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982), *overruled in part on other grounds, In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993) (Landmark Project).

Thus, we need not at this time formulate a prescriptive definition of the term "demanded," for the only way to satisfy the public interest, as declared in § 37-435(3), is by denying per-

mits to appropriate waters when doing so would jeopardize the continued existence of an endangered or threatened species. Consequently, the director's evidentially supported finding that the district's proposed project would jeopardize the continued existence of the endangered whooping crane demanded that the district's applications be denied.

That being so, the second summarized assignment of error is likewise without merit.

V. JUDGMENT

For the foregoing reasons, the director's order is, as first noted in part I above, affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

WRIGHT, J., dissenting.

I respectfully dissent from the decision of the majority. The Central Platte Natural Resources District filed applications for permits to appropriate and store water for its Prairie Bend II project. In my opinion, the decision of the director of the Department of Water Resources to deny the applications was arbitrary and was not supported by the evidence.

As a part of his order, the director considered "[w]hether the Project, if approved, would jeopardize nongame endangered species or their habitat (§ 37-435)." The director concluded:

> Nongame and Endangered Species
>
> The Project will jeopardize the continued existence of the endangered whooping crane. Provided the Project is operated so as to bypass flows specified by the Commission it will not jeopardize the interior least tern. . . .
>
> Whooping Cranes
>
> Problematic is the Commission's statement that the Project would not jeopardize whooping cranes. According to the Biological Opinion, the nonjeopardy determination assumes the Project diversion dam structure will be located so as to insure that roosting habitat will not be adversely affected (E16,2). During examination Ross Lock, a staff biologist assigned to the

Commission's Lincoln office and author of the Biological Opinion, verified that assumption (T2889).

Earlier Ken Strom, a field biologist who resides nearby, testified the diversion dam would be situated on land with crane-watching blinds operated by the U.S. Fish and Wildlife Service (T1269). He said whooping cranes have been sighted at the proposed dam site (T1228, T1271-1272).

More completely undermining Lock's assumption, however, is a letter (E103) to the Acting Regional Director of the Bureau of Reclamation from the Acting Field Supervisor of the Nebraska-Kansas Field Office of the U.S. Fish and Wildlife Service. In regard to the location of the Prairie Bend Diversion Dam, it states:

This location . . . needs further evaluation because of recent whooping crane sightings in the vicinity and land acquisition by the State of Wyoming. In November of 1986, three whooping cranes roosted in the Platte River channel about 1,800 feet upstream of the proposed dam site. Furthermore, the dam currently would be sited within the property recently purchased by the Wyoming Water Development Commission for the purpose of offsetting whooping crane roosting habitat impacts attributable to the proposed Deer Creek project. For these reasons, we believe the diversion dam as proposed may need to be relocated.

As a technical matter roosting site water depth should be less than 12 inches (E103,II-2). The Project diversion dam would be placed across the entire river channel and is expected to back up water to a depth of four feet during normal operations. Extending a mile upstream, the depth might be one to two feet (T587-588). Given these facts, when it comes to whooping cranes the Commission's Biological Opinion is not reliable.

The director rejected the findings of the commission based upon the above conclusions and determined that the applications endangered the whooping crane. The majority finds that the director's conclusion that the proposed project would jeop-

ardize the endangered whooping crane was supported by competent and relevant evidence. I disagree.

The majority cited the following evidence as support for denial of the applications: (1) There were 20 confirmed sightings of whooping cranes in the Platte River Valley from April 4, 1943, through April 4, 1988, and (2) a biologist had personally observed whooping cranes in the immediate vicinity of the Prairie Bend diversion dam. The director had also noted that the proposed diversion dam was located near crane-watching blinds operated by the U.S. Fish and Wildlife Service. Additionally, the director referred to the April 11, 1989, letter from the acting field supervisor of the Nebraska-Kansas Field Office of the U.S. Fish and Wildlife Service to the acting regional director of the Bureau of Reclamation, which stated in part:

> A remaining concern, which only recently came to light, is the resolution of the proposed location for the Prairie Diversion Dam. This location, which has been discussed with members of your Grand Island staff, needs further evaluation because of recent whooping crane sightings in the vicinity and land acquisition by the State of Wyoming. In November of 1986, three whooping cranes roosted in the Platte River channel about 1,800 feet upstream of the proposed dam site. Furthermore, the dam currently would be sited within the property recently purchased by the Wyoming Water Development Commission for the purpose of offsetting whooping crane roosting habitat impacts attributable to the proposed Deer Creek project. For these reasons, we believe the diversion dam as proposed may need to be relocated. However, this issue will be addressed in the advanced planning phase of the project and will be resolved at that time.

The evidence is insufficient to support the director's order for the following reasons: The director's statement concerning the upstream water level backup caused by the diversion dam is erroneous. Determination of the depth of water at any point upstream from the damsite is based upon the water level at the damsite. Contrary to the director's order, the record does not

state that the diversion dam will back up water to a depth of 4 feet "during normal operations." Duane Woodward, an expert witness whose testimony was cited by the director as the basis for this conclusion, testified that the maximum height that the water could back up at the damsite would be 4 feet and that it would do so only under highly unusual conditions.

> And then if you look up by the embankments, *they show what the maximum water level would be with a hundred-year flood, and that's elevation 2,126.* And so during most normal operations, the water level would be approximately — somewhere between that — in that four-feet range. It would be less than that four-feet range. That's the difference of the 2,126 and the 2,122, is four feet. So the deepest the water would be over the spillway crest would be four feet.

(Emphasis supplied.) Thus, 4 feet is the absolute maximum water level the dam could ever produce, and such levels would occur only in a 100-year flood cycle.

The director stated that given this 4-foot figure, "[e]xtending a mile upstream, the depth might be one to two feet." This conclusion is also erroneous. Woodward testified regarding elevation rates as follows:

> So if you're moving upstream from the diversion dam, the elevation gets higher and higher.
>
> Q[.] And what's the interplay between the increase in the elevation of the river bed and the depth of water that you're seeing in the — that the dam creates?
>
> A[.] Well, as you move upstream, the depth will get less and less. So if there's four foot of depth at the dam, then as you move up, say, a half-mile or so, you might only have two feet or one foot.

The director used this testimony to support his claim that 1 mile from the dam, the water level would be 1 or 2 feet. However, the testimony at the hearing was that the water level would be 1 to 2 feet as near as *one-half mile* from the proposed damsite.

In fact, Woodward testified that the typical dropoff in elevation on the Platte River was 6 feet per mile. Therefore, if the water level at the dam was the maximum level of 4 feet,

the water level at one-half mile from the damsite would be reduced by 3 feet, resulting in a maximum water level of 1 foot. Under normal operating conditions, the backup water level at the dam would be less than 4 feet. Applying Woodward's elevation dropoff analysis, the 3-foot dropoff from the dam would place upstream water levels at less than 1 foot. According to the standards cited by the director, 1 foot or less is an ideal water level condition for whooping crane roosting.

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. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). A decision is arbitrary when it is made in disregard of the facts and without some basis which would lead a reasonable person to the same conclusion. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). The director's erroneous statement of the evidence and his erroneous calculations regarding the water level formed an arbitrary basis for his rejection of the commission's report.

As a further basis for rejecting the commission's report, the director referred to the April 11, 1989, letter from the acting field supervisor of the Nebraska-Kansas Field Office of the U.S. Fish and Wildlife Service. The director claimed this letter undermined the commission's determination that the proposed site would not jeopardize whooping cranes. In my opinion, the director arbitrarily used this letter to reject the commission's report. The field supervisor's conclusion in the letter was that he agreed with the Bureau of Reclamation's finding that "the currently proposed project would not likely adversely affect whooping crane designated critical habitat, [or] whooping crane roosting habitat morphology."

The director ignored this statement and instead noted the letter's passing concern about the precise location of the diversion dam. As set forth above, the letter concludes that "this issue will be addressed in the advanced planning phase of the project and will be resolved at that time." The letter does not state that relocation of the proposed damsite is required to protect whooping crane roosting habitat. It merely states that the

reported whooping crane sighting created a basis for concern about the precise location of the dam. The letter clearly anticipates that the project will go forward and that any risk presented to whooping crane habitat would be investigated further and would be addressed in later phases of the project development. There is no evidence that any further investigation or adjustment occurred, and the director does not cite to evidence in the record which suggests that these concerns were not addressed during later project planning stages. There is no evidence that the U.S. Fish and Wildlife Service or the Bureau of Reclamation ever again expressed any concerns about the proposed placement of the diversion dam.

The conclusion that the director makes from the letter is not supported by other evidence relied upon by the director. The letter was written under the assumption that the whooping cranes roosted at the location of the sighting. However, the testimony of Ken Strom, the biologist who was present at the whooping crane sighting, does not establish that the whooping cranes roosted at the location of the sighting. Strom testified that he saw the birds resting on or flying over the river at a spot which he indicated on a map was approximately one-half mile from the proposed damsite. Strom stated that although he watched the birds for approximately 30 minutes, he never saw them roosting on the river at that spot. He testified that he simply assumed they had roosted there. In my opinion, this is not a sufficient evidentiary basis for making a claim that this sighting "completely undermin[es]" the commission's determination that the proposed damsite will not disrupt whooping crane roosting habitat, and did not support the director's rejection of the commission's report. A sighting of three whooping cranes approximately one-half mile from the proposed damsite cannot be the basis for a denial of the applications in view of our Constitution's strong mandate that "[t]he right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest." See Neb. Const. art. XV, § 6.

Finally, the director concludes that "[f]rom a public interest perspective, denial of the applications should be based

upon an absence of established need to augment existing water supplies now obtained from local ground water sources." In my opinion, this conclusion does not conform to the law. The law does not permit the director to determine that the public interest demands that Central Platte's applications be denied on the basis of the director's opinion about the necessity of the proposed project.

WHITE, C.J., concurring.

I write separately to address issues raised by the dissent and to comment on the appropriate standard of review of administrative decisions.

The Legislature created the Department of Water Resources (DWR) to act as an arm of the executive branch, with the DWR occasionally acting in a quasi-judicial capacity. Ours is the first judicial review of DWR decisions, and accordingly, we proceed mindful of the fact that the DWR is not bound by the rules of evidence, civil procedure, or many of the other rules governing proceedings in the judicial branch.

A review using the "arbitrary and capricious" standard requires considerable deference to the judgment and expertise of the agency. A decision is arbitrary and capricious

> if the agency has relied on factors which [the legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). This description does not apply to the director's decision. A decision is not arbitrary and capricious merely because it ascribes greater weight to some pieces of evidence, so long as some evidence does support the decision.

The dissent points to evidence from which the director has drawn conclusions, arguing that those conclusions respond to unlikely environmental scenarios. The conclusions are not without support, however, even if they derive from the worst-case scenarios presented by the experts who testified.

Rather, the conclusions serve to err on the side of caution to protect a threatened species that will be harmed if the worst of the presented scenarios comes to pass.

Erring on the side of caution is not the same as "in disregard of the facts and without some basis which would lead a reasonable person to the same conclusion." In insinuating that the director should have disregarded the worst-case scenario and based his conclusions on different facts that the dissent considers to be weightier or more important, the dissent conducts its own finding of fact—but finding facts is not within our province in this case. This court is not a super regulatory body to review the policy or wisdom reflected in determinations made by the DWR as to such issues.

It appears that the DWR has acted within its jurisdiction, and there is some competent evidence to sustain its findings and order. As such, this court cannot interject itself into the realm of the executive's discretion as to what action should be taken to avert a threat to an endangered species.

RAYMOND AND NEGOSHIA GUSTIN, APPELLEES, V. GLEN SCHEELE, APPELLANT.

549 N.W.2d 135

Filed June 14, 1996. No. S-94-215.

1. **Equity: Quiet Title.** A quiet title action 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.
3. **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.

4. **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.
5. **Constitutional Law: Railroads: Highways.** Railways heretofore constructed, or that may hereafter be constructed, in this state are declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law.
6. **Railroads: Right-of-Way: Eminent Domain: Adverse Possession.** A right-of-way for the construction of a railway acquired by condemnation proceedings is not subject to alienation by adverse possession so long as a railroad is operated thereon.
7. **Constitutional Law: Eminent Domain: Legislature: Real Estate: Corporations.** The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the Legislature of the property and franchises of incorporated companies already organized, or hereafter to be organized, and subjecting them to the public necessity the same as of individuals.
8. **Railroads: Eminent Domain: Easements: Real Estate.** A railway company may, by condemnation proceedings, in the exercise of the power of eminent domain, acquire a right of possession and easement over real estate for the purpose of constructing and operating a railway.
9. **Railroads: Eminent Domain: Real Estate.** It is not within the power of a railway company to take, by condemnation proceedings, the right of possession of a private owner of lands for any other purpose than for a public use, and it holds the right of possession only for such purpose.
10. **Real Estate.** A property owner holding property in fee simple is permitted to freely alienate any part of his or her property.
11. **Real Estate: Adverse Possession: Conveyances.** An adverse possessor acquiring property held in fee simple does not acquire more than he could have acquired in a conveyance from the original owner.
12. **Railroads.** Railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways.
13. **Railroads: Real Estate.** A railroad acquiring property in fee simple for the use of its railway line has discretionary powers in determining what amount of land is necessary for the use of its railway operations.
14. **Railroads: Real Estate: Adverse Possession.** Railroad property acquired by private sale and held in fee simple, which has not been designated for the railroad's line or other railroad operations, is subject to adverse possession.
15. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period of 10 years.
16. **Adverse Possession: Real Estate.** The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another.

17. ____: ____. An adverse possessor can succeed in his claim even if he does not know he is occupying land not included in his deed or chain of title.
18. **Adverse Possession: Real Estate: Boundaries: Proof.** The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Charles D. Humble and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

Jeffrey L. Stoehr, of Stoehr & Searson, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiffs-appellees, Raymond and Negoshia Gustin, brought this quiet title action for the purpose of establishing the south boundary line to real property owned by the Gustins, and the north boundary line to real property belonging to defendant-appellant, Glen Scheele. The parties' lots had previously been separated by a railroad right-of-way owned by the Missouri Pacific Railway Company (railroad). Scheele purchased the right-of-way property of the railroad, and a dispute arose as to whether the Gustins were possessing former railroad right-of-way property. The district court found in favor of the Gustins on the theory of adverse possession, quieted title in the Gustins, and permanently enjoined Scheele from interfering with the Gustins' use of their land. Scheele appeals.

Scheele assigns five errors, which can be consolidated into three. Scheele contends that (1) the district court erred in holding that Neb. Const. art. X, § 4, does not prevent railroad property located in the State of Nebraska from being adversely possessed, (2) the district court erred in holding that the limitations period for adverse possession of a railroad right-of-way could commence before the railroad has abandoned the track or line construction on the right-of-way, and (3) the district court erred in concluding that the Gustins had

sustained their burden to prove they and their predecessors in title had satisfied the requirements of adverse possession.

In 1887, the railroad acquired property from private owners for the use of its railroad. These deeds did not provide a formal metes and bounds description. The deeds only described the property as "[a] strip of ground one hundred feet wide it being Fifty feet on each side of the center line of the Railroad of said Company with all additional strips of land said Railroad Company may require or may have taken or used to construct its said railway line . . . ." The parties do not dispute that this property was acquired by the railroad in fee simple.

In April 1982, the Gustins acquired by warranty deed the ownership of Lots 20 and 22 of Irregular Tracts in the south half (S 1/2) of Section 31, Township 8 North, Range 8 East of the 6th P.M., Lancaster County, Nebraska. These lots' southern borders abutted the railroad right-of-way. The Gustins' lots have never been described by any particular metes and bounds descriptions. Specific to this appeal is the location of the south boundary line of Lot 20.

The west end of the south border of Lot 20 contains an extrusion in a southerly direction that is enclosed by the Gustins' fence. Raymond Gustin testified that he measured this extrusion to be approximately 10 feet in width north to south by 328 feet in length east to west. Gustin and others testified that this fenced extrusion existed at the time the Gustins acquired the property. Gustin's father testified that the fence line had been in exactly the same location for the past 75 years. Gustin also testified that the southern fence line's distance from the center of the railroad right-of-way varied from approximately 28 feet to 52 feet.

Gustin testified that since they purchased the property in 1982, the Gustins have used the full extent of the property for agricultural purposes such as cattle grazing. Also, at some point during his possession of the property, Gustin ran an electric wire along the inside of the fence to keep cattle from escaping. He testified that the Gustins have maintained and repaired the southern fence line of the property throughout their ownership. While the railroad was still in operation, the

railroad maintained the property south of the fence by removing noxious weeds and mowing, but did not maintain any property north of the fence line.

Gustin also testified that other than Scheele's actions, there has been no interruption in the Gustins' use of the land that makes up the extrusion on the southern border of their property.

In 1985, the railroad discontinued the operation of its line in this area. On April 30, 1987, Crete Branch, Inc., obtained title to the right-of-way property from the railroad through quitclaim deed.

On February 9, 1993, Scheele acquired title to the railroad right-of-way by quitclaim deed from Crete Branch, Inc. The quitclaim deed described the property as:

> A strip of land, varying in width, 100 to 150 feet in width, and being the former right-of-way of the Missouri Pacific Railway Company, upon and through the South Half of the South Half (S1/2S1/2) of Section 31, Township 8 North, and Range 8 West of the Sixth Principal Meridian, Lancaster County, Nebraska.

After acquiring this property, Scheele had it surveyed by Dennis D. Simonds of Allied Surveying Company. This survey depicts a boundary line vastly different from what the Gustins treated as the boundary. Rather than depicting a southerly extrusion at the west end of the property of an area of 10 by 328 feet, the survey depicts a northerly jog at the west end of the property approximately 50 feet in width by 700 feet in length. In other words, Scheele contends that the railroad owned an additional 50- by 700-foot strip of land north of the center of the railroad tracks, making the railroad's property in this area 100 feet wide north of the center of the tracks.

Simonds testified that to perform his survey, he used and relied on the original deeds, right-of-way maps from the Lancaster County engineer's office and the Union Pacific Railroad, and a survey of a lot adjacent to Lot 20. He testified that he conducted a physical inspection of the property, looking for physical features such as culverts, bridges, and abutments. He then compared his actual dimensions with the

dimensions provided on the maps in order to set the boundaries as depicted in his survey.

After receiving the survey from Simonds, Scheele removed portions of the preexisting fence and built his own fence, moving the fence line to the position he believed to be the north end of his property as indicated by the survey.

On July 23, 1993, as a result of Scheele's conduct, the Gustins brought this action to quiet title in the disputed property. They alleged in their petition that they acquired title to the area enclosed by the original fence line by adverse possession. The Gustins sought that title to "all property located north of the original south fence line and not included within the platted description of Lot 20, if any, be quieted and confirmed in the plaintiffs as against the defendant . . . ." They also sought injunctive relief and damages.

On December 9, the district court issued an order quieting title to the strip of land in the Gustins, and permanently enjoining Scheele from entering the Gustins' property. In this order, the district court judge stated, "The south line of the strip in question, is more than 50 feet from the center line of the property granted to the railroad. There is no evidence that the railroad ever acquired the strip as used in question, except conjecture on the part of the surveyor." The judge also stated that "[t]he preponderance of the evidence shows that the plaintiffs and their predecessors in title, have been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a period of over ten years as to the defendant."

On December 16, Scheele filed a motion for new trial, contending, among other things, that there was an irregularity in the district court judge's December 9 order which prevented Scheele from having a fair trial. Specifically, Scheele's motion stated:

> On page 3 of the Court's Order, the following is found: "[T]he south line of the strip in question, is more than 50 feet from the center line of the property granted to the railroad[.]" Other references in the Order to the 10' x 328' strip of land seems [sic] to locate the south side of

> the strip 40 feet from the center line of the former railroad right-of-way.

On January 27, 1994, the district court entered a modified order which again quieted title in the Gustins and permanently enjoined Scheele from entering the property. This modified order was the same as the court's original order in every respect except that it no longer contained the judge's finding that the strip of land was more than 50 feet from the centerline of the right-of-way. The judge ordered that

> title to the property described as a strip of land 10' x 328' on the south side of Lot 20 of Irregular Tract, located in the south half, Section 31, Township 8 North, Range 8 East of the 6th P.M., Lancaster County, Nebraska, which is encompassed by a boundary line fence, is confirmed and quieted in the plaintiffs as to the defendant.

Scheele appeals from the modified order of the district court.

A quiet title action sounds in equity. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995). 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. *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *City of Lincoln v. Townhouser, Inc.*, 248 Neb. 399, 534 N.W.2d 756 (1995).

The Gustins contend that the property line dispute in this case can be resolved under the theory of acquiescence and recognition, rather than adverse possession. We dispose of this contention before addressing Scheele's assignments of error regarding adverse possession.

It is true that 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. *Crystal Clear Optical v. Silver*, 247 Neb. 981, 531 N.W.2d 535 (1995). However, the Gustins failed to plead the theory of acquiescence and recog-

nition, as required by Neb. Rev. Stat. § 34-301 (Reissue 1993). Moreover, 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. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994). Because the theory of recognition and acquiescence was not put in issue by the pleadings, it will not be considered on appeal.

Regarding the district court's finding based on adverse possession, we first find it necessary to ascertain whether railroad property is involved, for the reason that additional issues arise if an adverse possessor is claiming title to railroad property. The original railroad deeds granted a 50-foot strip north of the center of the railway tracks. Raymond Gustin testified that his fence line varied from 28 to 52 feet in distance from the center of the tracks. Therefore, without even considering whether Simonds' survey of the property accurately depicted the railroad boundary, at least a portion, if not all, of the strip of land in question is former railroad property as described in the deed.

Railroads are somewhat unique in that they are private corporations conducting their operations for the general welfare of the public and are regulated by the state's Public Service Commission. Railroads, although they are private corporations, also can acquire land by eminent domain for their use. Neb. Rev. Stat. § 74-308 (Reissue 1990).

Moreover, railroad lines are characterized as public highways in this state. Article X, § 4, of the Nebraska Constitution declares railroads public highways and provides, in relevant part: "Railways heretofore constructed, or that may hereafter be constructed, in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law."

Scheele contends that the land in question cannot be adversely possessed because it was originally railroad property. He argues that the statutory period for adverse possession of railroad property cannot commence until the railroad has completely abandoned the property. Scheele claims that the railroad in this case did not abandon the property until 1985,

and therefore the Gustins' action for adverse possession, commenced in July 1993, fails because the statutory period has not been satisfied.

In support of this contention, Scheele contends that article X, § 4, as construed in *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845, 211 N.W. 206 (1926), prevents railroad property from being subject to adverse possession until the railroad has completely ceased service and abandoned the property.

In *Edholm*, this court held that a right-of-way for the construction of a railway acquired by condemnation proceedings is not subject to alienation by adverse possession so long as a railroad is operated thereon.

This court's reasoning in support of the holding in *Edholm* was largely dependent on the fact that the property was obtained by condemnation proceedings. The court first acknowledged, "Whether title by adverse possession may be acquired to lands forming a part of the right of way of a railroad corporation, acquired in the exercise of the power of eminent domain, is an open question in this state." *Id.* at 847, 211 N.W. at 207.

The court then discussed the two state constitutional provisions it found applicable to the facts. It first discussed article X, § 4, mentioned above, pertaining to the classification of railways as public highways, then discussed Neb. Const. art. X, § 6, which states:

> The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature, of the property and franchises of incorporated companies already organized, or hereafter to be organized, and subjecting them to the public necessity the same as of individuals.

The court then noted that under the state Constitution, "a railway company may, by condemnation proceedings, in the exercise of the power of eminent domain, acquire a right of possession and easement over real estate for the purpose of constructing and operating a railway." 114 Neb. at 847, 211 N.W. at 208. The court also concluded that pursuant to article X, § 6, this right may be acquired only for a public use, stating, "It is not within the power of a railway company to

take, by condemnation proceedings, the right of possession of a private owner of lands for any other purpose than for a public use, and it holds the right of possession only for such purpose." 114 Neb. at 847-48, 211 N.W. at 208.

The court further observed:

> A railway company may not, by its voluntary act, alienate its right of way to private individuals, to be used for private purposes inconsistent with that for which the right of way was acquired. If it could do so, then it would be possible to condemn and take private property, ostensibly for a public purpose, and immediately convert it for a private purpose. It would be permitting, by indirection, the condemnation of private property for a private purpose, which our law does not sanction.

Id. at 848, 211 N.W. at 208.

The *Edholm* court continued:

> If a railway company cannot voluntarily alienate any part of its right of way so long as it is using the same for railway purposes, it is difficult to perceive how, by its inaction, it can permit title to be acquired, and it is also difficult to perceive how one can acquire a greater right against a railway company by adverse possession than he can acquire by a conveyance from it.

Id.

In conclusion, the *Edholm* court stated:

> We do not wish to be understood as holding that a railroad right of way, obtained by condemnation proceedings, may not be divested by adverse possession when there has been full abandonment of the right of way, such as where the railroad company removes its tracks from the right of way and places them in an entirely different location.

Id. at 849, 211 N.W. at 208.

The holding and reasoning set forth in *Edholm* are correct when analyzing an adverse possession claim of railroad property that was originally acquired by condemnation. It is apparent, however, that the *Edholm* court did not address the issue of whether its holding would apply to a claim of adverse possession of property originally acquired by a railroad through

private sale and held in fee simple—the facts of this case. Therefore, we must determine whether the holding in *Edholm* should be extended to apply to a claim for adverse possession of railroad property acquired by a railroad in fee simple, rather than by condemnation.

This distinction has previously been noted by the court. In *Chicago, R. I. & P. R. Co. v. Welch*, 83 Neb. 106, 118 N.W. 1116 (1908), the court determined whether a party who subsequently acquired title to property originally granted to a railroad in fee simple was protected under the state's recording statutes by recording his deed first. The railroad in *Welch* acquired property in fee simple for the use of its railroad line. The grantors of the railroad property then platted a village on adjacent land owned by them. This plat, however, overlapped the description in the deed conveyed to the railroad. The railroad never used the portion of the land which was contained in the village plat. The defendant subsequently purchased from the original grantors two lots which were located within the railroad's property. The defendant filed his deed before the railroad filed its deed to the land.

The *Welch* court first noted:

> The briefs of counsel contain a learned and instructive argument relative to the law of adverse possession as applied to a railroad right of way, but we do not consider that subject an important one in the instant case. Plaintiff did not acquire the land in dispute by condemnation proceedings, but by warranty deed.

Id. at 108, 118 N.W. at 1116. The court ultimately held that the defendant was protected under the state's recording statute, determining that the defendant was a bona fide purchaser and filed his deed without notice of the railroad's ownership.

As the *Welch* case indicates, a railroad holding title to property in fee simple can be divested of its property.

The Supreme Court of Wisconsin has recently held that railway property acquired by means of a private sale is subject to divestiture by adverse possession. *Meiers v. Wang*, 192 Wis. 2d 115, 531 N.W.2d 54 (1995). Although Wisconsin does not appear to have a state constitutional provision declaring railroads public highways, Wisconsin statutes give railroads the

power to condemn property and operate railway lines thereon when the state deems the railway line will serve a public convenience and necessity. See Wis. Stat. Ann. §§ 32.02 (West 1989) and 191.01 (West 1992).

The *Meiers* court, addressing the appellant's argument that railroad property could not be adversely possessed, stated that

> public policy does not bar a private citizen's claim for adverse possession of a railroad right-of-way when the railroad . . . acquired the property by means of a private sale. The nature of a railroad right-of-way acquired by means of a private sale is distinctly different from a thoroughfare dedicated as a public road by the state. The dispute in this case involves private parties and does not, therefore, implicate the state or its interest in acquiring the land for a public purpose.

192 Wis. 2d at 129, 531 N.W.2d at 60.

The concerns raised by the *Edholm* court in regard to condemned property do not arise in a case such as the one at bar. A property owner holding property in fee simple is permitted to freely alienate any part of his or her property. See *Andrews v. Hall*, 156 Neb. 817, 58 N.W.2d 201 (1953). An adverse possessor acquiring property held in fee simple does not acquire more than he could have acquired in a conveyance from the original owner.

Also, " 'railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways . . . .' " *Chicago & N. W. R. Co. v. State*, 74 Neb. 77, 80, 103 N.W. 1087, 1088 (1905). Therefore, a railroad acquiring property in fee simple for the use of its railway line has discretionary powers in determining what amount of land is necessary for the use of its railway operations. Holding the property in fee simple, the railroad could have alienated the property not used for its railway purposes to individuals. See Neb. Rev. Stat. § 74-305 (Reissue 1990) (repealed 1994).

On the other hand, as noted in *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845, 211 N.W. 206 (1926), by condemnation, a railroad only acquires an easement or

right-of-way over the land for the limited use of operating its railroad for the welfare of the public. The state permits a railroad to acquire and hold the condemned land for the sole purpose of establishing a public highway. See § 74-308; article X, § 4. This easement is based on public necessity and serving the welfare of the citizens of this state. The condemnee, however, does not relinquish his or her possessory interest in the underlying land.

Based on the foregoing, we find that railroad property acquired by private sale and held in fee simple is subject to adverse possession.

We do recognize, however, that public highways cannot be adversely possessed. *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966); *Barrett v. Hand*, 158 Neb. 273, 63 N.W.2d 185 (1954). As mentioned previously, under the state Constitution, railroads are declared public highways. Therefore, to be consistent with the Constitution and case law of this state, our holding is limited to railroad property, held in fee simple by a railroad, which has not been designated for its railroad line or other operations such as stations, depots, sidetracks, et cetera.

The property allegedly adversely possessed in this case has not been declared a public highway and therefore does not deserve protection under the state Constitution. The railroad determined what portion of its property held in fee simple was required for railway purposes. This is evidenced by the fence line that has been in existence, according to some testimony, for over 75 years. Also, the railroad maintained the property only up to fence line, mowing and controlling noxious weeds. The railroad did not maintain any property north of the fence line bordering the Gustins' property. These circumstances reflect the railroad's intention that the land south of the fence be designated for railroad purposes, but not the property located to the north of the fence. The railroad, holding title in fee simple, could have conveyed the property not being used for railway purposes to private owners. Rather than conveying the property in question, the railroad failed to assert its rights over the property. Therefore, the property in question in this case was subject to adverse possession.

Scheele also contends that even if the property in question was susceptible to adverse possession, the Gustins failed to meet their burden of proving that they acquired the land by adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period of 10 years. *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the land is in adverse possession of another. See *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967).

Moreover, an adverse possessor can succeed in his claim even if he does not know he is occupying land not included in his deed or chain of title. *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965). However,

> the placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time.

Martin v. Kozuszek, 216 Neb. 705, 708, 345 N.W.2d 26, 27-28 (1984).

The Gustins contend that they and their predecessors in interest have satisfied these requirements beyond a preponderance of the evidence.

The evidence presented at trial indicates that the strip of land in question has been enclosed by a fence which the Gustins believed to be the southern border of their property when they purchased the land in 1982. Although it is not clear from the evidence whether the railroad or the Gustins' predecessors in interest erected the fence, one witness testified that this fence was "typical railroad fence" and had been in place for approximately the last 75 years. The Gustins used the full extent of the land in question for cattle grazing throughout the extent of their ownership of Lot 20. Moreover, prior to

Scheele's actions in 1993, neither the railroad nor its successors in interest had maintained or interfered with the property north of the fence line, although the railroad did maintain the property south of the fence.

After a de novo review of the evidence, we conclude that the Gustins have satisfied the requirements of adverse possession. Therefore, we affirm the order of the district court quieting title to the area of land located in the South half of Section 31, Township 8 North, Range 8 East of the 6th P.M., Lancaster County, Nebraska, which is enclosed by the boundary fence at the southern end of Lot 20.

AFFIRMED.

RONALD J. SCHOLL ET AL., APPELLANTS, V. COUNTY OF BOONE, NEBRASKA, APPELLEE.

549 N.W.2d 144

Filed June 14, 1996. Nos. S-94-232 through S-94-236.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Political Subdivisions Tort Claims Act: Counties: Highways: Bridges.** The duty of care imposed by the Political Subdivisions Tort Claims Act upon a county is to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
4. **Political Subdivisions Tort Claims Act: Negligence: Proof.** To recover under the Political Subdivisions Tort Claims Act, a claimant must prove the four basic

elements of negligence, namely, duty, breach of duty, proximate causation, and damages.

5. **Counties: Highways: Liability.** A county is not and should not be considered an insurer of the safety of travelers on its roads.
6. **Negligence: Presumptions: Proof.** Negligence is never presumed, and the mere happening of an accident does not prove negligence as a matter of law.

Appeal from the District Court for Boone County: ROBERT R. STEINKE, Judge. Affirmed.

Jeffrey L. Stoehr, of Stoehr & Searson, for appellants.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Appellants, Ronald J. Scholl; Pamela S. Scholl; and Ronald J. Scholl, as guardian of the minor children, Amanda J. Scholl, Derek A. Scholl, and Jared V. Scholl (the Scholls), filed a petition in the Boone County District Court under the Nebraska Political Subdivisions Tort Claims Act, alleging that appellee, Boone County, was negligent in replacing two bridges with two culverts on West Raeville Road, a county road in Boone County, because the culverts were inadequate to drain the water under the road.

The Scholls alleged in their second amended petition that Boone County was negligent in designing the culverts, resulting in injuries and damages to the Scholls when their vehicle, while traveling on West Raeville Road, crashed into an embankment created by a washout during a rainstorm. At trial, central issues were whether the culverts were adequate to drain water from the relevant area during a rainstorm of reasonably expected severity and how unusual the amount of rainfall was on the day of the accident.

This is an appeal from a judgment of the Boone County District Court, following a bench trial on the issue of liability alone, finding that Boone County had no liability because it did not breach any duty owed to the Scholls.

The Scholls appealed to the Nebraska Court of Appeals, asserting that the district court erred by not finding that Boone County was negligent as a matter of law for placing a structure in a natural drainageway that was insufficient to accommodate historic rainfall events; not finding that Boone County was negligent as a matter of law for breaching its duty to address known dangerous conditions or defects that could be discovered through the exercise of due care and which led to the culvert failure; using a "balancing test" to compare Boone County's negligent acts to the storm event; not finding as a matter of law that Boone County's structure did not meet reasonable engineering standards; not following the undisputed physical facts and conditions established at trial so as to find Boone County's acts to be the sole and proximate cause of the Scholls' loss; and, finally, determining the storm event to be the proximate cause of the Scholls' loss.

We removed the case from the Court of Appeals' docket, pursuant to our power to regulate the caseloads of the lower courts. We affirm.

BACKGROUND

In April and May 1989, Boone County replaced two dilapidated and rotted wooden "cross-overs" (so called because they were both under 20 feet in length and were therefore not required to be inventoried or regularly inspected) with two culverts, one 48 inches in diameter and the other 72 inches in diameter, located about 200 yards apart from each other in a low-lying area of West Raeville Road, a rural gravel road, in Boone County, Nebraska. On September 3, 1989, during a rainstorm, the Scholls left Elgin, Nebraska, at around 11 p.m. and turned off of Highway 14 onto West Raeville Road. When the Scholl pickup truck traveled over the 72-inch culvert, the soil materials around the culvert either collapsed beneath them or had been washed out. The Scholl vehicle, in which all of the Scholls were passengers, dropped into a hole. The Scholls allege that damages occurred because of the negligence of Boone County when their vehicle struck an embankment created by the washout of the 72-inch culvert during the rainstorm. This action followed.

By agreement of the parties, these five negligence actions, brought pursuant to the Nebraska Political Subdivisions Tort Claims Act, were consolidated for purposes of trial. By further agreement of the parties, the trial of these consolidated actions was bifurcated, with the issue of liability initially considered. Trial on the issue of liability lasted 8 days. Much of the testimony at trial consisted of expert testimony. A brief summary of relevant trial testimony follows.

Culvert Design

LeRoy Gerrard, Boone County highway superintendent, testified that he used what is called the Dickens formula to size the culverts. The Dickens formula is used to determine how much water will flow in a particular drainage area during a 4-inch, 24-hour rain. The formula takes into account the size of the drainage area in acres and the slope and contour of the land. Gerrard initially recommended one 84-inch culvert, but a Boone County road foreman suggested two culverts, one 72 inches and the other 48 inches in diameter. Gerrard agreed, on that basis that that would increase the amount of water which could travel through the culverts.

The Scholls' expert witness, John Payton, testified that Gerrard's use of the Dickens formula in sizing the culverts resulted in a negligent design and was not appropriate.

Boone County offered the testimony of Patrick Diederich, a registered civil engineer who specializes in hydrology. Diederich testified that the Dickens formula used by Gerrard would yield a design for a 2- to 5-year storm, which by itself might be inadequate. However, Diederich noted that such formulas, including the "modified rational formula" used by Payton, fail to take into account any "storage" values for water that is expected to be routed through the culverts. "Storage" was defined as a backup of water due to the terrain in the area in front of the culvert which alters the result of both the Dickens formula and the modified rational formula. Diederich testified that "routing" formulas for watershed analysis have existed for many years and take such storage into account. Diederich testified that the "HEC-1 formula," often utilized

by the Army Corps of Engineers, is such a "routing" formula for watershed analysis.

Applying the HEC-1 formula, Diederich opined that the culverts designed by Gerrard were designed for a 10- to 25-year storm. It was the further opinion of Diederich that Boone County's design of the culverts in question was valid and appropriate according to accepted engineering standards.

RAINFALL

Calvin Naegelin, a meteorologist, testified that the storm in question produced 3 to 5 inches of precipitation in the area of West Raeville Road in question in a 3- to 5-hour period, with the most significant rainfall intensity likely taking place between 8 and 11 p.m.

Testimony of other witnesses revealed that rainfall on September 3, 1989, in areas around West Raeville Road, varied from 2.08 inches to 5.5 inches or more.

Keith Schumacher testified that the September 3, 1989, storm produced the hardest rain he could recall.

Kathy Beckman testified that it had rained extremely hard for 45 minutes to 1 hour and that when she traveled across the culverts on West Raeville Road on the night of September 3, 1989, followed by her parents, who were concerned for her safety, she observed standing water at levels she had never seen during the 9 years she had lived in the area.

Diederich testified, upon the storm data available from September 3, 1989, that it was his opinion the storm could be classified anywhere between a 10- to 100-year storm.

JUDGMENT

At the conclusion of the trial, the trial court took Boone County's motion for directed verdict under advisement and subsequently overruled the motion.

In its final order, the court stated:

> Having determined that [the Scholls] have failed to prove [Boone County] has breached any duty owed by it to them, the Court finds for [Boone County] and against [the Scholls] as to the issue of liability. Accordingly, each of the respective Petitions of [the Scholls] are ordered

dismissed, with the costs of each action taxed against [the Scholls].

ASSIGNMENTS OF ERROR

The Scholls assert that the district court erred when:

a) It failed to find that [Boone County] was negligent as a matter of law for placing a structure in a natural drainageway that was insufficient to accommodate historic rainfall events.

b) It failed to find that [Boone County] was negligent as a matter of law for breaching its duty to address known dangerous conditions or defects that could be discovered through the exercise of due care and which led to the culvert failure.

c) It used a "balancing test" to compare [Boone County's] negligent acts to the storm event which is contrary to law.

d) It failed to find as a matter of law [Boone County's] structure did not meet reasonable engineering standards.

e) It failed to follow the undisputed physical facts and conditions established at trial so as to find [Boone County's] acts to be the sole and proximate cause of [the Scholls'] loss.

f) It determined the storm event to be the proximate cause of [the Scholls'] loss.

STANDARD OF REVIEW

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson, supra*; *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995); *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995).

ANALYSIS

The Scholls' assignments of error basically contend that the trial court erred in not accepting the Scholls' argument that Boone County was negligent in designing, constructing, and maintaining the drainageway through West Raeville Road, specifically in removing the original two wooden bridges and replacing them with the two culverts.

This court has defined the duty of care imposed by the Political Subdivisions Tort Claims Act upon a county as " '[using] reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.' " *Millman v. County of Butler*, 244 Neb. 125, 131, 504 N.W.2d 820, 824 (1993), quoting *Hendrickson v. City of Kearney*, 210 Neb. 8, 312 N.W.2d 677 (1981).

To recover under the Political Subdivisions Tort Claims Act, a claimant must prove the four basic elements of negligence, namely, duty, breach of duty, proximate causation, and damages. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). We have also noted that a county is not and should not be considered an insurer of the safety of travelers on its roads. *Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978).

The Scholls presented no evidence that the county violated any statutory standards, regulations, or policies specifically prescribing a course of action or conduct for sizing a drainage area, selecting a culvert size, or replacing "cross-overs" with culverts, as Boone County did in this case.

The record, however, does establish that the many engineering formulas utilized to design and size culverts, and testified to during the course of the trial, are subject to valid criticisms and that the utilization of any specific formula can logically be defended, or criticized, depending upon the engineering assumptions made and the principles and variables used.

The evidence establishes that the storm of September 3, 1989, was a substantial event. Negligence is never presumed, and the mere happening of an accident does not prove negligence as a matter of law. *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986). The burden of establishing Boone County's negligence rests with the Scholls.

Considering the testimony and all other evidence received during the course of the trial in a light most favorable to Boone County, that is, resolving every controverted fact in favor of Boone County, it being entitled to the benefit of every inference that can reasonably be deduced from the evidence, we find that the court was not clearly wrong in its finding that the Scholls failed to prove that Boone County had breached any duty owed by it to them. See, *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

The Scholls' assertion that "[the court] used a 'balancing test' to compare [Boone County's] negligent acts to the storm event which is contrary to law" is not supported by the record.

CONCLUSION

Having found that the trial court was not clearly erroneous in its judgment, we hereby affirm the lower court's judgment.

AFFIRMED.

CAPORALE, J., participating on briefs.

BETTY SMITH, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

549 N.W.2d 149

Filed June 14, 1996. No. S-94-599.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Limitations of Actions.** The point at which a statute of limitations begins to run must be determined from the facts of each case.
3. ____. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Shawn Elliott, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, John R. Thompson, and David T. Bydalek for appellees.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

The plaintiff-appellant, Betty Smith, on her own behalf and purportedly on behalf of all others similarly situated, seeks to recover from the defendant-appellee State of Nebraska income she claims to have lost as the result of being transferred, under the provisions of Neb. Rev. Stat. § 24-593 (Reissue 1995), from the employment of the city of Lincoln to that of the state. Following a trial solely on the issue of liability, the district court dismissed the suit as time barred. Smith then appealed to the Nebraska Court of Appeals. On our own motion, we, under our authority to regulate the caseloads of the two courts, removed the matter to our docket.

The sole question is whether the district court erred in ruling that the suit was not timely filed. Having been tried on stipulated facts, this matter presents only issues of law. On such questions, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *In re Interest of Archie C., ante* p.

123, 547 N.W.2d 913 (1996); *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

Section 24-593 was enacted as part of the statutory scheme which, among other things, eliminated municipal courts as of July 1, 1985, and transferred the personnel of said courts to the county courts. 1984 Neb. Laws, L.B. 13. Whereas funding for municipal court personnel had been provided by the cities in which the courts were located, Neb. Rev. Stat. § 26-106 (Reissue 1979) and *State, ex rel. Woolsey, v. Morgan*, 138 Neb. 635, 294 N.W. 436 (1940), funding for county court personnel is provided by the state, Neb. Rev. Stat. § 24-514 (Reissue 1995).

Section 24-593(1) reads:

> Any employee of a municipal court of a city of the primary or metropolitan class, except municipal judges, municipal probation officers, violations bureau staff, constables, and sheriffs, shall, on July 1, 1985, be transferred to the county court of the county where such city is located. The salary and classification of any transferred employee shall be subject to sections 24-513 [dealing with salaries of county court judges and employees and such judges' travel expenses] and 24-514 [dealing with funding of salaries, benefits, and expenses of county court judges and employees and other items], except that no employee shall incur a loss of income as a result of the transfer and any classification.

Prior to July 1, 1985, Smith was an employee of the municipal court of the city of Lincoln; on said date she, pursuant to the foregoing statute, became an employee of the state and was transferred to its employment classification and pay system. On May 30, 1991, Smith filed a contract claim with the State Claims Board, alleging that as a result, she had suffered a loss of income, more specifically, that she will receive a smaller contribution to her retirement fund from the state than she did from the city, lesser insurance benefits, and fewer paid nonworking days, and that she must work longer hours. For purposes of this analysis, we assume, but do not decide, that each of the losses claimed by Smith constitutes the loss of income contemplated by § 24-593(1).

On June 10, 1991, the State notified the claims board that it objected to the claim. Pursuant to the provisions of Neb. Rev. Stat. § 81-8,305(3) (Reissue 1994), the claims board thereafter notified Smith on June 20 that given the State's objection, it could not exercise jurisdiction over her claim. On August 9, Smith filed her district court petition.

In its answer to Smith's petition, the State asserted, among other things, that the cause of action was barred by the statute of limitations.

Neb. Rev. Stat. § 81-8,306 (Reissue 1994) provides, in part, that "[e]xcept as provided in section 25-213 [dealing with persons under legal disability], every contract claim permitted under the State Contract Claims Act shall be forever barred unless the claim is filed with the Risk Manager within two years of the time at which the claim accrued." Although Smith was transferred to state employee status on July 1, 1985, and did not file a claim until May 30, 1991, she maintains that a new cause of action accrued with each contribution to her retirement fund. The issue presented therefore is whether her cause of action accrued when she was transferred to state employee status or whether each contribution by the state to her retirement fund constituted the accrual of a new cause of action.

The point at which a statute of limitations begins to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994).

Both parties cite to *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994), as support for their respective positions. In that case, six firefighters filed suit against the employer, seeking to have their entire respective contributions to a pension plan returned to them in one lump-sum payment. They contended that the provisions of the pension plan which permitted nondisabled firefighters, whose employment had

been terminated before the age of retirement, to collect a lump-sum return of their contributions unconstitutionally and illegally discriminated against disabled firefighters. We hereafter refer to this aspect of *Bauers* as the pension cause. Four of the six firefighters also sought to have returned to them the amounts that the employer deducted from their monthly pension benefits equal to the workers' compensation benefits they each received. Henceforth, this phase of *Bauers* is called the compensation cause. The employer denied the claims, and the firefighters appealed to the trial court. The employer filed a motion for summary judgment, which was granted by the trial court. The court found that the claims accrued on the first date each of the firefighters was placed on the pension roll and that none of them had filed their claims with the employer within 1 year of the accrual of their claims, as required by Neb. Rev. Stat. § 15-840 (Reissue 1991). The firefighters then appealed to this court.

In connection with the pension cause, the firefighters argued that once they were placed on the pension roll, the employer had a continuing obligation to pay them, and, thus, their claims accrued each month a payment became due. In rejecting that argument and affirming the trial court's judgment in that regard, we wrote:

> Once the firefighters' employment was terminated and they were awarded their pensions, they became entitled to receive an installment each month and were not entitled to elect to collect a lump-sum payment. This limitation did not occur with each monthly installment, it occurred once—when each firefighter terminated his employment before he had reached the age of retirement and when such termination was not caused by death or disability.
>
> . . . The firefighters' claims for the return of their contributions does [sic] not arise from the installments to which they are entitled. The provisions of the plan do not permit any firefighters, disabled or otherwise, to elect at any time to collect the lump-sum amount of their contributions. Instead, Lincoln Mun. Code § 2.64.024 provides that *at the time of termination* certain firefighters may elect to collect the lump-sum amount. The last act

> which brought the firefighters within the provision at issue occurred when the firefighters terminated their employment.

(Emphasis in original.) *Bauers*, 245 Neb. at 642, 514 N.W.2d at 631.

However, in reversing the trial court's judgment with regard to the compensation cause, we wrote that

> once the firefighters were placed on the pension roll, such firefighters became entitled to each installment of the pension. [Citation omitted.] In this respect, pension benefits are similar to installment contracts, and courts have stated that with each installment a cause of action arises from that installment regardless of when the initial breach occurred. These courts, however, have also stated that the action which may arise from a particular installment is limited to that installment. An injured party must bring the action within the applicable statute of limitations, and although the same conduct occurred in relation to installments for which the statute of limitations had already expired, the aggrieved party may not recover for such installments. The recovery of damages, therefore, is limited to the installments which fell within the period of the applicable statute of limitations. . . .
>
> As to each pension installment from which the [employer] deducted workers' compensation benefits, the firefighters' claims to challenge the validity of such deductions accrued. [Citation omitted.] We emphasize, however, that such a claim accrued only to that particular installment; the firefighters do not have a general right to challenge at any time the validity of all of the deductions that occurred. The firefighters' claims flow from the terms of the plan, together with the [employer's] actions, in deducting for the workers' compensation benefits.

Id. at 643-45, 514 N.W.2d at 632-33. Thus, the firefighters' claims as to the election of a lump-sum payment of their pension contributions were barred because the cause of action accrued when they were awarded their pensions, but the claims as to the deductions for workers' compensation benefits (at

least for those deductions made within the statutory period) accrued each time an installment became due.

In deciding *Bauers*, we relied on *Barney v. City of Lincoln*, 144 Neb. 537, 13 N.W.2d 870 (1944). In that case, the plaintiff brought an action to recover pension benefits he maintained were due him from the employer. The plaintiff claimed that he entered the employment as a firefighter on December 10, 1923, and was continuously in that employment until November 18, 1928, when, he alleged, he became totally and permanently disabled as a result of an injury received in the line of duty. He then filed with the employer on July 27, 1942, an application for a pension, which was disallowed.

We determined that the statute of limitations barred the plaintiff's action, holding that the cause of action accrued on the date he became totally and permanently disabled. We explained:

> A pension law which provides for the payment of benefits based upon the monthly earnings of an employee, to be paid monthly upon the death, disability or retirement of the employee, does not create a continuing liability. The liability for the payment of the pension accrues when the events stated in the law occur which entitle the employee to a pension. . . . The fact that such liability is to be discharged under the provisions of the statute by monthly payments for the remainder of the life of the employee entitled thereto does not make the liability a continuing one in the sense that a new liability is created from day to day or month to month. An example of a continuing liability is where a person contracts to support another during his lifetime. In such case, every day that support is not afforded constitutes a breach,—the liability continues to exist up to the very day of the decease of the person to be supported. No analogous situation exists where the liability accrued by the happening of a certain event and the discharge of the liability thus accruing is by statute made payable by monthly installments during the remainder of the lifetime of the beneficiary.

144 Neb. at 541, 13 N.W.2d at 872.

The pension cause in *Bauers* is more analogous to the situation at hand than is the compensation cause thereof. Smith's cause of action stems from being transferred to the state's classification and pay system, not from any individual contribution the state has made to her retirement fund. In addition, the language in § 24-593(1), that "no employee shall incur a loss of income as a result of the transfer and any classification," delineates the rights of the employee at the time of transfer from city to state employee status, not on a continuing basis. While any damages Smith suffered may have increased with each contribution to her retirement fund, the cause of action itself arose from her transfer from city to state employee status.

The same reasoning applies as well to Smith's other claimed losses. As Smith's cause of action accrued on July 1, 1985, and she did not file a claim until May 30, 1991, or more than 2 years after accrual of the cause of action, § 81-8,306 bars her claim. The district court therefore did not err in dismissing her petition.

AFFIRMED.

CAPORALE, J., participating on briefs.

JOANN DOLBERG, APPELLANT, V. MOLLY PALTANI AND ERICKSON & SEDERSTROM, A CORPORATION, APPELLEES.

549 N.W.2d 635

Filed June 14, 1996. No. S-94-605.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

3. **Negligence: Liability.** Deciding that a party is negligent as a matter of law does not equate to a finding that the defendant is liable.
4. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence: Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
6. **Negligence: Juries: Appeal and Error.** When contributory negligence is pled as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.
7. **Motor Vehicles: Highways: Right-of-Way.** Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle.
8. ____: ____: ____. Under Neb. Rev. Stat. § 60-6,123 (Reissue 1993), a driver with a green light must yield the right-of-way to other vehicles and pedestrians lawfully within the intersection.
9. **Motor Vehicles: Highways: Negligence.** Absent exceptional circumstances, a motorist on a favored street with a green light does not have the duty to anticipate the negligence of a motorist on a cross street who runs a red light.
10. **Jury Instructions.** It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.
11. **Jury Instructions: Appeal and Error.** Conflicting instructions are erroneous unless it appears that the jury was not misled.

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

Julianne M. Dunn for appellant.

Dan H. Ketcham and Amy Sherman LaFollette, of Hansen, Engles & Locher, P.C., for appellee Paltani.

Christopher J. Tjaden, of Gross & Welch, P.C., for appellee Erickson & Sederstrom.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Joann Dolberg brought a negligence action against Molly Paltani and her employer, Erickson & Sederstrom, for injuries that Dolberg received in a car accident with Paltani. The jury rendered a verdict in favor of both defendants. Dolberg appeals. Because we conclude that Dolberg was prejudiced by

the trial court's submission of the issue of contributory negligence and erroneous instructions to the jury, we reverse.

FACTUAL BACKGROUND

This case involves an automobile collision that occurred on April 3, 1992, at the intersection of 25th and Douglas Streets in Omaha, Nebraska. At this intersection, Douglas Street is a four-lane eastbound one-way road, while 25th Street is a three-lane southbound one-way road. The intersection is controlled by a traffic light. Immediately preceding the accident, Dolberg was driving east on Douglas Street in the middle lane left of center, approaching the intersection with 25th Street. Paltani was proceeding south in the middle lane of 25th Street, approaching Douglas Street. On the northwest corner of the intersection of 25th and Douglas Streets is a parking lot; however, there is no testimony in the record to establish whether there were cars parked there at the time of the accident.

Jack Cook, who was operating a pickup truck approximately 1½ to 2 car lengths behind Dolberg, testified that as he began to approach the intersection at 25th Street, he saw the car operated by Paltani and ascertained that she was not going to stop at the traffic light. Cook applied his brakes and avoided entering the intersection, but witnessed the collision between Dolberg and Paltani. Cook testified that Paltani must have run a red light because the traffic light for Douglas Street was green.

Neither Dolberg nor Paltani saw the other before their collision. Dolberg testified that the light controlling traffic on Douglas Street was green, while Paltani testified that she did not remember the color of the light controlling traffic on 25th Street. When they collided in the intersection, the front end of Dolberg's car struck the right rear wheel area of Paltani's car. Dolberg testified that after the collision, she had a headache and her neck and shoulders hurt. Although she was offered the services of a rescue squad, she refused.

At trial, Dolberg and Paltani adduced conflicting medical testimony on the extent of Dolberg's injuries, which is not relevant to the disposition of this case. At the conclusion of the evidence, the court determined as a matter of law that Paltani

was negligent and was acting within the scope of her employment with Erickson & Sederstrom, her employer at the time of the accident. During the instruction conference, Dolberg raised an objection to two instructions, Nos. 7 and 10. However, the court overruled these objections and gave the instructions. The jury rendered a verdict in favor of both defendants.

ASSIGNMENTS OF ERROR

Dolberg assigns 13 errors. In light of our decision, we will discuss only four of Dolberg's assigned errors: The district court erred in (1) refusing to direct a verdict against the defendants, (2) submitting the issue of contributory negligence to the jury, (3) instructing the jury on the effect of the violation of a statute or ordinance, and (4) failing to define "efficient intervening cause" when that term was included in the instructions.

STANDARD OF REVIEW

A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995).

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

ANALYSIS

Failure to Direct Verdict Against Defendants

Dolberg assigns that the court erred in failing to direct a verdict of liability against each defendant. Dolberg argues that the court found Paltani to be negligent as a matter of law and that therefore the defendants were liable. However, deciding that a party is negligent as a matter of law does not equate to

a finding that the defendant is liable. See *Davis v. Phillips*, 215 Neb. 184, 337 N.W.2d 754 (1983) (finding court's refusal to direct verdict on liability proper when issue of contributory negligence is before jury).

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). A finding of negligence as a matter of law equates to a finding that the plaintiff has established the first two of those four elements. However, the issues of causation and damages remain for the jury's determination. See *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993).

It is undisputed that Paltani violated her obligation to stop at the red light and to yield the right-of-way to Dolberg. The court decided this issue as a matter of law. What remains for resolution is whether Paltani's negligent act resulted in any harm to Dolberg. We have held that determination of causation is, ordinarily, a matter for the trier of fact. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). As the issues of causation and damages must go to the jury, the trial court did not err in failing to direct a verdict of liability, which would require the court to usurp the fact finder's role.

Submitting Contributory Negligence to Jury

Dolberg assigns that the court erred in submitting the issue of contributory negligence to the jury. As Dolberg asserts, when contributory negligence is pled as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987).

Dolberg essentially claims that there was no possibility that she was contributorily negligent because she had a green light at the time of the collision. Neb. Rev. Stat. § 60-6,123(1)(a) (Reissue 1993) provides:

> Vehicular traffic facing a circular green indication may proceed straight through or turn right or left unless a sign at such place prohibits either such turn, but vehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such indication is exhibited.

Pursuant to § 60-6,123, a driver approaching a green traffic light is in the privileged position. However, we have previously held that intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982); *Reese v. Mayer*, 198 Neb. 499, 253 N.W.2d 317 (1977). See, also, *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). We have also held that "although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving." *Burrows v. Jacobsen*, 209 Neb. 778, 780, 311 N.W.2d 880, 883 (1981). In fact, we recently held, with regard to a road protected by stop signs, that a driver approaching an intersection is not in a favored position and entitled to proceed merely because that driver has the right-of-way. *Floyd v. Worobec, supra.*

We have also examined the question of whether a motorist was contributorily negligent in failing to recognize that another motorist would not stop. In *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984), a dumptruck failed to yield the right-of-way to another motorist. Although we stated that "we are not prepared to say that the driver of a motor vehicle must slow down at every intersection in anticipation that the driver of the vehicle on the nonfavored street is about to commit a negligent act," we also recognized that even a driver on a favored highway must keep a proper lookout. *Id.* at 840, 353 N.W.2d at 722. Furthermore, in *Sacco v. Gau*, 188 Neb. 808, 199 N.W.2d 605 (1972), a car and a truck collided in an urban intersection controlled by a traffic signal; however, each party claimed to have a green light. Nevertheless, we

found the evidence sufficient to sustain a finding that Gau had a green light, because two witnesses corroborated Gau's account that he had the green light. In discussing the issue of whether Gau was operating at a lawful speed, we noted that Gau "had a right to assume, if he had the right-of-way, that other drivers would respect his right-of-way and not run a red light." *Id.* at 812, 199 N.W.2d at 608. Additionally, we noted, "In view of the fact that Gau was entitled to assume that the Scapellato car would stop for the red light and could not reasonably have been expected to avoid the accident when it failed to do so, we cannot perceive wherein he was negligent." *Id.* at 813, 199 N.W.2d at 609.

Under § 60-6,123, a driver with a green light must yield the right-of-way to other vehicles and pedestrians lawfully within the intersection. We recognize that we have previously said that the motorist's right-of-way is subject to the rights of those already in the intersection. See, *Graves v. Bednar*, 171 Neb. 499, 107 N.W.2d 12 (1960); *Styskal v. Brickey*, 158 Neb. 208, 62 N.W.2d 854 (1954); *Laurinat v. Giery*, 157 Neb. 681, 61 N.W.2d 251 (1953). However, in each of these cases, there was evidence that the vehicle "already" in the intersection entered the intersection lawfully. Therefore, our previous holdings do not contradict the statutorily imposed duty to yield to those lawfully within the intersection.

However, Paltani did not enter the intersection lawfully. In light of the uncontroverted testimony that the light for Douglas Street was green, the trial court decided that Paltani ran the red light and was therefore negligent as a matter of law. Because she ran the red light, Paltani was not lawfully in the intersection. Again, it is undisputed that Dolberg had the green light. Paltani is asserting neither that she had the green light nor that she entered the intersection on a steady yellow, could not stop safely, and was thereby authorized to proceed cautiously. See § 60-6,123(2)(a). However, § 60-6,123 does not delineate the duty of a driver approaching a vehicle or pedestrian unlawfully in the intersection. Therefore, we must determine the duty of a driver with a green traffic light to keep a lookout for vehicles entering the intersection unlawfully from a cross street.

We hold that absent exceptional circumstances, a motorist on a favored street with a green light does not have the duty to anticipate the negligence of a motorist on a cross street who runs a red light. By exceptional circumstances, we mean where the driver could have easily avoided the accident by exercising the slightest degree of care. As no such extreme circumstances were present in this case, there was not sufficient evidence to support the court's submission of the issue of contributory negligence to the jury. By submitting the issue of contributory negligence to the jury, the court committed prejudicial error.

INSTRUCTION ON VIOLATION OF STATUTE OR ORDINANCE

Dolberg also alleges that the court erred in giving instruction No. 10 to the jury. Instruction No. 10 states:

> The violation of a statute or ordinance, if you so find, does not necessarily establish negligence. The violation is evidence of negligence which you may consider, along with all the other facts and circumstances, in deciding whether or not there was negligence proximately causing or contributing to cause an accident.

Dolberg alleges that this instruction was improperly submitted to the jury because there was no evidence that Dolberg violated a statute or ordinance. Dolberg argues that this instruction could only relate to Paltani's conduct in running a red light and that because her negligence was established as a matter of law, there was no need for this instruction. However, Paltani contends that the court gave instruction No. 10 because instruction No. 7 mentions the duty to exercise reasonable care. She argues that instruction No. 10 indicates that if Dolberg violated her duty to keep a proper lookout, the violation was only evidence of negligence and would not establish contributory negligence on her part.

We conclude that the court erred in giving this instruction. Paltani's negligence was established as a matter of law; therefore, no instruction on the effect of the violation of a statute was necessary. Furthermore, even if Dolberg failed to keep a proper lookout, this conduct may have been negligent, but was not a violation of a statute or ordinance.

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. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994). However, we note that it is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. *Farmers & Merchants Bank v. Grams, ante* p. 191, 548 N.W.2d 764 (1996); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). We conclude that by giving instruction No. 10, the court prejudiced Dolberg. By instructing the jury both that Paltani was negligent as a matter of law and that the violation of a statute was only evidence of negligence, the court created a contradiction in the instructions. Conflicting instructions are erroneous unless it appears that the jury was not misled. *Hamernick v. Essex Dodge Ltd., supra*. Finding no violation of statute on the part of Dolberg, the jury could only have concluded that instruction No. 10 applied to Paltani, when the issue of her negligence was not at issue in the case.

CONCLUSION

We conclude that Dolberg's substantial rights were prejudiced by the court's erroneous instruction and its submission of the issue of contributory negligence to the jury. Therefore, we reverse, and remand for a new trial. As we find that a new trial is necessary, we need not reach Dolberg's remaining assigned errors.

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE, J., participating on briefs.

KATHY GOOLSBY, APPELLANT, V. PAT ANDERSON AND ALBERTSON'S, INC., APPELLEES.

549 N.W.2d 153

Filed June 14, 1996. No. S-94-1027.

1. **Judgments: Jurisdiction.** A jurisdictional question does not involve a factual dispute and is resolved as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court determines and gives 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.
6. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
7. **Statutes: Legislature: Intent.** To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
8. **Appeal and Error.** Errors assigned but not argued will not be addressed.
9. **Fair Employment Practices: Actions.** A plaintiff is not precluded from bringing a private cause of action for alleged violations under the Nebraska Fair Employment Practice Act.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

Mark M. Schorr and Soren S. Jensen, of Erickson & Sederstrom, P.C., for appellees.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Plaintiff-appellant, Kathy Goolsby, brought this action for alleged sexual harassment she had experienced in connection with her employment at an Albertson's supermarket. In her

second amended petition, she alleged five causes of action for recovery. The district court sustained demurrers to the first, third, and fourth causes of action, which pertain to civil rights violations under the Nebraska Constitution and under the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988). The court subsequently dismissed these causes of action. Goolsby's second and fifth causes of action have been disposed of, and Goolsby's second amended petition has been dismissed by the district court. Goolsby now specifically appeals the district court's order dismissing the first, third, and fourth causes of action pertaining to her civil rights claims.

Goolsby assigns the following errors: (1) The district court erred in dismissing the cause of action premised on Neb. Const. art. I, § 1, and (2) the district court erred in ruling that it lacked subject matter jurisdiction under Neb. Rev. Stat. § 20-148 (Reissue 1991) to hear her causes of action pertaining to the alleged violations of the Nebraska Fair Employment Practice Act.

Goolsby filed suit in the district court seeking damages from the defendants-appellees, Pat Anderson and Albertson's, Inc., for allegedly subjecting her to "sexual harassment and a sexually polluted work environment." Goolsby filed her claim under § 20-148, which allows a person to sue a person or a company for a deprivation of rights secured by Nebraska laws.

In her original petition, Goolsby alleged that the appellees deprived Goolsby of her civil rights in the private workplace that are protected by the state Constitution and the Nebraska Fair Employment Practice Act. Specifically, Goolsby alleged that she was deprived of her rights guaranteed by Neb. Const. art. I, § 1. She also alleged violations of §§ 48-1104 and 48-1114. Goolsby also alleged intentional infliction of emotional distress as a cause of action. In response, the appellees filed a demurrer alleging that Goolsby failed to state a cause of action.

The district court sustained the appellees' demurrer. In its order, the district court found that the exclusive remedy for Goolsby's Nebraska Fair Employment Practice Act claims was through the statutory scheme set out in the act. The court

stated that under the act, a claim like Goolsby's must be first investigated by the Nebraska Equal Opportunity Commission (NEOC) and then be ruled on by an administrative judge.

The district court specifically stated, "A private cause of action exclusive of the remedies found in 48-1101 et. seq. are not contemplated by the statutes of the state of Nebraska read in pari materia." The district court concluded that it would not have jurisdiction until Goolsby exhausted her administrative remedies and appealed an order of an administrative judge rendered pursuant to § 48-1101 et seq. The court granted Goolsby 2 weeks to amend her petition.

Goolsby filed an amended petition, to which the appellees filed a demurrer. Goolsby, however, filed a second amended petition prior to the court's consideration of this demurrer. Goolsby's first cause of action in her second amended petition again alleged that she was deprived of her rights guaranteed by Neb. Const. art. I, § 1. Goolsby's second cause of action alleged intentional infliction of emotional distress.

Goolsby's third cause of action alleged that the appellees had deprived her of "her rights, privileges and immunities to be free from sexual harassment and discrimination as secured by the laws of the State of Nebraska, specifically Neb. Rev. Stat. §48-1104." Goolsby's fourth cause of action alleged that Albertson's constructive transfer of Goolsby "constitutes retaliation in violation of Neb. Rev. Stat. §48-1114." Goolsby's fifth cause of action alleged that the appellees breached the employment contract.

In response, the appellees filed a demurrer contending that the district court did not have subject matter jurisdiction and that the petition failed to state a cause of action.

The district court issued an order again sustaining the demurrers as to the first, third, and fourth causes of action. Goolsby stood on her petition, and the court dismissed her first, third, and fourth causes of action. The court, however, overruled the demurrer as to Goolsby's second and fifth causes of action.

Goolsby appealed the district court's order to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal, concluding that it lacked jurisdiction for the reason that there

had not yet been a final disposition of all causes of action pled by Goolsby. *Goolsby v. Anderson*, 3 NCA 750 (1993).

Goolsby has dismissed without prejudice the second cause of action. The district court, after presentation of evidence in a jury trial on the fifth cause of action, dismissed the same. Goolsby has not appealed the order dismissing her fifth cause of action. Rather, Goolsby only appeals the district court's order dismissing her first, third, and fourth causes of action.

Regarding this court's standard of review, a jurisdictional question does not involve a factual dispute and is resolved as a matter of law. *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995).

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. *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996).

In discerning the meaning of a statute, an appellate court determines and gives 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. *In re Interest of Todd T.*, 249 Neb. 738, 545 N.W.2d 711 (1996). In addition, this court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Moreover, to ascertain the intent of the Legislature, a court may examine the legislative history of the act in question. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988).

Goolsby's first assignment of error concerning a violation under art. I, § 1, of the state Constitution was not discussed in her brief. Errors assigned but not argued will not be addressed. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). Therefore, we will not address this assignment of error.

We must next determine whether § 20-148, when reading the statutes of this state in pari materia, allows a claimant to bring a private cause of action in state court for violations under the Nebraska Fair Employment Practice Act before exhausting the available administrative remedies under the act. Section 20-148 provides:

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

This court has not explicitly addressed whether § 20-148 invokes a state district court with jurisdiction to entertain alleged Nebraska Fair Employment Practice Act violations. In *Steier v. Crosier Fathers of Hastings*, 242 Neb. 16, 492 N.W.2d 870 (1992), however, the plaintiff filed an age discrimination action under § 20-148, alleging violations of rights secured by both Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. § 48-1001 et seq. (Reissue 1988), and the Nebraska Fair Employment Practice Act, § 48-1101 et seq. The defendant in *Steier* did not challenge the district court's jurisdiction under § 20-148, nor did this court raise a jurisdictional challenge on its own motion.

Rather, in *Steier*, this court analyzed the plaintiff's claims as if jurisdiction was proper under § 20-148. Quoting § 20-148, this court stated, "The 'Laws of the State of Nebraska' which plaintiff alleges contain rights which she has been denied are § 48-1001 et seq. and § 48-1101 et seq." *Steier*, 242 Neb. at 18, 492 N.W.2d at 872. This court, rather

than finding a jurisdictional problem, concluded that the plaintiff could not seek relief under either act because the employer did not employ the requisite number of employees in order to make its conduct controlled by the act.

On its face, § 20-148 does not explicitly state that a plaintiff can bypass the administrative remedies set forth in the Nebraska Fair Employment Practice Act. However, § 20-148 does not explicitly prohibit a plaintiff from invoking jurisdiction under § 20-148 for violations alleged under the act. Nor do the provisions of the Nebraska Fair Employment Practice Act, § 48-1101 et seq., explicitly require that all alleged violations of the act be pursued exclusively under the administrative procedures set forth in the act.

The legislative history in this case, however, offers clear guidance as to the legislative intent behind § 20-148. The bill that would become § 20-148, 1977 Neb. Laws, L.B. 66, was introduced by State Senator Ernest Chambers. Excerpts from Senator Chambers' testimony before the Judiciary Committee reveal the purpose of the legislation:

> SENATOR CHAMBERS: [T]here is an equal opportunity commission which enforces certain rights . . . by offering a tedious, slow and cumbersome method of trying to resolve a grievance. The backlog they have now might require you to wait 18 months to [2 years] before you arrive at a resolution and the resolution of the problem then is not definitive. You have to go through a . . . reconciliation, discussion, persuasion, and if that does not work then you can have a formal hearing . . . . Well, either side can disagree, then you can go to court. This bill would make it possible if you have a grievance to go into court, initially. . . .
>
> SENATOR BARNETT: Senator Chambers, how come we need a law for this? Why can't we do that right now?
>
> SENATOR CHAMBERS: Because in some instances if you go into court on certain matters, you are told to exhaust the remedies, administrative remedies, first.
>
> . . . .

> SENATOR BARNETT: And it is your feeling that [this bill] would eliminate the run around of settling these actions that you get now out of the court[?]
>
> SENATOR CHAMBERS: Right. . . . If it does go into court, then I present all that I have on which I base the claim and then you oppose it and the court makes a decision. . . . But through the [NEOC] system you can go on for up to two years [or] longer and after all of that is completed you then might go into court anyway and start all over. By that time evidence can be old, witnesses can be gone or dead, and it becomes in a lot of cases, a paper victory, if you win it.

Judiciary Committee Hearing, L.B. 66, 86th Leg., 1st Sess. (Jan. 18, 1977).

The Judiciary Committee advanced L.B. 66 to the floor of the Legislature on a unanimous 8-0 vote. In floor debate, Senator Chambers reiterated the purpose of § 20-148:

> [L.B. 66] does exactly what it says. It would allow a person with a grievance to go into court. All that [it] does is not require a person to get behind a two year backlog before having a grievance solved. If you go into court all of the issues can be presented at that time and the entire issue resolved once and for all.

Floor Debate, 86th Leg., 1st Sess. 434 (Feb. 11, 1977). Senator Warner acknowledged that NEOC had "something like a thousand or so cases backlogged two to three years." *Id.* Without additional NEOC funding from the Legislature, the caseload backlog was expected to swell to 1,400 in the coming year. L.B. 66 advanced through general and select files and was passed on final reading by a vote of 33-0.

As indicated by the legislative history of L.B. 66, it is clear that the purpose of § 20-148 is to allow plaintiffs to enforce their constitutional and statutory rights in district court without first having exhausted statutory administrative remedies. Section 20-148 was enacted to provide an alternative remedy for plaintiffs who otherwise would be trapped in bureaucratic backlogs such as the one at NEOC.

When reading the statutes of this state in pari materia, we find that a plaintiff is not precluded from bringing a private

cause of action for alleged violations under the Nebraska Fair Employment Practice Act. It is true that the Nebraska Fair Employment Practice Act in existence at the time Goolsby's cause of action arose did not explicitly provide a private cause of action to parties alleging violations under the act.

However, § 20-148 is a procedural statute which does not create any new substantive rights. Section 20-148 was enacted so that plaintiffs seeking to vindicate rights already existing under constitutional or statutory law could avoid the review procedures of agencies like NEOC. Without § 20-148, the act's review scheme would offer the only remedy for Goolsby's civil rights claims. In § 20-148, the Legislature created an alternative method for pursuing civil rights claims that are defined elsewhere in constitutional or statutory law. Absent express legislation, this court will not interpret the statutes of this state as denying a plaintiff of his or her state constitutional rights to access of the courts and to the administration of justice without delay. See Neb. Const. art. I, § 13.

Section 20-148 applies to the case at bar. The rights of workers in the private workplace to be free from sexual harassment and employer retaliation are secured by the laws of Nebraska in §§ 48-1104 and 48-1114 of the Nebraska Fair Employment Practice Act. Pursuant to § 20-148, Goolsby can pursue her claims under §§ 48-1104 and 48-1114 in state district court without first exhausting her administrative remedies under § 48-1101 et seq.

For the reasons stated above, we affirm the district court's judgment dismissing Goolsby's first cause of action set forth in her second amended petition. However, we reverse the district court's judgment dismissing Goolsby's third and fourth causes of action which alleged violations under the Nebraska Fair Employment Practice Act, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., participating on briefs.

CAPORALE, J., concurring.

While I concur in the majority's judgment, I write separately to lament the continued use, in interpreting a statute, of what was said on the legislative floor and characterizing those statements as the "legislative history."

Without again detailing the difference, in interpreting the meaning of an ambiguous statute, between relying on what the Legislature did as contrasted to relying on what an individual legislator or group of legislators said, as set forth in my concurrence in *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995) (Fahrnbruch and Lanphier, JJ., joining), I point out that the statute in question, Neb. Rev. Stat. § 20-148 (Reissue 1991), is not ambiguous. It reads:

> (1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.
>
> (2) The remedies provided by this section shall be in addition to any other remedy provided by Chapter 20, article 1, and shall not be interpreted as denying any person the right of seeking other proper remedies provided thereunder.

There is no mention therein of an exhaustion of administrative remedies. There is no mention of the Administrative Procedure Act. There is no mention of the Nebraska Fair Employment Practice Act. Section 20-148 clearly and unambiguously provides that a person or company that violates a Nebraska citizen's constitutional rights shall be liable to such person in a civil action brought by that person. A simple reading of the statute provides the answer to the question posed without resort to any legislative source, legitimate or otherwise. See, also, *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249

Neb. 913, 546 N.W.2d 315 (1996) (Caporale, J., concurring; Lanphier, J., joins).

The evils inherent in resorting to the statements of individual legislators when investigating the meaning of an ambiguous statute are compounded when an unambiguous statute is at issue. When the text of the statute is clear and we resort to legislative sources, we deprive legislators of the assurance that we will give ordinary terms, used in an ordinary context, a predictable meaning. *Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (Scalia, J., dissenting). Such practice also unnecessarily increases the cost of litigation by multiplying the research time necessary to litigate the meaning of a statute. W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371. See, also, *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951) (Jackson, J., concurring).

FAHRNBRUCH and LANPHIER, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLANT, V. ROBERT ATKINS, APPELLEE.
549 N.W.2d 159

Filed June 14, 1996. No. S-95-299.

1. **Statutes: Appeal and Error.** The interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

5. **Constitutional Law: Statutes: Presumptions: Proof.** When passing on the constitutionality of a statute, a court begins with a presumption of validity, and the burden of demonstrating a constitutional defect rests with the challenger.
6. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
7. **Equal Protection.** As a general matter, the Equal Protection Clause of the 14th Amendment to the U.S. Constitution requires the government to treat similarly situated people alike.
8. ____. The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
9. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently than others similarly situated; absent this threshold showing, one lacks a viable equal protection claim; if one can make the threshold showing, the inquiry then shifts to whether the legislation at issue can survive judicial scrutiny.
10. **Equal Protection: Statutes: Legislature.** In cases not dealing with a fundamental right or suspect class, all that is required to sustain the legislation is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose.
11. **Equal Protection.** The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if the classification rests on grounds which are wholly irrelevant to the achievement of the State's objective.
12. **Equal Protection: Legislature.** Social and economic measures run afoul of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational.
13. **Equal Protection.** A similarly situated inquiry focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action.
14. **Equal Protection: Prisoners.** City and county jail inmates are not similarly situated to inmates of the state prison system for the purposes of awarding good time.

Appeal from the District Court for Lincoln County, JOHN P. MURPHY, Judge, on appeal thereto from the County Court for Lincoln County, KENT E. FLOROM, Judge. Exception sustained.

Kent D. Turnbull, Lincoln County Attorney, for appellant.

Robert P. Lindemeier, Lincoln County Public Defender, for appellee.

Don Stenberg, Attorney General, and Laurie Smith Camp for State of Nebraska regarding constitutional issue.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Taking exception to the district court's affirmance of the county court's order concerning the amount by which the jail sentence the county court imposed upon the defendant-appellee, Robert Atkins, was to be reduced for good time, the plaintiff-appellant, State of Nebraska, perfected this appeal under the provisions of Neb. Rev. Stat. §§ 24-1106 and 29-2315.01 (Reissue 1995).

FACTS

In accordance with Atkins' plea, the county court found him guilty of having been a minor unlawfully in possession of alcohol and on May 17, 1994, sentenced him to 10 days in the county jail. Complying with a "General Order" of the district court, the county court further ordered that Atkins be awarded a " 'Good Time' " reduction of the sentence on a "day for day basis," in the same manner as good time is credited to "persons similarly confined, but held under the direction of the Dept. of Corrections." The State appealed to the district court, contending that the county court's good time order was contrary to law; the district court affirmed the county court's judgment.

The resolution of this appeal is controlled by Neb. Rev. Stat. § 47-502 (Reissue 1993), which provides:

> Any person sentenced to a city or county jail shall have his or her term reduced seven days for each fourteen consecutive days during which he or she has not committed any breach of discipline or other violation of jail regulations. The reductions authorized by this section shall be granted at the end of each period of fourteen days, with such periods to run consecutively from the date of confinement following sentencing.

SCOPE OF REVIEW

As a matter controlled by statute, we are presented with questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

ANALYSIS

The district court reasoned that the language of § 47-502 is ambiguous and that unless construed so as to treat county jail inmates like their counterparts in the state prison system, the statute would infringe upon the federal equal protection rights of the former. Thus, contrary to the State's contention, the district court did not rule that § 47-502 is unconstitutional.

Nonetheless, the unique character of the district court's general order and judgment in this case requires that we undertake two separate and distinct inquiries. We must first determine whether the district court properly construed § 47-502. Then, as a separate matter, we must determine whether the proper construction of the statute violates the Equal Protection Clause.

Statutory Construction.

Before embarking on a study of the statutory language, we recall that a statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992).

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). Nor is it within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Dillard Dept. Stores v. Polinsky*, 247

Neb. 821, 530 N.W.2d 637 (1995). See, also, *In re Interest of Rondell B., supra.*

Moreover, when passing on the constitutionality of a statute, a court begins with a presumption of validity, and the burden of demonstrating a constitutional defect rests with the challenger. See *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

Relying on *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988), the district court found that § 47-502 was ambiguous and open to construction. In *Williams*, which concerned the interpretation of a 1984 rendition of the statute, we found the statutory language "with such periods to run consecutively from the date of confinement following sentencing" to be ambiguous and then undertook an examination of the statute's legislative history to determine the intent of the Legislature. As a result, we construed § 47-502 such as to make good time credit in the jail system applicable to time spent in jail awaiting sentencing. Because the current version of § 47-502 contains the same statutory language at issue in *Williams*, the district court concluded that the statute was ambiguous and open to judicial construction.

In doing so, the district court overlooked the controlling rule that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996); *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 436 N.W.2d 164 (1989); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983).

In its 1993 amendment of the version of § 47-502 at issue in *Williams*, the Legislature made only one change; it changed from 21 to 14 the number of days a city or county jail inmate had to serve before earning 7 days of good time. 1993 Neb. Laws, L.B. 113. That amendment left the statutory language construed in *Williams* intact. Accordingly, not only was there no need for the district court to turn to legislative history to ascertain the Legislature's intent, it was wrong to do so. The

Legislature had already made clear its intent by its acquiescence in our interpretation.

The other provision of § 47-502 which pertains to the amount of good time that city or county jails must provide is direct and unambiguous. It provides in part that "[a]ny person sentenced to a city or county jail shall have his or her term reduced seven days for each fourteen consecutive days during which he or she has not committed any breach of discipline or other violation of jail regulations." The plain meaning of this language is that city and county jail inmates must serve 14 consecutive days without a breach of discipline or a violation of jail regulations in order to be entitled to a 7-day sentence reduction. Because the words of the statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986).

Once it is understood that this court's interpretation in *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988), remains viable, the meaning of the statute is clear. Good time credit is provided on the same basis for time spent in jail awaiting sentencing; that is, city and county jail inmates must serve 14 consecutive days without misconduct to earn a 7-day reduction of the sentence.

In sum, the district court erred in finding § 47-502 to be ambiguous and open to construction.

Equal Protection.

We next consider whether the foregoing proper construction of § 47-502 offends the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

As a general matter, the Equal Protection Clause requires the government to treat similarly situated people alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). However, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 1177, 130 L. Ed. 2d 1130 (1995). Thus, the initial inquiry in an equal protection analysis focuses on whether one

has demonstrated that one was treated differently than others similarly situated. Absent this threshold showing, one lacks a viable equal protection claim. *Id.*

If one can make this threshold showing, the inquiry then shifts to whether the legislation at issue can survive judicial scrutiny. In cases not dealing with a fundamental right or suspect class, all that is required to sustain the legislation is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose. *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986). The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989), "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). Thus, social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational. *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991), *cert. denied* 502 U.S. 814, 112 S. Ct. 65, 116 L. Ed. 2d 40. See, also, *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996).

In this case, we need not reach the merits of the equal protection claim because city and county jail inmates and state prison inmates are not similarly situated with respect to the provision of good time.

A similarly situated inquiry focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action. *Klinger, supra.* The challenged governmental action here is the provision of good time. Therefore, the relevant inquiry is whether city and county jail inmates are similarly situated to state prison inmates for that purpose.

In contrast to the good time treatment afforded city and county jail inmates by § 47-502, at the relevant time, Neb. Rev. Stat. § 83-1,107 (Reissue 1994) provided that inmates in

the state prison system were entitled to a 6-month reduction of their term for every year served. For any time less than a year served, there was a pro rata reduction. Thus, state prison inmates received day-for-day good time credit; city and county jail inmates did not. (1995 Neb. Laws, L.B. 371, § 20, modifies the good time credited to state prison inmates operative July 1, 1996.)

Based on nothing more than the fact that both groups are composed of prisoners, the district court concluded that city and county jail inmates and state prison inmates are similarly situated with respect to the provision of good time. In doing so, the court ignored real differences between the two groups.

For example, inmates committed to the state prison system serve longer sentences for more serious crimes and receive the benefit of many rehabilitation programs available in the state system. See, Neb. Rev. Stat. § 28-105 (Reissue 1995); Neb. Rev. Stat. § 83-171 (Reissue 1994). State prison inmates also may receive maximum and minimum terms. Neb. Rev. Stat. § 29-2204 (Reissue 1995). Maximum terms are used to determine discharge dates, and minimum terms are used to determine parole eligibility dates. § 83-1,107. The sentence reduction provided for in § 83-1,107 applies to both terms. None of this applies to city and county jail inmates, who serve shorter sentences for less serious crimes. Neb. Rev. Stat. § 28-106 (Reissue 1995). They are ineligible for parole and have very limited access to rehabilitation programs. See Neb. Rev. Stat. §§ 83-170(3) and 83-1,110 (Reissue 1994).

Because incarceration in jail differs so greatly from incarceration in the state prison system in terms of both length of sentence and character, city and county jail inmates are not similarly situated to state prison inmates for the purposes of awarding good time. For this reason, if for no other, the provision of good time to city and county jail inmates on an unequal basis with state prison inmates does not violate equal protection rights.

CONCLUSION

For the foregoing reasons, the State's exception is sustained.

EXCEPTION SUSTAINED.

HALL COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

549 N.W.2d 164

Filed June 14, 1996. No. S-95-895.

1. **Legislature: Taxation.** Necessary revenue shall be raised by taxation in such a manner as the Legislature may direct.
2. **Legislature: Taxation: Valuation.** The Legislature may declare agricultural land as a distinct class for purposes of taxation, and may provide for a different taxing method for agricultural land that is not uniform with other classes of property, but which results in values that are uniform within the class of agricultural land.
3. **Legislature: Taxation.** The Legislature has declared agricultural land as a separate and distinct class for purposes of property taxation.
4. **State Equalization Board: Valuation.** The State Board of Equalization and Assessment is given the power to equalize the values of all real property located in the state.
5. ____: ____. The State Board of Equalization and Assessment shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax district or real property valued by the state. Such increase or decrease shall be made by a percent.
6. **Taxation: Valuation.** The object of the law of uniformity in taxation is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value.
7. **State Equalization Board: Appeal and Error.** In an appeal from the State Board of Equalization and Assessment, an appellate court searches only for errors appearing on the record, i.e., whether the decision conforms with the law; is supported by relevant and competent evidence; and was not arbitrary, capricious, or unreasonable.
8. **State Equalization Board.** The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing the assessment of property.
9. **State Equalization Board: Presumptions: Proof.** The presumption is that the State Board of Equalization and Assessment faithfully performed its duties, and the burden is upon the appellant to prove that the action of the board was erroneous, arbitrary, capricious, and contrary to the law.
10. **State Equalization Board: Appeal and Error.** In order to reverse the order of the State Board of Equalization and Assessment, an appellate court would be required to hold that the board utterly failed to follow a reasonable course of action.
11. ____: ____. If the State Board of Equalization and Assessment fails to follow the statutes and acts without authority, proper evidence, or due investigation or for any other reason renders a decision which is not based upon the facts, or is not according to law, its order will be reversed.

12. **State Equalization Board: Records.** The record of the proceedings before the State Board of Equalization and Assessment must be sufficient to sustain the action taken by the board.
13. **Taxation: Valuation.** In dealing with the intangible concepts of valuation and uniformity, a mathematically precise result can never be achieved. Neither mathematical exactness nor precise uniformity is possible in the complex task of equalization.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Jerom E. Janulewicz, Deputy Hall County Attorney, for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This is an appeal by Hall County, Nebraska, from the order of the State Board of Equalization and Assessment (board), dated August 15, 1995, refusing to order a reduction in the assessed valuations of taxable real property in Hall County.

Hall County contends that by refusing to reduce the assessed residential real property values in Hall County, the board acted arbitrarily, capriciously, and contrary to law, and its action constitutes an abuse of discretion. Because we find that Hall County failed to meet its burden in proving that the board acted arbitrarily and capriciously, we affirm.

On July 14, 1994, the board established the standards to be used for the equalization of real property values for 1995. The board adopted a motion setting outside limits of the assessed values at 92 percent and 100 percent for residential and commercial/industrial property, and 74 percent and 80 percent for agricultural property. The board ordered counties that assessed their property outside of these limits to show cause why their assessed values should not be adjusted to conform to its decision.

Based on the board's motion, county assessors and county boards of equalization set values of locally assessed real prop-

erty on or prior to June 15, 1995, as required by Neb. Rev. Stat. § 77-1506.02 (Cum. Supp. 1994).

The board met on July 14, 1995. After reviewing the assessed values for all of the counties in the state, the board determined that 13 counties had assessed values of residential property lower than 92 percent. Of these counties below the 92 percent floor that was set by the board in 1994, five counties were located in the same community college taxing district as Hall County. These counties included (1) Adams County, with an assessed residential value of 91 percent; (2) Clay County, with an assessed residential value of 90 percent; (3) Kearney County, with an assessed residential value of 89 percent; (4) Platte County, with an assessed residential value of 91 percent; and (5) Boone County, with an assessed residential value of 89 percent.

At this July 14 meeting, the board adopted a new policy which reduced the minimum acceptable assessed values to 89 percent for residential and commercial/industrial property and to 71 percent for agricultural property. The board also decided to issue a notice to show cause, requiring a county to show cause why adjustments for property values should be made in order to achieve a just, equitable, legal assessment of real property in the state.

Following the board's action on July 14, Hall County filed a petition for reduction of valuations. The petition stated that taxable real property for the tax year 1995 had been assessed by Hall County at the following percentages of fair market value: residential, 98 percent; commercial/industrial, 100 percent; and agricultural land, 74 percent.

Hall County's petition further alleged:

> As a result of the July 14, 1995, action of the State Board, classes of real property, particularly residential property, in various counties, including Douglas, Adams, Boone, Clay, Dodge, Kearney, Madison, Platte, Saunders and Washington, will be valued for tax purposes at a lesser percentage of fair market value than property within the same classes within Hall County. Adams, Boone, Clay, Kearney and Platte counties are within the same community college district as Hall County and, as

> a result of the disproportionate valuations within said district, property with[in] Hall County will be taxed at a proportionately higher rate than will property located in other counties within the community college district.

Hall County alleged that a reduction of residential property to 89 percent of fair market value and commercial/industrial property and a reduction of agricultural property to 71 percent of fair market value was necessary to achieve intercounty equalization.

On August 11, 1995, the board held hearings requiring Hall County, and 10 other counties that responded to the notices, to show cause why their assessed values should be reduced. At this hearing, the board heard testimony from five Hall County representatives. The representatives complained of the board's decision on July 14 to reduce the minimum parameter to 89 percent of fair market value. They also requested that residential property in Hall County be adjusted to the levels that were requested in Hall County's petition for reduction.

Hall County also submitted an affidavit of Janet Pelland, the Hall County assessor. This affidavit listed various taxing districts that included Hall County. This list included the counties located in the community college district, the district that Hall County expressed concern about in its petition.

On August 14, the board held a meeting to determine if adjustments should be made with regard to the counties requesting reductions. The board discussed these counties according to their geographical location to determine how the requested assessed value adjustments correlated with neighboring counties.

The board first considered a motion to reduce the assessed value of Sarpy County from 94 percent to 89 percent of fair market value. Sarpy County presented extensive evidence indicating that a 94-percent assessed value created significant inequalities in taxation with bordering Douglas County, which had an assessed value of 89 percent. The board therefore adopted this motion so as to equalize Sarpy County's property values with those of Douglas County.

The board then addressed Rock and Keya Paha Counties' requests to create a more equalized assessment with the neigh-

boring counties in the north central region of the state. The board adopted a motion to reduce the assessed residential property value of both of these counties to 91 percent. The board then discussed whether, by adopting this motion, a tax shift would occur resulting in agricultural landowners in these counties bearing a heavier tax burden. The board concluded that a tax shift to agricultural land would be insignificant because there was very little residential property located in these counties.

The board then addressed the counties located in the central portion of the state that were seeking reductions. The board first adopted a motion to reduce the assessed residential value of Dawson County by 6 percent, from an assessed value of 100 percent to 94 percent.

The board then considered a motion to reduce the assessed values of residential property in York, Hamilton, Frontier, and Hall Counties to an assessed value of 92 percent. Gary Quandt, a Hall County supervisor, was present at the board's discussion of this motion. He urged that Hall County should be reduced to 89 percent because of the lower assessed values of the surrounding counties that are in the same community college taxing district. He stated that a reduction to 92 percent was acceptable if that was the maximum reduction the board would consider.

The board ultimately adopted the motion to decrease the assessed value of residential property in Hall, York, Keya Paha, and Frontier Counties to 92 percent.

However, immediately after adopting the motion, the board again indicated a concern that such reductions in residential values could result in an unintended tax shift to agricultural land. The board therefore addressed the issue of whether it was necessary to make an appropriate adjustment to the assessed value of agricultural property so as to prevent a tax shift resulting in an undue tax burden on agricultural landowners. The board's primary concern was that a tax shift to agricultural land or a reduction in the assessed value of agricultural land would extend over county lines and create inequalization in taxing districts, imposing a heavier tax burden on agricultural landowners.

In addressing this issue, the board reviewed a document prepared by the property tax division of the Nebraska Department of Revenue. This document was a statistical table which separated the property of the 11 counties under consideration into subclasses, such as residential, commercial/industrial, and agricultural. The table broke down the total value of all property for each county into percentages according to subclass. The table also indicated how these subclass percentages would change if the assessed value of residential property were reduced a particular percentage.

With regard to Hall County, the table was based on a 4-percent reduction in the assessed valuation of residential property, rather than the 6-percent reduction adopted by the board. The table indicated that residential property consisted of 49.31 percent of total property value in Hall County. The table reflected that a 4-percent decrease in the assessed value of residential property would decrease the percentage of the residential property value to 48.29 percent of total property value. With regard to the agricultural land, the table indicated that the percentage in Hall County was 13.79 percent. However, the table indicated that a 4-percent decrease would raise the percentage of total valued property to 14.07 percent.

The board's concern was focused on counties that contained roughly equal percentages of residential and agricultural property, or a higher percentage of residential property. Referring to the shift that could result from a reduction of the assessed residential values, one board member noted that

> where it's close to 50/50 or more residential, substantially different ranges of residential versus ag land, that it's pretty clear that if you make an adjustment to residential you get a shift, and if you get a shift, then it puts . . . you out of sync with your neighboring counties on ag land to ag land, and that can cause some uncertain results for some taxing districts and you can't develop a matrix to show exactly how that would work so that you can fix it so you wouldn't end up with potentially some major shifts.

On August 15, the board reconvened and further discussed the tax shift ramifications of certain counties. The board again

referred to the table created by the Nebraska Department of Revenue.

Hall County Supervisor Quandt was present at this proceeding and spoke to the board concerning the tax shift. Quandt indicated that according to his figures, the breakdown of total land value in Hall County consisted of 56.5 percent residential, 23.4 percent commercial, and 20.1 percent agricultural. He then told the board that a reduction of 6 percent in the assessed value of residential property would create a tax shift increasing the percentage of agricultural land by .7 percent to 20.8 percent of total land value for the county.

The board ultimately concluded that a reduction in residential property values was likely to create a tax shift in Hall County and would result in imposing a greater tax burden on agricultural property owners both in Hall County and in the same taxing districts as Hall County. The board noted that the tax shift would be much higher within the school districts as compared to the shift that results within the county.

The board also reached this same conclusion for Dawson, Hamilton, and York Counties. This conclusion was based on the fact that these counties contained both a significant amount of residential land and agricultural land. Therefore, the board adopted a motion to readjust the assessed residential values of these counties back to their original levels.

The board did not readjust the assessed value of residential property in Frontier County because it contained such a small amount of residential property and, therefore, the tax shift would be minimal. Frontier County is not located within Hall County's community college taxing district.

The board's final order reduced the valuation of four counties. Sarpy County, with an indicated valuation of 94 percent, was decreased 5 percent. Frontier County, with an indicated valuation of 100 percent, was decreased 8 percent. Rock County, with an indicated valuation of 99 percent, was decreased 8 percent. Keya Paha County, with an indicated valuation of 100 percent, was decreased 9 percent.

Neb. Const. art. VIII, § 1, provides that necessary revenue shall be raised by taxation in such a manner as the Legislature may direct. However, this constitutional provision also

requires that taxes be levied by valuation uniformly and proportionately upon all real property as defined by the Legislature.

Also pursuant to Neb. Const. art. VIII, § 1(4), the Legislature may declare agricultural land as a distinct class for purposes of taxation, and may provide for a different taxing method for agricultural land that is not uniform with other classes of property, but which results in values that are uniform within the class of agricultural land. The Legislature has in fact declared agricultural land as a separate and distinct class for purposes of property taxation. Neb. Rev. Stat. § 77-201(2) (Cum. Supp. 1994).

The Legislature has charged the board with the responsibility and duty to give effect to the constitutional requirement that all taxes be levied uniformly and proportionately upon all real property.

Pursuant to Neb. Rev. Stat. §§ 77-505 et seq. (Cum. Supp. 1994), the board is given the power to equalize the values of all real property located in the state. Section 77-506 provides:

> Pursuant to section 77-505, the State Board of Equalization and Assessment shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax district or real property valued by the state. Such increase or decrease shall be made by a percent.

The object of the law of uniformity in taxation is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value. *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 134 N.W.2d 272 (1965).

In an appeal from the board, an appellate court searches only for errors appearing on the record, i.e., whether the decision conforms with the law; is supported by relevant and competent evidence; and was not arbitrary, capricious, or unreasonable. *County of Adams v. State Bd. of Equal.*, 247 Neb. 179, 525 N.W.2d 629 (1995).

Moreover, the board has a wide latitude of judgment and discretion in equalizing the assessment of property. *Box Butte*

County v. State Board of Equalization & Assessment, 206 Neb. 696, 295 N.W.2d 670 (1980).

" '[T]he presumption is that the Board faithfully performed its duties and the burden is upon the appellant to prove that the action of the Board was erroneous, arbitrary, capricious, and contrary to the law.' " *Id.* at 709, 295 N.W.2d at 679.

This court has further held, " 'In order to reverse the order of the Board, we would be required to hold the Board utterly failed to follow a reasonable course of action . . . .' " *Id.*

However, this court has also noted that the board's power is not unlimited. "If the state board fails to follow the statute and acts without authority, proper evidence, or due investigation or for any other reason renders a decision which is not based upon the facts, or is not according to law, its order will be reversed." *County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 475, 143 N.W.2d 880, 883 (1966). The record of the proceedings before the board must be sufficient to sustain the action taken by the board. *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970).

Hall County essentially has set forth two arguments on appeal. First, Hall County contends that the board acted arbitrarily and capriciously by failing to reduce Hall County's assessed value of residential property to the level of the counties that had the lowest values within the same community college tax district.

Second, Hall County contends that the board acted arbitrarily and capriciously by reducing the valuation levels of Sarpy, Rock, Frontier, and Keya Paha Counties without also reducing the valuation of Hall County. Hall County, in its petition for reduction, also alleged that the act of the board in modifying the range of valuation was arbitrary and capricious. However, Hall County has not asserted this argument on appeal.

In response, the board contends that it did not act arbitrarily and capriciously in refusing to reduce the residential property valuations. The board argues that it had a legitimate concern supported by the record that an assessed residential value reduction would result in unintended tax shifts from residen-

tial to agricultural property within Hall County and within the overlapping taxing districts. The board further argues that a reduction in the assessed value of agricultural land to remedy a potential tax shift would also result in altering tax burdens for agricultural land across county lines.

Regarding the community college district in which Hall County is located, the record indicates that five counties within the district had an assessed residential property value of 89 percent. However, the record also indicates that six counties had equal or greater assessed residential values than that of Hall County's 98 percent. Moreover, the average percentage of the aggregate level of assessed residential property values for the counties located in this tax district is 94.76 percent.

This court has never required that the assessed values between counties be adjusted so as to be exactly equal or to be calculated with mathematical precision. "In dealing with the intangible concepts of valuation and uniformity, a mathematically precise result can never be achieved. Neither mathematical exactness nor precise uniformity is possible in the complex task of equalization." *County of Gage*, 185 Neb. at 756, 178 N.W.2d at 764.

This court, in *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 619, 134 N.W.2d 272, 278 (1965), stated:

> [I]t can probably always be demonstrated that the Board, in dealing with the intangible concepts of valuation and uniformity, could never reach any mathematically precise result. Such a yardstick or criterion of equalization can never be accomplished. Approximation, both as to value and uniformity, is all that can be accomplished. [Citation omitted.] And, we have held that the object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a *uniform standard of value*.

(Emphasis in original.)

All of the counties within the community college taxing district fall within the parameters set by the board. The assessed values of residential property cover the whole range of 89 per-

cent to 100 percent. Hall County's value is not of such a discrepancy from other counties in this taxing district so as to conclude that the board did not accomplish uniformity.

Moreover, when determining whether to reduce Hall County's assessed values to conform with the lower counties in the district, the board analyzed the potential major tax shift ramifications that could arise within taxing districts. Hall County, however, failed to produce any evidence to show that the board's findings as to the potential tax shifts were erroneous or arbitrary. The board concluded that the tax shifts could be significant in the taxing district, and Hall County has not shown this court any evidence to the contrary. In sum, the board acted reasonably in refusing to reduce Hall County residential property values based on community college taxing district grounds. Nor did the Board act arbitrarily by reducing other counties' assessed residential property values while refusing to reduce Hall County's values. The record clearly supports the rationale behind reducing these other counties' assessed residential values.

Regarding Sarpy County, the board concluded that a reduction was required to prevent a significant inequality between Sarpy County and Douglas County. This decision was supported by extensive evidence presented by Sarpy County.

Regarding the rural counties, the board determined that tax shift concerns for these counties were minimal based on the small amount of residential property located in these counties. The board concluded that reduction was feasible without creating inequalization. Again, Hall County has failed to demonstrate how these reductions result in capricious, arbitrary behavior by the board.

In conclusion, the board concluded that by reducing Hall County's assessed valuation of residential property, potential inequalization, rather than greater equalization, could result. This finding is supported by the record of the hearings. Hall County has failed to present sufficient evidence to refute the board's findings regarding the potential tax shifts.

Therefore, the board's decision to maintain Hall County's residential property at an assessed value of 98 percent was not arbitrary or capricious. We affirm.

AFFIRMED.

DENNIS D. SCHUELKE, APPELLANT AND CROSS-APPELLEE, V. DAVID L. WILSON, APPELLEE AND CROSS-APPELLANT, AND BUSINESS BROKERS OF YORK AND MAACO ENTERPRISES, INC., APPELLEES.

549 N.W.2d 176

Filed June 21, 1996. No. S-93-1123.

1. **Actions: Rescission: Equity: Appeal and Error.** An action for rescission is equitable in nature and as such is reviewable by an appellate court de novo on the record.
2. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent 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 fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Actions: Fraud: Proof.** In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.
4. **Fraud: Proof: Circumstantial Evidence.** In a fraud case, direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred.
5. **Rescission: Fraud: Proof: Evidence.** In a rescission case, the party alleging fraud must prove all elements by clear and convincing evidence.
6. **Fraud.** A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
7. ____. Nebraska law imposes a duty of ordinary prudence upon a party claiming fraudulent misrepresentation.
8. **Actions: Fraud.** While no action will lie where ordinary prudence would have prevented the deception, that rule is generally applied where the means of discovering the truth was in the hands of the party defrauded.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

Terry C. Dougherty, of Knudsen, Berkheimer, Richardson & Endacott, and Terry K. Barber for appellant.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellee Wilson.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This action was brought by Dennis D. Schuelke, seeking rescission of an agreement with David L. Wilson for the purchase of an auto paint and body repair franchise in Lincoln, Nebraska. Schuelke pleaded theories of fraudulent concealment and fraudulent misrepresentation. Wilson filed a counterclaim, requesting payment of two promissory notes executed by Schuelke. The district court ordered rescission. The court, however, held that no further transfers between Schuelke and Wilson were required to return the parties to the status quo and entered an order accordingly. Schuelke appeals; Wilson cross-appeals.

Schuelke assigns two errors: (1) The trial court erred in determining the value of the franchise from a document that was offered into evidence allegedly only for the purpose of proving that Wilson had misrepresented information to Schuelke, and (2) the trial court, after determining that Schuelke was entitled to rescission, erred in holding that Schuelke's petition should be dismissed without ordering further transfers between the parties.

In his cross-appeal, Wilson contends that the district court erred in granting rescission. Because we find that Schuelke was not entitled to rescission, we reverse, and remand with directions.

In 1980, Wilson purchased an auto paint and body repair franchise in Lincoln called Maaco Auto Painting and Bodyworks (Maaco). He owned the franchise until selling it to Schuelke in 1989. Until December 1988, the actual ownership of the Maaco franchise was listed in the name of Dakin, Inc., a corporation in which Wilson was president, and he and his wife were the stockholders. The only asset held by Dakin was the Maaco business. Wilson also owned Darsco, Inc. At the time of the sale of the franchise, Darsco provided the management services for the Lincoln Maaco franchise and one

other Maaco franchise in Omaha, Nebraska, which Wilson owned.

In June 1989, Schuelke met with Lee Adams of Business Brokers Corporation to discuss possible investment options. Wilson, the owner of the Maaco franchise, had previously contracted with Business Brokers to sell the franchise. Adams discussed the possibility of Schuelke purchasing the Maaco franchise. Schuelke painted automobiles as a hobby and intended to manage and operate the Maaco business himself.

After meeting with Adams, Schuelke then met with Wilson to discuss purchasing the franchise. The parties held several meetings prior to the purchase. Various matters were discussed at these meetings, including profitability, the quality of the material used and work performed, the building lease where the business was located, and advertising materials and techniques.

Adams and Wilson represented that Maaco would generate approximately $400,000 per year in gross sales and produce a profit margin of 25 percent. Wilson provided Schuelke with a document containing Maaco's statements of profit for the years 1986 and 1987. The statements of profit were broken down into three areas: sales, cost of sales, and expenses. These statements of profit listed total sales at $420,360.30 for 1986 and $396,147.39 for 1987. They listed earnings before income taxes at $116,688.31 for 1986 and $102,029.95 for 1987.

Each statement of profit contained a footnote that stated, "The above expense figures have been adjusted to reflect an owner operated franchise." Several of the expense figures listed in the statements of profit were adjusted by Wilson. The adjustments were made from expenses listed on Dakin's tax returns for the corresponding years.

Wilson testified at trial that these adjustments were made to reflect expenses that would be incurred in an owner-operated franchise as opposed to an absentee-owner franchise. In his testimony, Wilson explained that he operated the franchise as an absentee-owner, employing managers to run the business. He further explained that some of the expenses would be eliminated or reduced if the business was operated as an owner-operated franchise.

At one of the meetings between Wilson and Schuelke, Wilson explained how he reached the adjusted figures listed under the expenses section of the statements of profit. Wilson testified that he provided Schuelke with the tax returns for the years 1985 through 1988 at this meeting. These tax returns contained the preadjusted figures regarding the expenses listed on the statements of profit. Wilson explained to Schuelke his reasons for making each adjustment and gave him copies of the statements of profit containing handwritten notations next to the expense column indicating the preadjusted amount which was derived from the tax returns.

Wilson further testified that he told Schuelke that these adjustments were approximations based on the history of the business. Wilson also testified that he consulted with the Lincoln Maaco's accountant, Ron Ferdig, when making the adjustments on the statements of profit. Wilson testified that because these expense figures were approximations, he recommended that Schuelke see an accountant or a lawyer to have them verified. Wilson also specifically provided Schuelke with Ferdig's name and telephone number so Schuelke could consult with Ferdig concerning these statements of profit.

In regard to the statements of profit, Schuelke testified that Wilson explained the adjustments item by item and further testified that he understood Wilson's representations of these adjustments. Schuelke also testified that he had ample opportunity to have the adjusted figures analyzed by an accountant, but chose not to do so.

In regard to the tax returns, Schuelke testified that these were provided to him with ample opportunity to review them before signing the final purchase agreement. Schuelke also testified that Wilson never avoided discussing with or explaining to Schuelke the figures that were listed on the statements of profit or the tax returns.

The most significant expense not appearing on the statements of profit was an expense characterized as an "administrative fee." This fee totaled $41,400 in 1986 and $55,200 in 1987. This fee was paid to Darsco, Wilson's other corporation, for administrative services provided by Darsco. A portion of this fee was then paid by Darsco to Wilson as an

employee in the form of wages. Wilson testified that he explained to Schuelke that this fee would no longer be paid to Darsco because Darsco would no longer be providing management services.

Wilson also eliminated a large portion of the salary expense. This expense was reduced by $19,415 for 1986 and $19,088 for 1987. Wilson testified that he told Schuelke this expense would be reduced because Schuelke was to manage the operation himself and would no longer need the manager employed by Wilson.

Other expenses that were not listed on the statements of profit were depreciation, bad debt expense, and interest expense. Expenses that were reduced but not eliminated on the statements of profit included insurance expenses, office expenses, professional fees, rent, repairs and maintenance, payroll, and license expenses. Last, some expenses were not adjusted, while others were increased from the actual amount that Wilson incurred.

Ferdig testified that he believed the differences between the statements of profit and the corporate tax returns were reasonable adjustments for operating the business under an owner-operator style of management.

Larry L. Lausten, a certified public accountant, testified at trial as an expert witness for Schuelke. Lausten testified as to the differences in the expenses listed between the tax returns and the statements of profit. After reviewing the tax returns and statements of profit, Lausten concluded that expenses were understated by $101,138 in 1986 and $92,629 in 1987. He testified that, in his opinion, some of these expenses should not have been reduced or eliminated.

Specifically, Lausten stated that he believed that the interest expense, the bad debt expense, and the administrative expense should not have been completely eliminated. He stated that because Schuelke was borrowing money to finance the franchise, an interest expense would be incurred. He also testified that because the operation had receivables, a bad debt expense would be incurred. Regarding the administrative fee, Lausten testified that he believed Schuelke would incur some of the same expenses that were included in the administrative fee

paid to Darsco. Lausten did not specifically state whether he believed it was improper for Wilson to reduce or eliminate any other expenses that were adjusted on the statements of profit.

In October 1989, Schuelke executed a final purchase agreement to purchase the Maaco business from Wilson. The agreement called for a purchase price of $250,000. Of this purchase price, Schuelke paid $140,000 in cash and executed two promissory notes in the total amount of $110,000 to satisfy the remainder.

Schuelke began operating the franchise in the middle of October 1989. On November 22, Schuelke wrote a letter to Wilson stating that he was rescinding the agreement. In his letter, Schuelke stated that Wilson misrepresented, among other things, "the business expenses and weekly sales." In this letter, he offered to restore Wilson with the franchise and property in exchange for Wilson's returning Schuelke's original payment and canceling the notes Schuelke executed.

Schuelke initiated this action on January 12, 1990. Schuelke, in his prayer for relief, requested that the court grant rescission or, in the alternative, damages. Wilson filed a counterclaim, alleging that Schuelke defaulted under the promissory notes and seeking damages in the amount of the balance of the notes.

Schuelke continued operating the Maaco business until June 1990, at which point he closed and abandoned the business. Schuelke testified that at the time he closed the business, he left all of the equipment behind except for some paint. He also testified that Maaco Enterprises, Inc., terminated his franchise agreement after he closed and abandoned the business.

In the 35 weeks of the Lincoln Maaco's operation under Schuelke's ownership, the franchise generated $301,963 in gross sales. At trial, this figure was used to determine a projected sales figure for a 1-year period. Schuelke was projected to generate $448,644 in sales in his first year of operation. However, his weekly expenses and cost of goods were generally greater than his sales, and, for the most part, he operated at a loss. Schuelke generated a profit the first 3 weeks he operated the business. Thereafter, he mostly operated at a loss,

with intermittent weeks of profit. At the time of closing, Schuelke's operating losses totaled approximately $30,000.

At trial, the deposition of Fred McMullen, Maaco Enterprises, Inc.'s director of center openings and development, was admitted into evidence. He testified in his deposition as to both the operation of a Maaco franchise in general and as to Schuelke's management of the Lincoln Maaco.

McMullen testified as to the difficulties new owners encounter in operating a Maaco franchise and stated that it was typical for a new Maaco franchise owner to struggle financially in the first year of operation. He stated that new owners encounter variances week to week in the gross figures produced. McMullen also testified that Maaco operators incur cost control problems during the winter months because of a decrease in sales due to the holiday season and the weather.

McMullen received and reviewed "weekly summary business reports" from Schuelke which listed sales, cost of goods, and expenses. McMullen testified that he had several discussions with Schuelke throughout Schuelke's ownership of the franchise regarding Schuelke's productivity as reflected in the weekly reports. He testified that Schuelke's financial difficulty was typical of a new owner in his or her first year, especially when taking over the operation just prior to the winter months. McMullen also stated that he made recommendations to Schuelke several times throughout Schuelke's ownership concerning how to improve the financial status of the franchise. McMullen further testified that toward the end of Schuelke's operation of the franchise, Schuelke refused to operate the business according to McMullen's recommendations.

On October 8, 1993, the district court issued an order granting rescission of the purchase agreement. The district court based its decision to grant rescission on the theory of fraudulent misrepresentation, rather than fraudulent concealment. Specifically, the court concluded that the representations made regarding the difference in profitability between an owner-operated Maaco and a management-type enterprise were materially false. In this regard, the court stated:

> When the Lincoln Maaco was operated by Wilson, it was a management-type enterprise. Under [Schuelke], it

became an owner-operator business. The potential financial consequences of this distinction, at least as guessed by Wilson, are shown on Exhibit 76. Exhibit 76 shows the differences between the Statements of Profit for 1987 and 1986 and the respective federal tax forms and the reasons for the discrepancies. In addition, the Statements of Profit reflect that they are "adjusted to reflect an owner operated franchise." Prior to the closing, Wilson went over the figures on Exhibit 76 with [Schuelke] and told him that the adjustments were a "guesstimate." He recommended that [Schuelke] have the figures verified. Along with the Statements of Profit, [Schuelke] had the annual tax returns, which provided the historical documents prepared in accordance with generally acceptable accounting principles.

By couching his explanation for the differences shown on Exhibit 76 as "guesstimates," Wilson attempts to deflect any conclusion that [Schuelke] was justified in relying upon his representations. This attempt is not successful. Wilson made these representations to [Schuelke] knowing that [Schuelke] was relying upon them and upon Wilson's many years of experience in the Maaco business. Although the court does not find that Wilson made the representations falsely, it does find, by clear and convincing evidence, that he made representations concerning financial matters to [Schuelke] recklessly, without knowledge of their truth and as positive assertions; that Wilson intended [Schuelke] to rely on those financial representations; that [Schuelke] did rely thereon; that the representations were false; and that [Schuelke] suffered damages as a result thereof.

An action for rescission is equitable in nature and as such is reviewable by an appellate court de novo on the record. *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985). In a de novo review, an appellate court reaches a conclusion independent 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 fact that the trial court heard and observed the witnesses and accepted

one version of the facts rather than another. *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

In a fraud case, direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

In a rescission case, the party alleging fraud must prove all elements by clear and convincing evidence. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). After reviewing the record de novo, we find that Schuelke failed to prove all of the elements of fraudulent misrepresentation by clear and convincing evidence.

Specifically, Schuelke failed to prove by clear and convincing evidence that Wilson intended for Schuelke to rely on Wilson's representations regarding the profitability of the company when operated under an owner-operator type of management versus an absentee-owner type of management. Wilson made particular representations as to why he believed certain expenses would be reduced or eliminated under an owner-operator management style. Wilson, however, then specifically told Schuelke that the figures he stated were approximations that he established after discussing the matter with his accountant. Moreover, Wilson then recommended that Schuelke have these figures verified. These facts negate Wilson's intention that Schuelke rely upon his representations.

Moreover, we do not find that the record supports a finding that Schuelke acted reasonably in relying on these represen-

tations as to the profitability of the business under an owner-operator style of management.

It is true that a person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity. *Forker Solar, Inc., supra*. Nebraska law, however, imposes a duty of ordinary prudence. *Id.* In regard to this duty, this court has stated that "[w]hile no action will lie where ordinary prudence would have prevented the deception, that rule is generally applied where the means of discovering the truth was in the hands of the party defrauded." *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 883, 332 N.W.2d 196, 202 (1983).

Under the circumstances of this case, we find that Schuelke was not justified in relying on the representations set forth in the statements of profit or on Wilson's explanations regarding the adjustments he made as to expenses. Schuelke specifically testified that he was concerned about the differences between the expense figures listed in the tax returns and those listed in the statements of profit. Wilson, after explaining his adjustments to the expenses, recommended that Schuelke have the figures verified. Schuelke concedes that he had in his possession all the documents necessary to have the expense figures reviewed to ascertain their accuracy. Schuelke, however, took no further action in ascertaining the validity of these adjusted expense figures.

Under the circumstances of this case, Schuelke did not act in an ordinary and prudent manner in relying on the representations made by Wilson. The adjusted expenses listed in the statements of profit were substantially lower than those listed in the tax returns for the corresponding years. As Schuelke testified, this naturally concerned him. These concerns that Schuelke admitted he had regarding the adjusted expense figures, however, could not have been eliminated after discussing the adjustments with Wilson. Wilson, rather than attempting to assure Schuelke of the accuracy of his representations, told Schuelke that the adjustments were approximations and recommended that they be verified.

This court, in *Little v. Gillette*, 218 Neb. 271, 354 N.W.2d 147 (1984), addressed the same type of claim as made by Schuelke in the case at bar—alleged fraudulent misrepresentations by a vendor of a franchise. However, the vendor's conduct in *Little* was vastly different from Wilson's conduct in this case. In *Little*, the defendants continuously represented to the plaintiff that the franchise would generate a monthly profit of $10,000. The defendants also told the plaintiff that they would verify the financial figures regarding the estimated projected profit. The defendants, however, never verified these figures. Moreover, the defendants knew prior to the sale that the franchise was a " 'financial disaster,' " *id.* at 275, 354 N.W.2d at 151, but never disclosed this to the plaintiff.

This court found that the jury's finding of fraudulent misrepresentation in *Little* was supported by the facts. In regard to the defendants' argument that the plaintiff did not use ordinary prudence, this court stated:

> The [defendants] shed little light as to what investigation [the plaintiff] could have undertaken to ascertain that the previous operation was operated at a loss. She had asked for previous financial records, to no avail. Her suspicions were somewhat assuaged by the representations that she could make a profit by [two of the defendants], both of whom were experienced in business. The question of reliance was properly submitted to the jury, and it determined the issue adversely to the [defendants'] position. As the jury's determination was not clearly wrong, it will not be reversed on appeal.

Id. at 277, 354 N.W.2d at 152.

Unlike the circumstances set forth in *Little*, the facts in the instant case do not support a similar finding that Schuelke was justified in relying on Wilson's representations. In the case at bar, Wilson understood why Schuelke had concerns regarding the figures listed in the statements of profit. Wilson explained the reasons for making adjustments and explained that these figures were merely approximations. Unlike the defendants in *Little*, Wilson provided Schuelke with the necessary financial records. Furthermore, unlike the defendants in *Little*, rather

than attempting to alleviate any concerns of Schuelke, Wilson expressly told Schuelke to have these figures verified.

For the reasons stated above, we find the record does not support the district court's finding that Schuelke was entitled to rescission. Because Schuelke was not entitled to rescission, we need not address Schuelke's assignments of error. We reverse, and remand with directions that the district court address Wilson's counterclaim for payment of the promissory notes.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., participating on briefs.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, APPELLEE, v. GEORGE S. YELICH, APPELLANT.

549 N.W.2d 172

Filed June 21, 1996. No. S-94-946.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. ____: ____. Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
3. **Contracts: Jurisdiction.** Forum selection clauses in contracts may be legally enforceable in this state if the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction and if (1) a court of this state has power under the law of this state to entertain the action; (2) this state is a reasonably convenient place for the trial of the action; (3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (4) the defendant was served as required by law.
4. **Declaratory Judgments.** The granting of declaratory relief is discretionary.

5. **Actions: Declaratory Judgments: Contracts.** An action requesting a declaration of contract rights will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.
6. **Actions: Declaratory Judgments: Jurisdiction.** A court abuses its discretion when it entertains jurisdiction over a declaratory judgment action where an action or proceeding is already pending in another forum involving the same issues and the same parties.
7. **Foreign Judgments: Jurisdiction: Presumptions.** It is to be presumed that a foreign court rendering a judgment had jurisdiction.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with directions.

Lee R. Terry, Suzanne Shehan, and J. Michael Benninger for appellant.

Carol C. Knoepfler and Cynthia A. Rismiller, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

After appellant George S. Yelich was terminated by Woodmen of the World Life Insurance Society, he and his wife commenced an action for wrongful discharge and defamation in a West Virginia circuit court. Woodmen filed a motion to dismiss the action based on a forum selection clause in its employment contract with Yelich which provided that all causes of action arising under the contract must be brought in Douglas County, Nebraska. After a hearing, the West Virginia circuit court applied Nebraska law and held that the forum selection clause was not enforceable on the facts and denied Woodmen's motion to dismiss. However, while the motion to dismiss was pending in West Virginia, Woodmen filed a declaratory judgment action in the district court for Douglas County, Nebraska, and asked that the court enforce the forum selection clause and enjoin Yelich from proceeding further in West Virginia. Both parties moved for summary judgment.

The Nebraska district court granted summary judgment in favor of Woodmen and granted injunctive relief, ordering Yelich to halt the proceedings in West Virginia. Yelich appealed. We hold the district court abused its discretion by entertaining Woodmen's declaratory judgment action when another action was pending in another court involving the same parties and the same issue. We reverse, and remand with directions to enter summary judgment in favor of Yelich.

BACKGROUND

Yelich was terminated by Woodmen amidst allegations of sexual harassment. On or about June 23, 1993, Yelich commenced an action for wrongful discharge and defamation in the circuit court of Marion County, West Virginia, the county in which Yelich lived and had worked for Woodmen. Yelich's wife, Patricia, joined him as plaintiff and sought damages for her own humiliation and suffering arising from the alleged defamation and for loss of consortium. In addition to Woodmen, Yelich named his immediate supervisor, Donnon F. Waldrip, as defendant.

Woodmen moved to dismiss the action based on a forum selection clause in the employment contract between the parties. The forum selection clause stated that "the exclusive venue for the pursuit of any legal proceeding or remedy arising out of this contract shall be in Douglas County, Nebraska."

A hearing was conducted on the motion to dismiss on August 31, 1993. By its order dated September 9, 1993, the West Virginia court applied Nebraska law and denied Woodmen's motion to dismiss. The court found that the plaintiffs and defendant Waldrip were West Virginia residents, that the employment contract had been executed in West Virginia, and that Yelich's alleged conduct and actions which gave rise to his discharge were performed in West Virginia. The court further found that Woodmen actively conducted business in West Virginia. Finally, the court found that it would be inconvenient to require the plaintiffs and the witnesses to pursue the action in Nebraska.

While the motion to dismiss was still pending before the West Virginia court, Woodmen filed an action for declaratory judgment in the district court for Douglas County, Nebraska, on August 10, 1993, naming Yelich as the sole defendant. Woodmen alleged that the forum selection clause was legally enforceable and asked the court to enjoin Yelich from any further proceedings in the West Virginia action for wrongful discharge and defamation. On October 4, Yelich answered and stated that the forum selection clause issue had been contested in West Virginia and that the West Virginia court had denied Woodmen's motion to dismiss.

Woodmen filed a motion for summary judgment in the declaratory judgment action on April 19, 1994. Woodmen asserted that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. On May 19, Yelich also filed for summary judgment and stated that the issues suggested in Woodmen's petition for declaratory judgment had been resolved by the West Virginia court. Both parties introduced affidavits in support of their motions, as well as pleadings from the West Virginia action and the order of the West Virginia court denying Woodmen's motion to dismiss.

On September 23, 1994, the district court held that the forum selection clause was enforceable, granted summary judgment in favor of Woodmen, and issued the injunction. Yelich timely appealed to the Nebraska Court of Appeals on September 30. By order of this court, the appeal was moved to our docket in order to regulate the caseloads of lower courts.

ASSIGNMENTS OF ERROR

Yelich asserts that the trial court erred by granting Woodmen's motion for summary judgment and by further finding that the forum selection clause was enforceable; by enjoining any further action in the West Virginia case; and by failing to grant his motion for summary judgment because, as a matter of law, Nebraska is not a reasonably convenient place for trial and the issue of venue is res judicata.

STANDARD OF REVIEW

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995); *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995).

Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Columbia Nat. Ins. v. Pacesetter Homes, supra.*

ANALYSIS

Forum selection clauses in contracts may be legally enforceable in this state.

> (1) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant . . . was served as required by law . . . .

Neb. Rev. Stat. § 25-414 (Reissue 1995). See, also, Neb. Rev. Stat. § 25-415 (Reissue 1995) (pertaining to forum selection clauses placing choice of forum in another state).

This court has held that a forum selection clause, which specifically references § 25-415, is not contrary to public policy and does not deny courts their inherent authority to consider appropriate matters presented to them. *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984). We also stated that a trial court may refuse to dismiss an action where the facts are consistent with § 25-415's limitations. However, in *Haakinson & Beaty Co.*, we did not discuss boundaries for § 25-415's limitations.

After Yelich chose to commence his cause of action in West Virginia, Woodmen sought to have the forum selection clause enforced by that court. The pleadings and the court order indicate that the contested issue raised by Woodmen's motion to dismiss was whether Nebraska was a reasonably convenient place for the trial. The West Virginia court issued factual findings pertinent to that issue. In addressing Woodmen's motion to dismiss, the West Virginia court recited that it had considered Nebraska law when reaching its ruling and that pursuant to *Woodmen of the World Life Ins. Soc. v. Puccio*, 1 Neb. App. 478, 499 N.W.2d 85 (1993), and *Woodmen of the World Life Ins. Soc. v. Walker*, 1 Neb. App. 882, 510 N.W.2d 439 (1993), it would not be reasonable and just to enforce the forum selection clause. The two cited cases are the only Nebraska authority explicitly addressing the issue of when forum selection clauses are enforceable.

The petition in this declaratory judgment action showed on its face that an action was pending in West Virginia involving the same persons and the same issues. Yelich's answer stated that the West Virginia court had conclusively resolved the very issue presented by Woodmen's request for declaratory relief.

The granting of declaratory relief is discretionary. *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983). This court has adopted a rule that an action requesting a declaration of contract rights "will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action." *Id.* at 85, 341 N.W.2d at 612. See, also, *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976); *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969); *State ex rel. Meyer v. Sorrell*, 174 Neb. 340, 117 N.W.2d 872 (1962). A court abuses its discretion when it entertains jurisdiction over a declaratory judgment action in such a situation. *Slosburg v. City of Omaha, supra*; *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946).

" 'Where an action or proceeding is already pending in another forum involving the same issues, it is manifestly

unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or plaintiff in that suit. . . .' " *Strawn v. County of Sarpy*, 146 Neb. at 788, 21 N.W.2d at 600.

The parties do not raise the issue of whether the West Virginia court possessed subject matter and personal jurisdiction. It is to be presumed that a foreign court rendering a judgment had jurisdiction. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988).

Therefore, the issue regarding the enforceability of the forum selection clause had been raised in a court of competent jurisdiction prior to the filing of the declaratory judgment action as revealed on the face of the petition. Woodmen had its day in court on this issue in West Virginia and then sought to circumvent a potentially unfavorable ruling by seeking relief in a court of this state. On these facts, entertaining the declaratory judgment action was an abuse of discretion. See, *Sim v. Comisky, supra*; *Zarybnicky v. County of Gage, supra*. Since the issue of the enforceability of the forum selection clause was not properly before the district court, we do not reach the merits of that issue.

We note that *Woodmen of the World Life Ins. Soc. v. Puccio*, 1 Neb. App. 478, 499 N.W.2d 85 (1993), is procedurally and factually very similar to this case. In *Puccio*, Woodmen filed a declaratory judgment action and asked the district court for Douglas County to construe a forum selection clause after a West Virginia court had denied a motion to dismiss a breach of contract case for improper venue. Although the issues of res judicata and full faith and credit were raised in the district court and on appeal, the Court of Appeals did not address them. The Court of Appeals ruled on the merits of the case. To the degree that *Puccio* permitted the use of a declaratory judgment action to obtain judicial review of a judgment of another forum, it is overruled.

Similar questions may be raised by a review of *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994). However, in *Kight*, it is not clear that the declaratory judgment action involved the same issues as the matter pending in the other forum.

CONCLUSION

The district court abused its discretion in granting summary judgment in favor of Woodmen, by failing to grant summary judgment in favor of Yelich, and by issuing the injunction. We reverse the orders of the district court, and remand the cause with directions to enter summary judgment in favor of Yelich.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. BERNARD L. WOLF, APPELLANT.

549 N.W.2d 183

Filed June 21, 1996. No. S-95-478.

1. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause protects against three abuses of the criminal justice system: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.
2. **Penalties and Forfeitures.** When a civil penalty has only a deterrent purpose and is devoid of any remedial purpose, that penalty is punishment in substance, regardless of the fact that it is civil in name.
3. **Statutes: Double Jeopardy.** The fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence as well precludes a finding that the statute results in punishment for double jeopardy purposes.
4. **Double Jeopardy: Licenses and Permits: Revocation.** The revocation or suspension of a professional license generally does not constitute punishment for the purposes of double jeopardy analysis.
5. **Penalties and Forfeitures: Words and Phrases.** A penalty must bear a rational relation to the costs to government of the violation and must not appear to qualify as punishment in the plain meaning of the word.
6. **Penalties and Forfeitures: Appeal and Error.** While a $10,000 fine imposed under Neb. Rev. Stat. § 71-155 (Cum. Supp. 1994) may well serve a punitive purpose in certain cases, an appellate court will not assume in a vacuum that a potential fine not actually imposed could serve only primarily punitive purposes.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Chris M. Arps for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

This is an appeal from an order denying a plea in bar. Bernard L. Wolf contends that his prosecution for possession of a controlled substance under Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1994), is barred by the Double Jeopardy Clauses to the federal Constitution's Fifth Amendment and art. I, § 12, of the Nebraska Constitution. We affirm.

BACKGROUND

By his own admission, Bernard L. Wolf has suffered from an addiction to prescription drugs since his teenage years. For reasons perhaps more opportunistic than prudent, Wolf chose pharmacy as his career and began working at Midlands Community Hospital after securing from the State his license to practice pharmacy. Wolf's actions in his capacity as a state-licensed pharmacist first came under scrutiny in July 1994, when the Nebraska Department of Health Investigations Division instigated an investigation of missing cocaine, narcotics, barbiturates, and tranquilizers, including triazolam and alprazolam. Triazolam and alprazolam are among the controlled substances enumerated in Neb. Rev. Stat. § 28-405 (Cum. Supps. 1992 & 1994); the drugs are better known by their respective trade names, Halcion and Xanax.

The Department of Health eventually traced the missing substances to Wolf. On August 30, 1994, Wolf admitted in an interview with a Department of Health investigator to diverting an assortment of drugs from the hospital pharmacy for his personal edification and without a prescription for the 6 to 9 months preceding the interview. Wolf stated that he had most recently taken drugs from the pharmacy in the first week of August 1994, that he had ingested Halcion and Xanax at that time, and that he was addicted to prescription drugs and alcohol.

The Department of Health supplied its findings, including its interview with Wolf, to the offices of the Nebraska Attorney General and the Sarpy County Attorney. The Attorney General filed a petition for disciplinary action against Wolf before the director of the Department of Health. This petition alleged that (1) Wolf had an active dependency on or addiction to controlled substances or narcotic drugs, (2) Wolf knowingly or intentionally acquired or attempted to acquire possession of controlled substances by theft and knowingly or intentionally possessed controlled substances when he was not authorized to do so in violation of § 28-416 and Neb. Rev. Stat. § 28-418 (Reissue 1995), and (3) Wolf's actions constituted dishonorable conduct evidencing unfitness. The petition stated that Wolf's actions constituted grounds for disciplinary action pursuant to Neb. Rev. Stat. § 71-147(17) (Cum. Supp. 1994), and prayed for relief under any or all of the provisions of Neb. Rev. Stat. § 71-155 (Cum. Supp. 1994).

The record does not indicate the date of filing of the Attorney General's petition against Wolf, nor does the record indicate what, if anything, transpired between the filing of the petition and the ultimate conclusion of the proceeding. At any rate, the proceedings before the director of the Department of Health concluded on December 9, 1994, when Wolf entered into a settlement agreement with the Attorney General. As a condition of the agreement, Wolf elected not to contest most of the Attorney General's allegations and further admitted to the allegation concerning his active dependency on or addiction to the use of controlled substances and alcohol. Wolf agreed to pursue a new career other than in pharmacy and agreed that his license could be revoked.

On February 23, 1995, the Sarpy County Attorney filed an information in the district court, charging Wolf with one count of knowingly and intentionally possessing Halcion, in violation of § 28-416(3), between May 1 and August 30, 1994, and one count of knowingly and intentionally possessing Xanax, in violation of § 28-416(3), during the same period. Wolf filed a plea in bar, alleging that the criminal charges against him violated constitutional prohibitions against being twice put in jeopardy for the same offense. The district court overruled

Wolf's plea, and Wolf appealed; we granted the State's petition to bypass the Nebraska Court of Appeals for immediate review of this issue of first impression.

Wolf assigns one error: The district court for Sarpy County erred in denying his plea in bar. An issue regarding the denial of a plea in bar is a question of law. *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). Our resolution of this issue turns on whether the proceedings before the director of the Department of Health resulted in "punishment" as it is defined by the U.S. Supreme Court for double jeopardy purposes.

DOUBLE JEOPARDY AND CIVIL PENALTIES IN NEBRASKA

The Double Jeopardy Clause protects against three abuses of the criminal justice system: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Wolf alleges that he was subjected to multiple punishments for the same offense, i.e., the possibility of a $10,000 fine in the civil proceeding subjected him to "punishment" in the first proceeding and that, therefore, the subsequent criminal prosecution necessitates multiple defenses for the same underlying offense. The validity of Wolf's allegations, thus, turns on whether Wolf faced punishment in the civil proceeding before the director of the Department of Health.

The seminal case on double jeopardy implications of civil proceedings is *Halper, supra*. In *Halper*, the U.S. Supreme Court invalidated a $130,000 penalty imposed under the civil False Claims Act, 31 U.S.C. §§ 3729 to 3731 (1982 & Supp. III 1985). The defendant already had been convicted of violating the criminal false claims statute and sentenced to 2 years' imprisonment and fined $5,000. On appeal, the defendant argued that the $130,000 penalty, despite its genesis in a civil proceeding, constituted a second punishment for a single offense. The Supreme Court agreed, finding that

> [w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent

> proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-50. Under *Halper*, when a civil penalty has only a deterrent purpose and is devoid of any remedial purpose, that penalty is "punishment" in substance, regardless of the fact that it is civil in name.

This court first defined the punitive limits of civil penalties under *Halper* in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), *cert. denied* No. 95-8782, 1996 WL 226750 (U.S. June 10, 1996). *Hansen* arose from a double jeopardy challenge to Nebraska's administrative license revocation (ALR) scheme, wherein persons arrested for driving under the influence of alcohol face driver's license revocation by the Nebraska Department of Motor Vehicles in addition to criminal punishment. Despite Hansen's claim that ALR appeared to qualify as punishment, we found that a civil sanction rises to the level of "punishment" when it " 'may not fairly be characterized as remedial, but *only* as a deterrent or retribution.' " *Id.* at 185, 542 N.W.2d at 430.

Under *Hansen*, the fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence as well precludes a finding that the statute results in punishment for double jeopardy purposes. This reasoning validated the ALR scheme, whose provisions, taken as a whole, serve primarily a remedial purpose of protecting Nebraskans from drunk drivers while also serving an exemplary purpose of deterring motorists from driving drunk. As Nebraska's ALR scheme does not serve primarily a deterrent or retributive purpose, ALR does not trigger Double Jeopardy Clause protections. Our task in this case is to determine whether the same can be said of the statutes under which Wolf was prosecuted.

DOUBLE JEOPARDY IMPLICATIONS OF PROFESSIONAL LICENSE REVOCATION

In the proceedings before the director of the Department of Health, Wolf faced penalties listed in § 71-155, which enables the Director of Health "to exercise in his or her discretion any or all of the following powers":

> (1) Issue a censure or reprimand against the licensee, certificate holder, or registrant;
>
> (2) Suspend judgment;
>
> (3) Place the licensee, certificate holder, or registrant on probation;
>
> (4) Place a limitation or limitations on the license, certificate, or registration and upon the right of the licensee, certificate holder, or registrant to practice the profession to such extent, scope, or type of practice, for such time, and under such conditions as are found necessary and proper;
>
> (5) Impose a civil penalty not to exceed ten thousand dollars. The amount of the penalty shall be based on the severity of the violation;
>
> (6) Enter an order of suspension of the license, certificate, or registration;
>
> (7) Enter an order of revocation of the license, certificate, or registration; and
>
> (8) Dismiss the action.

Wolf contends that the provisions of § 71-155 constitute "punishment," such that the attempt to subsequently prosecute him criminally results in an impermissible attempt to punish him twice for the same offense.

The revocation or suspension of a professional license generally does not constitute "punishment" for the purposes of double jeopardy analysis. See *Hansen, supra* (noting that some other courts have found that professional license revocation serves remedial purpose of protecting public from unfit practitioners). Our analysis cannot end at this point, however, because § 71-155 threatens not only remedial penalties of license revocation, but also "a civil penalty not to exceed ten thousand dollars." § 71-155(5). Wolf argues that the $10,000 fine constitutes punishment and that, therefore, because the

proceeding before the Department of Health *could* have resulted in the imposition of punishment, he is being subjected to multiple punishments for the same offense.

Under *State v. Hansen*, 249 Neb. 177, 185, 542 N.W.2d 424, 430 (1996), *cert. denied* No. 95-8782, 1996 WL 226750 (U.S. June 10, 1996), a penalty must bear a rational relation to the costs to government of the violation and must not appear "to qualify as 'punishment' in the plain meaning of the word." (Quoting *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)). The amount of a civil penalty need not equal the exact amount of damages caused to the government, as the government is entitled to "rough justice." 490 U.S. at 449. However, where a civil penalty "does not remotely approximate the Government's damages and actual costs . . . rough justice becomes clear injustice." 490 U.S. at 446. Were it clear that the possible $10,000 fine provided for in § 71-155 lacked any remedial purpose and did not "remotely approximate the Government's . . . costs," then this court could find that indeed Wolf was subject to punishment. However, we conclude that Wolf was not "punished" in the first proceeding as no fine was actually imposed.

While a $10,000 fine imposed under § 71-155 may well serve a punitive purpose in certain cases, this court will not assume in a vacuum that a potential fine not actually imposed could serve only primarily punitive purposes as applied against Wolf. In fact, the fine, if imposed, might have merely compensated the State for its approximate investigative or prosecutorial expenses. Such expenses might well increase according to the severity of the violation or the deceptiveness of the violator during the investigation, and a fine that recoups some of these costs for the State would assume remedial qualities.

As stated in *Halper*, "a civil remedy does not rise to the level of 'punishment' merely because Congress provided for civil recovery in excess of the Government's actual damages . . . ." 490 U.S. at 442. Rather the analysis of the court must focus on "whether a civil sanction, *in application*, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." (Emphasis

supplied.) 490 U.S. at 443. The Double Jeopardy Clause's prohibition against multiple punishment is "intrinsically personal. Its violation can be identified only by assessing the character of *the actual sanctions imposed on the individual* by the machinery of the state." (Emphasis supplied.) 490 U.S. at 447. Finally, "a civil as well as a criminal sanction constitutes punishment when the sanction *as applied* in the individual case serves the goals of punishment." (Emphasis supplied.) 490 U.S. at 448. See, also, *Hansen, supra* (making particularized assessment of penalty actually imposed to determine if it constitutes "punishment" for purposes of double jeopardy).

Thus, the mere existence of a potential civil statutory sanction itself does not qualify as punishment under a *Halper* analysis. Rather, our analysis must focus on whether a civil sanction, in application, constitutes "punishment." It necessarily follows that a civil sanction must be imposed in order to make an assessment of whether that *particular* sanction, in its application, constitutes punishment for the purpose of a double jeopardy analysis. See *Halper, supra*.

In *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 551 N.E.2d 915 (1990), *cert. denied* 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 47, the Supreme Judicial Court of Massachusetts considered the validity of a statute similar in pertinent part to § 71-155. The appellant in that case had pled guilty to 10 counts of unlawfully dispensing controlled substances and was sentenced to a suspended prison sentence and a $60,000 fine; thereafter, the Board of Registration in Medicine revoked the appellant's license to practice medicine and imposed an additional civil penalty of $10,000. The appellant brought a double jeopardy challenge to only the $10,000 civil penalty and did not contest the validity of the license revocation. While the court in *Kvitka* determined that the medical board had statutory authority to order the $10,000 fine by virtue of the disciplinary statute, the court determined that consideration of the double jeopardy claim was necessary because of the $60,000 fine imposed on the defendant in the preceding criminal case.

The *Kvitka* court invalidated the imposition of the $10,000 fine, holding that it could not survive in light of *Halper*'s pro-

scription of retribution and deterrence in nonpunitive governmental objectives. This conclusion was based on a particularized assessment of the motivations behind the actual imposition of the $10,000 civil penalty in *Kvitka*. Significantly, there was no indication in the record or in the text of the statute that the purpose of the $10,000 fine was remedial. Moreover, the Board of Registration in Medicine made clear its intent to punish the physician by imposing its $10,000 fine through its statement that " 'misconduct in the area of prescription practice will not be treated lightly.' " 407 Mass. at 145, 551 N.Ed.2d at 918. Therefore, because Kvitka had been previously criminally punished, the subsequent imposition of the civil penalty for punitive purposes was disallowed as violative of the Double Jeopardy Clause.

The difference between *Kvitka* and this case is that in the instant case, there was no fine or criminal-like sanction imposed in the first proceeding. While it makes no difference that the proceedings in *Kvitka* and this case are reversed in order, i.e., in *Kvitka*, there was a criminal prosecution first and a civil proceeding second, while here, there was a civil proceeding first and an attempted criminal prosecution second, it does make a difference that, unlike *Kvitka*, no fine was imposed in this case in the first proceeding. See *Kvitka*, 407 Mass. at 145, 551 N.E.2d at 918 (stating that " 'the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed' " and then proceeded to make such assessment). The facts in the instant case are clearly distinguishable from *Kvitka*.

Because the proceedings against Wolf before the director of the Department of Health did not result in punishment within the meaning of *Halper* and *Hansen*, we find that the district court ruled correctly in denying Wolf's plea in bar.

AFFIRMED.

WHITE, C.J., dissenting.

The majority distinguishes this case from *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 551 N.E.2d 915 (1990), *cert. denied* 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 47, by stating that "there was no indication in the record

or in the text of the statute that the purpose of the $10,000 fine was remedial," and by finding that the board of registration "made clear its intent to punish the physician by imposing its $10,000 fine" through its statement of intolerance for professional misconduct. These factors do not counsel in favor of distinction. Neither the record nor the text of Neb. Rev. Stat. § 71-155 (Cum. Supp. 1994) indicates any remedial purpose behind the $10,000 fine, and, in fact, the text of the statute is as telling as the *Kvitka* board's statement that a punitive purpose underlies the fines in both cases.

The text of the provision for the $10,000 fine in § 71-155 reads as follows:

> Upon the completion of any hearing held under this section, the director shall have the authority through entry of an order to exercise in his or her discretion any or all of the following powers, irrespective of the petition:
>
> . . . .
>
> (5) Impose a civil penalty not to exceed ten thousand dollars. The amount of the penalty shall be based on the severity of the violation.

The text of this provision does not specify any mechanism for applying the windfall of the $10,000 fine to expenses of any sort. In fact, nowhere in the text of this provision does the Legislature indicate that the fine is meant to compensate, as the majority theorizes, for "investigative or prosecutorial expenses." The text ties the imposition and amount of the fine to one and only one factor: the severity of the offense. There is no "rational relation" between the provision for the fine and any ostensible costs to society as required by *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), and the statute in fact makes no provision whatsoever for even establishing costs to society.

The inclusion of a $10,000 fine in this otherwise remedial statute is analogous to a provision that would allow the Nebraska Department of Motor Vehicles to fine a driver $10,000 under Nebraska's administrative license revocation statutes: the fine substantially changes the character of the statute and calls into question its ostensibly remedial purpose.

The *Kvitka* court acknowledged the gap between "remedial" and "punitive" that impugns § 71-155 in this case:

> This is not a case where the government itself has suffered a loss because of the physician's fraud, cf. *United States v. Halper, supra*, or where there is an identifiable victim who has suffered damages due to the physician's actions. The only remedial aspect of the fine in this case would have been to reimburse the board for the expenses in handling the administrative matter against the physician. But the board, in its decision, did not base the fine on its administrative expenses.

407 Mass. at 146, 551 N.E. 2d at 918-19. The same can be said of the $10,000 fine with which Wolf was threatened in this case.

Under the U.S. Supreme Court's decision in *Halper* and this court's decision in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), *cert. denied* No. 95-8782, 1996 WL 226750 (U.S. June 10, 1996), a civil penalty must bear a "rational relation" to the costs to society of the violation and must not appear "to qualify as 'punishment' in the plain meaning of the word." 249 Neb. at 185, 542 N.W.2d at 430 (quoting *Halper, supra*). The provision for a $10,000 fine cannot pass muster under this standard. Even the State has not tried to defend the fine as remedial in nature. It is difficult to fathom how this penalty addresses the cost to society of Wolf's misconduct, except in the sense that the threat of its imposition serves as both a specific and a general deterrent—and under *Halper* and *Hansen*, when a sanction "may not fairly be characterized as remedial, but *only* as a deterrent or retribution," the sanction constitutes "punishment," 249 Neb. at 185, 542 N.W.2d at 430 (quoting *Halper, supra*), and thereby triggers double jeopardy protections.

As in *Halper*, there is no logical connection between this fine and the goal of remedying the cost to the State or society created by Wolf's misconduct. The absence of such a quantification leads me to conclude that the provision in § 71-155 for a $10,000 fine is, unlike license revocation, not rationally related to the goal of making society whole. See, e.g., *Halper, supra*. When the purpose of a statutory provision cannot fairly

be characterized as remedial, but only as a deterrent or retribution, and when a citizen is subject to the full force of that statute, then the citizen is subject to "punishment" within the meaning of *Halper* and *Hansen*.

Indeed, the State conceded at oral argument that the $10,000 fine has no remedial purpose. Its only defense of the fine was the fact that Wolf was not actually subjected to the $10,000 fine when the settlement agreement was finalized at the conclusion of the proceedings before the director of the Nebraska Department of Health. In response to this court's questions, the State asserted—and the majority agrees today—that we need be concerned only with the sanction actually imposed and not with the sanctions Wolf faced before the director of the Department of Health passed judgment. This assertion, however, conflicts with the U.S. Supreme Court's interpretation of the text of the Fifth Amendment.

In confining its analysis to exclusively whether Wolf was actually punished twice, the majority opinion overlooks other prohibitions of the Double Jeopardy Clause. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be *twice put in jeopardy* of life or limb." (Emphasis supplied.) U.S. Const. amend. V. The U.S. Supreme Court has explained that " 'the Clause serves the function of preventing both successive punishment and successive prosecution,' " *Witte v. U.S.*, ____ U.S. ____, 115 S. Ct. 2199, 2204, 132 L. Ed. 2d 351 (1995), and that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it," *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173, 21 L. Ed. 872 (1874).

The language of the Double Jeopardy Clause thus protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being twice put in jeopardy for such punishment. *Witte v. U.S., supra*; *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970). In *Price*, the petitioner challenged efforts by the state to convict him for murder after his conviction for a lesser-included offense had been reversed on appeal. The Supreme Court, in finding that the petitioner

could not be retried for the greater-included offense, held that the Double Jeopardy Clause "is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." 398 U.S. at 331. Whether he is convicted, acquitted, or convicted of a lesser offense than that with which he was originally charged, an accused is equally put in jeopardy the first time he faces punishment by the state. See *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

The Supreme Court has found that a tribunal whose purpose is essentially remedial can hold proceedings which are essentially criminal, thus triggering Double Jeopardy Clause protections. In *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975), the Court heard the appeal of a minor who had been tried as an adult in state court following a juvenile court adjudicatory finding that he had violated a criminal statute, and a subsequent finding that he was unfit for treatment as a juvenile and would not be punished or otherwise sanctioned by the juvenile court. The minor argued that he was placed in former jeopardy at the juvenile court adjudicatory hearing, whose object was to determine whether he had committed acts that violated a criminal law and whose potential consequences included both the stigma inherent in that determination and the deprivation of liberty.

The Supreme Court agreed and vacated the minor's state court conviction, holding that even if the state were correct in asserting that the minor faced only one punishment, the Double Jeopardy Clause is violated when an accused twice faces the risk of trial and conviction: "Jeopardy denotes risk." 421 U.S. at 528. The state had contended that the genesis of the juvenile court system was in the need to provide a distinct procedure and setting to rehabilitate troubled youths, rather than to punish criminally, and that as such the policies prohibiting double jeopardy were unconcerned. The truth of this contention, however, did not answer whether the minor was placed in former jeopardy, given the gap that had grown "between the originally benign conception of the system and its realities." 421 U.S. at 528.

Regardless of the type of proceeding, the minor in *Breed* was subjected to the burden of two trials for the same offense, was twice put to the task of marshaling his resources against those of the state, and was twice subjected to the " 'heavy personal strain' which such an experience represents"—all in violation of the letter and spirit of the Double Jeopardy Clause. 421 U.S. at 533. That emphasis on the substance of a proceeding, rather than on the form, is consistent with the Supreme Court's later decision in *Halper*, that relying on "civil" or "criminal" labels is not the dispositive means to ascertain whether a penalty is punishment. If one may be punished in a civil proceeding under *Halper*, then jeopardy must attach in a proceeding where one faces the risk of punishment by the state, even if the proceeding is civil by legal taxonomy.

In this case, the complaint against Wolf included violations of criminal laws prohibiting possession of a controlled substance, and the findings of fact on those issues at the Department of Health proceedings could be considered probative in the subsequent criminal prosecution under Neb. Rev. Stat. § 28-416 (Cum. Supp. 1994). In affirming the denial of Wolf's plea in bar, the majority subjects Wolf, like the minor in *Breed*, to two prosecutions with potential punitive consequences for the same offenses; he will be twice forced to marshal his resources against those of the State in an effort to avoid punishment and would be twice subjected to the "heavy personal strain" which the experience represents. Like the adjudicatory hearing in *Breed*, the object of the proceedings before the director of the Department of Health was to determine whether Wolf had committed acts that violated a criminal law, and its potential consequences included both the stigma inherent in that determination and the deprivation of up to $10,000. Although the genesis of license revocation proceedings may well be in the remedial purpose reflected in most of § 71-155, the $10,000 fine is by the State's concession a hammer for the State rather than a remedy for a loss. The reality of these proceedings is thus detached from their original conception by the fact that, through the provision for a $10,000 fine, the director of the Department of Health has the power to punish.

Wolf was twice charged with violations of § 28-416 and twice put in jeopardy of punishment by the State. Were Wolf to face only a remedial sanction for his violation of these laws before the Department of Health, the State would be permitted to seek punitive sanctions in its criminal proceeding. Because Wolf did face a purely punitive sanction before the Department of Health however, the text of the Fifth Amendment, as interpreted in *Breed*, should estop the State from seeking punishment a second time after Wolf settled for a lesser sanction in the first proceeding.

The majority suggests that the true purpose of the $10,000 fine cannot be known until the director imposes it as a consequence for professional misconduct. Thus, under the majority's reasoning, in any case wherein a penalty is not "criminal" by name, the State can successfully defend against a plea in bar by claiming that it cannot know whether the penalty is punitive until it is imposed—irrespective of why it seeks the imposition of that particular penalty. In other words, the majority has found that double jeopardy protections are triggered only *after* the State actually takes life, liberty, or property. This absurd result vitiates the Fifth Amendment bars against being "twice put in jeopardy"—not just against multiple punishments, but also against multiple prosecution. The framers of the Fifth Amendment intended the Double Jeopardy Clause to stop an improper prosecution at its outset, not after the defendant's and the court's resources have been spent and possibly wasted in lengthy and arduous litigation.

I would reverse the order of the district court denying Wolf's plea in bar and remand this cause with instructions to enter an order barring prosecution of these offenses pursuant to the Double Jeopardy Clause of the Fifth Amendment.

FAHRNBRUCH, J., joins in this dissent.

THOMAS J. KELLEY AND LAURA R. KELLEY, APPELLEES, V. BENCHMARK HOMES, INC., A NEBRASKA CORPORATION, APPELLANT.

550 N.W.2d 640

Filed June 28, 1996. No. S-94-115.

1. **Arbitration and Award.** Whether a stay of proceedings should be granted and arbitration required is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Constitutional Law: Statutes: Contracts: Arbitration and Award.** A statute authorizing binding arbitration of future disputes and clauses in contracts providing for binding arbitration of future disputes violates Neb. Const. art. I, § 13, which provides that all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.
4. **Constitutional Law: States.** The Supremacy Clause of the U.S. Constitution dictates that state law, including state constitutional law, is superseded to the extent that it conflicts with federal law.
5. **Federal Acts: Contracts: Arbitration and Award: Words and Phrases.** The words "involving commerce" in the federal Arbitration Act, 9 U.S.C. §§ 1 through 16 (1994), require a broad interpretation to give effect to the act's basic purpose, to put arbitration provisions on the same footing as the other terms of a contract.
6. **Federal Acts: Arbitration and Award: Words and Phrases.** The words "evidencing a transaction" in the federal Arbitration Act, 9 U.S.C. §§ 1 through 16 (1994), must be interpreted as meaning that the transaction in fact must involve interstate commerce even if the transaction as contemplated by the parties did not involve an interstate commerce connection.
7. **Federal Acts: Contracts: Arbitration and Award.** Contract clauses which require that parties submit to nonbinding arbitration or clauses that require arbitration as a condition precedent to the commencement of litigation are within the scope of the federal Arbitration Act, 9 U.S.C. §§ 1 through 16 (1994).
8. **Arbitration and Award.** A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.
9. **Arbitration and Award: Courts: Actions.** When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration.
10. **Courts: Actions.** Courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court.
11. **Constitutional Law: Courts: Actions: Parties: Proof.** In making its decision to stay proceedings, a trial court is to balance the competing needs of the par

> ties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof.

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

James F. Kasher and David G. Wilwerding, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Thomas J. Kelley, of McGrath, North, Mullin & Kratz, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ. and LUTHER, D.J.

PER CURIAM.

This matter is before the court as an interlocutory appeal pursuant to the federal Arbitration Act, 9 U.S.C. §§ 1 through 16 (1994) (AA). The appellant, Benchmark Homes, Inc., filed a motion to stay proceedings in the district court for Douglas County. Benchmark asserts, pursuant to the express terms of a warranty contract, that the appellees, Thomas J. Kelley and Laura R. Kelley, must first submit the causes alleged in their second amended petition to arbitration for resolution as a condition precedent to filing suit. The district court denied Benchmark's motion, and it is from this denial that Benchmark appeals. We find that the district court erred and accordingly reverse the judgment and remand the cause for further proceedings.

FACTUAL BACKGROUND

The Kelleys purchased a new home from Benchmark, closing the purchase on October 29, 1992. Within 1 month of closing, the Kelleys wrote to Benchmark and requested that it repair or inspect 24 separately identified defects in their new home. The record indicates that over the course of the next 12 months, the Kelleys wrote numerous letters to Benchmark and its counsel in an effort to get repairs made.

Benchmark was unable to satisfy the Kelleys, and they filed this suit. In their second amended petition, the Kelleys alleged four causes of action: trespass; breach of an implied warranty; breach of an express warranty; and damages for latent defects for which Benchmark, as a mass developer of homes, was strictly liable.

The alleged breach of the express warranty at issue arises under the Home Buyers Warranty the Kelleys purchased from Builders Structural Services, Inc. II (BSS), a Colorado corporation. The purchase price of this warranty was determined by a formula based upon the price of their home. The Kelleys purchased a 1-year workmanship/2-year systems warranty and a 10-year structural coverage warranty, in addition to a separate 5-year extended structural coverage warranty. In the application for home enrollment completed by the Kelleys and Benchmark, paragraph 11 explicitly states that "the warranty is an *EXPRESS LIMITED WARRANTY* and that no person or entity shall have any liability whatsoever, by implication or otherwise, for claims which are not *EXPRESSLY* covered by the warranty documents." (Emphasis in original.) Moreover, the BSS Home Buyers Warranty agreement contains an arbitration clause which states in pertinent part:

> If the Homebuyer(s) have submitted their complaints to the Builder and Home Buyers Warranty as described in the section above and the Homebuyer(s) and Builder continue to disagree on any defective items (including repairs attempted by the Builder) which might be covered hereunder, the Builder or Homebuyer(s) may request an impartial, third-party arbitration hearing administered through a Home Buyers Warranty approved arbitration service. . . . [T]he arbitration provided for hereunder shall not be legally binding, but shall be a condition precedent to the commencement of any litigation by any party to compel compliance with the warranty or to seek relief for any dispute arising out of this program.

Pursuant to the terms of the BSS warranty agreement, Benchmark requested arbitration of the matters set forth in the Kelleys' second amended petition. The Kelleys refused arbitration, contending that arbitration agreements entered into

before a dispute arises are against public policy and therefore void. Benchmark then moved the district court for an order staying the Kelleys' action pending arbitration as required under the terms of their Home Buyers Warranty agreement. The district court denied Benchmark's motion to stay proceedings, finding that "the obligations under the express warranty are wholly intrastate and do not involve commerce."

SCOPE OF REVIEW

Whether a stay should be granted and arbitration required is a question of law. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993). On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Scholl v. County of Boone, ante* p. 283, 549 N.W.2d 144 (1996); *State v. Bundy, ante* p. 213, 549 N.W.2d 122 (1996).

ASSIGNMENT OF ERROR

Benchmark asserts that the district court erred in finding that the express warranty at issue in the Kelleys' second amended petition did not involve commerce within the meaning of the AA.

ANALYSIS

Both parties agree that the express warranty evidenced by the BSS Home Buyers Warranty agreement is subject to arbitration if it evidences "a transaction involving commerce to settle by arbitration a controversy," within the meaning of § 2 of the AA. Section 2 thereof provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Under language in Neb. Const. art. I, § 13, reading that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay," we held invalid a statute authorizing binding arbitration of future disputes and contract clauses providing for such. See *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). However, the Supremacy Clause of the U.S. Constitution dictates that state law, including state constitutional law, is superseded to the extent that it conflicts with federal law. U.S. Const. art. VI, cl. 2; *Dowd, supra.*

In *Dowd*, the district court had required the plaintiffs to submit to arbitration their dispute concerning a breach of their customer agreement which alleged a wrongful liquidation of a margin account by their securities broker. The customer agreement signed by the Dowds and First Omaha Securities provided that Nebraska law would govern the contract and that any disputes from the agreement would be submitted to arbitration.

In affirming the district court's judgment, we reaffirmed that under Nebraska law, a predispute agreement to compel arbitration is void. However, we acknowledged that in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), the U.S. Supreme Court held a provision of the California Franchise Investment Law, which required judicial consideration of all claims brought under it, was preempted to the extent it conflicted with the AA. Thus, it followed that *Southland Corp.* must also require that a choice-of-law provision in a contract cannot prevent the enforcement of an otherwise valid arbitration clause in the same contract. In addition, we recognized that there are but two limitations to the enforceability of arbitration provisions governed by the AA. The arbitration clause must be part of a contract " ' "evidencing a transaction involving commerce," ' " and arbitration clauses may be revoked upon " ' "grounds as exist at law or in equity for the revocation of any contract." ' " *Dowd*, 242 Neb. at 354, 495 N.W.2d at 41, quoting *Southland Corp., supra.*

There are two issues raised in the instant action which require that we again examine the extent to which the AA preempts our state constitutional preference toward providing our citizens a remedy in the due course of law by holding all courts open. The first issue is whether the BSS Home Buyers Warranty contract evidences a transaction involving commerce within the meaning of the act. The second issue, raised in the Kelleys' supplemental brief, is whether a nonbinding predispute arbitration clause is within the meaning of the phrase "to settle by arbitration," as required by § 2 of the act.

Evidencing Transaction Involving Commerce.

Dispositive of the issue of whether the BSS contract evidences a transaction involving commerce is *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ____ U.S. ____, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). In *Allied-Bruce Terminix Companies, Inc.*, Steven Gwin purchased a lifetime termite protection plan for his home in Birmingham, Alabama, from the local Terminix office. Four years later, Gwin sold his home to the Dobsons. Terminix reinspected the house prior to closing and reported the house to be termite free. Subsequent to closing, the Dobsons discovered the house was infested with termites. The Dobsons found Allied-Bruce's efforts to treat and repair the house inadequate and filed suit against the Gwins, Allied-Bruce, and Terminix in state court. Allied-Bruce and Terminix asked the court for a stay to allow arbitration to proceed as required by the lifetime termite protection plan purchased by Gwin. Ultimately, the Alabama Supreme Court upheld the lower court's denial of the stay based upon a state statute making written predispute arbitration agreements invalid and unenforceable.

As a threshold matter, the U.S. Supreme Court recognized that the basic purpose of the AA was to overcome the refusal of courts to enforce agreements to arbitrate. The Court then concluded that the words " ' "involving commerce" ' " require a broad interpretation to give effect to the act's basic purpose, to put arbitration provisions on the same footing as a contract's other terms. 115 S. Ct. at 840. Thus, "the word 'involv-

ing,' like 'affecting,' signals an intent to exercise Congress's commerce power to the full." 115 S. Ct. at 841.

The U.S. Supreme Court then found that the words " 'evidencing a transaction' " must be interpreted as meaning that the transaction in fact must involve interstate commerce even if the transaction as contemplated by the parties did not involve an interstate commerce connection. 115 S. Ct. at 841. The Court reasoned that this interpretation was necessary to avoid costs and delays brought on by litigation concerning the intent of the parties and to give effect to Congress' intent to make arbitration agreements universally enforceable.

The Court determined that the arbitration clause there at issue concerned a transaction that in fact involved interstate commerce for two reasons. First, Terminix and Allied-Bruce were clearly multistate businesses, and second, the materials used to treat the house for termites and to repair the damage came from outside Alabama.

Application of *Allied-Bruce Terminix Companies, Inc.*, to the case now before us compels the conclusion that the BSS Home Buyers Warranty contract evidences a transaction that in fact involves commerce within the meaning of the AA. The BSS warranty was an agreement between the Kelleys and BSS, and BSS is an out-of-state business. The Home Buyers Warranty booklet given to the Kelleys clearly identified that district claims offices for Home Buyers Warranty were located in New Jersey, Georgia, Texas, and California. In addition, the homeowner information pamphlet given to the Kelleys indicated that Home Buyers Warranty itself has an Aurora, Colorado, address. Moreover, John C. Czerwinski, president of Benchmark, stated in his affidavit that a significant portion of the materials used to construct the Kelley home were manufactured outside Nebraska.

Thus, the BSS warranty agreement clearly constituted a transaction which in fact involved interstate commerce and is thus subject to the AA. The agreement evidences a transaction between a local homeowner and an out-of-state company, and the transaction required the use of goods which traveled in the stream of interstate commerce.

To Settle by Arbitration.

Alternatively, the Kelleys argue that a predispute contract clause requiring nonbinding arbitration cannot be considered an agreement "to settle by arbitration" within the meaning of § 2 of the AA. In essence, the Kelleys argue that nonbinding arbitration settles nothing in the sense that there is a finality to the controversy. Since nonbinding arbitration is not a final settlement, it must not be within the scope of § 2.

The Kelleys' argument is not supported by the construction of the AA given by other courts. The act was an attempt by Congress to place an arbitration agreement upon the same footing as other contracts and to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

The contract clause agreed to by the Kelleys provided that they would submit to an impartial third-party arbitration hearing, administered through a Home Buyers Warranty approved arbitration service, any dispute arising out of the BSS warranty as a condition precedent to the commencement of any litigation to compel compliance with the BSS warranty. The AA requires that this contract provision be given the same effect as any other contract provision. In considering this issue, other courts have found that contract clauses which require that parties submit to nonbinding arbitration or clauses that require arbitration as a condition precedent to the commencement of litigation are within the scope of the act.

For example, an agreement between competing bowling equipment manufacturers to obtain a nonbinding advisory opinion concerning disputes which might arise over comparative advertising claims was found to be within the scope of the

AA. *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985). In construing the scope of the Illinois Uniform Arbitration Act, the Illinois Court of Appeals stated: "It is not necessary for the parties to an arbitration agreement to be able to solve all disputes between them at arbitration. Rather, the court must give effect to the arbitration agreement and require those issues to be arbitrated which are covered by the agreement." *Heiden v. Galva Foundry Co.*, 223 Ill. App. 3d 163, 168, 584 N.E.2d 518, 522 (1991). "When a plaintiff 'bases its right to sue on the contract itself, not upon a statute or some other basis outside the contract, the provision requiring arbitration as a condition precedent to recovery must be observed.' " *Cheshire Place v. West of England Ship Owners Mut.*, 815 F. Supp. 593, 597 (E.D.N.Y. 1993).

Accordingly, the Home Buyers Warranty clause requiring that the parties submit to nonbinding arbitration a dispute arising under their agreement as a condition precedent to litigation is within the scope of the AA and must be given the same effect as any other contract provision. Therefore, the district court's denial of Benchmark's motion to stay the proceedings with respect to the BSS Home Buyers Warranty agreement is in error and requires reversal.

Stay of Other Causes of Action.

However, this does not end our inquiry. The Kelleys argue that even if the breach of an express warranty claim in their third cause of action must be stayed pursuant to arbitration, this does not require that their remaining causes of action must also be stayed.

Arbitration is purely a matter of contract, and a party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so. See *Creative Securities Corp. v. Bear Stearns & Co.*, 671 F. Supp. 961 (S.D.N.Y. 1987), *aff'd* 847 F.2d 834 (2d Cir. 1988). When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration. *Wilson v. Subway Sandwiches Shops, Inc.*, 823 F. Supp. 194 (S.D.N.Y. 1993).

Nonetheless, courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). In making its decision, the trial court is to balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof. *Id.*

The Kelleys did not agree to arbitrate all disputes which may arise between them and Benchmark. Instead, the record indicates that the Kelleys agreed to arbitration as a condition precedent to litigation only those disputes arising out of a claim based upon defects expressly covered by the BSS Home Buyers Warranty. However, because the BSS Home Buyers Warranty is subject to nonbinding arbitration, the interests of judicial economy require that the Kelleys' remaining causes of action be stayed pending the results of the arbitration of the BSS Home Buyers Warranty claim. Allowing the remaining causes of action to continue could result in an unnecessary duplication of litigation. See *Madison Beauty Supply v. Helene Curtis*, 167 Wis. 2d 237, 481 N.W.2d 644 (Wis. App. 1992).

CONCLUSION

Being erroneous, the order of the district court overruling Benchmark's motion to stay the proceedings is reversed, and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating.

TIMOTHY W. HAND, APPELLANT, V. ELDON STARR, APPELLEE.

550 N.W.2d 646

Filed June 28, 1996. No. S-94-688.

1. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
2. **Negligence: Livestock: Highways.** The owner of domestic animals has the duty to exercise ordinary care to confine his or her livestock to prevent them from being unattended upon the public highway. The principal test is whether one should reasonably have foreseen that any of the livestock would be upon the highway and the occurrence of such an accident; if the owner knows or, in the exercise of ordinary diligence, should know that any of the livestock are unattended upon the highway, it is the owner's duty to exercise ordinary care to round them up and confine them.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment.** 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.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Thomas County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

G. Peter Burger, of Burger & Bennett, P.C., and Blaine T. Gillett, of Ruff, Nisley & Lindemeier, for appellant.

Marvin O. Kieckhafer and William M. Wroblewski, of Kay & Kay, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

In this negligence action, the plaintiff-appellant, Timothy W. Hand, seeks to recover for injuries he suffered when the tractor-trailer he was driving collided with a cow owned by the defendant-appellee, Eldon Starr. The district court granted Starr's motion for summary judgment and dismissed Hand's

action. Hand thereupon appealed to the Nebraska Court of Appeals, asserting that the district court erred in so ruling. The Court of Appeals affirmed, and Hand successfully sought further review by this court. See *Hand v. Starr*, 96 NCA No. 2, case No. A-94-688 (not designated for permanent publication). Inasmuch as a question of material fact exists, we now reverse the judgment of the Court of Appeals and remand the cause with direction.

The scope of our review is determined by the rule that summary judgment is proper 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. *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996).

With that in mind, we turn our attention to the relevant facts. At approximately 9:30 p.m. on April 2, 1990, Hand was driving a tractor-trailer owned by Amsberry Trucking Company, Inc., northbound on U.S. Highway 83 at a speed of 55 miles per hour, when he collided with Starr's black cow. The weather and visibility were clear, and the headlights of the vehicle were turned on. Hand did not see the cow until he collided with it while it was in his path of travel. He lost control of the vehicle, which rolled 3½ times before coming to rest. As a result, Hand was injured.

The cow had been purchased by Starr in March 1990. A few days prior to April 2, the cow was in Starr's north pasture among a herd of approximately 150 cattle. Starr ranched over 18,000 acres and did not check his cattle on a daily basis. He maintained that although he had two full-time employees at the time, with an operation of that size, time would not permit the daily checking of his cattle.

The north pasture is divided into two sections which are enclosed by three- and four-wire barbed wire fences. Starr had not seen any evidence or received any information regarding damage to the north pasture fences.

Sometime during the evening of April 2, 1990, Starr was informed by the "Scrantons" of the Bill Scranton ranch that the subject cow was in one of their pastures among their herd

of cattle. The cow was last seen alive at the Scranton ranch at 6 o'clock the evening of the call. A brand inspector for the State of Nebraska also called Starr and told him that Starr's brand had been identified on a cow found at the Scranton ranch.

The Scranton ranch is located approximately 12 to 15 miles from the Starr ranch, approximately 1 mile west of Highway 83, and approximately 4 miles from the site of the collision; the subject Scranton pasture is enclosed by three- or four-wire barbed wire fences. Starr stated in his affidavit that he had no reason to believe or expect that the cow would escape from the confines of the Scrantons' pasture. Nor did he have an explanation as to how or why the cow got out of his pasture, other than stating, "The cow would have had to have gone berserk to have traveled, you know, through that many fences, crossed what we call the Dismal River."

In the afternoon of April 3, 1990, Starr took his horse trailer, a pickup, and a four-wheeler and went to the Scranton ranch to look for his cow, but was unable to locate it. The following day, Starr again went to the Scranton ranch to look for the cow, and was again unsuccessful. On April 5, Starr learned for the first time that the cow had been killed in the collision. Starr then examined his north pasture fences and found no problem with them. None of his other animals were out.

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995). The owner of domestic animals has the duty to exercise ordinary care to confine his or her livestock to prevent them from being unattended upon the public highway. The principal test is whether one should reasonably have foreseen that any of the livestock would be upon the highway and the occurrence of such an accident; if the owner knows or, in the exercise of ordinary diligence, should know that any of the livestock are unattended upon the highway, it is the owner's duty to exercise ordinary

care to round them up and confine them. *Dizco, Inc. v. Kenton*, 210 Neb. 141, 313 N.W.2d 268 (1981). See *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375 (1941).

The district court, in granting Starr summary judgment, found that Starr had not been negligent as a matter of law, or, in other words, that he had not breached this duty.

In support of that ruling, Starr points out that it is undisputed that his fences were in good repair. That may be so, but the fact is that the cow nonetheless escaped, and Starr was apprised of that fact before the accident occurred. Indeed, Starr was made aware of the fact that the escaped cow traveled a distance of 12 to 15 miles to the Scrantons' pasture. While Starr stated in his affidavit that he had no reason to believe or expect that the cow would escape from the confines of the Scrantons' pasture, it could be inferred that if the cow was able to get onto the Scrantons' land, it certainly could get off of it by the same means. Although the Scranton ranch was 1 mile from the highway and 4 miles from the accident scene, a reasonable person might well anticipate that a cow which had already traveled 12 to 15 miles in getting to the Scranton ranch could travel a few more miles onto a public highway.

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). The question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995); *Grover, Inc. v. Papio-Missouri Riv. Nat. Res. Dist.*, 247 Neb. 975, 531 N.W.2d 531 (1995).

Here, an issue of material fact exists as to whether Starr was negligent in failing to timely round up and confine his cow once he had been apprised that it had escaped his pasture and traveled 12 to 15 miles. Accordingly, it was erroneous for the district court to grant Starr's motion for summary judgment.

The judgment of the Court of Appeals is thus reversed and the cause remanded thereto with the direction that it reverse the judgment of the district court and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AMSBERRY TRUCKING COMPANY, INC., APPELLANT, V. ELDON STARR, APPELLEE.

550 N.W.2d 649

Filed June 28, 1996. No. S-94-689.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Thomas County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

G. Peter Burger, of Burger & Bennett, P.C., and Blaine T. Gillett, of Ruff, Nisley & Lindemeier, for appellant.

Marvin O. Kieckhafer and William M. Wroblewski, of Kay & Kay, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

In this negligence action, the plaintiff-appellant, Amsberry Trucking Company, Inc., seeks to recover for damages it sustained when a tractor-trailer it owned was involved in a collision with a cow owned by the defendant-appellee, Eldon Starr, while the vehicle was being driven by Amsberry Trucking's employee Timothy W. Hand, the plaintiff-appellant in *Hand v. Starr, ante* p. 377, 550 N.W.2d 646 (1996).

The district court granted Starr's motion for summary judgment, thereby dismissing Amsberry Trucking's action. Amsberry Trucking thereupon appealed to the Nebraska Court of Appeals, asserting the district court erred in so ruling. The Court of Appeals affirmed in a memorandum opinion and judgment on appeal filed January 9, 1996, and Amsberry Trucking successfully sought further review by this court.

Because the facts and analysis herein are the same as in *Hand, supra*, we now reverse the judgment of the Court of Appeals and remand the cause thereto with the direction that it reverse the judgment of the district court and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EDWARD H. PATTERSON AND BARBARA MORLEY, HUSBAND AND WIFE, AND AMERICAN CENTRAL CITY, INC., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

550 N.W.2d 650

Filed June 28, 1996. No. S-94-697.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
2. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
4. ____: ____. A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.

5. **Trial: Eminent Domain: Evidence.** In eminent domain proceedings where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situations of the properties.
6. **Eminent Domain: Evidence.** Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.
7. ____: ____. Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
8. **Eminent Domain: Expert Witnesses.** An expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine.

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

R. Kent Radke for appellants.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

The City of Lincoln, appellee, separately condemned two pieces of land owned by appellant American Central City, Inc., a Nebraska corporation. Appellant Barbara Morley is the wife of appellant Edward H. Patterson, who is president and sole stockholder of American Central City (hereafter all appellants will be referred to as "Patterson"). The court appointed two sets of appraisers, who awarded $569,812.36 and $25,952.52 for the two pieces of land. The parties appealed, and the cases were consolidated for trial. A jury trial was held, and the jury returned a verdict in favor of Patterson in the amount of

$424,270. Patterson appealed, assigning as error (1) that the verdict was not supported by the evidence, (2) that the court erred by excluding valuation determined by an "income or development cost approach" based on anticipated income from apartments Patterson expected to build on the land, and (3) that the court erred by allowing testimony by the city's witnesses which was not the proper measure of damages. We removed the case from the Court of Appeals' docket pursuant to our power to regulate the caseloads of lower courts. We affirm.

BACKGROUND

The City of Lincoln, under eminent domain, condemned Patterson's land on the stipulated date of May 25, 1990. The land was by resolution labeled as being blighted. Patterson acquired the land over a period of 18 years. At the time of taking, the land was zoned R-6, allowing a maximum of 218 apartment units on the property, but it was not developed.

At trial, several appraisers testified as to the value of the property. All testified that the highest and best use of the land at the date of taking would be to build apartment complexes on it.

Edward Patterson testified that the fair market value of the land was $2,180,000. In an offer of proof, after the city objected, Edward Patterson stated that his opinion of value based on the income or development cost valuation would be $4,470,330. The objections before and after the offer of proof were sustained.

Patterson's first expert stated that the fair market value of the land, using the comparable sales approach, was $872,000. He used 10 sales from 1987 to 1990. Patterson's second expert also stated that the fair market value was $872,000. He used Patterson's first expert's report. Neither expert was allowed, after objection, to testify as to the income or development cost valuation, that is, the value based on the income from apartments which Patterson expected to build on the land.

The city's first expert stated that the fair market value of the land, using the comparable sales approach, was $381,500. He used 21 sales from 1981 to 1990. He adjusted for the differ-

ences between the comparable properties and the condemned property and also adjusted for differences between market conditions at the time of the comparable sales and those existing at the time of the condemnation. Prior to this opinion, during a foundational examination, Patterson stated: "Your Honor, I would object to the witness giving testimony of value based on the fact he is not using the proper measure of damages." The objection was overruled. When this opinion was actually stated, Patterson raised no objection.

The city's second expert stated that the fair market value of the land, using the comparable sales approach, was $325,000. He used approximately 20 sales from various dates. He adjusted each comparable sale to minimize the differences between it and the condemned property. He explained each adjustment. He also, where he thought it appropriate, adjusted each comparable sale price to simulate the market conditions at the time of the condemnation of Patterson's property. These adjustments were explained. Patterson objected to this expert's valuation opinion, stating: "Your Honor, I object. Expressing an opinion based on the fact, that's using improper measure of damages." The objection was overruled. Both of the city's experts stated that the income or development cost valuation was improper when no structure existed on the premises.

ASSIGNMENTS OF ERROR

Patterson assigns as error:

1. That the verdict of the jury is contrary to law and not supported by the evidence in that the jury failed to find that the fair market value of the land taken by condemnation at time of taking was not [sic] in excess of Four Hundred Twenty-four Thousand Two Hundred Seventy Dollars ($424,270.00).

2. That the Court erred by not allowing Appellant to present expert testimony and evidence as to the fair market value of the subject property as of the date of taking, based upon an income and development cost approach to valuation.

3. That the Court erred by allowing testimony, duly objected to by the Appellant, in so far as the expert tes-

timony of the Defendant's witnesses, Frank Frost and Matthew J. Wilson, regarding evidence of fair market value of the subject property as of the date of the taking, in that the testimony of said expert witnesses was not the proper measure of damages.

STANDARD OF REVIEW

A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995); *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Solar Motors, supra*; *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. *Roberts, supra*; *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Solar Motors, supra*; *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995); *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994).

ANALYSIS

The expert witnesses for both the city and Patterson used the comparable sales approach to estimate the fair market value of the condemned land. Patterson then attempted to use the income or development cost approach. This would base the value of the land on anticipated income from apartments expected to be built on the land. Patterson argues that such an

approach was approved in *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968).

In *Iske v. Metropolitan Utilities Dist.*, the condemned land had a gravel deposit and was subject to a lease to remove and sell the gravel. The parties stipulated that there were no comparable sales for this land. That being true, the trial court allowed the plaintiff's expert in the action to testify as to the income which would be produced from the removal of the gravel and the recreational use of the lake which the removal would create. This court affirmed the use of the "income approach" in that situation.

The case of *Iske v. Metropolitan Utilities Dist.* was followed 2 years later by the case of *Iske v. Omaha Public Power Dist.*, 185 Neb. 724, 178 N.W.2d 633 (1970). This court allowed the use of the income approach in that case involving almost identical land. Again, the parties conceded that no comparable sales existed. The income approach, determining valuation from recreational use of the land, in both of the *Iske* cases was possible because the value derived from the "intrinsic nature" of the land.

This case is different from both of the *Iske* cases. Here, comparable sales were not only available, but Patterson's experts relied on comparable sales for their own valuations. Further, Patterson failed to prove that the land had any intrinsic value, such as recreational use, as compared to the land in either of the *Iske* cases. We find the exclusion was proper.

Patterson further assigns as error failure to exclude the testimony of the city's experts using the comparable sales approach. Both sides' expert witnesses used the comparable sales valuation approach.

We have stated that in eminent domain proceedings, where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situations of the properties. *McArthur v. Papio-Missouri River NRD, ante* p. 96, 547 N.W.2d 716 (1996); *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975). Whether the properties the subject of

other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *McArthur, supra*; *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983).

The testimony of the city's experts met those criteria. It cannot be said that the trial court abused its discretion in allowing the city's witnesses, after satisfying foundation, to testify to comparable sales. Therefore, we find the objections to the city's experts' opinions are without merit.

Regarding whether the verdict was sustained by the evidence, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. *Iske v. Omaha Public Power Dist., supra*; *Iske v. Metropolitan Utilities Dist., supra*.

The jury verdict fell in between the two conflicting sets of expert testimony. The expert witness testimony is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

We note that the jury had an opportunity to view the property.

From our review of the record, we conclude that the evidence presented a question for the jury and that it is sufficient to sustain the verdict, which is not clearly wrong.

CONCLUSION

Finding that the court did not err in excluding the income or development cost valuation and that sufficient evidence exists to support the jury's verdict, we affirm.

AFFIRMED.

MEYER BROTHERS, INC., A NEBRASKA CORPORATION, APPELLANT, V. THE TRAVELERS INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

551 N.W.2d 1

Filed June 28, 1996. No. S-94-853.

1. **Judgments: Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
2. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
3. **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.
4. **Limitations of Actions: Deceptive Trade Practices: Fraud.** An action must be commenced within 4 years for violation of the Uniform Deceptive Trade Practices Act or for fraud.
5. **Limitations of Actions: Pleadings.** For limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading.
6. ____: ____. If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

7. **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.
8. **Pleadings.** The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
9. **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.

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Affirmed.

David H. Hahn, of Hahn Law Office, for appellant.

Donald R. Witt, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee First National Bank & Trust.

William F. Davis for appellees Larry Volkmer and John Stukenholtz.

Richard H. Hoch, of Hoch & Steinheider, for appellee LeRoy Kreifels.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This action was filed on June 17, 1988, in the Otoe County District Court. Meyer Brothers, Inc., the appellant, sought, and was denied, a temporary restraining order, a permanent injunction, and damages against The Travelers Insurance Company (Travelers), First National Bank and Trust of Syracuse (FNB&T), Larry Volkmer, John Stukenholtz, LeRoy Kreifels, Paul F. Baltensperger, and Beverly J. Baltensperger, the appellees, for material provided and labor performed in the planting of crops in 1988.

A third amended petition was filed on July 19, 1993. It stated a theory of recovery (unfair and deceptive trade practices) and facts (that the appellees "acted in concert") not included in the original and previous amended petitions. The new cause of action was based on facts that occurred more than 5 years prior to the filing of the third amended petition. The statute of limitations for filing an action for unfair and

deceptive trade practices is 4 years. If the third amended petition alleged new facts, it was barred by the statute of limitations. If it was based on the same facts alleged in the action filed in 1988, it was not so barred. The issue, then, was whether the third amended petition related back to the original petition filed in 1988, in which case, the action would be within the limitations period. The trial court sustained demurrers by three of the appellees to the third amended petition. The appellant was given 30 days from February 8, 1994, to file a fourth amended petition. On March 15, the appellant filed a motion to extend time for filing its fourth amended petition. On August 15, the district court sustained the motion for summary judgment filed by one of the appellees, denied the appellant's motion to file a fourth amended petition, and dismissed the action with prejudice.

The appellant appealed the order of August 15, 1994, to the Nebraska Court of Appeals, arguing that the trial court erred in finding that the third amended petition did not relate back to the original petition. We removed the case from the Court of Appeals' docket pursuant to our power to regulate the caseloads of lower courts. We affirm the judgment of the trial court.

BACKGROUND

Meyer Brothers' original petition, filed on June 17, 1988, sought an injunction against the appellees, restraining them from preventing the appellant from exercising the rights granted to it under a farm lease. An amended petition, filed September 2, 1988, added a third cause of action for fraud or misrepresentation, but it was directed only against appellees Paul Baltensperger and FNB&T. A second amended petition, filed May 1, 1989, constituted an amendment to the second cause of action of the original petition and, more specifically, simply alleged the damages to be recovered by the appellant in the event it prevailed in the action for an injunction.

The third amended petition, filed July 19, 1993, alleged as to the acts which occurred in 1988 that "[t]he actions of [the appellees], acting in concert was an unfair and deceptive trade practice act" which caused damages to the appellant.

Three of the appellees filed demurrers, which were taken under advisement on November 30, 1993. On February 8, 1994, the trial court sustained the demurrers and gave the appellant 30 days to file a fourth amended petition. On March 2, appellee Kreifels filed a motion for summary judgment to the third amended petition as violative of the statute of limitations.

On March 15, 1994, the appellant filed a motion to extend the time to file a fourth amended petition. The appellees objected to the motion, and in a journal entry dated August 15, 1994, the court sustained the objections interposed by the appellees to the appellant's motion to file a fourth amended petition and denied the appellant's motion. The court further granted appellee Kreifels' motion for summary judgment, which motion was interposed to the third amended petition. The court then dismissed the action with prejudice at the appellant's costs.

The appellant filed an appeal of the August 15, 1994, order to the Court of Appeals. We removed the case from the Court of Appeals' docket pursuant to our power to regulate the caseloads of lower courts.

ASSIGNMENTS OF ERROR

The appellant originally assigned as error:

1. The court erred in determining that the filing of the third amended petition dismissed, with prejudice, any causes of action not set forth in the third amended petition [sic].

2. The court erred in failing to allow the plaintiffs to file a fourth amended petition.

3. The court erred in granting motions for summary judgment based upon the statute of limitations.

In its reply brief however, the appellant states that the sole issue is whether the third amended petition related back to previous petitions.

In summary, the appellant objects to the court's sustaining of the demurrer on February 8, 1994, and the court's order of August 15, 1994, which dismissed the action after granting appellee Kreifels' motion for summary judgment on the third

amended petition and refused appellant's request to file a fourth amended petition.

STANDARD OF REVIEW

An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995); *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995).

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996); *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995); *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995).

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. *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995); *Hearon, supra*; *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995); *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

ANALYSIS

According to the appellant, "[t]he sole issue in this appeal is whether the plaintiff\appellant's third amended petition related back to previous petitions." (Emphasis omitted.) Reply brief for appellant at 1.

The original petition in 1988 alleged a cause of action for a temporary restraining order, a permanent injunction, and damages for material provided and labor performed in the planting of crops in 1988. The third amended petition filed in 1993 stated that the actions of the appellees, "acting in concert was an unfair and deceptive trade practice act."

An action must be commenced within 4 years for violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat.

§ 87-303.10 (Reissue 1994), or for fraud, Neb. Rev. Stat. § 25-207(4) (Reissue 1995).

For limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971). If the third amended petition relates back to the original petition, the appellant's cause of action is not barred by the statute of limitations.

The appellees claim that the action outlined in the third amended petition is barred by the statute of limitations. The appellant claims that the third amended petition simply relates to the facts that were outlined in the original petition and that the filing of the third amended petition relates back to the original petition. The appellees respond that the action of the third amended petition changes the cause of action relied upon by the appellant and that it is inappropriate to relate that filing back to the original filing date. See, *St. Paul Fire & Marine Ins. Co., supra*; *West Omaha Inv., supra*; *Kohler, supra*.

A thorough comparison of the original petition and the third amended petition in this case leads to the conclusion that not only has the theory of recovery changed, the evidence needed to support the appellant's claim in the third amended petition is significantly different from the evidence needed to support the claim stated in the original petition. The appellant's assertion that the appellees acted "in concert" is a totally new factual allegation which the appellant would be required to prove in order to support the new cause of action under the unfair and deceptive trade practices act.

Therefore, the filing of the third amended petition does not relate back to the original petition, and because the 4-year statute of limitations for the claim in the third amended petition had run, it appears on the face of that petition that such claim was barred by the statute of limitations.

If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a

cause of action, must show some excuse tolling the operation and bar of the statute. *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). We find that the appellant has shown no such excuse, and its cause is therefore barred by the statute of limitations.

Certain appellees further argue that even if the third amended petition related back, the appellant waived any error if it failed to stand on that pleading. On February 8, 1994, the trial court sustained the appellees' demurrers and gave the appellant 30 days to file a fourth amended petition. On March 15, the appellant, out of time, filed a motion to extend the time to file a fourth amended petition, which was denied by the court.

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. *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995); *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

The facts in *Bert Cattle Co., supra*, are similar to the facts in the instant case. In *Bert Cattle Co.*, the original petition of the plaintiff was followed by an amended petition. The defendant demurred to the amended petition, which demurrer was sustained, and the plaintiff was given 10 days to file another amended petition. The plaintiff then timely filed a second amended petition which in essence contained the same allegations as the amended petition. Again the defendant demurred, and this demurrer was also sustained. The plaintiff was then given 2 weeks to file a third amended petition. Four and one-half months later, the plaintiff filed a motion for leave to file a third amended petition. Leave was denied, and the action was dismissed.

On appeal, the plaintiff assigned as error the court's sustaining of the defendant's demurrer to the second amended petition. In refusing to address the issue, this court stated:

> As it is well established that 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 par-

> ticular demurrer, *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986), we address solely the second assignment of error.

Id. at 640, 471 N.W.2d at 766.

The facts of this case are not distinguishable from *Bert Cattle Co.*, and we find that the appellant elected not to stand on its third amended petition.

After the appellant's motion to extend the time to file a fourth amended petition was denied, it attempted to file a fourth amended petition, which attempt was also denied. The appellant claims this as error. We assume that the appellant is arguing in the alternative when it assigns this error. By making this argument, the appellant seemingly admits that it did not stand on its third amended petition. See *Bert Cattle Co., supra*. Further, the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). We find that denying the motion to extend the time to file a fourth amended petition and subsequently denying an amendment to the action barred by the statute of limitations was not an abuse of discretion.

Finally, regarding whether the court erred in granting summary judgment on the statute of limitations issue, 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. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996); *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995).

There is not a genuine issue of material fact regarding whether 4 years had passed since the facts which were the basis for the third amended petition occurred in this case. Viewing the evidence in a light most favorable to the appellant, that is, giving the appellant the benefit of all reasonable inferences deducible from the evidence, we find that the summary judgment was proper.

CONCLUSION

We find that the errors assigned and argued by the appellant centering on the premise that the third amended petition related back to previous petitions are without merit. The appellant's third amended petition did not relate back to the original petition, and the demurrers were properly granted; further, the appellant elected not to stand on its third amended petition. Therefore, the granting of summary judgment and dismissal of the action by the trial court are affirmed.

AFFIRMED.

THE HILLARY CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. UNITED STATES COLD STORAGE, INC., A FOREIGN CORPORATION, APPELLEE.

550 N.W.2d 889

Filed June 28, 1996. No. S-94-887.

1. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Real Estate: Conveyances: Time.** An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract.
3. ____: ____: ____: ____. In order to determine whether an implied easement from former use was created, courts must look to the time of the conveyance subdividing the property that first brought into question whether an implied easement was created.
4. **Easements: Real Estate: Words and Phrases.** Implied easements that arise by necessity are easements that are created to reach land that is otherwise landlocked and could not be utilized.
5. **Easements.** The rule of strict necessity is applied to easements that arise by necessity and implied reservations, but not to implied easements from former use.

6. **Courts.** A court's opinion controls its syllabus, the syllabus being merely explanatory of the opinion and having no more force and effect than the statements made in the opinion on which the syllabus is based.
7. **Easements: Proof.** The degree of necessity required to prove the existence of an implied easement from former use is "reasonable necessity."
8. **Easements: Real Estate: Conveyances: Time: Appurtenances.** Once it is determined that the elements required for the creation of an implied easement existed at the time of the conveyance subdividing the property, the easement becomes appurtenant to the property and the elements for creation are no longer relevant to a determination of the continued existence of that easement upon a subsequent conveyance.
9. **Easements: Conveyances: Appurtenances.** Once an implied easement is created, it becomes appurtenant to the dominant tenement and remains in existence upon a subsequent conveyance unless and until it is somehow terminated.
10. **Easements: Abandonment: Pleadings: Proof.** Abandonment of an easement must be pled and proved, the burden of proof being on the party alleging it.
11. **Easements: Abandonment: Time.** Nonuse of an easement for a period less than the prescriptive period of 10 years will not itself work an abandonment of the easement.
12. **Easements: Abandonment: Intent: Time.** Nonuse of an easement for a period less than the prescriptive period, accompanied by acts clearly indicating an intention to abandon the right, will work an extinguishment of the easement.
13. ____: ____: ____: ____. An intention to abandon an easement cannot be inferred from the mere fact that the easement was not used for a period of years in excess of the prescriptive period.
14. **Easements: Abandonment: Time: Intent: Presumptions: Proof.** Nonuse of an easement for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuse is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it.
15. **Easements: Abandonment: Intent: Proof.** An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.
16. **Easements: Abandonment: Intent: Time.** In determining whether there was an intent to abandon an easement, time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Thomas L. Saladino and Joseph A. Jordano, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Jeffrey D. Toberer and Jennifer W. Jerram, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

The appellant, The Hillary Corporation (Hillary), brought this action seeking a declaratory judgment that it possesses an implied easement for railway access across the property of the appellee, United States Cold Storage, Inc. (U.S. Cold). Hillary also sought an injunction to prevent U.S. Cold from interfering with Hillary's use of the alleged easement. Hillary's claim for damages was reserved for trial at a later date.

The district court for Douglas County found that Hillary's predecessor in interest formerly possessed an implied easement for railway access across U.S. Cold's property. However, the court dismissed Hillary's petition, finding that the implied easement did not exist at the time the property was transferred to Hillary. Hillary appeals.

From our de novo review, we determine that Hillary's predecessor in interest possessed an implied easement for railway access across U.S. Cold's property and did not intend to abandon the easement. Thus, we determine that the implied easement existed when the property was transferred to Hillary. We further determine that Hillary did not intend to abandon the easement. As a result, we conclude that Hillary possesses an implied easement for railway access across the property of U.S. Cold. We therefore reverse, and remand for further proceedings.

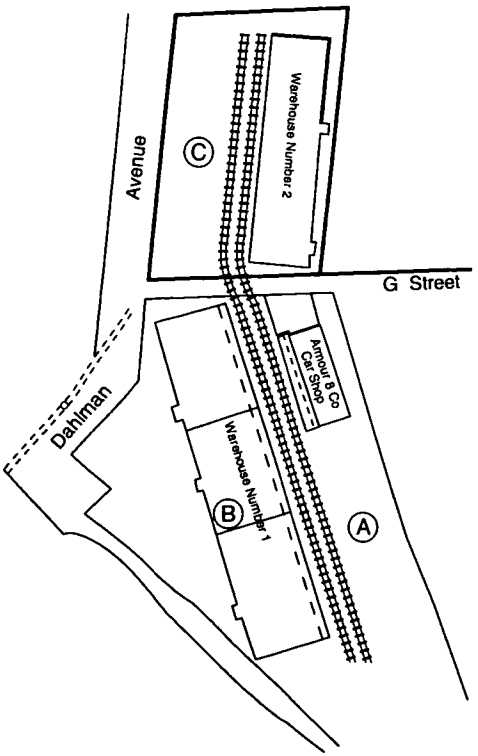
I. ASSIGNMENTS OF ERROR

Hillary alleges the district court erred in (1) finding that the easement did not exist when Hillary's predecessor in interest transferred the property to Hillary, (2) determining that the rail tracks must be necessary for the enjoyment of the dominant parcel and that the use of the easement be continuous in order for an implied easement to remain in existence, (3) applying standards for creation or establishment of an implied

easement to determine the question of whether an easement by implied grant was still in existence upon retransfer of the property, (4) failing to make a finding of fact that the easement was used within 10 years prior to the filing of Hillary's petition, (5) failing to make a finding of fact that Hillary and its predecessors in interest had no intention of abandoning the easement and did not abandon the easement, (6) finding that the tracks were serviced only until April 21, 1981, and (7) finding that the last use of the tracks according to the notes of a predecessor in interest was in February 1980.

II. BACKGROUND

Below is a sketch of the parcels of land involved. The sketch is for illustrative purposes only and does not purport to be drawn to scale. See *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976).



The parcels of property identified as A and B are owned by the appellee, U.S. Cold, a New Jersey corporation. Parcel A contains a shop building and parcel B contains a warehouse. Parcel C, which lies to the north of parcels A and B, contains a warehouse and is owned by the appellant, Hillary, a Nebraska corporation.

Parcel C adjoins parcels A and B, divided only by G Street. The railroad tracks which are the subject of the alleged implied easement run southerly across parcel C, cross G Street, and then run southeasterly across parcel B. A portion of the track runs across a 20-foot-wide strip of land along the southern boundary of parcel A.

1. Overview of Real Estate Transfers

An overview of the pertinent real estate transfers is necessary to an understanding of this action. Kay Omaha Livestock Market, Inc. (Kay Omaha), formerly known as Union Stockyards Company, continually owned parcels A, B, and C from 1918 until 1975. Harold Norman, retired secretary and treasurer of the former Union Stockyards, testified that the railroad tracks were built by Union Stockyards in 1952 and were used by the company to haul grain to its warehouses. On February 28, 1975, Kay Omaha sold parcel A to U.S. Cold. On April 21, 1976, Kay Omaha sold parcel C to Stewart Seed Company. In October 1976, the chain of title of parcel B went from Kay Omaha to Omaha Holdings, Inc., then passed to William Chapman in May 1977, and finally to U.S. Cold in November 1977. In 1988, Stewart Seed Company deeded parcel C to Leora Fuller, one of the principals of Stewart Seed. In 1992, James Krueger formed Hillary and purchased parcel C from Fuller.

When Kay Omaha sold parcel A to U.S. Cold in 1975, it expressly reserved for itself, its successors, and its assigns a permanent easement to run with the land across the 20-foot-wide strip along the southern boundary of parcel A. This easement was for the express benefit of parcels B and C, which were still owned by Kay Omaha at that time. Accordingly, there is no dispute that U.S. Cold took parcel A

subject to an express easement for the benefit of the owners of parcels B and C.

However, no express easement for railway access across parcel B, for the benefit of parcel C, was ever reserved throughout the chain of title of parcel B. Bill Kratvill, the current vice president of Autoliner Corporation, testified that he personally operated railroad cars over the tracks on parcels B and C from 1971 through 1976. Dan Reeder, listing agent for Kay Omaha, testified that when he listed parcel C for sale in 1976, he advertised the property as having rail access. Fuller testified that the existence of the tracks, and the right to bring railroad cars in and out over those tracks, were of prime importance in Stewart Seed's decision to acquire parcel C. The deed and the bill of sale for parcel C, conveyed to Stewart Seed from Kay Omaha, contained an express conveyance of the rail tracks on the property from the south line of G Street. These documents do not mention an easement for rail access across parcel B.

The district court found that U.S. Cold "was aware of the possibility of an easement in favor of Stewart [Seed]" when it entered into an agreement with Chapman in 1977 for the purchase of parcel B. U.S. Cold had the choice to elect between receiving one of two types of deeds. It could choose to receive a deed that was expressly subject to the Stewart Seed implied easement, or could choose to receive a deed that did not mention the implied easement, but only if U.S Cold gave Chapman an indemnity for any claims made by Stewart Seed. U.S. Cold elected to receive a deed that did not mention the Stewart Seed implied easement.

After acquiring parcel B in 1977, U.S. Cold rebuilt the tracks on its property from double spur tracks into a single spur track. U.S. Cold then installed a switch to connect the single spur track to the double spur tracks running across G Street to parcel C.

2. Testimony on Last Use of Tracks

Don Barnett testified that his company was a tenant of Stewart Seed from 1979 to sometime in 1981 and that an estimated 30 to 40 carloads of product came to his company via

the tracks. Fuller's notes showed that the tracks were last used in February 1980. However, Fuller testified that Stewart Seed and/or its tenants used the tracks "from 1979 through 1983 and then, as I recall, there was a couple of more cars in like '84 or '85." On cross-examination, Fuller testified that the tracks were used "from 1976 to 1983 for sure, and I think 1984 and '85." However, upon further cross-examination, Fuller stated that she did not have the records showing usage of the track in 1983 or after and that the Brandon railroad would have those records.

Records of the Brandon Corporation, the railroad company that serviced the tracks, showed use of the tracks approximately 54 times between May 1979 and April 1981. On direct examination, Bob Antczak, president of the Brandon Corporation, stated that he did not have records after 1981 and therefore could not say whether any cars were moved over the tracks after 1981.

Fil Catania, one of Stewart Seed's tenants, was asked on direct examination, "[W]hat was the last year that you can recall receiving a car on the spur track?" Catania stated, "Between '80 and '83, '84, somewhere in there." Hillary's counsel then read the testimony that Catania gave when he was deposed by U.S. Cold's counsel. Catania's deposition testimony indicated that he used the tracks sometime prior to 1988, but that he was less than certain about the exact year he last used the tracks.

In its order, the district court found that the tracks were not used "after 1981 or so."

3. Testimony on Intent to Abandon

At trial, Fuller testified that she never intended to abandon the right to use the tracks. The advertisement Stewart Seed ran for parcel C from 1988 to 1992 listed the property for sale with rail trackage.

Adrian Woltkamp, former vice president of U.S. Cold, testified, and the district court found, that U.S. Cold "paid the costs of rebuilding and has paid the cost for the maintenance of the tracks with no contribution from Stewart [Seed], though Stewart [Seed] was asked to do so." The only evidence

adduced at trial was that in 1977, Stewart Seed refused to compensate U.S. Cold for reconstructing the tracks from two parallel tracks to a single track. Kratvill testified that when he last used the tracks in 1976, they were in adequate condition.

In 1985, U.S. Cold installed a security fence and padlocked gates across the northern boundary of its property. The fence and gates crossed the railroad tracks, thereby blocking use of the tracks to the north. The record reflects that the fence that was constructed contained a swinging gate large enough for a train to pass through.

In July 1992, U.S. Cold began removing the railroad tracks and ties on its property and began laying asphalt on the area. In December 1992, Hillary purchased parcel C from Fuller. There is no mention of an easement for rail access in the deed. Upon learning from U.S. Cold that it was U.S. Cold's belief that no easement existed over parcel B for the benefit of Hillary, Hillary renegotiated the price of parcel C with Fuller. Krueger, president of Hillary, testified that he planned to repair the tracks upon parcel C. After taking title to parcel C, Hillary filed this suit to establish the existence of an implied easement for rail access over parcel B.

III. STANDARD OF REVIEW

In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994), and *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993), subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another, *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995), and *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

IV. ANALYSIS

1. Whether Implied Easement From Former Use Was Created at Time Property Was Subdivided

In its order, the district court found that Stewart Seed acquired an implied easement for use of the rail tracks over parcel B when it purchased parcel C from Kay Omaha in 1976. This court most recently addressed the elements required to create an implied easement from former use in *Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982). In that case, the court held:

> An easement by implication from former use arises only where [1] the use giving rise to the easement was in existence at the time of the conveyance subdividing the property; [2] the use has been so long continued and so obvious as to show that it was meant to be permanent; and [3] the easement is necessary for the proper and reasonable enjoyment of the dominant tract.

Id. at 284, 318 N.W.2d at 274.

(a) Timeframe

In order to determine whether an implied easement from former use was created, we must first ascertain what point in time to look to when making this determination. The directive announced in *Hengen v. Hengen, supra*, is to look to "the time of the conveyance subdividing the property." Prior to 1975, Kay Omaha owned parcels A, B, and C. We must determine whether the "conveyance subdividing the property" was February 28, 1975, when Kay Omaha conveyed parcel A to U.S. Cold, or April 21, 1976, when Kay Omaha conveyed parcel C to Stewart Seed.

When Kay Omaha conveyed parcel A to U.S. Cold on February 28, 1975, it expressly reserved for itself, its successors, and its assigns a permanent easement for the use of the rail tracks across the 20-foot-wide strip along the southern boundary of parcel A. Thus, there is no dispute that U.S. Cold took parcel A subject to an express easement for the benefit of Kay Omaha and the successors in interest to parcels B and C. At the time parcel A was conveyed to U.S. Cold, Kay

Omaha still owned parcels B and C. Thus, there was no dispute about Kay Omaha's right to use the tracks over parcel B at that time.

Kay Omaha's conveyance of parcel C to Stewart Seed marked the first time that parcels B and C were not under common ownership. Thus, it was this "conveyance subdividing the property" that first brought into question whether an implied easement for use of the tracks over parcel B was created. As a result, we conclude the time we must look to, in order to determine whether the elements required to create an implied easement were met, is when Kay Omaha conveyed parcel C to Stewart Seed on April 21, 1976.

(b) Continuous and Obvious Use

In its order, the district court found that "the rail tracks had been in use for over twenty (20) years at the time Union Stockyards [Kay Omaha] began subdividing the property" and that "[a]t the time [Stewart Seed] acquired the property . . . the tracks were obvious and so was the . . . use of the tracks." At trial, Norman, retired secretary and treasurer of the former Union Stockyards, testified that the tracks were built by Union Stockyards in 1952, and were used by the company to haul grain to its warehouses. Kratvill, the current vice president of Autoliner Corporation, testified that he personally operated railroad cars over the tracks on parcels B and C from 1971 through 1976. Thus, we determine that the use giving rise to the easement was in existence, and had been so long continued and so obvious as to show that it was meant to be permanent, at the time Kay Omaha conveyed parcel C to Stewart Seed. See *Hengen v. Hengen, supra.*

(c) Whether Some Degree of Necessity Is Required to Establish Implied Easement From Former Use

Although the district court found that the use of the tracks was continuous and obvious, the court did not make a finding whether the alleged easement was "necessary" for Stewart Seed's use and enjoyment of parcel C at the time it acquired the property. Hillary argues that proof that the alleged easement was necessary for the use and enjoyment of the property is not an essential element for creation of an implied ease-

ment. Conversely, U.S. Cold argues that necessity is an essential element for creation of an implied easement and that Hillary failed to prove the alleged easement was necessary for Stewart Seed's use and enjoyment of parcel C at the time the property was acquired. In an attempt to support its position, Hillary cites *Price Realty Co. v. Airport Authority*, 175 Neb. 791, 124 N.W.2d 207 (1963), in which this court recognized that there are two types of implied easements: (1) those that arise as an element of necessity or (2) those that arise from what has been said or done by the parties to the transaction. At issue in *Price Realty Co.* was whether an easement by necessity was created. In the instant case, Hillary asserts that the claimed easement from former use falls into the category of implied easements that arise from what has been said or done by the parties to the transaction, and thus, proof of necessity is not required.

Hillary is correct that the alleged easement fits into the category of implied easements that arise from what has been said or done by the parties to the transaction, i.e., from former use. However, it does not follow that no degree of necessity is required to be proved in order to establish an implied easement from former use.

When the *Price Realty Co.* court listed easements that arise as an element of necessity as being one of two types of implied easements, it was referring to easements that arise as a result of a strict (absolute) necessity. This court has repeatedly stated that " ' "[a] way of necessity usually arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. . . ." ' " *Johnson v. Mays*, 216 Neb. 890, 895, 346 N.W.2d 401, 404 (1984). Accord, *Hansen v. Smikahl*, 173 Neb. 309, 113 N.W.2d 210 (1962); *Badura v. Lyons*, 147 Neb. 442, 23 N.W.2d 678 (1946). Generally, when this court alludes to implied easements that arise by necessity, we are referring to easements that are created to reach land that is otherwise landlocked and could not be utilized. As a result, *Price Realty Co., supra*, does not stand for the proposition that no degree of necessity is

required to be proved in order to establish an implied easement from former use, as Hillary asserts.

In furtherance of its position, Hillary cites *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263, 267, 93 N.W. 163, 164 (1903), in which this court stated:

> A distinction is doubtless to be made between cases where the easement so created is obvious and permanent and those where it is not equally open and visible to the purchaser. In the latter class of cases, it is usually held that the easement must be reasonably necessary to the enjoyment of that portion of the land for which it is claimed, or else must be reserved in the deed. [Citation omitted.] But where the easement is attended by some alteration in the land, which in its nature is obvious and permanent and may be seen on inspection by any person who views the land, it is not required that it be necessary nor that it be expressly reserved.

While it is true this excerpt supports Hillary's position, this court has held since *Gayton* that proof of some degree of necessity is required to establish an implied easement from former use. In *Christensen v. Luehrs*, 133 Neb. 50, 53, 273 N.W. 839, 841 (1937), the court held:

> "Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or advantage of a continuous and apparent nature, and sells the one in favor of which such continuous and apparent quasi easement exists, such easement being *necessary* to the reasonable enjoyment of the property granted, will pass to the grantee by implication. . . ."

(Emphasis supplied.)

As previously stated, in *Hengen v. Hengen*, 211 Neb. 276, 284, 318 N.W.2d 269, 274 (1982), it was held:

> An easement by implication from former use arises only where [1] the use giving rise to the easement was in existence at the time of the conveyance subdividing the property; [2] the use has been so long continued and so obvious as to show that it was meant to be permanent;

and [3] the easement is *necessary* for the proper and reasonable enjoyment of the dominant tract.

(Emphasis supplied.)

Considering the two lines of cases, we determine the better view sustains the rule that some degree of necessity must be proved before an implied easement from former use will be found to exist over land owned by another. Thus, to the extent that *Fremont, E. & M. V. R. Co. v. Gayton, supra*, stands for the proposition that no degree of necessity is required to establish an implied easement from former use, it is overruled.

(d) Degree of Necessity Required to Establish Implied Easement From Former Use

U.S. Cold argues that the degree of necessity required to be proved in order to establish an implied easement from former use is "strict or absolute necessity." In support of this position, it cites *Chalen v. Cialino*, 206 Neb. 106, 291 N.W.2d 256 (1980); *Meier v. Maguire*, 172 Neb. 52, 108 N.W.2d 397 (1961); and *Badura v. Lyons, supra*. U.S. Cold correctly asserts that the court in *Badura* and *Chalen* required proof of strict necessity. However, U.S. Cold overlooks the fact that the issue in those two cases was not whether an implied easement from former use was created.

The issue in *Badura* was whether an easement by necessity was created. As discussed previously, easements by necessity arise when land is otherwise landlocked, and thus are distinguishable from easements that arise from former use. In *Badura*, the court stated that "ways of necessity are ways of strict necessity as distinguished from ways of mere convenience [citations omitted]; and that the degree of necessity requisite to support such a way is an absolute necessity, for which inconvenience without more does not suffice." 147 Neb. at 450, 23 N.W.2d at 684.

The issue in *Chalen* was whether an implied easement by reservation was created. In *Bennett v. Evans*, 161 Neb. 807, 74 N.W.2d 728 (1956), this court made it clear that there is a well-recognized distinction between implied grants and implied reservations in that the rule of strict necessity is applied to implied reservations, but not to implied grants.

(Citing *Lampman v. Milks*, 21 N.Y. 505 (1860).) As a result, we determine that *Badura* and *Chalen* are distinguishable from the instant case in that those cases did not arise in the context of an implied easement from former use.

As in the instant case, the issue in *Meier v. Maguire, supra*, was whether an implied easement from former use was created. Headnote 3 of that opinion supports U.S. Cold's position that strict necessity must be proved in order to establish an implied easement from former use. However, a close reading of the opinion exposes headnote 3 as being inconsistent with what the court actually stated in the body of the opinion. In the opinion, the court discusses *Bennett v. Evans, supra*, and then declares, "As we stated in that case, implied grants [easements arising from former use] are not favored, although they are more favored than implied reservations. The factor of necessity is involved in both." 172 Neb. at 56-57, 108 N.W.2d at 400.

While the *Meier* court did state that necessity is a factor to be considered in both implied reservations and implied grants, it did not state, or even imply, that the requisite degree of necessity is the same in both. Furthermore, the fact that the court declared that implied grants are "more favored than implied reservations" indicates that a lesser degree of necessity is required to be proved for implied grants than is required for implied reservations. Moreover, the opinion cites numerous times with approval to *Bennett v. Evans, supra*, in which the court stated that " 'the rule of strict necessity is applied to implied reservations but not to implied grants. . . .' " 161 Neb. at 820, 74 N.W.2d at 736. As a result, we find that headnote 3 cannot be reconciled with the opinion.

A court's opinion controls its syllabus, the syllabus being merely explanatory of the opinion and having no more force and effect than the statements made in the opinion on which the syllabus is based. *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940). Black's Law Dictionary 1449 (6th ed. 1990) includes "headnote" in its definition of syllabus and goes on to state that "[o]rdinarily, where a headnote, even though prepared by the court, is given no special force by statute or rule of court, the opinion is to be looked to for the original and

authentic statement of the grounds of decision" (citing *Burbank v. Ernst*, 232 U.S. 162, 34 S. Ct. 299, 58 L. Ed. 551 (1914)). As a result, we find that *Meier* does not support U.S. Cold's position that strict necessity must be proved in order to establish an implied easement from former use.

In *Christensen v. Luehrs*, 133 Neb. 50, 54, 273 N.W. 839, 841 (1937), this court stated:

> Some authorities hold . . . that an easement will not pass by implication except in cases of strict necessity, while others hold that an easement by implied grant can only arise in case of necessity. *The weight of authority and better view sustain the rule that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made, and that it should not be absolutely necessary for the enjoyment of the estate granted.*

(Emphasis supplied.)

Likewise, in *Hengen v. Hengen*, 211 Neb. 276, 284, 318 N.W.2d 269, 274 (1982), this court stated that to prove the existence of an implied easement from former use, "the easement is necessary for the *proper and reasonable enjoyment* of the dominant tract." (Emphasis supplied.) As a result, we conclude the degree of necessity required to prove the existence of an implied easement from former use is "reasonable necessity."

(e) Whether Alleged Easement Was Reasonably Necessary for Use and Enjoyment of Property

U.S. Cold argues that use of the tracks across parcel B was not reasonably necessary for Stewart Seed's use and enjoyment of its land (parcel C) because evidence was adduced at trial that demonstrated that parcel C was accessible via use of trucks on public streets. This court has never reviewed a case involving an alleged easement for rail access. See *Burke Warehouse, Inc. v. Thanas*, 358 Mass. 823, 267 N.E.2d 917 (1971). However, in *Hengen v. Hengen, supra*, this court addressed whether the owners of the southwest quarter of a section of land had an implied easement, arising from use

before severance of the section, to obtain irrigation water from a canal in the northwest quarter. The court found an implied easement existed, stating that "[t]he necessity involved . . . is to transport the irrigation water from the canal in the northwest quarter to the southwest quarter . . . ." 211 Neb. at 284, 318 N.W.2d at 275.

Thus, the *Hengen* court found the easement was necessary for the proper and reasonable enjoyment of the dominant tract without discussing possible alternative methods of transporting the irrigation water. U.S. Cold's argument, that the necessity element was not met because of the existence of possible alternative methods of transportation, is an argument grounded in strict necessity instead of the reasonable necessity standard applicable in the instant case.

The testimony adduced at trial showed that the tracks across parcel B were part of the main rail line created by Union Stockyards and were the only available access to the tracks across parcel C. Obviously, this easement was reasonably necessary for Stewart Seed's convenient and comfortable use and enjoyment of parcel C at the time parcels B and C were subdivided. See, *Hengen v. Hengen, supra*; *Christensen v. Luehrs, supra*. As a result, we find that Stewart Seed acquired an implied easement from former use, for use of the rail tracks across parcel B, upon its acquisition of parcel C on April 21, 1976.

2. Whether Implied Easement Existed When Hillary Purchased Property

Although the district court found that Stewart Seed acquired an implied easement over U.S. Cold's property (parcel B), it went on to find that "the implied easement of rail access was not in existence when Leora Fuller transferred the property to Hillary." As a result, the district court dismissed Hillary's petition. The court reasoned that because the elements necessary for creation of an implied easement did not exist at the time Stewart Seed conveyed parcel C to Fuller, the implied easement did not exist at the time Fuller transferred parcel C to Hillary.

(a) Conveying Dominant Tenement

Clearly, the district court reached its conclusion based on its belief that in order for an implied easement to remain in existence upon a subsequent conveyance, the elements necessary for the creation of an implied easement must be met at the time of each conveyance in the chain of title.

However,

> when an easement, although not originally belonging to an estate, has become appurtenant to it either by grant or prescription, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee.

Cole v. Bradbury, 86 Me. 380, 384, 29 A. 1097, 1098 (1894). See, also, 7 Thompson on Real Property § 60.07(b)(1) (Thomas ed. 1994); *Smith v. Garbe*, 86 Neb. 91, 98, 124 N.W. 921, 924 (1910) (" '[a]n easement appurtenant to land will pass by a conveyance, although the words "with the appurtenances" are not used . . .' "); *Vanderwerff v. Consumers Gas Co.*, 166 Pa. Super. 358, 362, 71 A.2d 809, 811 (1950) ("[e]asements by implication require no deed or writing to support them and they pass by a conveyance of the estates to which they are appurtenant. . . . But under all of the authorities an implied easement can *arise* only where the servitude is of a permanent nature, continuous, and sufficiently apparent to give notice of its existence" (emphasis supplied) (emphasis omitted)); *Broadhead v. Terpening*, 611 So. 2d 949, 954 (Miss. 1992) (" '[e]asements by necessity and by implication are appurtenant to the dominant estate and run with land' ").

In other words, once it is determined that the elements required for the creation of an implied easement existed at the time of the conveyance subdividing the property, the easement becomes appurtenant to the property and the elements for creation are no longer relevant to a determination of the continued existence of that easement upon a subsequent conveyance.

U.S. Cold cites *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N.W. 236 (1907), in support of the district court's determination that the elements necessary for creation of an implied

easement must exist at the time of each conveyance in the chain of title.

In that case, a building was constructed along the outer boundary of a lot bordering a public street. A stairway rising to the second floor of the building was constructed on the street. Under the applicable law of that time period, the court determined that the building owner had acquired an easement by adverse possession in the portion of the street occupied by the stairway. The stairway was subsequently removed. Four years after the removal, the building was sold to Agnew, who reconstructed the stairway.

The city sought to remove the stairway, arguing essentially that the easement did not exist at the time Agnew purchased the property because its use was not continuous, obvious, and necessary at that time. The court held,

> This rule seems to apply more particularly to the creation of easements by implied grant upon the severance of the estate; but, conceding its applicability to the case in hand, we think the easement in question was apparent to an ordinary observer and naturally and necessarily belonged to the premises.

79 Neb. at 607, 113 N.W. at 237.

We conclude the court was correct in stating that the application of these elements "seems to apply more particularly to the creation of easements by implied grant upon the severance of the estate," and that it was incorrect in applying these elements at the time of the conveyance to Agnew. Thus, to the extent that *Agnew v. City of Pawnee City* stands for the proposition that the elements required to create an implied easement must exist at the time of a subsequent conveyance in order for the easement to survive the conveyance, it is overruled.

Once an implied easement is created, it becomes appurtenant to the dominant tenement and remains in existence upon a subsequent conveyance unless and until it is somehow terminated. See *Beloit Foundry Co. v. Ryan*, 28 Ill. 2d 379, 388, 192 N.E.2d 384, 390 (1963) ("[a]n easement appurtenant passes by conveyance of the land to which it is annexed, even without being expressly mentioned, and the servient estate continues to be subject thereto until such right is terminated

or abandoned"). See, also, 7 Thompson on Real Property § 60.07(b)(1) (Thomas ed. 1994).

The only theory pled by U.S. Cold that the easement in the instant case was terminated is that it was abandoned. Thus, in order to determine whether the implied easement existed at the time Fuller transferred parcel C to Hillary, we must determine whether Stewart Seed or Fuller abandoned the easement.

(b) Abandonment

Abandonment of an easement must be pled and proved, the burden of proof being on the party alleging it. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N.W. 236 (1907). Nonuse of an easement for a period less than the prescriptive period of 10 years will not itself work an abandonment of the easement. *Agnew v. City of Pawnee, supra*. However, nonuse of an easement for a period less than the prescriptive period, accompanied by acts clearly indicating an intention to abandon the right, will work an extinguishment of the easement. *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954); *Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932).

An intention to abandon an easement cannot be inferred from the mere fact that the easement was not used for a period of years in excess of the prescriptive period. See, *Masid v. First State Bank, supra*; *Agnew v. City of Pawnee City, supra*. However, nonuse of an easement for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuse is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it. *Masid v. First State Bank, supra*; *Agnew v. City of Pawnee City, supra*.

Thus, in order to determine whether Hillary's predecessors in interest abandoned the implied easement, we must first determine whether the predecessors, at some point in time between the creation of the easement and when Hillary acquired parcel C, failed to use the easement for a period of years in excess of the 10-year prescriptive period. If they used the easement within the prescriptive period, then the burden of proving that the predecessors intended to abandon the ease-

ment is on U.S. Cold. If they did not use the easement within the prescriptive period, then a presumption of abandonment arises and the burden of rebutting the presumption, by proving that the predecessors did not intend to abandon the easement, is on Hillary. See, *Masid v. First State Bank, supra*; *Agnew v. City of Pawnee City, supra*.

(c) Whether Hillary's Predecessors in Interest Used Tracks Within 10 Years of Date Hillary Purchased Property

In its order, the district court found that Hillary's predecessors in interest did not use the track "after 1981 or so." The court reasoned:

> The last use of the tracks, according to Leora Fuller's notes . . . was February, 1980 and both Donald Barnett of the Barnett Corporation and Robert Antczak show track usage in 1981. Ms. Fuller and Fil Catania stated that they thought there was track usage in 1983, but no records were produced at trial to support this.

According to the records produced at trial, the last use of the tracks took place in April 1981. While it is not necessary that the evidence adduced on the last use of the tracks be in the form of written records, we find the testimony adduced on the use of the tracks after April 1981 to be less than persuasive. Thus, considering and giving weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another, we find that the tracks were last used in 1981. See, *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995); *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

Hillary bought parcel C on December 1, 1992. Thus, we conclude that Hillary's predecessors in interest failed to use the tracks for a period of years in excess of the 10-year prescriptive period. As a result, the presumption arises that Hillary's predecessors in interest abandoned the tracks, and thus, Hillary bears the burden of rebutting the presumption by proving that its predecessors did not *intend* to abandon the tracks. See, *Masid v. First State Bank, supra*; *Agnew v. City of Pawnee City, supra*.

(d) Whether Hillary's Predecessors in Interest Intended to Abandon Implied Easement

> " 'An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case . . . .' "

Mader v. Mettenbrink, 159 Neb. 118, 130, 65 N.W.2d 334, 343 (1954) (quoting *Williams v. Lantz*, 123 Neb. 67, 242 N.W. 269 (1932)).

Hillary argues that its predecessors in interest had no intention of abandoning the implied easement. At trial, Fuller unequivocally testified that she never intended to abandon the right to use the tracks. Furthermore, after Fuller acquired parcel C, she advertised it for sale, at all times, as having rail access.

U.S. Cold argues that the following factors illustrate that Stewart Seed and/or Fuller intended to abandon the implied easement: (1) nonuse of the tracks from 1981 forward; (2) refusal to pay for any portion of maintenance, repairs, or replacement of the tracks; (3) acquiescence in the installation of a fence and padlocked gates across the tracks; and (4) failure to expressly convey the implied easement to their respective grantees.

As for factor (1), in determining whether there was an intent to abandon an easement, " ' "[t]ime is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important . . . ." ' " *Mader v. Mettenbrink*, 159 Neb. at 130, 65 N.W.2d at 343 (quoting *Williams v. Lantz, supra*). As stated in *Masid v. First State Bank*, 213 Neb. 431, 435-36, 329 N.W.2d 560, 563 (1983):

> It is true the evidence is that the land to which the easement is appurtenant was vacant for a period of 11 or 12 years. However, this circumstance, in and of itself, does not establish abandonment. . . . [T]he plaintiff herein did

> not by his own act render the use of the easement impossible, nor did he obstruct it in a manner inconsistent with its further enjoyment. There is no abandonment in this case . . . .

Regarding factor (2), the only evidence adduced at trial was that in 1977 Stewart Seed refused to compensate U.S. Cold for reconstructing the tracks on parcel B from two parallel tracks to a single track. Kratvill testified that when he last used the tracks in 1976, they were in adequate condition. Thus, Hillary argues that this reconstruction project was an unnecessary, unilateral activity by U.S. Cold and that its predecessors did not contribute because they were of the opinion that the tracks did not need to be reconstructed.

Considering factor (3), the record reflects that the fence that was constructed contained a swinging gate large enough for a train to pass through. See, *Spiegel v. Ferraro*, 142 A.D.2d 573, 529 N.Y.S.2d 908 (1988); *DeJong v. Abphill Assoc.*, 121 A.D.2d 678, 504 N.Y.S.2d 445 (1986) (failure of owner of dominant estate to act to have removed an obstruction placed on easement by owner of servient estate did not establish abandonment).

As for factor (4), in *Ballinger v. Kinney*, 87 Neb. 342, 345, 127 N.W. 239, 240 (1910), this court held, "The easement, being appurtenant, passe[s] by . . . deed . . . notwithstanding said instrument contains no reference thereto." See, also, section IV(2)(a) on "Conveying Dominant Tenement," *supra*.

We find that these factors, as a whole, do not rebut the evidence presented by Hillary—that its predecessors in interest did not intend to abandon the tracks. We further find that Hillary did not obstruct the easement in any manner or acquiesce in any acts inconsistent with its further enjoyment of the easement. See, *Masid v. First State Bank, supra*; *First Investment Co. v. State Fire Marshal*, 175 Neb. 66, 120 N.W.2d 549 (1963); *Toelle v. Preuss*, 172 Neb. 239, 109 N.W.2d 293 (1961). See, also, *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954). Thus, we determine that Hillary met its burden of rebutting the presumption of abandonment by proving that it was more likely than not that its predecessors in interest did not intend to abandon the easement. As a

result, we conclude the implied easement existed at the time Fuller conveyed parcel C to Hillary.

(e) Whether Hillary Intended to Abandon Implied Easement

Finally, U.S. Cold argues that Hillary intended to abandon the easement because it acquiesced in U.S. Cold's tearing up the tracks and laying asphalt in July 1992. However, Hillary brought this action as soon as it bought the property. Krueger, president of Hillary, testified that he planned to repair the tracks upon parcel C after establishment of the easement through this lawsuit. Thus, we find that Hillary did not intend to abandon the easement. As a result, we conclude that Hillary possesses an implied easement for railway access across the property (parcel B) of U.S. Cold.

V. CONCLUSION

We determine that Hillary's predecessor in interest possessed an implied easement for railway access across U.S. Cold's property and did not intend to abandon the easement. Thus, we determine that the implied easement existed when the property was transferred to Hillary. We further determine that Hillary did not intend to abandon the easement. As a result, we conclude that Hillary possesses an implied easement for railway access across the property of U.S. Cold. We therefore reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., and LANPHIER, J., not participating.

EVELYN A. O'CONNOR, APPELLANT, AND DAVID A. KAUFMAN AND VIRGINIA L. KAUFMAN, HUSBAND AND WIFE, APPELLEES.

550 N.W.2d 902

Filed June 28, 1996. No. S-94-898.

1. **Summary Judgment.** Summary judgment is proper 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: Evidence.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
3. **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.
4. **Easements: Words and Phrases.** An easement by implication from former use arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show that it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract.
5. **Easements.** In order to determine whether an implied easement from former use was created, courts must look to the time of the conveyance subdividing the property that first brought into question whether an implied easement was created.
6. **Summary Judgment: Proof.** In the absence of a prima facie showing by the movant that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for further proceedings.

James Duffy O'Connor and, on brief, Donn C. Raymond for appellant.

John P. Weis, of Atkins, Ferguson & Carney, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

The appellant, Evelyn A. O'Connor, brought this action for declaratory judgment, alleging in her amended petition that she possesses an implied easement for the use of a well, pump, and pipeline on land owned by David A. Kaufman and Virginia L. Kaufman. O'Connor also requested that the Kaufmans be required to reinstall the well, pump, and pipeline

and sought an injunction to prevent the Kaufmans from further interfering with her use of the well, pump, and pipeline. The Kaufmans answered the amended petition and filed a motion for summary judgment. The district court for Scotts Bluff County sustained the Kaufmans' motion and dismissed O'Connor's amended petition. O'Connor appeals.

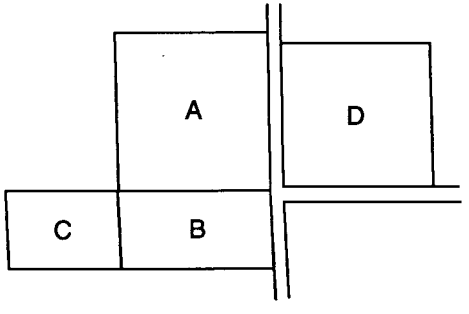
Viewing the evidence in a light most favorable to O'Connor, we determine there is a genuine issue of material fact as to whether an implied easement for use of the well, pump, and pipeline was created. We therefore reverse, and remand for further proceedings.

ASSIGNMENTS OF ERROR

O'Connor alleges the district court erred in (1) sustaining the Kaufmans' motion for summary judgment, (2) failing to find there was a genuine issue of material fact as to the necessity of an implied easement for furnishing domestic water to O'Connor's land, and (3) finding that it was essential for O'Connor to prove the Kaufmans had actual knowledge of the implied easement when they acquired title to their land.

BACKGROUND

Below is a sketch of the parcels of land involved. The sketch is for illustrative purposes only and does not purport to be drawn to scale. See *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976). The property at issue is approximately 460 acres of farmland located southeast of Lyman, Nebraska. O'Connor is the owner of the parcels marked A, B, and C. The Kaufmans are the owners of parcel D. Parcels A and D adjoin each other, divided only by a country road.



Until January 2, 1965, William Ledingham, Jr., owned and farmed all the land (parcels A, B, C, and D). Ledingham maintained a home on parcel A, which is now owned by O'Connor. The well, pump, and pipeline in question were built by Ledingham approximately 40 years ago on parcel D in order to furnish domestic water to his home on parcel A. The pipeline running from parcel D to parcel A is underground.

On January 2, 1965, Ledingham conveyed all the land to Ledingham, Inc. Ledingham passed away on January 29, 1975, and Ledingham, Inc., conveyed the land to his two children by corporate dissolution deeds. Parcels A and B were conveyed to Ledingham's son, Jerry Ledingham, and parcels C and D were conveyed to his daughter, Sandra Carnesecca. Carnesecca subsequently conveyed parcel C to her brother, Jerry Ledingham, in an effort to equalize their interests in their father's estate.

Jerry Ledingham passed away on January 31, 1985, and parcels A, B, and C were conveyed by personal representative deed to O'Connor, his wife. Title of parcel D went from Carnesecca to Renteria Brothers Land and Livestock, Inc., on February 7, 1978, then passed to Arthur and Dora Renteria on January 16, 1979, then to Arthur Renteria on January 26, 1979, then to Renteria Farms, Inc., on August 20, 1981, and finally, to the Kaufmans by sheriff's deed on November 8, 1989. No express easement for use of the well, pump, and pipeline was ever reserved throughout the chain of title to parcel D. Prior to purchasing the land, the Kaufmans searched the title record and visually inspected the land without discovering the alleged easement.

From 1978 to 1990, the house on parcel A shared the water from the well with a small house, occupied by Victor Roldan, and other outbuildings located on parcel D. In October 1985, O'Connor rented the house located on parcel A to Bill Derr. In the lease, Derr agreed to pay a fee for pumping water onto the premises from the well on parcel D. When the Kaufmans acquired the property in November 1989, Derr agreed to pay them $25 per month for use of water from the well. This

agreement continued until Derr moved out of the house in July 1991.

In September 1991, while no one was living in the house on parcel A, the Kaufmans removed the well, pump, and pipeline on parcel D and began farming the land where these items were formerly located. After the well was removed, O'Connor hired Don Rider to drill a well on parcel A in order to supply water to the house on that land. Since the well was drilled, Stanley Welsch and his family of five have lived in the house.

O'Connor's original petition alleged only a prescriptive right to the use of water from the well on parcel D. The court granted O'Connor leave to amend her petition due to an error in the legal description of her property. In her amended petition, O'Connor added a claim based upon the existence of an implied easement. In her brief, O'Connor states that for purposes of this appeal, she is not relying upon an easement by prescription, but upon an implied easement. The amended petition states in pertinent part:

> That the lands owned by plaintiff and defendants adjoin each other and that prior to plaintiff or defendants acquiring title to their respective land all of said land was owned by William Ledingham who farmed all of the land owned, maintained a home on the land owned by the plaintiff; and, installed an irrigation well on the property owned by the defendants together with a pipeline running therefrom for the purpose of providing domestic water to his home and adjoining facilities on the land owned by the plaintiff. That the reason for said installation was that the land owned by the plaintiff was incapable of supporting a water well sufficient to provide water for domestic purposes. Said well, pump and pipeline was installed more than 40 years ago and has remained in the same location for continuous furnishing of domestic water to plaintiff's land.

The Kaufmans did not challenge the sufficiency of O'Connor's amended petition to state a cause of action. The Kaufmans answered by claiming that the elements required to support the creation of an implied easement were not satisfied. O'Connor submitted her own affidavit, and the Kaufmans sub-

mitted the affidavits of Roldan, Welsch, Rider, Howard Spath, David Kaufman, Carnesecca, and Derr.

STANDARD OF REVIEW

Summary judgment is proper 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. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996); *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995).

A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995); *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

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. *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995); *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995).

ANALYSIS

In its order, the district court states, "Upon the evidence adduced at the hearing, a review of the file, arguments of counsel and briefs submitted, the Court finds that there is no genuine issue as to any material fact and that the [Kaufmans] are entitled to judgment as a matter of law." This court recently addressed the elements required to create an implied easement from former use in *Hillary Corp. v. United States Cold Storage, ante* p. 397, 550 N.W.2d 889 (1996). In that case, we held:

> "An easement by implication from former use arises only where [1] the use giving rise to the easement was in existence at the time of the conveyance subdividing the

> property; [2] the use has been so long continued and so obvious as to show that it was meant to be permanent; and [3] the easement is necessary for the proper and reasonable enjoyment of the dominant tract."

Id. at 405, 550 N.W.2d at 894, quoting *Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982).

In order to determine whether an implied easement from former use was created, we must look to "the time of the conveyance subdividing the property" that first brought into question whether an implied easement was created. See *Hillary Corp. v. United States Cold Storage, supra.* The conveyances from Ledingham, Inc., to William Ledingham's son and daughter on January 29, 1975, marked the first time that parcels A (the house) and D (the well, pump, and pipeline) were not under common ownership. As a result, we conclude that the time we must look to, in order to determine whether the elements required to create an implied easement were met, is January 29, 1975.

At the hearing on the motion for summary judgment, O'Connor submitted her own affidavit, and the Kaufmans submitted the affidavits of Roldan, Welsch, Rider, Spath, David Kaufman, Carnesecca, and Derr. These affidavits discussed events that transpired in the late 1980's and early 1990's, focusing predominantly upon the adequacy of the well dug in 1991 on parcel A to supply water to the house on that land. None of the affidavits submitted by either O'Connor or the Kaufmans referred to the alleged easement as of January 29, 1975, when parcels A and D were first divided.

Because the affidavits did not relate back to the appropriate timeframe, they are not relevant evidence for determining whether the elements required to create the alleged easement were met. See Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). As a result, we look only to the amended petition and answer to determine whether a genuine issue of material fact remains for trial.

In her amended petition, O'Connor essentially claims that the elements required to create an implied easement existed at the time of the conveyances subdividing the property. The Kaufmans answered the amended petition by claiming that the

elements required to support the creation of an implied easement were not satisfied. Abandonment was not included as a theory in the Kaufmans' answer.

Viewing the evidence in a light most favorable to O'Connor, we determine that the Kaufmans failed to produce enough evidence to demonstrate that they are entitled to a judgment as a matter of law if the evidence were uncontroverted at trial. See, *Blackbird v. SDB Investments, supra*; *Hearon v. May, supra*; *Keefe v. Glasford's Enter., supra*; *Medley v. Davis, supra*. In the absence of a prima facie showing by the movant that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition. *Roubideaux v. Davenport*, 247 Neb. 746, 530 N.W.2d 232 (1995). As a result, we conclude that the trial court erred in granting the Kaufmans' motion for summary judgment, because genuine issues of material fact remain for trial as to obvious, continuous, and reasonably necessary use at the time of the conveyances subdividing the property (January 29, 1975).

CONCLUSION

Viewing the evidence in a light most favorable to O'Connor, we conclude there is a genuine issue of material fact as to whether an implied easement for use of the well, pump, and pipeline was created at the time of the conveyances subdividing the property. We therefore reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. TODD C. CARPENTER, APPELLANT.

551 N.W.2d 518

Filed June 28, 1996. No. S-95-967.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
2. ____: ____. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
3. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
4. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court.
5. **Constitutional Law: Statutes: Proof.** The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.
6. **Constitutional Law: Statutes: Presumptions.** A statute will be presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
8. **Constitutional Law: Statutes.** A vagueness challenge to a statute is conceptually distinct from an overbreadth challenge.
9. ____: ____. An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected conduct.
10. ____: ____. As a general rule, in a challenge to the overbreadth and vagueness of a law, the court's first task is to analyze overbreadth.
11. ____: ____. An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.
12. **Constitutional Law: Statutes: Standing.** In determining whether standing exists for a challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct.
13. ____: ____: ____. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis the statute is overbroad, and such challenge must fail.
14. ____: ____: ____. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned

statute and cannot maintain that the statute is vague when applied to the conduct of others.

15. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
16. **Constitutional Law: Legislature: Statutes.** Where the Legislature fails to establish minimal guidelines to prevent a standardless sweep that allows police officers, prosecutors, and juries to pursue their personal predilections, the statute must fail as being unconstitutionally vague.
17. **Constitutional Law: Criminal Law: Statutes: Intent.** Challenging a criminal statute as having a deficient mens rea requirement is a constitutional challenge to the facial validity of the statute.
18. **Statutes: Demurrer.** A motion to quash or a demurrer are the proper procedural methods for challenging the facial validity of a statute.
19. **Criminal Law: Trial: Motions to Suppress.** Outside the context of a hearing on a motion to suppress, a trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Todd C. Carpenter was found guilty by the district court for Lancaster County of two counts of transferring a motor vehicle without stating the actual mileage to the best of his knowledge and belief, pursuant to Neb. Rev. Stat. § 60-2303 (Reissue 1988). The court also found Carpenter guilty of one count of knowingly causing an odometer of a motor vehicle to be changed to reflect a mileage different from what had actually been driven, pursuant to Neb. Rev. Stat. § 60-2301 (Reissue 1988). The district court sentenced Carpenter to 3 years' probation. Carpenter appeals the district court's decision. We determine that § 60-2303 is unconstitutionally

vague and thus reverse Carpenter's convictions under that section. However, we determine that § 60-2301 is constitutional and that there was sufficient evidence to sustain Carpenter's conviction under that section. We therefore affirm in part, and in part reverse.

I. BACKGROUND

Carpenter Motors, Inc., is a Nebraska corporation in the business of selling used motor vehicles. Its principal place of business is located in Lincoln, Nebraska. Carpenter is the secretary/treasurer, vice president, and employee of Carpenter Motors. As such, Carpenter's duties include selling vehicles and purchasing vehicles for resale.

1. COUNT I

In July 1991, Carpenter Motors purchased through the Metro Auto Auction in the Kansas City, Missouri, area a 1989 Ford Taurus from the D.L. Peterson Trust Company. The buyer's copy of the "Title Warranty and Bill of Sale" listed the mileage on the odometer as 23,048. In a separate space on that document was written, "AS IS" and "Over Mech Limits." Carpenter's signature appears on the "buyer's signature" line. The odometer disclosure statement from the D.L. Peterson Trust Company was not received into evidence.

Later that month, Timothy Haakenstad purchased the 1989 Ford Taurus from Carpenter Motors. Haakenstad testified that at the time he purchased the vehicle, the odometer displayed approximately 24,000 miles. Haakenstad further testified that Carpenter told him that the vehicle had been a rental or leased vehicle, that the renter or lessee felt there was a discrepancy in the mileage, that it appeared to be a low-mileage car, and that it is customary for rental companies to get rid of their vehicles between 40,000 to 60,000 miles.

When the sale was consummated, Carpenter Motors provided Haakenstad with an odometer disclosure statement as required by Nebraska law. These statements are on a form prescribed by the Nebraska Department of Motor Vehicles that state in pertinent part:

> I state that the odometer now reads _____ . . . miles and to the best of my knowledge reflects the actual

mileage of the vehicle described herein, unless one of the following statements is checked.

☐ (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

☐ (2) I hereby certify that the odometer is NOT the actual mileage. WARNING - ODOMETER DISCREPANCY.

This form was signed by Ramona Hyde, an employee of Carpenter Motors, on behalf of Carpenter Motors. It stated that "the odometer now reads 23048 . . . miles," and the second box was checked to indicate this mileage was not the actual mileage. At trial, Hyde testified that it was standard procedure for Carpenter to inform her which box, if any, to check for each car she sold. The first box, indicating that the odometer had exceeded its mechanical limits, was not checked.

2. COUNT II

In July 1991, Carpenter Motors purchased through the Metro Auto Auction in Kansas City a 1988 Ford Taurus from Premier Leasing Company. The buyer's copy of the "Title Warranty and Bill of Sale" listed the mileage on the odometer as 7,460. In a separate space on that document was written "As is" and "Over Mech Limits." Carpenter's signature appears on the "buyer's signature" line.

The odometer disclosure statement provided by Premier Leasing also indicated that "the odometer . . . now reads 7460 . . . miles." The box on that form designated "**Warning - Odometer Discrepancy**" was checked, indicating that the reading was not the actual mileage. The box for certifying that the "odometer reading reflects the amount of mileage in excess of its mechanical limits" was not checked. Carpenter's signature appears on the line designated "Transferee's Signature - Buyer."

In August 1991, Scott Johnson purchased the 1988 Ford Taurus from Carpenter Motors. Johnson testified that at the time he purchased the vehicle, the odometer displayed approximately 7,000 miles and that he asked Carpenter whether the

vehicle had exceeded the 100,000-mile mechanical limit on its odometer. Johnson testified that Carpenter told him that it had not. Johnson further testified that Carpenter stated that the original odometer had been broken and replaced, that the 7,000 miles had been registered on the replacement odometer, and that the broken odometer read about 50,000 miles when it was replaced.

Carpenter Motors provided Johnson with an odometer disclosure statement which indicated the mileage on the odometer to be 7,460. The second box warning that the indicated mileage was not the true mileage was checked. The first box, certifying that to the best of the transferor's knowledge the odometer reading reflects the amount of mileage in excess of the odometer's mechanical limits, was not checked. Carpenter's signature appears on the "transferor's signature" line.

3. Facts as to Good Faith Defense: Counts I and II

Carpenter testified that he called the Nebraska Motor Vehicle Industry Licensing Board sometime in 1990 to ascertain the proper method for filling out odometer disclosure statements in situations where the odometer in a vehicle had exceeded its mechanical limit and was not otherwise accurate. Corrine Fiel, an investigator for the Nebraska Motor Vehicle Industry Licensing Board, testified that she recalled Carpenter calling her sometime in 1990 with this inquiry. She advised Carpenter that she would have to discuss the matter with Bill Edwards, the director of the Nebraska Motor Vehicle Industry Licensing Board, to get a ruling.

After having spoken with Edwards, Fiel relayed Edwards' advice to Carpenter: that he should check only one box—the second one indicating an odometer discrepancy. Carpenter testified that based on this advice, whenever it had been brought to his attention that Carpenter Motors received a vehicle in which there was any indication of a problem registering miles, Carpenter Motors would check the second box on the odometer disclosure statement warning that the indicated mileage was not the actual mileage.

4. Count III

In June 1990, Stephen Dunn purchased a 1984 Mazda RX7 from Carpenter Motors. Dunn test drove the vehicle approximately 2 or 3 months before he purchased it. Dunn testified that at the time he purchased the vehicle, its odometer registered approximately 86,000 miles.

Patrick Bell testified that he was the owner of and did business as Bell Auto Repair. Bell further testified that he had business dealings with Carpenter and was a second cousin of his. According to Bell's business records, on or about June 8, 1990, someone on behalf of Carpenter Motors delivered the 1984 Mazda RX7 to Bell Auto Repair for repair of the vehicle's odometer. The method of repair was to install a used instrument cluster (speedometer, odometer, gauges, et cetera) which was provided by Carpenter Motors. Bell testified he could not remember who made the request for the repair or who brought the instrument cluster in to be installed.

Bell Auto Repair's order forms indicate that at the time the vehicle was delivered to them for repair, the indicated mileage on the odometer was 140,685. The in-house copy of this form indicates that the mileage on the installed replacement odometer was 86,238. The record reflects and the trial court found that Carpenter's signature appears on both the in-house copy and the customer copy of the repair order.

The odometer disclosure statement given to Dunn by Carpenter Motors upon closure of the sale certified an odometer reading of 86,367. The second box was checked, warning that the indicated mileage was not the actual mileage. The first box warning that the odometer had exceeded its mechanical limit was not checked. Dunn testified that at the closing, he overheard Carpenter instruct Hyde to "check box number two, that the odometer was not working and that it wasn't accurate at that point and that it was possible that it even had over a 100,000 miles on it." Dunn further testified that there were no stickers relating to the odometer reading affixed to the dashboard, inside doors, or any other place on the car.

Carpenter was charged only under the odometer disclosure statutes and not with fraud or theft by deception. The district court found Carpenter guilty of two counts of transferring a

motor vehicle without stating the actual mileage to the best of his knowledge and belief, pursuant to § 60-2303, and one count of knowingly causing an odometer of a motor vehicle to be changed to reflect a mileage different from what had actually been driven, pursuant to § 60-2301. The court sentenced Carpenter to three years' probation. Carpenter appeals the district court's decision.

II. ASSIGNMENTS OF ERROR

Carpenter alleges that the district court erred in failing to find (1) that the provisions of Neb. Rev. Stat. § 60-2302 (Reissue 1988) and §§ 60-2301 and 60-2303 are unconstitutionally vague and/or overbroad as applied, (2) that intent to deceive is statutorily and constitutionally an essential element of §§ 60-2301, 60-2302, and 60-2303, punishable under Neb. Rev. Stat. § 60-2307 (Reissue 1988), (3) that there was insufficient evidence to sustain the convictions, and (4) that he was entitled to an affirmative defense based upon his good faith reliance upon advice from the Nebraska Motor Vehicle Industry Licensing Board with respect to the manner of compliance with the provisions of § 60-2303, and that (5) the district court failed to make adequate findings of fact and conclusions of law.

III. STANDARD OF REVIEW

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Masters, supra*; *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach

an independent, correct conclusion regarding questions of law. *State v. Kunath, supra*; *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993).

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by the trial court. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996); *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995).

The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality. *Id.* A statute will be presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *Id.*

IV. ANALYSIS

1. COUNTS I AND II (§ 60-2303)

In counts I and II, Carpenter was charged with and convicted of violating § 60-2303, which states in pertinent part:

> The transferor of any motor vehicle of an age of less than twenty-five years, which was equipped with an odometer by the manufacturer, shall provide to the buyer a statement signed by the transferor. Such statement shall . . . (3) if the transferor has knowledge that the mileage shown on the odometer is not that actually driven, *state the actual mileage to the best of the transferor's knowledge and belief.*

(Emphasis supplied.)

Section 60-2303 must be read in conjunction with Neb. Rev. Stat. § 60-2304 (Reissue 1988). Section 60-2304 states in pertinent part: "The statement required by section 60-2303 *shall* be on a form prescribed by the Department of Motor Vehicles." (Emphasis supplied.) As stated, the form prescribed by the Department of Motor Vehicles contains a blank line designated for the transferor to state the mileage as it appears on the odometer at the time of transfer. If the transferor has knowledge that "the mileage shown on the odometer is not that

actually driven," the only options provided to him or her by the form are to check the applicable boxes, which state:

> ☐ (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.
>
> ☐ (2) I hereby certify that the odometer reading is **NOT** the actual mileage. **WARNING - ODOMETER DISCREPANCY.**

(a) Vagueness/Overbreadth

Carpenter first alleges the district court erred in failing to find that § 60-2303 is unconstitutionally vague and/or overbroad as applied. A vagueness challenge to a statute is conceptually distinct from an overbreadth challenge. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected conduct. *Id.* As a general rule, in a challenge to the overbreadth and vagueness of a law, the court's first task is to analyze overbreadth. *Id.*

(i) Standing

An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *Id.* In determining whether standing exists for a challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. *Id.* If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis the statute is overbroad, and such challenge must fail. *State v. Copple, supra*; *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). We determine that filling out an odometer disclosure statement, as required by § 60-2303, does not reach a substantial amount of constitutionally protected conduct. As a result, Carpenter does not have standing to challenge § 60-2303 for overbreadth.

Irrespective of standing to challenge § 60-2303 for overbreadth, Carpenter may have standing to challenge it for

vagueness. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State ex rel. Dept. of Health v. Jeffrey, supra*; *State v. Walton*, 246 Neb. 893, 523 N.W.2d 699 (1994). Under the facts of this case, we determine that Carpenter was not engaging in conduct clearly proscribed by § 60-2303 when he checked the second box instead of the first box on the odometer disclosure statement forms. Furthermore, we determine that Carpenter is alleging that § 60-2303 is vague as applied to his conduct and not the conduct of others. As a result, we conclude that Carpenter has standing to challenge § 60-2303 for vagueness.

(ii) Vagueness

The vice of vagueness in a penal statute was denounced by the U.S. Supreme Court in *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983):

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." [Citation omitted.]

See, also, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

In the instant case, it is undisputed that the odometers in question had exceeded their mechanical limits. However, there were also discrepancies as to the actual mileage on the vehi-

cles. The odometer disclosure statement Carpenter received from Premier Leasing, when he purchased the 1988 Ford Taurus, indicated that the odometer read 7,460 miles. On that form, the box for certifying that the reading was not the actual mileage ("**WARNING - ODOMETER DISCREPANCY**") was checked. However, the box for certifying that the odometer reading reflects the amount of mileage in excess of its mechanical limits was not checked. The odometer disclosure statement Carpenter received from D.L. Peterson Trust Company when he purchased the 1989 Ford Taurus was not received into evidence. However, evidence was adduced at trial that there was a discrepancy in the mileage actually driven.

In its order, the district court found that "[u]nder these circumstances, the transferor [Carpenter] violated Neb.Rev.Stat. §60-2303 by checking box number two instead of box number one," when he sold the vehicles. However, as applied to these facts, it is unclear why checking the second box violates § 60-2303, but checking the first box complies with the statute.

If Carpenter had checked only the first box, he could have been prosecuted for not checking the second box because not only were the odometers over their mechanical limits, there were also discrepancies as to their accuracy. In other words, under these facts, a transferor is caught in a Catch-22 as a result of law enforcement's unbridled discretion to determine which of two theories to pursue. This potential for arbitrary enforcement is the very ill the void-for-vagueness doctrine was designed to prevent. Where the Legislature fails to establish minimal guidelines to prevent a standardless sweep that allows police officers, prosecutors, and juries to pursue their personal predilections, the statute must fail as being unconstitutionally vague. See *Kolender v. Lawson, supra.*

Furthermore, regardless of which box Carpenter checked, or even if he had checked both boxes, he still would not have complied with the directive of § 60-2303 to "state the actual mileage to the best of [his] knowledge and belief." The odometer disclosure statement form prescribed by the Department of Motor Vehicles does not provide a space for the transferor to state the mileage that the vehicle has actually

been driven, the odometer's mechanical limit, or the extent of the odometer's discrepancy. Nonetheless, the writing at the bottom of these forms states that "This Form complies with both the State and the Federal Odometer Law."

In 1993, the Legislature amended § 60-2303 which is now found at Neb. Rev. Stat. § 60-134 (Reissue 1993). This legislation was amended after the alleged wrongs occurred in the instant case. However, we note that the statute, as amended, does not require the transferor to "state the actual mileage to the best of the transferor's knowledge and belief." Instead, under § 60-134:

> [I]f the transferor has knowledge that the mileage shown on the odometer is in excess of the designated mechanical odometer limit, [he/she] shall include a statement to that effect, or . . . if the transferor has knowledge that the odometer reading differs from the actual mileage and that the difference is greater than that caused by odometer calibration error, [he/she] shall state that the odometer reading does not reflect the actual mileage and should not be relied upon.

(b) § 60-2303 Unconstitutionally Vague

Moreover, Carpenter was advised by a state agency to check only the first box under these circumstances. It is unreasonable to hold Carpenter accountable for determining that a violation of the law occurs by not checking the more correct of the two boxes that are provided on the form. Thus, we determine that § 60-2303 does not provide minimal guidelines to govern law enforcement and is so unclearly defined that it deprives persons of ordinary intelligence fair notice as to what conduct is prohibited. As a result, we conclude that § 60-2303 is unconstitutionally vague as applied to the facts of the instant case. Thus, Carpenter's convictions under § 60-2303 are reversed, and we will not analyze Carpenter's other assigned errors regarding that section.

2. Count III

In count III, Carpenter was charged with and convicted of violating § 60-2301. That section states in pertinent part:

> It shall be unlawful for any person to:

> (1) Knowingly tamper with, adjust, alter, change, disconnect or fail to connect an odometer of a motor vehicle, or to cause any of the foregoing to occur, to reflect a mileage different than has actually been driven by such motor vehicle . . . .

Section 60-2302 must be read in conjunction with § 60-2301. Section 60-2302 states in pertinent part:

> If any odometer is repaired or replaced, the reading of the repaired or replaced odometer shall be set at the reading of the odometer repaired or replaced immediately prior to repair or replacement . . . when the repaired or replaced odometer is incapable of registering the same mileage as before such repair or replacement, the repaired or replaced odometer shall be adjusted to read zero and a notice in writing on a form prescribed by the Department of Motor Vehicles shall be attached to the left door frame . . . specifying the mileage prior to repair or replacement of the odometer and the date on which it was repaired or replaced . . . .

(a) Vagueness/Overbreadth

Carpenter alleges that §§ 60-2301 and 60-2302 are unconstitutionally vague and/or overbroad as applied. We determine that providing notice that a repaired or replaced odometer is not registering the same mileage as before the repair or replacement, as required by §§ 60-2301 and 60-2302, does not reach a substantial amount of constitutionally protected conduct. As a result, Carpenter does not have standing to challenge these sections for overbreadth. See, *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985).

We further determine that if Carpenter in fact caused the odometer to be changed to reflect a mileage different than was actually driven by the 1984 Mazda RX7, without complying with § 60-2302, as he was charged, then he was engaging in conduct clearly proscribed by § 60-2301. As a result, Carpenter does not have standing to challenge §§ 60-2301 and

60-2302 for vagueness. Thus, we will analyze Carpenter's other assigned errors regarding these sections.

(b) Mens Rea

Carpenter next alleges the district court erred in failing to find that intent to deceive is statutorily and constitutionally an essential element of §§ 60-2301 and 60-2302. Section 60-2307 states in pertinent part: "Any person who violates any other provision of sections 60-2301 to 60-2307 shall be guilty of a Class IV felony." Neb. Rev. Stat. § 28-105(1) (Reissue 1989) states that conviction of a Class IV felony is punishable by "Maximum — five years imprisonment, or ten thousand dollars fine, or both[,] Minimum — none." Carpenter argues that because of the potential for substantial criminal penalties, the court must either interpret the statutes to require intent to deceive or declare the statutes unconstitutional.

Challenging a criminal statute as having a deficient mens rea requirement is a constitutional challenge to the facial validity of the statute. Under Nebraska law, a motion to quash or a demurrer are the proper procedural methods for challenging the facial validity of a statute. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). See, also, Neb. Rev. Stat. §§ 29-1808 and 29-1810 (Reissue 1995). In the instant case, Carpenter did not file a demurrer or challenge the statute as lacking a sufficient mens rea in his motion to quash. Carpenter first raised this challenge in his motion for new trial. A motion for new trial is not a proper procedural method for challenging the facial validity of a statute. *Id.* See, also, Neb. Rev. Stat. § 29-1812 (Reissue 1995). As a result, we will not consider this assigned error because it was not properly preserved for appeal.

(c) Sufficiency of Evidence

Carpenter next alleges the district court erred in failing to find there was insufficient evidence to sustain his conviction under § 60-2301. In its order, the district court found that "Carpenter Motors, Inc. or the defendant violated Neb.Rev.Stat. §60-2301," and that "[t]he defendant, Todd C.

Carpenter, acted as either the principal or as an aider and abettor with respect to the crime."

Carpenter's argument is essentially twofold: (1) There was insufficient evidence to convict Carpenter based on the court's reasoning that he was either the principal actor or the aider and abettor with respect to the crime, and (2) there was insufficient evidence that Carpenter changed or directed the change of the odometer.

With regard to Carpenter's first argument, § 60-2301 states that it shall be unlawful for *any person* to knowingly cause an odometer of a motor vehicle to be changed to reflect a mileage different from what had actually been driven by such motor vehicle. Carpenter clearly falls into the category of "any person." The reasoning upon which the court based its guilty verdict, that Carpenter acted either as the principal or as an aider and abettor, is narrower than the statute's broad "any person" requirement. As a result, Carpenter's first argument is without merit.

Regarding Carpenter's second argument, Bell Auto Repair's order forms indicate that at the time the 1984 Mazda RX7 was delivered to them for installation of a new odometer, the indicated mileage on the old odometer was 140,685. The in-house copy of this form indicates that the mileage on the installed replacement odometer provided by Carpenter Motors was 86,238. The record reflects and the trial court found that Carpenter's signature appears on both the in-house copy and the customer copy of the repair order. Dunn testified that Carpenter sold him the car without affixing any stickers relating to the odometer reading in the car. As a result, we conclude that when viewed and construed most favorably to the State, there was sufficient evidence for the trial court to find that Carpenter knowingly caused an odometer of a motor vehicle to be changed to reflect a mileage different from what had actually been driven as prohibited by § 60-2301. See, *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

(d) Findings of Fact and Conclusions of Law

Finally, Carpenter alleges the district court erred in failing to make adequate findings of fact and conclusions of law. Outside the context of a hearing on a motion to suppress, a trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). See, also, *State v. Osborn, ante* p. 57, 547 N.W.2d 139 (1996). In any event, we conclude the district court made adequate findings of fact and conclusions of law. As a result, we conclude that all of Carpenter's assigned errors as to count III are without merit.

V. CONCLUSION

We determine that § 60-2303 is unconstitutionally vague and thus reverse Carpenter's convictions under that section. However, we determine that § 60-2301 is constitutional and that there was sufficient evidence to sustain Carpenter's conviction under that section. We therefore affirm in part, and in part reverse.

AFFIRMED IN PART, AND IN PART REVERSED.

METROPOLITAN UTILITIES DISTRICT, APPELLEE, V. TWIN PLATTE NATURAL RESOURCES DISTRICT, APPELLANT, APPLICATION A-17310 OF THE METROPOLITAN UTILITIES DISTRICT.

550 N.W.2d 907

Filed June 28, 1996. No. S-95-1022.

1. **Judgments: Appeal and Error.** On issues of law, an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the tribunal below.
2. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial tribunal.
3. **Actions: Parties: Standing.** Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real inter-

est in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy.

4. ____: ____: ____. The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
5. **Constitutional Law: Statutes: Standing.** To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
6. **Political Subdivisions: Legislature.** A political subdivision has only that power delegated to it by the Legislature; a grant of power to a political subdivision is to be strictly construed.
7. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district, not simply convenient, but indispensable.
8. **Natural Resources Districts: Waters.** The powers of a natural resources district pertain to the development, management, utilization, and conservation of ground water and surface water.
9. **Standing.** Neb. Rev. Stat. § 46-233 (Reissue 1993) did not supplant the common-law standard of standing.

Appeal from the Department of Water Resources. Affirmed.

Jess C. Nielsen, of Nielsen & Birch, for appellant.

Ronald E. Bucher for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The would-be objector, Twin Platte Natural Resources District, appealed to the Nebraska Court of Appeals the order of the Director of Water Resources removing Twin Platte as an objector to the application of the applicant-appellee, Metropolitan Utilities District of Omaha, for a permit to appropriate public waters from the Platte River to induce the recharge of the ground water at the utilities district's well field near La Platte, Nebraska. In so doing, Twin Platte assigned a number of errors to the director, including (1) his failure to

grant it a hearing and (2) his determination that it lacked standing. It then successfully petitioned this court for an order bypassing the Court of Appeals. Inasmuch as Twin Platte did not ask for a hearing and the director correctly determined that Twin Platte lacks standing, we affirm.

II. SCOPE OF REVIEW

The issues attending the foregoing and controlling assignments of error present questions of law, in connection with which an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the tribunal below. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

III. FACTS

The utilities district filed its application with the Nebraska Department of Water Resources on September 9, 1993, and subsequently corrected it on five separate occasions. The priority date for 56 of the wells was claimed to be January 1, 1970, and the priority date for the one remaining well was claimed to be January 1, 1990, the dates the wells were drilled, rather than the date of the application.

Twin Platte filed an objection to the application on August 17, 1994, claiming that it had an interest in the matter because its constituency included landowners and water users with water rights granted after January 1, 1970, and January 1, 1990.

After all other objectors either were removed or had withdrawn, the utilities district and Twin Platte filed with the director a "case stated," which provided, in pertinent part:

> [The utilities district] and Twin Platte . . . hereby stipulate that the following case stated shall be and is hereby submitted . . . for consideration in this case to be binding upon said respective parties:
>
> . . . .
>
> 2. For purposes of presenting the objections of [Twin Platte] to the application of [the utilities district] in this case, [Twin Platte] does not contest the factual case that [the utilities district] will present or has presented to the Department in support of its application; it is assumed

but not decided that [the utilities district] can and will present the required factual proof needed to support its application, that is to say that [the utilities district] has stated the factual justification for its application as required by LB301, laws of 1993.

3. [The utilities district] contends that upon satisfying the above referenced proof of facts, it is entitled to an instream flow right in the Platte River for induced recharge of the aquifer pumped by said wells, with a priority date assigned by statute which relates to the date the wells were drilled and not to the date on which application for the water right was made.

4. Within the geographical area of [Twin Platte] are irrigators who have perfected rights to divert natural flow water in the North Platte, South Platte, and Platte Rivers, and tributaries thereto, to water crops which would be senior to, and have priority to a water right granted with the priority date of the [utilities district] application; but, which would become junior to, and subservient to, a priority date assigned to existing [utilities district] wells based upon the date said wells were drilled. [Twin Platte] is authorized by statute to regulate ground water withdrawals within its district and generally to represent surface water users in its district.

5. [Twin Platte] contends that the statutory provisions which assign a priority date for [the utilities district] wells related to the date the wells were drilled to divert water from the river, being Sections 46-233, 235, 235.01, 235.02, 235.03 and 235.04, all as amended by LB301, laws of 1993, violate the protection afforded other water rights by the Nebraska and United States of America Constitutions.

6. [Twin Platte] also contends that said LB301, as compared to other statutory provisions is unconstitutionally amendatory and unworkable and unmanageable by the [department].

On August 9, 1995, the utilities district filed a motion for a determination as to Twin Platte's standing. On August 24, Twin Platte filed a "countermotion." That pleading did not

request any action on the part of the department, but, rather, provided argument on the issue of standing. Twin Platte did not request a hearing on either its so-called countermotion or the utilities district's motion.

In an order dated August 28, 1995, the director removed Twin Platte from the listing of parties in the case, finding that it did not have standing in the proceeding. Twin Platte then filed its notice of appeal to the Court of Appeals.

IV. ANALYSIS

Before reaching the relevant assignments of error, an initial matter needs to be addressed. Twin Platte asserts in its brief that "[t]he factual and legal issues between the parties were reduced to a 'Case Stated' pursuant to [Neb. Ct. R. of Prac.] 5L, . . . filed with [the department] and is presented for this appeal." Brief for appellant at 1-2. However, the utilities district states that "the Case Stated filed with [the department] was *not* intended as a Case Stated before this Court because it clearly is not in compliance with [Neb. Ct. R. of Prac.] 5B(13) . . . ." (Emphasis in original.) Brief for appellee at 1.

Neb. Ct. R. of Prac. 5B(13) (rev. 1996) provides as follows:

> Case Stated. The parties may by agreement state the case to be presented to this court on appeal. The case stated shall briefly recite the facts out of which the questions of law arise, and also any substantial conflict in the evidence as to any fact involved. It shall separately identify and quote the rulings of the court complained of, with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated shall constitute the bill of exceptions. It must be allowed and certified by the judge who tried the case, filed with the clerk of the district court, made a part of the record of the district court as in other cases, and included therein when the transcript of the record is filed in this court.

The case stated filed with the department did not separately identify and quote the rulings about which complaint is made; indeed, no rulings had been made at the time of its filing.

Neither was the case stated certified by the director who issued the order about which complaint is made on appeal. Consequently, the case stated filed for the consideration of the department does not serve as a case stated in this court.

1. HEARING

Twin Platte first asserts that the director erred in failing to grant it a hearing on the issue of its standing. However, Twin Platte did not request a hearing on either the utilities district's motion to determine Twin Platte's standing or its own filing. Resolution of this assignment of error is controlled by the rule that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial tribunal. See, *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *Kropf v. Kropf*, 248 Neb. 614, 538 N.W.2d 496 (1995); *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995). Therefore, this assignment of error is without merit.

2. STANDING

Twin Platte next urges that the director erred in determining that it lacked standing to object to the utilities district's application.

Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525

N.W.2d 193 (1994); *Styskal v. Wright*, 246 Neb. 513, 519 N.W.2d 543 (1994).

Although Twin Platte does not have a water right that would be adversely affected by the utilities district's application and does not assert such a right, it nonetheless presents in its brief a number of arguments for its position that it has standing. It first contends that the case stated acknowledges as a matter of fact as well as law that it is authorized by statute to represent surface water users in its district. But as previously demonstrated, the case stated filed with the director does not serve as a case stated in this court. Moreover, whether Twin Platte is authorized by statute to represent surface water users in its district in litigation is a question of law which, as noted in part II, is to be determined independently by this court.

Second, Twin Platte urges that it has standing by virtue of the fact that some of its constituents have water rights which may be affected by the utilities district's application. In other words, Twin Platte asserts that it has the power to represent the interests of its constituents in this case, even if those constituents choose not to exercise their rights.

As a political subdivision, Twin Platte has only that power delegated to it by the Legislature. A grant of power to a political subdivision is to be strictly construed. *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988). A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district, not simply convenient, but indispensable. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995).

In relevant part, Neb. Rev. Stat. § 2-3229 (Cum. Supp. 1994) defines the purposes of natural resources districts as being "to develop and execute, through the exercise of powers and authorities granted by law, plans, facilities, works, and programs relating to . . . (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water . . . ." Thus, as the

director correctly noted, the powers of a natural resources district pertain to the development, management, utilization, and conservation of ground and surface waters. We have neither been cited to nor are we aware of any statute which grants natural resources districts the power to represent the interests of constituents in litigation. It would be stretching our powers of analogy to declare that such authority was necessarily implied in or incident to any express powers, or was indispensably essential to the declared objects and purposes of Twin Platte. See, *Wagoner, supra*; Neb. Rev. Stat. § 2-3201 et seq. (Reissue 1991 & Cum. Supp. 1994). Therefore, the fact that the water rights of the constituents of a natural resources district may be affected by an application to appropriate waters does not confer standing upon such natural resources district to object to the application.

Twin Platte also claims that it has standing because it is entitled to represent the public interest. It cites to § 2-3201 for the proposition that natural resources districts are to see to the welfare of the people, which it claims is synonymous with stating that Twin Platte represents the public interest. Section 2-3201 provides, in pertinent part:

> The Legislature hereby recognizes and declares that it is essential to the health and welfare of the people of the State of Nebraska to conserve, protect, develop, and manage the natural resources of this state. The Legislature further recognizes the significant achievements that have been made in the conservation, protection, development, and management of our natural resources and declares that the most efficient and economical method of accelerating these achievements is by creating natural resources districts encompassing all of the area of the state.

Not only is the power to represent the public interest in litigation in which a natural resources district does not otherwise have standing not expressly granted by this statute, neither is it implied in or incident to any express powers, nor indispensably essential to the declared objects and purposes of a natural resources district.

Neb. Rev. Stat. § 46-235(4)(b) (Reissue 1993) provides that the director must take into consideration certain factors in determining whether an application for an appropriation for induced ground water recharge is in the public interest; it does not state that the public interest must be represented by a particular party. Thus, Twin Platte does not have the power to represent the public interest in litigation in which it does not have standing.

Finally, Twin Platte argues that the Legislature has supplanted the common-law concept of standing by enacting Neb. Rev. Stat. § 46-233 (Reissue 1993). That section provides:

> (5) Prior to taking action on an application for induced ground water recharge, the Director of Water Resources shall publish notice of such application at the applicant's expense at least once each week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may, in writing, object to the application. . . .
>
> (6) After the director has accepted the application . . . and published notice as required under subsection (5) of this section, the director shall, if he or she determines that a hearing is necessary, set a time and place for a public hearing on the application. . . . All interested parties shall be allowed to testify and present evidence relative to the application.

Twin Platte urges that the term "interest," as used in this section, is broader than the common-law standard of standing. While Twin Platte does not provide a proposed definition of this term, it urges that "[t]he precedent of what happens to the [utilities district] application is of vital importance to [Twin Platte] responsibilities," brief for appellant at 21; "[i]t is of vital interest to [Twin Platte] as to whether the statutes should require [the utilities district] to divert into ponds and canals, saving 'unappropriated water' for use by others upstream anywhere to Wyoming," and "[natural resources districts] have authority to impose restrictions on public water suppliers and may limit their water use to a greater degree or extent than

that permitted by [the department]; which certainly describes the interest of [natural resources districts] in this litigation," *id.* at 22; and "[t]he interest of [Twin Platte] is to see that pumping does not curtail use of the Platte River for other legitimate purposes and preserve flows for its constituency," *id.* at 26.

There simply is no merit in this argument. The term "interest" has been used by this court in defining the common-law standard of standing. See, *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). There is nothing in the language of the statute which would indicate that the Legislature intended to divert from the common-law standard of standing.

In addition, Twin Platte's broad construction of the term "interest" would lead to an absurd result. The Constitution of this state provides that "[t]he use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes . . . ." Neb. Const. art. XV, § 5. If mere interest in the outcome of an application was all that was necessary for standing, then every citizen of the state would have standing to object to an application. In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993). Statutory language is to be given its plain and ordinary meaning, and this court will, if possible, try to avoid a construction which would lead to an absurd result. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

Section 46-233 did not supplant the common-law standard of standing. As Twin Platte does not have standing pursuant to that standard, the second assignment of error is also without merit.

V. JUDGMENT

The determination that Twin Platte lacks standing requires that we affirm the director's order and makes it unnecessary to consider the other assigned errors.

AFFIRMED.

CITY OF LINCOLN, APPELLEE, V. TWIN PLATTE NATURAL RESOURCES DISTRICT, APPELLANT, APPLICATION A-17312 OF THE CITY OF LINCOLN.

551 N.W.2d 6

Filed June 28, 1996. No. S-95-1224.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Jurisdiction: Appeal and Error.** It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Administrative Law: Judgments: Time: Appeal and Error.** Even in the absence of statutory authority, an administrative agency has the power to reconsider its own decisions; however, except where the motion to reconsider is one based on newly discovered evidence, the agency's power to reconsider its own order exists only until the aggrieved party files an appeal or the statutory appeal time has expired.
4. **Administrative Law: Time: Appeal and Error.** A motion to reconsider filed with an administrative agency will not toll the statutory time for seeking judicial review.
5. **Administrative Law: Due Process: Notice.** As a general rule, where an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.
6. **Administrative Law: Due Process.** The demands of due process do not require a hearing at any particular point in an administrative hearing so long as the requisite hearing is held before the final order becomes effective.
7. **Final Orders: Appeal and Error.** In a special proceeding, an order is final and appealable if it affects a substantial right of the aggrieved party.
8. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

Appeal from the Department of Water Resources. Appeal dismissed.

Jess C. Nielsen, of Nielsen & Birch, for appellant.

William F. Austin, Lincoln City Attorney, and Steve Huggenberger for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The would-be objector, Twin Platte Natural Resources District, appealed to the Nebraska Court of Appeals from the order of the director of the Department of Water Resources removing Twin Platte as an objector to the application of the applicant-appellee, City of Lincoln, for a permit to appropriate public waters from the Platte River to induce the recharge of the ground water at the City's well field near Ashland, Nebraska. In so doing, Twin Platte assigned a number of errors to the director. It then successfully petitioned this court for an order bypassing the Court of Appeals. As we lack jurisdiction, we now dismiss the appeal.

The scope of our review is controlled by the rule that when a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

The City filed its application with the department on September 9, 1993, and a corrected application on February 25, 1994.

Twin Platte subsequently filed an objection to the application, claiming an interest in the matter because its constituency included landowners and water users with water rights that would be affected by the application.

The City then filed a motion seeking a determination of Twin Platte's status as an objector. The City contended therein that Twin Platte did not have statutory authority to represent the interests of private surface water appropriators in this matter and therefore did not have a sufficient interest in the case to have standing as a party. Twin Platte did not file a response to this motion. Finding that Twin Platte did not have a sufficient interest in the case to have standing as a party, the director removed it as an objector by an order dated October 13, 1995.

On October 30, 1995, Twin Platte filed a motion requesting that the director withdraw his October 13 order and grant it a hearing pursuant to Neb. Rev. Stat. § 46-209 (Supp. 1995), which provides, in pertinent part:

> If a decision is made without a hearing, a hearing shall be held at the request of any party to the proceeding if the request is made within fifteen days after the decision is rendered. . . . Upon any hearing, the department shall receive any evidence relevant to the matter under investigation and the burden of proof shall be upon the person making the complaint, petition, and application. After such hearing and investigation, the department shall render a decision in the premises in writing and shall issue such order or orders duly certified as it may deem necessary.

The director granted Twin Platte a hearing, which was held telephonically on November 3, 1995, but, at least so far as the evidence shows, the director at no time set aside or affirmed his October 13 order. Twin Platte filed its notice of appeal on November 9.

It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995); *In re Interest of Krystal P. et al.*, 248 Neb. 905, 540 N.W.2d 316 (1995).

Neb. Rev. Stat. § 46-210 (Reissue 1993) provides:

> If any . . . party . . . interested in irrigation or water power work affected thereby [is] dissatisfied with the decision or with any order adopted, such . . . party . . . may appeal to the Court of Appeals to reverse, vacate, or modify the order complained of. . . . The time for perfecting such appeal shall be limited to thirty days after the rendition of such decision or order . . . .

The question presented is whether Twin Platte's motion requesting the withdrawal of the director's order of October 13, 1995, and the holding of a hearing on the issue of standing, toll the 30-day appeal time set by § 46-210 such that because no order was entered following the hearing, the present appeal is not the subject of a final order.

Even in the absence of statutory authority, an administrative agency has the power to reconsider its own decisions. See *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994).

However, except where the motion to reconsider is one based on newly discovered evidence, the agency's power to reconsider its own order exists only until the aggrieved party files an appeal or the statutory appeal time has expired. *Id.*

In addition, we have held that a motion to reconsider filed with an administrative agency will not toll the statutory time for seeking judicial review, as would a motion for new trial under Neb. Rev. Stat. §§ 25-1143 and 25-1912(2) (Reissue 1995). *B. T. Energy Corp. v. Marcus*, 222 Neb. 207, 382 N.W.2d 616 (1986) (no jurisdiction acquired where appeal taken more than statutorily specified 30 days after decision of administrative agency notwithstanding intervening nonstatutory request for rehearing).

However, the motion filed by Twin Platte is distinguishable from the motion for rehearing filed in *B. T. Energy Corp.* because Twin Platte was not afforded a hearing prior to the entry of the October 13 order. As there had been no initial hearing, the motion for a hearing pursuant to § 46-209 cannot be considered one for rehearing.

As a general rule, where an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972), *appeal dismissed* 409 U.S. 972, 93 S. Ct. 307, 34 L. Ed. 2d 236. However, the " ' "demands of due process do not require a hearing at . . . any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." ' " *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 695-96, 235 N.W.2d 223, 228 (1975).

In a special proceeding such as is involved here, an order is final and appealable if it affects a substantial right of the aggrieved party. *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996); *In re Adoption of Krystal P. & Kile P., supra*; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). As the October 13 order removed Twin Platte from the proceeding, it affected a substantial right Twin Platte claimed and would have been appealable had Twin Platte not sought a hearing as provided in § 46-209. However, as Twin Platte

requested a hearing pursuant to the statutory scheme at issue, the October 13 order did not become an effective final order.

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Schlund, supra*; *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995); *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995). Thus, the answer to the question presented is in the affirmative; that is to say, as no ruling resulting from the hearing mandated and granted on the October 13 order is contained in the record, there is no appealable final order. As a consequence, we lack jurisdiction to consider this appeal.

APPEAL DISMISSED.

COUNTY CORK, INC., DOING BUSINESS AS COUNTY CORK LIQUOR, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

550 N.W.2d 913

Filed June 28, 1996. No. S-95-1395.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Administrative Law: Statutes.** A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose.
3. ____: ____. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
4. **Statutes: Words and Phrases.** When an amendatory act uses language substantially similar to that found to be unenforceable and statutory changes were

not made in response to the court's previous opinion, that statutory section will likewise be found unenforceable.

5. **Constitutional Law: Statutes.** When an amendatory act is invalid, the previous statute on the subject remains in full force and effect.
6. **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.
7. **Administrative Law: Alcoholic Liquors: Other Acts.** In order for a regulation to be "necessary or convenient" to the enforcement of the Nebraska Liquor Control Act, the Nebraska Liquor Control Commission must show some nexus between the "Other Illegal Activities" and alcoholic liquors.

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

Donald L. Dunn and Timothy L. Moll, of Rembolt Ludtke & Berger, for appellant.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

The question presented is whether the powers statutorily granted to the Nebraska Liquor Control Commission (Commission) allow the regulation of illegal acts not directly related to the sale, manufacture, or distribution of liquor. County Cork, Inc., appeals from an order of the district court for Lancaster County affirming an order of the Commission suspending the liquor license of County Cork. The basis of the suspension order was a criminal citation issued to an employee of County Cork for selling tobacco to a minor. As we find that the Commission exceeded its statutory power in enforcing the regulation under which it suspended County Cork's license, we reverse.

FACTUAL BACKGROUND

According to the evidence presented to the Commission, Officer Dan Plautz of the Nebraska State Patrol conducted a series of tobacco compliance checks at a number of liquor stores in Lincoln, Nebraska, on October 24, 1994. Plautz

drove a cooperating 17-year-old female to the liquor stores and instructed her to attempt to purchase cigarettes with her own identification. After showing identification, the cooperating individual purchased cigarettes at the County Cork Liquor store at 2702 South Street. After she left the store and gave the cigarettes to Plautz, Plautz issued a criminal citation to the County Cork employee for selling tobacco products to a minor in violation of Neb. Rev. Stat. § 28-1419 (Reissue 1995).

At the time at which this citation was given, a regulation of the Commission provided: "Other Illegal Activities. No activity prohibited by any provision of the Nebraska Law or Local Ordinance shall be conducted on or about any premises licensed under the Nebraska Liquor Control Act." 237 Neb. Admin. Code, ch. 6, § 019.01Q (March 29, 1994). Pursuant to this regulation, the Commission notified County Cork that it would hold a hearing to determine whether County Cork had violated the "Other Illegal Activities" regulation.

On January 5, 1995, the Commission held a hearing at which County Cork moved to dismiss the charges against it on the grounds that the regulation prohibiting "Other Illegal Activities" was overly broad and exceeded the Commission's rulemaking authority. The motion was denied. At the time of this hearing, the underlying criminal charge against the County Cork employee had not been adjudicated. Nevertheless, on January 31, the Commission entered an order finding that County Cork had violated the "Other Illegal Activities" regulation by selling tobacco to a minor. The Commission suspended County Cork's liquor license for 1 day and assessed court costs of $45 against County Cork.

County Cork timely appealed to the district court for Lancaster County, and the district court affirmed the order of the Commission. We granted County Cork's petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

County Cork argues that the district court erred in affirming the order of the Commission because (1) the "Other Illegal Activities" regulation is facially invalid and unenforceable as an attempt by the Commission to regulate beyond the author-

ity granted to it by statute, (2) it is beyond the power and authority of the Commission to enforce the "Other Illegal Activities" regulation against County Cork for selling tobacco to a minor, and (3) the order deprives County Cork of property without due process of law in violation of article I, § 3, of the Constitution of the State of Nebraska and the 5th and 14th Amendments to the U.S. Constitution.

STANDARD OF REVIEW

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. *In re Interest of Archie C., ante* p. 123, 547 N.W.2d 913 (1996); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995); *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995).

ANALYSIS

There are two related but distinct doctrines concerning the limitations on the delegation of powers upon an administrative agency. The first, and more common, problem is that of delegating legislative authority upon an administrative agency. We have previously held certain amendments to the Nebraska Liquor Control Act (Act) to be unconstitutional as delegations of legislative authority upon an administrative agency. See, *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993); *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

However, this appeal does not present the delegation problem. Instead, we must determine whether the Commission exceeded its statutorily based rulemaking authority in promulgating the "Other Illegal Activities" regulation.

The Commission is statutorily created and empowered. We have previously noted that a legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). However, an administrative agency is

limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982).

In order to ascertain the powers delegated to the Commission, we must interpret its enabling legislation. 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. *Solar Motors v. First Nat. Bank of Chadron, supra*; *In re Estate of Soule, supra*.

ENABLING LEGISLATION

As a number of statutory enactments relating to the Act have been declared to be unconstitutional, we will set forth only the relevant version of each provision granting powers to the Commission. See, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993).

Neb. Rev. Stat. § 53-101.01 (Reissue 1988) was amended by the following legislative enactments: L.B. 781 in 1989, L.B. 344 in 1991, and L.B. 183 in 1993. In *Kwik Shop v. City of Lincoln, supra*, we declared L.B. 781 to be unconstitutional in its entirety. L.B. 344 was an amendment to the version of the statute enacted as L.B. 781. Furthermore, the language of § 53-101.01, as amended by L.B. 183, is substantially similar to that found to be unenforceable in *Kwik Shop*. Additionally, L.B. 183 was adopted 2 months before *Kwik Shop* was decided; thus the statutory changes cannot be said to have been an effort to cure the constitutional infirmities addressed in *Kwik Shop*. See, *Marting v. Nebraska Liquor Control Comm.*, *ante* p. 134, 548 N.W.2d 326 (1996); *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992).

As we concluded in *Marting*, when an amendatory act uses language substantially similar to that found to be unenforceable and statutory changes were not made in response to the court's previous opinion, that statutory section will likewise be

found unenforceable. When an amendatory act is invalid, the previous statute on the subject remains in full force and effect. *Marting v. Nebraska Liquor Control Comm., supra*; *Kwik Shop v. City of Lincoln, supra*. Thus, the controlling version of this statute is found at § 53-101.01 (Reissue 1988):

> It is hereby declared to be the policy of the Legislature to: (1) Regulate the transportation or importation of alcoholic liquor into this state when such alcoholic liquor is intended for delivery or use within the state; (2) promote adequate, economical, and efficient service by licensees selling alcoholic liquor within the State of Nebraska, without unjust or undue discrimination, preference, or advantage; (3) generate revenue by imposing an excise tax upon alcoholic liquor; and (4) *promote the health, safety, and welfare of the people of the State of Nebraska and encourage temperance in the consumption of alcoholic liquor by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.*

(Emphasis supplied.) Neb. Rev. Stat. § 53-101.05 has not been amended by any statutes subsequently found unenforceable. Therefore, the relevant version is § 53-101.05 (Reissue 1993):

> The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.

Furthermore, Neb. Rev. Stat. § 53-116 was also amended by L.B. 781 and L.B. 183, and for the reasons set forth above with regard to § 53-101.01, we find that the applicable version is § 53-116 (Reissue 1988), which provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the commission."

Neb. Rev. Stat. § 53-118 (Reissue 1993) has not been amended by invalid statutory enactments; therefore, § 53-118

(Reissue 1993) is applicable and allows the Commission to adopt and promulgate rules and regulations as follows:

> The commission shall adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act. The rules and regulations shall include, among such other things as the commission may determine, provisions: (1) Prescribing conditions as to the issuance of duplicate licenses in lieu of those lost or destroyed; (2) *determining for which violations of the rules and regulations licenses shall be suspended, canceled, or revoked;* (3) establishing standards of purity, sanitation, honest advertising, and representation; and (4) *covering any and all the other details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act.*

(Emphasis supplied.)

The Act empowers the Commission to regulate the distribution, sale, and traffic in liquor throughout the state. However, we find no express grant which specifically allows the Commission to pass regulations directing other activities of its licensees. We recognize that §§ 53-101.01 and 53-101.05 contain certain language that the Commission should promote the "health, safety, and welfare of the people of the State of Nebraska"; however, we note that in each of these statutes, the seemingly broad language is followed by the following language: "by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor." 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. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). We conclude that the purpose and intent of the Legislature in referencing the "health, safety, and welfare of the people of the State of Nebraska" was concerned only with the Legislature's regulation of the manufacture, sale, and distribution of alcoholic liquor. Thus, any regulation affecting

the health, safety, and welfare, which goes beyond regulating the manufacture, sale, and distribution of alcoholic liquor, is beyond the statutory grant.

However, § 53-118 empowers the Commission to promulgate rules and regulations "covering any and all the other details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act."

NECESSARY AND CONVENIENT UNDER § 53-118

The Commission contends that the "Other Illegal Activities" regulation fits within its statutory grant of power as a detail "necessary or convenient to the enforcement of the intent, purpose, and requirements of the act." In fact, the Commission argues that we have previously sanctioned the regulation of illegal activities by the Commission. In *O'Connor v. Nebraska Liquor Control Commission*, 191 Neb. 436, 215 N.W.2d 635 (1974), we affirmed the suspension of a liquor license based upon the storage of alcoholic beverages in an unlicensed basement area of the establishment, the permission of gambling on the premises, and the giving of false information to a law enforcement officer. Although we affirmed the suspension on each of these three grounds, we did not specifically consider whether the Commission had the authority to suspend a license for conducting illegal activities.

The Commission also cites *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972), a case in which we upheld the constitutionality of a city ordinance providing for the revocation of liquor licenses if topless dancing was permitted on the licensed premises. Again, in *Major Liquors, Inc.*, we were not concerned with the power of the city to regulate, but with whether the ordinance violated the First Amendment or the Equal Protection Clause. Even so, we recognized a clear nexus between topless dancing and alcohol consumption.

On the other hand, we have previously found that the Commission had exceeded its statutory authority in promulgating rules requiring an applicant to show either need or exceptional need in order to obtain a license. *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d

600 (1982). In *Bond*, the owner of a convenience store, which also sold gasoline, applied to the Commission for a retail, off-sale only, beer license. The Commission denied the application for the license because a rule promulgated by the Commission required a showing of " 'exceptional need beyond general convenience or service to the public' " if gasoline and liquor are to be sold on the same premises. *Id.* at 668, 316 N.W.2d at 602. We determined that the statutes required a showing of neither ordinary need nor exceptional need, and we stated that "[a]n administrative agency is limited in its rule-making authority to the powers granted to the agency by the statutes which they are to administer." *Id.* at 668, 316 N.W.2d at 603. Furthermore, despite the seemingly broad language of "necessary or convenient to the enforcement of the intent, purpose, and requirements of the act," we determined in *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963), that the Commission did not have the authority to regulate prices in the liquor industry.

We have also limited the rulemaking authority of other administrative agencies when we have found that they exceeded their statutory grant of power. We held in *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984), that the State Racing Commission had no statutory authority to enact rules and regulations extinguishing the rights of holders of unclaimed parimutuel tickets. Also, in *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994), we held that the Department of Social Services (DSS) had exceeded its statutory authority when it eliminated caretaker relatives from eligibility for a medical assistance program. In *Clemens*, we acknowledged that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute, but this delegated authority is limited to the powers delegated to the agency by the statute which the agency is to administer. Finding no specific statutory authority for the action of DSS, we held that DSS exceeded its mandate.

Furthermore, in *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988), we found that the Department of

Public Institutions had exceeded the authority actually delegated to it by the Legislature by passing a regulation expanding the class of persons to which a statute on ability to pay for services applied. In *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984), we found that the health care certificate of need appeal panel had exceeded its statutory authority in interpreting its rules and regulations to disallow the leasing of hospital equipment. We held that it was inappropriate to add a criterion of need that was not specifically authorized by the statute.

However, we have not always found that an agency has exceeded its statutory authorization. In *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 112, 416 N.W.2d 551, 563 (1987), we found that a DSS regulation prohibiting corporal punishment in licensed day-care centers had a direct relationship to DSS' authorization to make rules and regulations " 'as it shall deem necessary for . . . the proper care and protection of children.' " We found that the DSS regulation had a *direct relationship* to the concepts of both child care and child protection.

We conclude that in order for a regulation to be "necessary or convenient" to the enforcement of the Act, the Commission must show some nexus between the "Other Illegal Activities" and alcoholic liquors. County Cork argues that to enforce the "Other Illegal Activities" regulation would lead to absurd results. For example, County Cork asserts that the Commission could suspend a license if a licensee erected a sign without a proper permit, or violated the local plumbing code. We agree that such a rule could result in a licensee being disciplined with numerous activities not connected to the sale of alcohol.

The statutory grant of power to the Commission allows the Commission to regulate the "manufacture, sale, and distribution and traffic of alcoholic liquors," and not every activity which occurs upon the licensed premises. The regulation of all illegal activities on premises licensed by the Commission is not encompassed within the Commission's general grant of power. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which

they are to administer, and may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982).

It is within the domain of the Legislature to grant broad sweeping powers with regard to the regulation of other illegal activities to the Commission. However, we have found no such grant of authority under the present enabling legislation. Finding no statutory authorization for the "Other Illegal Activities" regulation, we decide that the Commission exceeded its statutory grant of power by promulgating the regulation.

Because we conclude that the Commission's "Other Illegal Activities" regulation exceeds its statutory authority, we need not reach County Cork's other assigned errors.

CONCLUSION

The Commission exceeded its statutory authority in promulgating the "Other Illegal Activities" regulation. As the regulation under which County Cork's license was suspended is invalid, we reverse the district court's affirmance of the Commission's order suspending County Cork's license.

REVERSED.

MARJORIE L. POSTMA, APPELLANT, V. B & R STORES, INC., DOING BUSINESS AS SUPER SAVER, AND GIBSON GREETING CARDS, INC., APPELLEES.

550 N.W.2d 34

Filed July 5, 1996. No. S-94-103.

1. **Pleadings: Appeal and Error.** Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed.

2. **Pleadings.** Neb. Rev. Stat. § 25-852 (Reissue 1995) should be liberally construed and amendments thereunder permitted where they are proposed at an opportune time and will be in the furtherance of justice.
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 clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
4. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a requested instruction where the substance of the requested instruction was covered in the instructions given.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Ronald D. Lahners, of Friedman Law Offices, for appellant.

Thomas D. Wulff, of Rickerson, Welch, Wulff & Childers, for appellee B & R Stores.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Appellant, Marjorie L. Postma, commenced this action in the district court for Lancaster County against appellees, B & R Stores, Inc., doing business as Super Saver, and Gibson Greeting Cards, Inc., seeking damages for injuries she suffered when she slipped and fell in a Super Saver grocery store. Gibson was joined in the petition solely for the purposes of workers' compensation subrogation. A jury returned a verdict for Super Saver and Gibson. After denial of her motion for new trial, Postma appealed to the Nebraska Court of Appeals, assigning as error the trial court's failure to allow a request to amend the petition made at the close of the evidence and its failure to give Postma's proposed jury instructions dealing with the duty of reasonable care. In order to regulate the caseloads of this court and the Nebraska Court of Appeals, we transferred the case to this court's docket. We conclude that the trial court did not abuse its discretion in denying the request to amend and that the trial court correctly instructed

the jury. Accordingly, we affirm the ruling of the trial court denying the motion for new trial.

FACTUAL BACKGROUND

Super Saver, owned by B & R and located at various sites in Lincoln, Nebraska, is a warehouse-type grocery store with concrete floors. The Super Saver store in question is located at 233 North 48th Street. At all times relevant to this case, Postma was employed as a greeting card stocker by Gibson, a company that displayed goods in a number of B & R stores, including Super Saver, by mutual arrangement with B & R. Postma was an active woman in her late fifties. She had previously undergone spinal fusion surgery in 1964 to correct a stress fracture of her lower spine caused by a birth defect called spondylolysis.

On December 7, 1987, Postma was working in the Gibson display area in the Super Saver store at 233 North 48th Street, which display area was located near the front of the store, to the north of the cash registers. As part of her duties for Gibson, Postma was in charge of stocking, straightening, and maintaining the Gibson display area. Under an agreement with the store, merchandise of competitors found in a particular display area was to be collected and delivered to an open cash register at the front of the store.

At approximately 4 p.m. on December 7, 1987, Postma and a friend, who was also working in the store, were conversing while walking from the card display area to the cash registers so that Postma could return two rolls of a competitor's wrapping paper to an open cash register. Postma found an open cash register near the middle of the register area. She approached this register by walking around a magazine rack located in front and to the side of the register's conveyor belt. While attempting to set the rolls of wrapping paper on the conveyor belt, she slipped and fell on the floor directly behind the conveyor belt area of the cash register lane. Postma landed on her hip and buttocks area as a result of the fall and injured her wrist, ankle, and back. After the fall, Postma and other witnesses discovered that there were grapes both on the floor where Postma fell and on her shoe. The produce area is

located along the northernmost outer edge of the store, and the grapes are displayed in bulk; they are not prepackaged.

TRIAL PROCEEDINGS

In October 1991, Postma filed suit against Super Saver and Gibson, asserting, on a theory of constructive notice, that Super Saver was negligent in failing to inspect and maintain its floors, failing to warn Postma of the dangerous condition, and failing to provide Postma with a safe place to work. Super Saver denied negligence, asserting contributory negligence on the part of Postma for failing to observe that which was in plain view. During trial, the parties stipulated to the fact that Postma was a business invitee.

The exhibits in this case consisted of medical records; bills; x rays; financial information on Postma; and various photographs and diagrams of the Super Saver store in question, specifically the checkout area and the produce area. Also included was a series of photographs of grapes on the Super Saver floor, at various distances.

In addition to her own testimony in support of her case, Postma presented testimony from Alice Harrison, the friend who was walking with Postma at the time Postma fell; Ronald Scholz, the manager of the Super Saver at 233 North 48th Street; Dr. Michael Keralis, the physician who examined Postma at a medical clinic immediately after the accident; Rob Rempel, the cashier at Super Saver in front of whose register Postma fell; and Dr. H. Randall Woodward, the physician who performed cervical fusion surgery on Postma.

Super Saver presented the testimony of Chrystal McCarthy, the front-end manager of Super Saver in charge of the cash register area on the day of the fall, and Richard Malousek, who was the manager of the Super Saver at 233 North 48th Street at the time of the fall.

All of the Super Saver employees testified that they were neither specifically aware of the grapes in question before the fall nor aware of how long these grapes had been there. Testimony regarding the cleanliness standards and practices of Super Saver was elicited from various witnesses, to the effect that all employees were trained to help with cleaning, that

managers regularly patrolled areas for fallen debris, and that a full-time maintenance person swept the floors every 2 hours. This maintenance person was not available for trial due to a medical condition, and neither side presented a written record of when the maintenance person last swept the floors prior to the fall. Testimony as to how grapes were sold, i.e., in bulk, was also elicited from various witnesses over the objection of Super Saver.

At the close of the evidence, Postma moved to amend her petition to include a theory of negligent merchandising of grapes, and she proposed jury instructions on the duty of care including this issue. The trial court denied the motion to amend and refused Postma's proposed jury instructions on the duty of care owed an invitee. In addition to other instructions, the trial court instructed the jury on a constructive notice theory of negligence, contributory negligence, the duty of reasonable care owed a business invitee, and the burden of proof on the plaintiff. Specifically in regard to the plaintiff's burden of proof, the jury was instructed:

> Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, 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 the plaintiff;
>
> (3) that 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 the plaintiff against the danger;
>
> (5) that the condition was a proximate cause of some damage to the plaintiff; and
>
> (6) the nature and extent of that damage.

The jury returned a verdict for Super Saver and Gibson. Postma filed a motion for new trial, asserting, among other

things, that the court erred in failing to give proposed jury instructions as to the risk caused by bulk merchandising and the accompanying duty of care and in refusing to allow Postma to amend her petition to include a theory of negligent merchandising. The trial court denied the motion for new trial. Postma appeals the denial of her motion for new trial.

ASSIGNMENTS OF ERROR

Postma asserts that the district court erred in (1) failing to allow her to amend her petition at the close of the evidence to include a theory of negligent merchandising and (2) refusing to give proposed jury instructions as to the duties of reasonable care owed to Postma, particularly in regard to foreseeable hazards caused by displaying goods in bulk in open bins. Postma does not assign as error the findings of the jury as to negligence.

STANDARD OF REVIEW

Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). Although at certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue, Neb. Rev. Stat. § 25-852 (Reissue 1995) should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Bittner v. Miller, supra*.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995). It is not error for a trial court to refuse

to give a requested instruction where the substance of the requested instruction was covered in the instructions given. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

ANALYSIS

Amendment of Pleadings

At the close of the evidence, counsel for Postma requested leave to amend the pleadings to include the following additional allegation of negligence: "That the type of merchandising being engaged in by the defendant [bulk merchandising], in and of itself, created a foreseeable hazard to the plaintiff while she was working in the store." Counsel for Super Saver objected, and the trial court denied Postma's request to amend. Postma assigns as error the trial court's denial of her request to amend.

According to Nebraska statutory law, a court may,

> either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding . . . by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

§ 25-852. While we need not reach the issue, we assume for the sake of argument that Nebraska recognizes a theory of negligence based on bulk merchandising which inherently creates a foreseeable hazard. However, we conclude that Postma's assignment of error must fail. Generally, § 25-852 should be liberally construed to allow amendments where they are proposed at an opportune time and in furtherance of justice. *Hoiengs v. County of Adams, supra*; *Bittner v. Miller, supra*. Such amendments may even be allowed at the close of the evidence. *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983); *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978). However, amendments should not be allowed at certain stages of trial where amendments change the issues or quantum of proof on an issue.

Associated Wrecking v. Wiekhorst Bros., 228 Neb. 764, 424 N.W.2d 343 (1988), citing *Bittner v. Miller, supra.* Furthermore, the decision whether to allow an amendment is a decision left to the discretion of the trial court. *Id.*; *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

Therefore, Postma must show that the trial court abused its discretion in refusing to allow the proposed amendment. 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 clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Cimino v. FirsTier Bank, supra.*

We conclude that Postma has not met the burden of showing that the actions of the trial court were clearly untenable. The operative petition in this case alleged negligence under a constructive notice theory of negligent maintenance, stating that Super Saver was negligent for the following reasons: "A. Failure to properly inspect and maintain its floors; B. Failure to warn Plaintiff that the floor was slippery and that a grape was on the floor; and C. Failure to provide Plaintiff with a safe place to work." The petition made no mention of how the grapes involved were displayed and sold, or that the method of merchandising, in itself, created a foreseeable hazard. Postma asserts that such theory was presented and argued in her trial brief. However, there is no evidence that such issue was contained in the pretrial statement of the trial court, which limited the issues for trial. In fact, in its order denying the motion for new trial, the trial court stated, "[T]his case was pled and pretried as a [regular] 'slip and fall' case."

The only evidence presented at trial apparently fitting the proposed theory of negligent merchandising consisted of some testimony on how merchandise was displayed, elicited by Postma's counsel on cross-examination. There was no evidence presented as to the practices of other stores or what specific procedures would protect against such a "foreseeable hazard." Furthermore, the motion to amend was not made until after the close of all the evidence, so that Super Saver did not

have the ability to present evidence on the issue. Consequently, we conclude that the trial court acted within its discretion in denying Postma's request to amend her petition, reasonably concluding that the amendment changed the issues involved in the case and that Postma presented the amendment at an inopportune time.

JURY INSTRUCTIONS

Postma also assigns as error the trial court's refusal to give certain proposed jury instructions. Specifically, these proposed jury instructions are Nos. 1, 3, 4, 5, and 6. Proposed instructions Nos. 4, 5, and 6 all relate to the duty of care owed by a shopkeeper who displays merchandise in bulk. Having concluded that the trial court did not abuse its discretion in refusing to allow Postma to amend her petition, we conclude that the trial court did not err in refusing to give instructions Nos. 4, 5, and 6 dealing with theory of bulk merchandising risk, a theory that was neither pled nor proved.

In regard to proposed jury instructions Nos. 1 and 3, we conclude that, excluding the references to the bulk merchandising theory, the substance of these proposed instructions was contained in the instructions actually given to the jury. Under Nebraska law, it is not error for a trial court to refuse a requested jury instruction where the substance of that instruction is contained in the instructions actually given. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Therefore, since the substance of these instructions, absent the theory of bulk merchandising, was contained in the instructions given the jury, the trial court did not err in refusing to give the proposed instructions. The trial court correctly instructed the jury as to the duty of care owed an invitee and the burden of proof on the plaintiff in this case. Accordingly, the order of the district court denying the motion for new trial is affirmed.

AFFIRMED.

PILOT INVESTMENT GROUP LTD., A NEBRASKA LIMITED PARTNERSHIP, AND MARK M. RHODES, AS GENERAL PARTNER OF PILOT INVESTMENT GROUP LTD., APPELLANTS, V. DANNY HOFARTH ET AL., APPELLEES.

550 N.W.2d 27

Filed July 5, 1996. No. S-94-281.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. ____: ____. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
3. ____: ____. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
4. **Judgments: Demurrer: Appeal and Error.** A trial court should specify the grounds for sustaining a demurrer when several grounds for the demurrer are asserted; however, an appellate court will not reverse a trial court's ruling if such ruling was correct, and failure to specify grounds for sustaining a demurrer does not change the legal position of the parties.
5. ____: ____: ____. An order sustaining a demurrer should be affirmed if any one of the grounds on which it was asserted is well taken.
6. **Foreclosure: Deeds.** There is no presumption of valid service contained in the statutes governing sheriff's deeds that follow a tax foreclosure sale.
7. **Foreclosure.** Lack of proper service and notice upon an interested party in a tax foreclosure sale renders the sale void for lack of personal jurisdiction.
8. **Judgments: Quiet Title: Sales: Collateral Attack.** An order confirming a sale may be collaterally attacked through a quiet title action where, due to improper service and lack of actual notice, a court fails to obtain personal jurisdiction over the party possessing or owning the property sold.
9. **Judgments: Service of Process.** In order to set aside a judgment or order based on service by publication, a party must affirmatively assert a lack of actual notice.
10. **Equity: Statutes.** Equitable remedies are generally not available where a statute provides an adequate remedy at law.
11. **Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Steven J. Lefler, of Lefler & Franklin, for appellants.

James S. Jansen, Douglas County Attorney, and John E. Huber for appellee Douglas County.

William T. Ginsburg, of Suber & Ginsburg, for appellee Land Reutilization Commission of Douglas County.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

INTRODUCTION

This is an appeal from an order of the district court sustaining demurrers of Douglas County and the Land Reutilization Commission, defendants in the underlying action to quiet title or, alternatively, for unjust enrichment brought by Pilot Investment Group Ltd. and its general partner, Mark M. Rhodes (both hereinafter referred to as Pilot). Both Douglas County and the Land Reutilization Commission demurred on the grounds that there was a defect of the parties defendant, that the two causes of action were improperly joined, and that the petition failed to state a cause of action against the moving defendant. The district court sustained the demurrers and dismissed the petition without granting Pilot an opportunity to amend its petition. This appeal followed. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

This case arises out of a tax sale of real property owned by Pilot and located at 1006 South 30th Avenue, Omaha, Nebraska. The property in question was sold at a sheriff's sale to the Land Reutilization Commission and then resold to defendant Danny Hofarth. Pilot did not object at the time of sale or at the confirmation hearing; however, Pilot asserts lack of notice of both the sale and the confirmation hearing.

In pertinent part, Pilot alleged the following in its petition:

> 1. . . . Pilot . . . is a Nebraska Limited Partnership.

2. . . . Mark M. Rhodes ("Rhodes") is a resident of the state of New Mexico, the sole general partner of Pilot, and an attorney licensed to practice in the states of Nebraska and New Mexico.

. . . .

5. The property which is the subject of this complaint ("the Omaha 4-Plex") is commonly known as 1006 South 30th Ave[.], Omaha, Nebraska . . . .

6. Pilot acquired the Omaha 4-Plex on October 22, 1982 for the purchase price of $36,000.00, and has been in actual possession ever since, until . . . Hofarth improperly took possession.

7. Pilot recorded its Limited Partnership Agreement in the Office of the County Clerk of Douglas County, Nebraska and listed its principle [sic] place of business as 5072 South 135th Street, Omaha, Nebraska . . . .

8. At all material times . . . Pilot utilized the services of Richter Real Estate to manage the Omaha 4-Plex, and Richter Real Estate had its offices at 5072 South 135th Street, Omaha, Nebraska . . . .

9. At all material times . . . Rhodes was an active member of the Nebraska bar, and Rhodes' mailing address was published by the Nebraska bar as a New Mexico address and could be readily ascertained upon diligent inquiry.

10. Between May 1989 and [December 1993], two petitions were brought in the Douglas County District Court to collect taxes purportedly owed on the Omaha 4-Plex. Both petitions named as defendants, among other persons, Pilot [and] Rhodes . . . .

. . . .

12. The first petition brought by the County, styled County of Douglas v. KO Limited Partnership . . . was, upon information and belief, filed sometime before February 8, 1990 . . . (said action hereafter referred to as "the First Proceeding").

13. On February 8, 1990, Rhodes caused an Answer to the County's petition in the First Proceeding to be mailed to the County's counsel of record.

14. Said Answer was signed by Rhodes above the address and telephone number of his law firm, Rhodes & Salmon, P.C., to wit: "1014 Lomas Blvd., N.W., Albuquerque, NM 87102, (505) 247-0328".

15. On February 12, 1990, said Answer was filed in the Douglas County District Court, along with a Certificate of Mailing certifying that a copy of said Answer had been mailed to the County's counsel of record, Ronald L. Staskiewicz, Douglas County Attorney. . . .

16. On September 1, 1989, Rhodes paid the County the taxes which the County alleged were due on the Property in the First Proceeding for the year 1986, using a check giving Pilot's mailing address in New Mexico: P.O. Box 23175, Albuquerque, New Mexico 87192 . . . .

17. Thus since February 1990, Douglas County . . . had actual notice of three (3) mailing addresses where Pilot and Rhodes would receive actual notice of any proceedings . . . .

18. On August 20, 1990, the County caused a second petition to be filed in Douglas County District Court, styled County of Douglas v. Ida B. Lewis, et al. . . . (said action hereafter referred to as "the Second Proceeding") requesting payment of 1988 taxes.

19. On September 14, 1990, a "Return of Service" was filed in the Second Proceeding indicating that Pilot could not be found at the Omaha 4-Plex.

20. On October 22, 1990, Pilot paid the 1987 taxes with a check from Rhodes, showing a New Mexico address.

21. On November 20, 1990, the County, by and through [the] Deputy County Attorney, filed in the Second Proceeding an "Affidavit of Mailing of Notice of First Publication", wherein [the deputy county attorney] stated that he had mailed a copy of a notice published in the Daily Record to Pilot [at] the address of the Omaha 4-Plex, and further stated, under oath:

"that after diligent investigation and inquiry [he] has been unable to ascertain and does not know the post

office address of any other party appearing to have a direct legal interest in the above entitled action or proceeding other than those to whom notice has been mailed in writing."

22. [The] Deputy County Attorney . . . thus swore that he had made "diligent investigation and inquiry"; notwithstanding the fact that the County had actual notice of where Pilot might reasonably be expected to receive actual notice by mail, to wit:

a. Pilot's Omaha Address, which was public record, and also the address for the property manager for the Omaha 4-Plex;

b. Rhodes' pleadings and appearance in the First Proceeding, filed approximately six (6) months before the Second Proceeding was initiated;

c. Rhodes' tender of 1987 taxes on a check from a New Mexico address, and accepted by Douglas County less than a month before [the] Deputy County Attorney . . . swore Rhodes and Pilot could not be found.

23. On May 15, 1991, [the] Deputy County Attorney . . . filed a similar affidavit, this time an "Affidavit of Notice of Sheriff Sale", where he again swore that [he] had made "diligent investigation and inquiry".

24. A sheriff's sale was subsequently held . . . on June 10, 1991, where [the Land Reutilization Commission] purportedly purchased the property.

25. On August 9, 1993, [the] Deputy County Attorney . . . filed a "Motion to Confirm" the sheriff's sale.

26. On August 9, 1993, [the] Deputy County Attorney . . . claims to have mailed a notice of hearing regarding the "Motion to Confirm" to . . . Pilot, and "John and Jane Doe" at the Omaha 4-Plex.

27. On or about August 19, 1993, [the Land Reutilization Commission] purportedly sold the Omaha 4-Plex to . . . Hofarth for $15,000.00, and claimed a fifty percent (50%) commission on the sale.

28. Upon information and belief, the fair market value of the Omaha 4-Plex exceeds $15,000.00.

29. In August, 1993 . . . Hofarth notified Rhodes that he purportedly owned the Omaha 4-Plex and, over Pilot and Rhodes' protest, wrongfully assumed possession of the Omaha 4-Plex.

COUNT I
TO QUIET TITLE

30. Plaintiffs incorporate the above stated allegations . . . inclusive, as if fully stated herein.

31. The foreclosure proceedings were void for lack of notice.

32. Title to the Omaha 4-Plex should be quieted in Pilot . . . conditioned solely upon Pilot's redemption of the property by payment of taxes lawfully assessed and due upon the property.

. . . .

COUNT II
(IN THE ALTERNATIVE)
UNJUST ENRICHMENT

33. Plaintiffs incorporate the above stated allegations . . . inclusive, as if fully stated herein.

34. [The Land Reutilization Commission's] purchase of the Omaha 4-Plex and subsequent sale to Hofarth are void.

35. Hofarth has been unjustly enriched, and [Pilot has] been damaged, in an amount equal to the fair value of the Omaha 4-Plex, less taxes due, on the date . . . Hofarth purportedly purchased the property, plus any rents wrongfully collected by Hofarth.

Both Douglas County and the Land Reutilization Commission demurred to the petition alleging a defect in parties defendant, improper joinder of causes of action, and failure to state a cause of action. After hearing arguments of counsel and taking the matter under advisement, the district court entered an order sustaining the demurrers, without specifying on which grounds the demurrers were sustained, and dismissing the petition.

ASSIGNMENT OF ERROR

Pilot asserts that the district court erred in sustaining the demurrers of the defendants and dismissing the petition.

SCOPE OF REVIEW

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). Furthermore, when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995).

ANALYSIS

As set forth above, the defendants demurred to Pilot's petition on three grounds. We have stated on numerous occasions that a trial court should specify the grounds for sustaining a demurrer when several grounds for the demurrer are asserted. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989). Such a requirement is primarily for the benefit of the reviewing court. However, failure to specify the grounds for sustaining a demurrer does not affect the legal position of the parties in the case. *LaPan v. Myers, supra*. An order sustaining a demurrer should be affirmed if any one of the grounds on which it was

asserted is well taken. *Fox v. Metromail of Delaware, supra*; *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993). Therefore, we must examine whether any one of the grounds for the demurrers is well taken and, further, whether any reasonable possibility exists that an amendment will correct the defects.

We conclude that even if there existed a defect of parties defendant in the petition of Pilot, as to Hofarth, Douglas County, and the Land Reutilization Commission, such defect would be curable by amendment of the petition. Similarly, a demurrer on the grounds of misjoinder of causes of action is also curable by filing two petitions and separately docketing each of the petitions in the district court. Neb. Rev. Stat. § 25-809 (Reissue 1995). Therefore, neither the ground of defect of the parties defendant nor that of misjoinder of causes of action stated in the demurrers supports the action of the district court in dismissing the petition. The only ground on which a dismissal would be proper in this case is if the petition failed to state a cause of action and this defect was not curable by amendment. Thus, we turn to a determination of those two specific issues.

Pilot alleges in both the quiet title and unjust enrichment causes of action that the tax sale to the Land Reutilization Commission and the subsequent transfer to Hofarth are void due to lack of proper notice to Pilot regarding the underlying foreclosure action and subsequent tax sale. The law is well settled that there is no presumption of valid service contained in the statutes governing sheriff's deeds that follow a tax foreclosure sale. *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). See, also, Neb. Rev. Stat. §§ 77-1901 through 77-1941 (Reissue 1990).

In its petition, Pilot concedes that constructive notice was provided by publication, but alleges that service by publication was improper because Douglas County had actual notice of where Pilot could be served personally or by mail. We have held that a collateral attack upon an order confirming a sale by way of a quiet title action is allowed where, due to improper service *and lack of actual notice*, a court fails to obtain personal jurisdiction over the party in possession of or

owning the property being sold. *Brown v. Glebe, supra* (stating, in context of quiet title action, that lack of personal jurisdiction over party in possession renders order of sale void and subject to collateral attack). *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982) (stating that void judgment is subject to collateral attack). However, Pilot failed to allege that it lacked *actual notice* of the foreclosure action and subsequent tax sale. That being so, Pilot failed to state a cause of action that would entitle it to relief by way of either quiet title or unjust enrichment.

Moreover, equitable remedies are generally not available where a statute provides an adequate remedy at law. *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993). In its petition in equity, Pilot failed to allege that there was no adequate remedy at law in this case. Neb. Rev. Stat. § 25-525 (Reissue 1995) sets forth a statutory procedure whereby a party against whom a judgment has been rendered without other service than by publication may, at any time within 5 years after the date of the judgment, have the judgment opened, and the party is allowed to defend. " ' " 'An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' " ' " *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. at 55, 524 N.W.2d at 567. Accord *Golden v. Bartholomew*, 140 Neb. 65, 299 N.W. 356 (1941).

Therefore, the district court was correct in sustaining the respective demurrers based on Pilot's failing to state a cause of action in its petition. However, we conclude that there is a reasonable possibility that Pilot could correct the defects in the petition by amendment, and the district court should have granted Pilot the opportunity to amend its pleadings. See *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). An amended petition could state whether or not Pilot lacked actual notice of the foreclosure action and subsequent tax sale. Furthermore, even though § 25-525 sets forth a statutory procedure to reopen a judgment rendered after service by publication, it is not clear from the allegations in the petition

that such a statutory procedure provides a wholly adequate remedy at law. Thus, Pilot may plead a cause of action seeking relief pursuant to § 25-525, or alternatively, it may seek equitable remedies if § 25-525 does not provide a wholly adequate remedy under the circumstances of this case. In either event, Pilot must be granted a reasonable opportunity to set forth, in an amended petition, sufficient facts and reasons for seeking either equitable relief or a remedy at law.

CONCLUSION

For the foregoing reasons, we reverse the judgment of dismissal of the district court and remand this cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONTINENTAL MORTGAGE, INC., APPELLANT, V. ROLLAND C. JOHNSON, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLEE, AND ADVANCED FINANCIAL, INC., THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

549 N.W.2d 640

Filed July 5, 1996. No. S-94-808.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Corporations.** A corporation is a legal entity separate and apart from its officers and shareholders.

4. **Corporations: Presumptions.** Although there is generally a presumption that acts of corporate officers pertaining to ordinary corporate business transactions are authorized by the corporation, when a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction is required to make an inquiry into the officer's authority.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for further proceedings.

Gary L. Dolan for appellant.

Thomas H. Dahlk, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellee Johnson.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Continental Mortgage, Inc. (CMI), formerly Creative Financing, Inc. (CFI), sued Rolland C. "Rollie" Johnson, seeking payment of a promissory note in the amount of $214,814.83. The district court granted summary judgment in favor of Johnson, and CMI appeals.

SCOPE OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Mendenhall v. Grantzinger*, 249 Neb. 847, 546 N.W.2d 775 (1996).

FACTS

In September 1990, Johnson agreed to sell approximately 80 percent of his shares of common stock in CFI to Peterson and Sons Holding Company (P&S) pursuant to a stock purchase option agreement. The agreement provided that CFI or P&S would cancel or pay all notes signed by Johnson payable to CFI. The district court determined that the agreement included the note that Johnson had signed in the amount of $214,814.83.

On September 21, 1990, Rollie and Lynn Johnson and an officer of P&S signed a memorandum of understanding which stated that P&S would have the right to purchase 90 percent of all shares of CFI stock owned or held by the Johnsons. This memorandum provided that the above-described note would not be demanded by "the corporation" and that the note would be satisfied to the benefit of the Johnsons.

Rollie Johnson's affidavit recited that on March 28, 1991, Advanced Medical Dynamics, Inc., now known as Advanced Financial, Inc. (AFI), issued 2,000,000 shares of its voting common stock to the Johnsons in exchange for 20 percent of the common stock of CFI owned by the Johnsons. AFI also issued 8,000,000 shares of its common stock to P&S in exchange for 80 percent of the shares of CFI which had been purchased by P&S pursuant to the stock purchase option agreement.

After P&S exercised its option, it assigned its rights and obligations under the agreement to AFI. AFI accepted the assignment and agreed to assume all unperformed obligations of P&S with respect to the stock purchase option.

On July 13, 1993, CMI sued Johnson for payment of the promissory note. Johnson filed a third-party complaint against AFI, alleging that AFI had agreed to pay the note by virtue of the assignment taken from P&S. The third-party complaint is not at issue in this appeal. The issue is whether CMI, a wholly owned subsidiary of AFI, is bound by the terms and conditions of a stock purchase option agreement which CMI did not sign and to which it was not a party.

CMI's second amended petition alleged that Johnson had executed and delivered the promissory note and that CMI had made written demand for payment, which was refused. Johnson admitted execution and delivery of the note and nonpayment, but denied that he had any obligation to pay the note. Johnson's affirmative defenses were that CMI was a wholly owned subsidiary of AFI, and AFI had a contractual obligation to Johnson to pay the note; that CMI was estopped from collecting on the note because of the parent-subsidiary relationship with AFI; and that Norman L. Peterson, a director, officer, and principal stockholder of AFI and an officer and

director of CMI, had represented to Johnson that CMI or another entity in which Peterson had an interest would pay the note.

The district court concluded that the language of the stock purchase option agreement and the memorandum of understanding was unambiguous and that once P&S exercised the option, Johnson was entitled to payment or cancellation of the note. The court found that the memorandum of understanding provided that the note signed by Johnson would be held as an asset of CFI and that payment of the note would not be demanded by CFI or P&S, but, instead, would be "satisfied-to the benefit of Johnson." The court found that Johnson had presented sufficient evidence to demonstrate that he was entitled to judgment as a matter of law and granted Johnson summary judgment on CMI's claim for collection of the note.

ASSIGNMENT OF ERROR

CMI asserts that the district court erred in sustaining Johnson's motion for summary judgment.

ANALYSIS

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Mendenhall v. Grantzinger*, 249 Neb. 847, 546 N.W.2d 775 (1996). 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. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996).

The stock purchase option agreement was between P&S as the optionee and Rollie and Lynn Johnson as the transferors. Part of the purchase price of the stock upon the exercise of the option by P&S was as follows: "(d) The payment or cancellation of all notes signed by Transferor to Creative Financing, Inc.[,] for the benefit of Transferor, and any tax liability (state and federal) of Transferor arising therefrom shall be paid by

Creative Financing, Inc.[,] or by the Optionee to the satisfaction of Transferor; . . ." The agreement was signed by Rollie Johnson and an officer of P&S.

In March 1991, AFI acquired a controlling interest in the voting common stock of CMI. At the time of the summary judgment, Peterson was president of AFI and chairman of the board of CMI. Peterson was on the board of directors of both CMI and AFI after the acquisition of CMI by AFI.

The fact that Peterson was an officer, director, and principal stockholder of AFI; was an officer and director of CMI; and had personally agreed that CMI would pay the promissory note does not entitle Johnson to a summary judgment against CMI. The record does not support the conclusion that CMI was bound by the actions of Peterson.

A corporation is a legal entity separate and apart from its officers and shareholders. *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). Although there is generally a presumption that acts of corporate officers pertaining to ordinary corporate business transactions are authorized by the corporation, when a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction is required to make an inquiry into the officer's authority. *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988). Here, the stock purchase option agreement was between the Johnsons and P&S. The record does not indicate that P&S had authority to bind CMI to the terms and conditions of the stock purchase option agreement.

We find that a genuine issue of material fact exists regarding CMI's right to maintain an action against Johnson on the promissory note. CMI and AFI are different corporations, and we cannot say as a matter of law that CMI is bound by the obligations of P&S which were then assigned to AFI. Therefore, the district court erred in granting summary judgment in favor of Johnson. Accordingly, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF AARON K., A CHILD UNDER 18 YEARS OF AGE.
SCOTTS BLUFF COUNTY, APPELLANT, V. DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

550 N.W.2d 13

Filed July 5, 1996. No. S-94-835.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents questions of law, in connection with which an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below.
2. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
3. **Statutes.** Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision.
4. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
5. **Juvenile Courts: Minors.** A juvenile offender is ordinarily committed to a public institution to effect treatment or rehabilitation, and not for the purpose of punishment.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with direction.

Douglas Warner, Scotts Bluff County Attorney, for appellant.

Don Stenberg, Attorney General, Royce N. Harper, Lisa Swinton, and Beth Tallon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The juvenile division of the county court determined that the Department of Social Services was financially responsible for the costs incurred while the subject juvenile, Aaron K., was in its custody and placed in detention. The department

sought review of the county court's decision by both a juvenile review panel and the district court. The juvenile review panel affirmed the decision of the county court; the district court determined that it lacked jurisdiction and thus dismissed the appeal before it. The department then appealed both decisions to the Nebraska Court of Appeals. That court determined that the juvenile review panel lacked jurisdiction but that the district court possessed jurisdiction. The Court of Appeals therefore dismissed the appeal from the juvenile review panel, reversed the judgment of the district court, and remanded the cause thereto with the direction that it entertain the department's appeal. *In re Interest of A.K.*, 2 Neb. App. 662, 513 N.W.2d 42 (1994). Upon doing as directed, the district court reversed the county court's judgment, thereby making Scotts Bluff County financially responsible for the costs of detention. The county thereupon appealed to the Court of Appeals, assigning the district court's ruling as error. Under our authority to regulate our caseload and that of the Court of Appeals, we, on our own motion, removed the matter to our docket. We now reverse the judgment of the district court and remand the cause thereto with the direction that it affirm the judgment of the county court.

The county attorney for Scotts Bluff County filed a petition with the juvenile division of the Scotts Bluff County Court, asking that the court exercise jurisdiction over the subject juvenile as one falling under the provisions of Neb. Rev. Stat. § 43-247(2) and (3)(b) (Reissue 1993) in that he had physically and sexually abused his sister. Section 43-247(2) provides that the juvenile court has jurisdiction of "[a]ny juvenile who has committed an act which would constitute a felony under the laws of this state." Section 43-247(3)(b) also grants the juvenile court jurisdiction when, among other things, any juvenile "deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others."

After the juvenile admitted the allegations in the petition, the county court found that he was indeed a juvenile who fell within the ambit of the above-cited statutory provisions and thus within the county court's jurisdiction. The county court then directed the department to conduct an investigation and

prepare a report for submission at the dispositional hearing. In the meantime, the county court ordered that the juvenile be detained at the Panhandle Juvenile Detention Center, which is now known as West Nebraska Juvenile Services. Although the request for detention was made by the county attorney, the probation officer who testified at the hearing also recommended that the juvenile be detained for an indefinite period of time. No representative of the department was present.

At the August 31, 1992, dispositional hearing, the county court granted the department legal custody of the juvenile for the purpose of placing him in an "adolescent perpetrator" program as soon as one became available. The county court also ordered that pending placement in such a program, the juvenile continue to be detained at West Nebraska Juvenile Services. The juvenile remained at the facility from this time until October 15, 1992, when the department placed him in the Griffith Center's adolescent perpetrator program at Larkspur, Colorado.

On October 20, 1992, the county attorney filed a motion to establish support in this matter. Pursuant to Neb. Rev. Stat. § 43-290 (Reissue 1993), the motion asked the county court to "determine an amount of support to be paid on behlaf [sic] of the juvenile by the juvenile's parent and, or, the costs to be paid by the [department] which are not otherwise paid by the juvenile's parent." Subsequent hearings were held on the limited issue of which individual or entity was responsible for the payment of the court-ordered detention costs. The cost of the juvenile's placement at the Griffith Center was not at issue.

The county court ultimately determined that the juvenile's mother was responsible for his support, but that under the provisions of § 43-290, any portion of those costs not paid by the mother was the department's responsibility. At that time, the county court deferred any determination as to the amount of those costs. Later, the mother stipulated that she would assign to the department a portion of the child support payments she received from the father for the juvenile and their other children. The county court then ordered the mother to do so in order, among other things, to reimburse the department for the costs incurred at West Nebraska Juvenile Services for the

court-ordered detention of the juvenile from August 31 to October 15, 1992. The department was ordered to reimburse Scotts Bluff County for the balance of the detention costs, a total of $5,077.16.

Because the facts in this case are not in dispute, the sole issue is one of statutory interpretation, a question of law in connection with which an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). The resolution of this case turns on the interpretation of § 43-290, the stated purpose of which is to promote parental responsibility and to provide for the equitable use and availability of public money. It provides, in pertinent part:

> Pursuant to the petition filed by the county attorney or any reputable person in accordance with section 43-274, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a parent for the juvenile at the same proceeding at which placement, study, or treatment is determined or at a separate proceeding. . . .
>
> At such proceeding, after summons to the parent of the time and place of hearing served as provided in sections 43-262 to 43-267, the court may order and decree that the parent shall pay, in such manner as the court may direct, a reasonable sum that will cover in whole or part the support, study, and treatment of the juvenile, which amount ordered paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment, and maintenance of the juvenile, the ability of the parent to pay, and the availability of money for the support of the juvenile from previous judicial decrees, social security benefits, veterans benefits, or other sources. . . .
>
> . . . .

> *If the juvenile has been committed to the care and custody of the Department of Social Services, the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent.*

(Emphasis supplied.)

Based on the emphasized portion of § 43-290, Scotts Bluff County contends that it was the department's responsibility to pay the costs associated with detaining the juvenile until he could be placed in a treatment program. The county points out that the juvenile had been placed in the custody of the department at the August 31, 1992, dispositional hearing and was held in detention at West Nebraska Juvenile Services from that time until his placement in the Griffith Center's adolescent perpetrator program on October 15, 1992. The county argues that under § 43-290, detention costs are encompassed within the term "support," and, thus, the department is responsible for any costs not otherwise paid by the juvenile's mother.

The department, on the other hand, argues that § 43-290 cannot be construed to include detention as a cost which devolves to it, since the statute does not specifically mention detention, directing only that the department pay for the support, study, and treatment of any juvenile committed to it. The department maintains that detention costs associated with the court-ordered detention of a juvenile are more properly understood to be an expense associated with the local administration of justice and thus the responsibility of each individual county.

In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision. See *State ex rel. Meyer v. County of Banner*,

196 Neb. 565, 244 N.W.2d 179 (1976). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Interest of Lisa O., supra*; *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

This case is controlled by our recent decision in *In re Interest of Lisa O., supra*. Therein, we held that when a juvenile is committed to the care and custody of the department and temporary detention results for the protection of the child or is found to be in the best interests of the juvenile's physical or mental health needs, the detention is, in fact, "treatment" of the juvenile as the term is used in § 43-290.

In so holding, we rejected the argument that court-ordered detention costs should be considered within the local administration of justice and hence the responsibility of each individual county. The reason we came to that conclusion is that a juvenile offender is not similarly situated as an adult criminal offender. A juvenile offender is ordinarily committed to a public institution to effect treatment or rehabilitation, and not for the purpose of punishment. See, also, *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

In relation to the facts in this case, it is clear that the court-ordered detention of the juvenile cannot be characterized as "support" within the meaning of § 43-290. It is more properly understood to be treatment, which is defined as meaning "preventive guidance and corrective training esp. of juvenile delinquents and youthful criminal offenders . . . ." Webster's Third New International Dictionary, Unabridged 2435 (1993). We have previously held that the confinement of a juvenile in a detention center for a weekend was the exact type of treatment necessary for that juvenile's guidance and safekeeping until the juvenile court had an opportunity to review the circumstances. *In re Interest of Lisa O., supra.*

This case is even stronger, for here the juvenile admitted the allegations that he sexually and physically abused his sister. As

a consequence, he was made a ward of the state. The purpose of his detention at West Nebraska Juvenile Services was both to facilitate the juvenile's placement in an adolescent perpetrator program and to shield his sibling from his abusive behavior. Because at least one purpose of the detention was to facilitate the juvenile's placement into a treatment program, the detention constituted treatment of a juvenile as that term is used in § 43-290.

Consequently, the department is required by § 43-290 to reimburse Scotts Bluff County for the costs of the court-ordered detention of the juvenile which are not otherwise paid by his mother.

Accordingly, the judgment of the district court is reversed and the cause remanded with the direction that it affirm the judgment of the county court.

REVERSED AND REMANDED WITH DIRECTION.

MICHAEL L. HARRISON, APPELLANT, V. JAMES J. SEAGROVES AND NEBRASKA BY-PRODUCTS, INC., A NEBRASKA CORPORATION, APPELLEES.

549 N.W.2d 644

Filed July 5, 1996. No. S-94-861.

1. **Summary Judgment.** Summary judgment is proper 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. ____. 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: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

4. **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.
5. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence was uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
6. ____: ____. The party opposing a motion for summary judgment has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
7. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
8. **Negligence: Juries.** If reasonable minds might draw different conclusions from the facts, the issues of negligence and contributory negligence are for the jury.
9. **Motor Vehicles: Negligence.** A left-turning motorist has the duty not to turn unless and until the movement can be made with reasonable safety.
10. ____: ____. One turning left must exercise reasonable care under all of the circumstances.
11. ____: ____. The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections. The observations must be made immediately before the impending movement; otherwise, the observation would be completely ineffective for the accomplishment of the purpose intended.
12. **Motor Vehicles: Highways: Negligence.** If a driver who is turning left across a highway fails to look at a time when looking would have been effective, he or she is negligent as a matter of law.
13. **Motor Vehicles: Negligence: Juries.** If a driver looks but does not see an approaching automobile because of unusual circumstances, the question of the driver's negligence is usually for the jury.
14. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.
15. **Motor Vehicles: Highways: Negligence.** It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
16. **Motor Vehicles: Negligence.** The speed of a motor vehicle is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits.
17. ____: ____. A motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions.

18. **Negligence: Proximate Cause: Juries.** Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Lincoln County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

J. Blake Edwards and Robert B. Reynolds, of McGinley, Lane, Mueller, O'Donnell & Reynolds, P.C., and Robert E. Roeder, of Baskins & Roeder, for appellant.

Stephen W. Kay, of Kay & Kay, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiff-appellant, Michael L. Harrison, filed this personal injury action against defendants-appellees, James J. Seagroves and Nebraska By-Products, Inc. (By-Products), alleging negligence and seeking damages for the personal injuries Harrison sustained when his motorcycle collided with By-Products' sanitary-waste truck on June 22, 1991. Both parties moved for summary judgment. The district court granted summary judgment in favor of the appellees and dismissed Harrison's petition. The Nebraska Court of Appeals affirmed. We granted Harrison's subsequent petition for further review.

Harrison assigns a single error: The Court of Appeals and the district court erred in holding that Harrison's negligence was more than slight as a matter of law and that the appellees' negligence, if any, was less than gross as a matter of law. Since we find that genuine issues of material fact exist, we reverse, and remand for a new trial.

The accident occurred on U.S. Highway 30, approximately 1 mile west of the North Platte airport. At the location of the accident, Highway 30 is a level, two-lane paved road with only a slight curve in the road. It contains no restrictions on pass-

ing in either direction. At the time of the accident, the road surface was dry and visibility was unlimited.

Located adjacent to the south side of Highway 30 is a truck weigh station. The weigh station contains a crescent-shaped driveway connected to Highway 30, with an entrance at each end of the driveway. Westbound traffic turns left across the eastbound lane into the east entrance at an angle greater than 90 degrees, and then exits the station at a point farther west onto Highway 30. Eastbound traffic turns right into the station via an entry lane at the west entrance at an angle greater than 90 degrees, and exits at a point farther east onto Highway 30.

On June 22, 1991, at approximately 12:40 p.m., Seagroves was westbound on Highway 30, driving a truck owned by By-Products. At that time, Harrison was also traveling westbound on his motorcycle. Seagroves attempted to turn left into the west entrance of the weigh station. Harrison was in the south lane of Highway 30, overtaking vehicles behind the By-Products truck and attempting to pass the truck. Harrison's motorcycle collided with the left front wheel of the truck as the truck was turning left. Harrison was thrown from his motorcycle and sustained injuries.

On May 24, 1993, Harrison filed an amended petition against Seagroves and Seagroves' employer, By-Products, seeking damages for the injuries Harrison sustained as a result of the alleged negligence of the appellees. In their amended answer filed May 27, 1994, the appellees alleged that Harrison's negligent acts or omissions were the proximate cause of the accident and that Harrison was contributorily negligent in a degree more than slight.

Both Harrison and the appellees filed motions for summary judgment. On July 17, 1994, a hearing was held on these motions. At this hearing, the court admitted into evidence the depositions of Seagroves, Harrison, three witnesses, and the investigating state trooper.

Seagroves testified in his deposition that he was heading westbound on Highway 30. As he approached the east entrance of the weigh station, he slowed down and turned on his left-turn signal, intending to turn left into this entrance. Seagroves' rear turn signals were inset and located underneath

the cargo box toward the center of the rear of the truck. The truck also had turn signal indicators on both sides of the hood.

Seagroves noticed a semi-trailer truck on the weigh station's scale, facing toward him. Seagroves therefore decided to proceed to the west entrance rather than the east entrance, thinking that the west entrance was the proper entrance. It was the first time he had entered this weigh station.

Seagroves testified that he slowly continued westbound to the west entrance, with his turn signal remaining on. Seagroves testified that no longer than a minute prior to turning, he looked in his side-view mirror and saw only a blue car and a red car behind the blue car, but did not see a motorcycle.

To turn into the west entrance of the station, Seagroves was required to turn back in a southeasterly direction into the entrance, so as to turn at an angle sharper than 90 degrees. He testified that he was traveling at approximately 5 miles per hour at the time he was turning.

Seagroves then testified that after he began his left turn, he heard a motorcycle accelerate. He testified that he looked at his side-view mirror and saw Harrison's motorcycle begin to pass the red car. Seagroves testified that he attempted to straighten out his truck in order to give the motorcycle room to pass, but the motorcycle collided with his left front tire.

The three witnesses who were deposed were traveling in the two cars behind the truck. The witnesses provided slightly different testimony as to what took place at the scene of the accident.

Jody Ostendorf, who was driving the blue car immediately behind the By-Products truck, testified that at some point between the two entrances, a third car passed her car and the By-Products truck. She testified that she saw in her rearview mirror the motorcycle passing the red car behind her, at a point which she believed was about one-eighth of a mile east of the accident scene. She testified that she then looked ahead and saw the truck just beginning to make a left turn. Ostendorf did not testify as to what rate of speed the motorcycle was traveling.

The other two witnesses, Robert Brannan and Helen Brannan, husband and wife, were traveling in the red car immediately behind Ostendorf's vehicle. They both testified that Harrison passed their car, darted into the westbound lane, and then darted back into the eastbound lane to pass Ostendorf's vehicle and the By-Products truck. They both testified that Harrison was traveling at an excessive rate of speed, but were not sure at what rate of speed he was traveling.

Robert Brannan testified that at the time the motorcycle began to pass his car, his car was approximately 300 to 400 feet behind the truck. Robert Brannan further stated that at the time the truck started to make its left turn, Harrison was already in the eastbound lane, and that at the time the truck began to turn, the motorcycle was not very far behind the By-Products truck.

Helen Brannan testified in her deposition that the truck had already begun its turn prior to Harrison's entering the eastbound lane. However, in an October 9, 1991, interview admitted into evidence as an exhibit to her deposition, Helen Brannan stated that Seagroves started his turn at the same time that the motorcycle pulled out into the eastbound lane. She also testified that the collision occurred at the very south edge of the highway and that Harrison attempted to avoid the collision by veering south.

Harrison testified in his deposition that he had no memory of the accident. He also testified that he disagreed with the reports as to the manner in which he was riding his motorcycle.

On July 21, 1994, the district court granted summary judgment in favor of the appellees and denied Harrison's motion for summary judgment. The court concluded that Harrison's negligence was more than slight as a matter of law and that Seagroves' negligence, if any, was less than gross as a matter of law.

On appeal, the Court of Appeals affirmed. *Harrison v. Seagroves*, 95 NCA No. 51, case No. A-94-861 (not designated for permanent publication). The Court of Appeals first concluded that, when viewing the evidence most favorably to Harrison, Seagroves' conduct was negligent. Specifically, the

Court of Appeals found evidence implying that Seagroves failed to see Harrison in his side-view mirror immediately prior to turning.

The Court of Appeals, however, concluded as a matter of law that Harrison also was negligent. Specifically, the court stated in regard to Harrison's conduct:

> The conclusion to be drawn from this conduct is that Harrison pulled into the eastbound lane of the highway at a rate of speed excessive under the circumstances and was attempting to pass at least two vehicles (the blue car and Seagroves' truck) which had slowed down in order to permit Seagroves to negotiate a left-hand turn. Additionally, Harrison failed to exercise due caution because he was not looking or keeping a proper lookout for the left-hand turn signal given by Seagroves.

Harrison v. Seagroves, 95 NCA No. 51 at 46. The Court of Appeals concluded by agreeing with the district court's finding that Harrison's negligence was more than slight and that Seagroves' negligence, if any, was less than gross as a matter of law.

Regarding this court's standard of review, summary judgment is proper 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. *Lockard v. Nebraska Pub. Power Dist.*, 249 Neb. 971, 546 N.W.2d 824 (1996).

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. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Lockard v. Nebraska Pub. Power Dist., supra.*

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. *Kocsis v. Harrison, supra*. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Roubideaux v. Davenport*, 247 Neb. 746, 530 N.W.2d 232 (1995).

Applying these standards to the facts of this case, we conclude that genuine issues of material fact exist as to the existence of both parties' negligence and the degree of negligence in comparison.

The statute applicable to this cause of action is Neb. Rev. Stat. § 25-21,185 (Reissue 1995), which provides that in a cause of action for negligence accruing before February 8, 1992, the plaintiff's negligence will not bar recovery if his or her negligence is only slight and the defendant's negligence is gross in comparison.

Therefore, in order for the appellees to be entitled to summary judgment in this case, they have the burden of proving, under the facts viewed most favorably to Harrison, that (1) Harrison's contributory negligence was more than slight as a matter of law or (2) Seagroves' negligence was not gross in comparison to Harrison's negligence as a matter of law. See *John v. ∞ (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990). If reasonable minds might draw different conclusions from the facts thus resolved, the issues of negligence and contributory negligence are for the jury. *Parmenter v. Johnson*, 213 Neb. 725, 331 N.W.2d 263 (1983). We find

that several different conclusions can be drawn from the evidence presented in this case.

Regarding Seagroves' alleged negligence, Seagroves testified that he is not certain as to how far in advance of initiating his left turn he checked his side-view mirror. This court has held that a left-turning motorist has the duty not to turn unless and until the movement can be made with reasonable safety. *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). One turning left must exercise reasonable care under all of the circumstances. *Id.*

> The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections. [Citation omitted.] ". . . The observations must be made immediately before the impending movement; otherwise . . . the observation would be completely ineffective for the accomplishment of the purpose intended."

Id. at 188, 525 N.W.2d at 635.

If a driver who is turning left across a highway fails to look at a time when looking would have been effective, he or she is negligent as a matter of law. See *id.* However, if the driver looks but does not see an approaching automobile because of unusual circumstances, the question of the driver's negligence is usually for the jury. See *id.*

Seagroves essentially testified that he looked in his side-view mirror at some point before his turn, but no longer than a minute prior to the turn, and saw only two cars. He began to turn, heard the motorcycle accelerate, looked in his side-view mirror, and saw the motorcycle begin to pass the second car behind him. He stated that he never saw the motorcycle before this time.

However, testimony and statements of the witnesses indicate that Harrison may already have been in the eastbound lane before Seagroves began to turn. One could reasonably infer from Robert Brannan's testimony that the motorcycle passed his car, moved back into the westbound lane, then moved back into the eastbound lane to pass the Ostendorf vehicle. Then, as Harrison was passing Ostendorf, Seagroves began his left

turn into the weigh station. This directly conflicts with Seagroves' statements that he saw the motorcycle passing Brannan's vehicle after he had already begun to turn.

Moreover, Ostendorf testified that a car passed Seagroves' truck at a point between the two entrances to the weigh station. Seagroves, however, makes no mention of this car when testifying as to what happened from the time he approached the weigh station and turned on his left-turn signal to the point where he began to make his left turn.

We find that reasonable minds could draw different conclusions from this evidence. For example, one could conclude that Seagroves failed to look when it would have been effective to do so. On the other hand, one could possibly conclude that Seagroves' failure to see Harrison's motorcycle was due to unusual circumstances obstructing Seagroves' view.

In regard to the issue of Harrison's contributory negligence, a plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). The Court of Appeals concluded that Harrison was traveling at an excessive rate of speed, such as to impede his ability to avoid colliding with the By-Products truck.

> It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.

Chlopek v. Schmall, 224 Neb. 78, 396 N.W.2d 103 (1986).

The speed of a motor vehicle is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits. *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). Moreover, " '[a] motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions.' " *Id.* at 189, 525 N.W.2d at 636.

We find the determination of whether Harrison's speed was unreasonable under the circumstances in this case to be a determination for the jury. See, *Huntwork v. Voss, supra*; *Davis v. Phillips*, 215 Neb. 184, 337 N.W.2d 754 (1983). Two witnesses had difficulty in ascertaining the approximate speed at which Harrison was traveling, and at the same time those witnesses made conclusive statements that they believed the speed was excessive. The other witness could not determine how fast Harrison was traveling.

In this case, when viewing the evidence in a light most favorable to Harrison, a genuine issue of material fact exists as to whether Harrison exercised vigilance commensurate with the conditions surrounding the accident. Seagroves signaled to turn into the east entrance, which was the proper entrance for westbound trucks to enter, but then proceeded down the highway to the west entrance. After Seagroves passed the east entrance, a car entered the eastbound passing lane and safely passed the truck. In order to turn into the west entrance, Seagroves was required to turn back in a southeasterly direction to enter the station. This was not the normal entrance for westbound trucks. These facts reflect the confusing nature of the conditions surrounding the accident.

Moreover, the evidence indicates that the truck's rear turn signals were inset toward the center of the truck. When viewed in Harrison's favor, the evidence also indicates that Harrison was already in the passing lane prior to the time that Seagroves initiated his turn, that the collision occurred at the south edge of the highway, and that Harrison attempted to avoid the collision by veering south. Based on these circumstances, we cannot conclude that as a matter of law Harrison was negligent.

In conclusion, we find that the evidence in this case is such that reasonable minds could draw different conclusions and inferences from the evidence as to the negligence of the appellees and the contributory negligence of Harrison, and as to the degree thereof, when each is compared with the other. In such a case, the issues must be submitted to the jury. See *Schmidt v. Orton*, 190 Neb. 257, 207 N.W.2d 390 (1973).

For the reasons stated above, we reverse the decision of the Court of Appeals and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.