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REPORTS OF CASES

DECIDED BETWEEN

MARCH 14, 1997 and AUGUST 14, 1997

IN THE

Supreme Court of Nebraska

VOLUME CCLII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1998

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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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WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice[2]

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DURING THE PERIOD OF THESE REPORTS

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LANET ASMUSSEN . . . . . Clerk
JOSEPH C. STEELE . . . . . .State Court Administrator

[1] Until March 16, 1997
[2] Appointed March 17, 1997

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
		William B. Zastera	Papillion
Third	Lancaster	Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	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

Number of District	Counties in District	Judges in District	City
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, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson 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
		John F. Steinheider	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. White	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, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, 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
Douglas	Douglas F. Johnson	Omaha
	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
Paul E. LeClair	Omaha
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Joseph S. Ramirez	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 251

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PATRICIA WENZL
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No. S-94-935: **State v. Hansen**. Affirmed. Gerrard, J. Fahrnbruch, J., concurs in the result.

No. S-95-865: **Schelkopf v. Griess**. Affirmed. McCormack, J.

No. S-96-177: **State v. Adams**. Reversed and remanded with directions. Per Curiam.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-36-960001: **In re Petition of NSBA to Adopt Mandatory Continuing Legal Education**. Petition dismissed.

No. S-93-890: **Winn v. Geo. A. Hormel & Co**. Affirmed. See rule 7A(1).

No. S-94-628: **State ex rel. NSBA v. Bruckner**. Respondent's application for reinstatement granted.

No. S-95-674: **Kumm v. Lewis & Clark Nat. Res. Dist**. Stipulation allowed; appeal dismissed.

No. S-95-1329: **Radio Group, Inc. v. Tandem Communications**. Stipulation allowed; appeal dismissed.

No. S-96-540: **Concord Enters., Inc. v. Vil Inn York, Ltd**. Stipulation allowed; appeal dismissed.

No. S-96-699: **First Nat. Bank of Chadron v. Petersen & Petersen**. Stipulation allowed; appeal dismissed.

No. S-96-778: **El-Tabech v. Lancaster Cty. Dist. Ct**. Appeal dismissed. See rule 7A(2).

No. A-96-1152: **State v. Van De Mark**. Appellant's motion entitled "Notice of Appeal to the Supreme Court of Nebraska" filed on April 28, 1997, dismissed. See rule 7A(2).

No. S-96-1224: **Columbia-Healthone v. Department of Health**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-97-072: **Gentert v. State**. Appeal dismissed for want of jurisdiction.

No. S-97-118: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-97-446: **State ex rel. NSBA v. Sather**. Application granted; license of Larry Douglas Sather to practice law in the State of Nebraska reinstated.

No. S-97-446: **State ex rel. NSBA v. Sather**. Judgment of 30-day suspension, effective May 21, 1997.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-95-322: **Ted Grace Homes, Inc. v. Dinklage**. Petition of appellant for further review overruled on March 12, 1997.

No. A-95-323: **Jack F. Paulson Trust v. Board of Adjustment**, 96 NCA No. 50. Petition of appellant for further review overruled on April 9, 1997.

No. A-95-438: **Pritchett v. Pohlmeier**. Petition of appellees for further review overruled on May 22, 1997.

No. A-95-682: **Glasgow v. J & M Investment Co.**, 97 NCA No. 8. Petition of appellees for further review overruled on April 23, 1997.

No. S-95-699: **Gans v. Huffman & Assocs.**, 97 NCA No. 14. Petition of appellant for further review sustained on May 14, 1997.

No. S-95-757: **Kaminski v. Bass**, 97 NCA No. 5. Petition of appellant for further review sustained on March 19, 1997.

No. A-95-790: **County of York v. Tracy**, 5 Neb. App. 240 (1996). Petition of appellee for further review overruled on March 12, 1997.

No. A-95-876: **Cahill v. Westside Community Sch. Found.** Petition of appellee for further review overruled on March 12, 1997.

No. A-95-888: **City of Lincoln v. Stephens**. Petition of appellant for further review overruled on March 14, 1997, for lack of jurisdiction.

No. S-95-934: **Fales v. Books**, 5 Neb. App. 372 (1997). Petition of appellee for further review sustained on June 18, 1997.

No. A-95-954: **Smith v. City of Omaha**. Petition of appellant for further review overruled on April 16, 1997.

No. A-95-982: **Watts v. Underriner**. Petition of appellant for further review overruled on March 12, 1997.

No. A-95-1012: **Coschka v. Gillogly**. Petition of appellant for further review overruled on March 12, 1997.

No. S-95-1024: **In re Estate of Wagner**. Petition of appellant for further review sustained on April 9, 1997.

No. S-95-1027: **State v. Freeman**, 96 NCA No. 41. Petition of appellant for further review sustained on March 26, 1997.

No. A-95-1050: **State v. Jones**. Petition of appellant for further review overruled on March 19, 1997.

No. A-95-1091: **Thorne v. Omaha Pub. Power Dist.**, 97 NCA No. 18. Petition of appellee Fuel Economy Contracting Co. for further review overruled on June 25, 1997.

No. A-95-1091: **Thorne v. Omaha Pub. Power Dist.**, 97 NCA No. 18. Petition of appellee OPPD for further review overruled on June 25, 1997.

No. A-95-1095: **I. P. Homeowners v. Radtke**, 5 Neb. App. 271 (1997). Petition of appellant for further review overruled on March 12, 1997.

No. S-95-1096: **Tyler v. Tyler**. Petition of appellee for further review sustained on April 9, 1997.

No. A-95-1164: **Baker v. Dolan**, 97 NCA No. 14. Petition of appellee for further review overruled on May 22, 1997.

No. A-95-1178: **Getzschman v. Light**. Petition of appellant for further review overruled on June 12, 1997.

No. S-95-1180: **Martin v. Roth**. Petition of appellant for further review sustained on March 12, 1997.

No. S-95-1182: **Salazar v. Nemec**, 5 Neb. App. 622 (1997). Petition of appellee for further review sustained on May 29, 1997.

No. S-95-1207: **Enterprise Rent-A-Car Co. Midwest v. Prokop**. Petition of appellee for further review sustained on June 18, 1997.

No. A-95-1209: **Love v. Folk**. Petition of appellant for further review overruled on May 22, 1997.

No. A-95-1268: **Cole v. Kiewit Constr. Co.**, 97 NCA No. 20. Petition of appellee for further review overruled on June 18, 1997.

No. A-95-1277: **P & H Electric v. Roche, Inc**. Petition of appellant for further review overruled on April 9, 1997.

No. A-95-1283: **Diers, Inc. v. Cohrs**. Petition of appellant for further review overruled on April 30, 1997.

No. A-95-1289: **Shadel v. Landess**. Petition of appellant for further review overruled on May 22, 1997.

No. S-95-1291: **State v. Jacques**, 97 NCA No. 8. Petition of appellant for further review sustained on April 30, 1997.

No. A-95-1300: **Collection Bureau of Lincoln v. Langemeier**, 97 NCA No. 11. Petition of appellants for further review overruled on May 22, 1997.

Nos. A-95-1311, A-95-1312: **State v. Davenport**, 5 Neb. App. 355 (1997). Petition of appellant for further review overruled on March 12, 1997.

No. A-95-1330: **Mulligan's Inc. v. Nebraska Liquor Control Comm.** Petition of appellant for further review overruled on July 16, 1997.

No. A-95-1338: **Bartling v. Bartling**. Petition of appellant for further review overruled on May 29, 1997.

No. A-95-1343: **State v. Hirsch**. Petition of appellant for further review overruled on June 18, 1997.

No. S-95-1370: **State v. Ready**, 5 Neb. App. 143 (1996). Petition of appellee for further review sustained on March 19, 1997.

No. A-95-1393: **Quinn v. Lincoln Public Schools**. Petition of appellant for further review overruled on June 25, 1997.

No. S-95-1396: **Wolgamott v. Abramson**, 5 Neb. App. 478 (1997). Petition of appellant for further review sustained on April 16, 1997.

No. S-96-012: **State v. Al-Zubaidy**, 5 Neb. App. 327 (1997). Petition of appellant for further review sustained on April 16, 1997.

No. A-96-043: **Spanyers v. Fuehrer**. Petition of appellant for further review overruled on July 23, 1997.

No. A-96-066: **Jones Air Conditioning v. Coupe**. Petition of appellant for further review overruled on June 18, 1997.

No. A-96-077: **State v. Caddy**. Petition of appellant for further review overruled on July 23, 1997.

No. S-96-079: **State v. Fiedler**, 5 Neb. App. 629 (1997). Petition of appellant for further review sustained on June 12, 1997.

No. A-96-087: **State v. Matthies**, 97 NCA No. 3. Petition of appellant for further review overruled on April 16, 1997.

No. A-96-094: **Margolis v. Selig**. Petition of appellee for further review overruled on July 16, 1997.

No. A-96-096: **Grebe v. Grebe**. Petition of appellant for further review overruled on June 18, 1997.

No. A-96-104: **State v. Valdez**, 5 Neb. App. 506 (1997). Petition of appellant for further review overruled on June 25, 1997.

No. A-96-120: **State v. Pittman**, 5 Neb. App. 152 (1996). Petition of appellant for further review overruled on March 26, 1997.

No. S-96-124: **Hilliard v. Robertson**. Petition of appellant for further review sustained on May 22, 1997.

No. A-96-168: **HEP, Inc. v. Gibraltar Constr. Co**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-193: **Shaffer v. Langemeier**. Petition of appellee for further review overruled on July 23, 1997.

No. A-96-199: **Betterman & Katelman v. Pipe & Piling Supplies**. Petition of appellant for further review overruled on July 16, 1997.

No. S-96-207: **Neumann v. American Family Ins.**, 5 Neb. App. 704 (1997). Petition of appellee for further review sustained on July 16, 1997.

No. S-96-251: **State v. Robbins**, 5 Neb. App. 382 (1997). Petition of appellee for further review sustained on March 19, 1997.

No. A-96-259: **State v. Schmidt**, 5 Neb. App. 653 (1997). Petition of appellant for further review overruled on June 12, 1997.

No. S-96-274: **Chelberg v. Guitars & Cadillacs of Nebraska Inc.** Petition of appellant for further review sustained on July 23, 1997.

No. S-96-334: **State v. Chitty**, 5 Neb. App. 412 (1997). Petition of appellee for further review sustained on April 16, 1997.

No. A-96-361: **State v. Eldred**, 5 Neb. App. 424 (1997). Petition of appellant for further review overruled on March 26, 1997.

No. A-96-362: **Friedli v. Davis**, 97 NCA No. 5. Petition of appellant for further review overruled on March 26, 1997.

Nos. A-96-364, A-96-365: **In re Interest of Jean Marie M. & Scott M.** Petition of appellant for further review overruled on April 9, 1997.

No. A-96-378: **Brown v. Butler Holdings, Inc.** Petition of appellant for further review overruled on August 4, 1997.

No. S-96-399: **Sheridan v. Catering Mgmt., Inc.**, 5 Neb. App. 305 (1997). Petition of appellant for further review sustained on March 12, 1997.

No. A-96-402: **State v. Poppe**, 97 NCA No. 5. Petition of appellee for further review overruled on March 19, 1997.

No. A-96-417: **State v. Brooks**, 5 Neb. App. 463 (1997). Petition of appellant for further review overruled on April 16, 1997.

No. A-96-427: **Pihl v. M & O Industries**, 96 NCA No. 49. Petition of appellant for further review overruled on March 12, 1997.

No. A-96-461: **In re Interest of Pamela B.** Petition of appellant for further review overruled on March 19, 1997.

Nos. A-96-476, A-96-477, A-96-499: **In re Interest of Adria C.** Petition of appellant for further review overruled on May 22, 1997.

No. S-96-511: **State v. Chojolan**, 97 NCA No. 6. Petition of appellant for further review sustained on June 12, 1997.

No. A-96-519: **State v. Elgert**, 97 NCA No. 7. Petition of appellant for further review overruled on April 9, 1997.

No. S-96-540: **Concord Enter., Inc. v. Vil Inn York, Ltd.** Petition of appellant for further review sustained on March 12, 1997.

No. A-96-544: **Bruggeman v. Bruggeman**, 97 NCA No. 16. Petition of appellant for further review overruled on June 18, 1997.

No. A-96-564: **In re Interest of Andrews**, 97 NCA No. 21. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-582: **In re Interest of John S., Jr., et al.**, 97 NCA No. 11. Petition of appellees for further review overruled on May 22, 1997.

No. A-96-590: **State v. Neiman.** Petition of appellant for further review overruled on May 22, 1997.

No. A-96-592: **Schluntz v. Hess**. Petition of appellant for further review overruled on May 14, 1997.

No. A-96-593: **Schluntz v. Hess**. Petition of appellant for further review overruled on July 28, 1997.

No. S-96-598: **State v. Craven**, 5 Neb. App. 590 (1997). Petition of appellant for further review sustained on May 14, 1997.

No. A-96-616: **State v. Dennis**. Petition of appellant for further review overruled on March 12, 1997.

No. A-96-617: **In re Interest of LaDonna K. et al**. Petition of appellant for further review overruled on July 23, 1997.

No. A-96-621: **Minor v. Union Pacific RR. Co**. Petition of appellant for further review overruled on March 19, 1997.

No. A-96-625: **State v. Jensen**. Petition of appellee for further review overruled on June 18, 1997.

No. A-96-637: **State v. McGuire**. Petition of appellant for further review overruled on March 19, 1997.

No. A-96-638: **State v. McGuire**. Petition of appellant for further review overruled on March 19, 1997.

No. A-96-640: **State v. Cemper**. Petition of appellant for further review overruled on March 12, 1997.

No. A-96-664: **State v. Gallardo**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-670: **In re Interest of Quinn D**. Petition of appellant for further review overruled on June 12, 1997.

No. S-96-691: **State v. Johnson**. Petition of appellant for further review sustained on July 16, 1997.

No. S-96-696: **Davidson v. Davidson**, 97 NCA No. 14. Petition of appellee for further review sustained on June 12, 1997.

No. A-96-708: **State v. Price**. Petition of appellant for further review overruled on May 22, 1997.

No. A-96-712: **State v. Harper**. Petition of appellant for further review overruled on May 29, 1997.

No. S-96-741: **State v. Howard**, 5 Neb. App. 596 (1997). Petition of appellee for further review sustained on May 14, 1997.

No. A-96-743: **State v. Starks**. Petition of appellant for further review overruled on April 9, 1997.

No. S-96-751: **State v. Smith**. Petition of appellant for further review sustained on May 29, 1997.

No. A-96-773: **Brooks v. Lincoln Mfg. Co.**, 97 NCA No. 12. Petition of appellant for further review overruled on May 29, 1997.

No. A-96-790: **State v. Critel**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-791: **State v. Critel**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-803: **Morris v. Casey's Gen. Store**. Petition of appellant for further review overruled on March 26, 1997.

No. A-96-805: **State v. Snyder**. Petition of appellant for further review overruled on April 9, 1997.

No. A-96-809: **In re Interest of Lindsay M. et al.**, 97 NCA No. 18. Petition of appellant for further review overruled on June 25, 1997.

No. A-96-817: **State v. Tuttle**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-826: **State v. Stauffer**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-869: **State v. Malina**, 97 NCA No. 25. Petition of appellant for further review overruled on August 4, 1997, as filed out of time.

No. S-96-870: **State v. Hays**. Petition of appellant for further review sustained on July 23, 1997.

No. A-96-872: **Plofkin v. Plofkin**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-900: **State v. Schmidt**. Petition of appellant for further review overruled on March 12, 1997.

No. A-96-909: **State v. Sepulveda**. Petition of appellant for further review overruled on June 25, 1997.

No. A-96-913: **State v. Salmons**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-916: **State v. Cervantes**, 97 NCA No. 15. Petition of appellant for further review overruled on May 22, 1997.

No. A-96-928: **Shikles v. Yellow Freight Sys**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-929: **Stewart v. Stewart**, 97 NCA No. 21. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-950: **Becker v. Board of Regents**. Petition of appellant for further review overruled on April 16, 1997.

No. A-96-1057: **State v. Stopp**. Petition of appellant for further review overruled on July 16, 1997.

No. S-96-1069: **Varela v. Fisher Roofing Co.**, 5 Neb. App. 722 (1997). Petition of appellant for further review sustained on July 23, 1997.

No. A-96-1099: **State v. Dixon**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-1118: **Waite v. Carpenter**. Petition of appellant for further review overruled on July 23, 1997.

Nos. A-96-1133, A-96-1134: **State v. Miller**. Petition of appellant for further review overruled on July 23, 1997.

No. A-96-1141: **Marker v. Slafter Oil Co**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-1153: **Koch v. Hardee's**. Petition of appellee for further review overruled on July 23, 1997.

No. A-96-1156: **Blythman v. Blythman**. Petition of appellant for further review overruled on July 14, 1997.

No. A-96-1213: **State v. Gutierrez**. Petition of appellant for further review overruled on May 29, 1997.

No. A-96-1214: **State v. Mead**. Petition of appellant for further review overruled on May 14, 1997.

No. A-96-1272: **State v. Partee**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-1287: **State v. Payne**. Petition of appellant for further review overruled on July 16, 1997.

No. A-97-045: **Pope v. Department of Corr. Servs**. Petition of appellant for further review overruled on April 9, 1997.

No. A-97-085: **James Neff Kramper Family Farm Part. v. City of S. Sioux City**. Petition of appellant for further review overruled on June 12, 1997.

No. A-97-253: **Remmen v. Zweiback**. Petition of appellant for further review overruled on June 12, 1997.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SUSAN MULLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRY LEE MULLER, DECEASED, APPELLEE AND CROSS-APPELLANT, V. TRI-STATE INSURANCE COMPANY OF MINNESOTA, APPELLANT AND CROSS-APPELLEE.

560 N.W.2d 130

Filed March 14, 1997. No. S-95-128.

1. **Insurance: Contracts.** 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.
2. **Contracts: Public Policy.** Courts are to be cautious in holding contracts void on the ground of public policy, and before they do so, prejudice to the public interest should clearly appear.
3. **Attorney Fees: Appeal and Error.** The amount of an attorney fee awarded under Neb. Rev. Stat. § 44-359 (Reissue 1993) is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Attorney Fees.** In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Jay L. Welch and Douglas E. Baker, of Welch, Wulff & Childers, for appellant.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LUTHER, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

This is a declaratory judgment action brought to determine the rights of the plaintiff-appellee and cross-appellant, Susan Muller, the widow and personal representative of the estate of her late husband, Terry Lee Muller, pursuant to the underinsured motorist provisions of the "Business Auto Coverage Form Declarations," made a part of the "Country Commodities Distributor's Policy" of insurance issued by the defendant-appellant and cross-appellee, Tri-State Insurance Company of Minnesota, to said decedent's employer, Richland Grain Co., Inc. The district court sustained the widow's motion for summary judgment and declared that she is entitled to payment pursuant to the terms of the underinsured motorist coverage, notwithstanding that she was entitled as well to workers' compensation benefits under the separate policy of workers' compensation insurance Tri-State had also issued to Richland Grain. Tri-State then appealed to the Nebraska Court of Appeals, asserting that the district court erred in (1) not declaring that the widow is limited to the receipt of workers' compensation benefits, (2) not declaring that Tri-State is entitled to offset payments under its workers' compensation policy against any liability it has under the automobile policy, and (3) awarding the widow an attorney fee. The widow cross-appealed, asserting the district court erred in not awarding her the full limit of insurance available under the automobile policy. 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 affirm.

II. SCOPE OF REVIEW

The issues present questions of law, in connection with which an appellate court reaches conclusions independent of the lower court's ruling. *Allemang v. Kearney Farm Ctr.*, 251 Neb. 68, 554 N.W.2d 785 (1996).

III. FACTS

The decedent lost his life as the result of an April 13, 1991, automobile accident which arose out of and in the course of his employment with Richland Grain. As a consequence, Tri-State

has paid the widow, and continues to pay her, workers' compensation benefits, which it estimates have a total present value of $188,700.

The widow filed a tort action against the tort-feasors for the wrongful death of the decedent and won a judgment in the amount of $751,845.08. The tort-feasors' insurer paid the full amount of its $100,000 liability to the clerk of the district court, where the money remains.

The underinsured motorist coverage in question limits Tri-State's liability to $250,000 per person and provides, in relevant part, that "[a]ny amount payable for damages shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law." The district court held that the foregoing setoff provision was void and against public policy and awarded the widow a judgment of $150,000 against Tri-State.

IV. ANALYSIS OF TRI-STATE'S APPEAL

1. Exclusiveness of Workers' Compensation Remedy

In its first assigned error, Tri-State alleges that the district court erred in concluding that the exclusive remedy provision of the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-111 (Reissue 1993), does not apply. That statute reads, in relevant part:

> Such agreement or the election provided for in section 48-112 [which provides, so far as is relevant here, that every employer and every employee "is presumed to accept and come under" the act] shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in the . . . [a]ct, and an acceptance of all the provisions of such act, and shall bind the employee himself or herself, and for compensation for his or her death shall bind his or her legal representatives, his or her surviving spouse and next of kin, as well as the employer, and the legal representatives of a deceased employer . . . . For the purpose of this section, if the employer carries a policy of workers' compensation insurance, the term employer shall also include the insurer.

Tri-State argues that § 48-111, along with our decision in *Pettigrew v. Home Ins. Co.*, 191 Neb. 312, 214 N.W.2d 920 (1974), prevents the widow from recovering under the underinsured motorist provisions of its automobile policy. The plaintiff in *Pettigrew* suffered injuries in the course of his employment, received workers' compensation benefits, and then sued his employer's workers' compensation carrier, alleging that the carrier negligently performed its agreement to provide safety engineering inspections. We held that the carrier was immune from liability by virtue of § 48-111, writing that "[i]t is evident to us that the legislative intent in adopting the language quoted was to place the insurer in the same situation as the employer and to eliminate actions of this type." *Id.* at 315, 214 N.W.2d at 923.

Tri-State also calls our attention to *CNA Ins. Co. v. Colman*, 222 Conn. 769, 610 A.2d 1257 (1992); *Bouley v. Norwich*, 222 Conn. 744, 610 A.2d 1245 (1992); *Hackenberg v. Transp. Authority*, 526 Pa. 358, 586 A.2d 879 (1991); and *Lewis v. School Dist. of Philadelphia*, 517 Pa. 461, 538 A.2d 862 (1988), which in general held that workers' compensation is an employee's exclusive remedy against the employer and that an employee may thus not recover uninsured motorist benefits from the employer for a work-related automobile accident. However, other jurisdictions have held that recovery of workers' compensation benefits does not preclude recovery of uninsured motorist benefits. *William v. City of Newport News*, 240 Va. 425, 397 S.E.2d 813 (1990); *Christy v. City of Newark*, 102 N.J. 598, 510 A.2d 22 (1986).

Instructive as the holdings of other states may be, we have observed that "[c]olor-matching cases would serve no useful purpose herein where our problem is one of statutory construction and our [workers' compensation] statute is not identical to those involved in other jurisdictions." *Pettigrew*, 191 Neb. at 314, 214 N.W.2d at 922.

It is true that under § 48-111, an employee's election of workers' compensation benefits "shall be a surrender . . . of [his or her] rights to any other method, form, or amount of compensation" against the employer's workers' compensation insurance carrier. The fact is, however, that as Richland Grain's underinsured motorist carrier, Tri-State is not Richland Grain's

workers' compensation carrier. This factual difference makes the reasoning of *Pettigrew, supra*, inapplicable. It would be illogical to allow an employee whose employer contracted with two separate insurance carriers (one for workers' compensation coverage and another for underinsured motorist coverage) to collect under both policies, but disallow the employee whose employer contracted with only one insurer, as in the instant case, to recover under both. In short, § 48-111 protects Tri-State only in its role as the workers' compensation carrier, not in its role as Richland Grain's underinsured motorist carrier.

That determination brings us to a consideration of Tri-State's claim that

> [t]he result of the [district court's] decision in this case is to permit those workers who happen to be injured while driving a company car to recover significantly more benefits from the employer and its insurers than those workers who are injured somewhere else while on the job. That is a distinction without a substantial difference, discrimination without a rational basis.

Brief for appellant at 13. In support of that proposition, Tri-State quotes from *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608-09, 300 N.W.2d 181, 187 (1980):

> "It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. . . . *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. . . .*"

(Emphasis in original.) Tri-State does not, however, tell us what legislation it is challenging. As Tri-State wants both classes to be treated equally, perhaps it is challenging the constitutionality of § 48-111. But even if the equal protection argument were to prove meritorious, Tri-State clearly lacks standing to argue the equal protection rights of an employee injured during the course of employment while driving a vehicle not owned by the employer. See *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982).

Accordingly, the district court did not err in concluding that the exclusive remedy provisions of § 48-111 do not apply in the instant case.

2. RIGHT TO SETOFF

In its second assignment of error, Tri-State asserts that the district court erred in concluding that it was not entitled to enforce the terms of the underinsured motorist provisions permitting it to reduce its liability by the value of benefits paid and payable to the widow under the workers' compensation act. The underinsured motorist policy provides, in relevant part, that "[a]ny amount payable for damages shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law." The district court held that this setoff provision was void and against public policy.

Tri-State correctly urges that the "parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute." *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 955, 503 N.W.2d 552, 559 (1993). We are also mindful that courts are to be cautious in holding contracts void on the ground of public policy, and before they do so, prejudice to the public interest should clearly appear. *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985).

> " ' "It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. * * * '[T]he power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' . . ." ' "

Southern Neb. Rural P.P. Dist. v. Nebraska Electric, 249 Neb. 913, 918, 546 N.W.2d 315, 319 (1996). See, also, *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988); *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985); *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980).

Nonetheless, there are circumstances under which public policy overcomes contractual provisions. Such an example is

found in *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968). We therein held that a setoff provision for medical payments coverage in an uninsured motorist coverage policy was void and against public policy, writing:

> The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through "other insurance," excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance.

Id. at 571, 156 N.W.2d at 139.

In urging that the foregoing applies only to uninsured motorist coverage and not to underinsured motorist coverage, Tri-State calls our attention to *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 743, 401 N.W.2d 160, 162 (1987), in which we held that the public policy outlined in *Stephens* did not prevent an insurer providing underinsured motorist coverage from enforcing setoff language reading that " 'the limit of liability shall be *reduced* by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations* who *may be* legally responsible.' " (Emphasis in original.) In so holding, we specifically noted that at the time the underinsured coverage in question was issued, there existed no underinsured motorist statute. It is true that in dicta we also observed that the later-enacted underinsured motorist statute contained provisions substantially different from those contained in the uninsured motorist statute considered in *Stephens*. Nonetheless, the fact is that as there then existed no underinsured motorist statute, there existed no impediment to enforcing the language of the policy.

That situation has changed. By the time the underinsured motorist coverage in question was issued, March 9, 1991, our Legislature had enacted the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 through 60-582 (Reissue 1988), which required that the automobile liability carrier offer underinsured motorist coverage which the insured

was free to reject. § 60-577. Such was the situation with respect to uninsured motorist coverage at the time *Stephens* was decided, Neb. Rev. Stat. § 60-509.01 (Reissue 1968), wherein we observed:

> A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose.

Stephens, 182 Neb. at 565-66, 156 N.W.2d at 136-37.

As the purpose of both coverages is to provide a means to make the victims of less than adequately insured motorists whole, or as nearly so as reasonably possible, the same reasoning and underlying policy which controlled *Stephens* apply to underinsured motorist coverage. Indeed, that such was the intention of the Legislature is established by the fact that in the process of adopting the Underinsured Motorist Insurance Coverage Act, the Legislature struck language which read:

> Any damages payable under the terms of underinsured motorist coverage to or for any person shall be reduced by (1) the amount paid and the present value of all amounts payable under any worker's compensation or other similar law exclusive of nonoccupational disability benefits, (2) the amounts paid or payable under any valid and collectible automobile medical payments insurance or any similar automobile personal injury protection insurance payable without regard to fault, and (3) any amount paid to or for the insured by or for any person or organization who is or may be held legally liable for bodily injury, sickness, disease, or death of the insured.

Banking, Commerce, and Insurance Committee Hearing, L.B. 573, 89th Leg., 1st Sess. 5 (Jan. 22, 1985).

As a consequence, the district court did not err in holding that the setoff provision in question is void as being against public policy.

3. Attorney Fee

Finally, in the third assignment of error, Tri-State claims the district court erred in awarding the widow a $12,000 attorney fee.

However, that claim is based on the premise that the widow is not entitled to payment pursuant to the underinsured provisions of Tri-State's automobile policy. Such not being the case, the claim fails. Neb. Rev. Stat. § 44-359 (Reissue 1993) provides, in relevant part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy, except workers' compensation insurance . . . against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

We have held that the amount of an attorney fee awarded under § 44-359 is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 244 Neb. 262, 506 N.W.2d 52 (1993). We have also held that in determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

It is therefore clear that the widow was entitled to an attorney fee and that applying the *National Am. Ins. Co.* standards, the

amount of the fee awarded cannot be said to constitute an abuse of discretion.

V. ANALYSIS OF WIDOW'S CROSS-APPEAL

In her cross-appeal, the widow alleges that the district court erred in failing to award her the total $250,000 limit of the underinsured motorist provision.

At the time in question, § 60-578 provided, in relevant part:

> (1) The maximum liability of the insurer under the underinsured motorist coverage shall be the lesser of:
>
> (a) The difference between the limit of underinsured motorist coverage and the amount paid to the insured by or for any person or organization which may be held legally liable for the bodily injury, sickness, disease, or death . . . .
>
> . . . .
>
> (2) In no event shall the liability of the insurer under such coverage be more than the limits of the underinsured motorist coverage provided.

The district court thus concluded that "the liability of the defendant in this case is the difference between the limit of underinsured motorist coverage ($250,000.00) and the amount paid to the plaintiff on behalf of the tortfeasor ($100,000.00), which liability, therefore, exists in the amount of $150,000.00."

The widow argues that the $100,000 paid in satisfaction of the judgment in her favor into the repository of the Colfax County District Court has not been paid "to the insured," as required by statute. She therefore urges that there should be no reduction. That argument has no merit, for the $100,000 paid to the court clerk accrues to the widow's benefit, subject to whatever subrogation rights Tri-State may have. Neb. Rev. Stat. § 48-118 (Reissue 1993) (stating when third person liable to employee or dependents for injury or death, employer subrogated to right of employee or dependents against such third person).

Tri-State, on the other hand, argues that as the widow has been paid $100,000 by the tort-feasors' insurer and "will receive workers' compensation benefits . . . valued at $180,000.00," supplemental brief for appellant at 3, she has been paid $280,000. It then concludes that it has no liability under § 60-578.

But Tri-State's position overlooks that workers' compensation benefits are not amounts "paid to the insured by or for any person or organization which may be held legally liable for the bodily injury, sickness, disease, or death." In the present instance, this language applies only to the amount paid by the tort-feasors' insurer. It therefore follows that the district court did not err in awarding the widow $150,000.

VI. JUDGMENT

For the foregoing reasons, the judgment of the district court is, as first noted in part I, affirmed.

AFFIRMED.

WRIGHT, J., concurring.

I concur only because the law as it presently exists requires this result. Normally, subrogation of workers' compensation benefits is permitted so that the insurer can recover its compensation payments to the extent that such payments have also been received by the victim from the third-party tort-feasor. The result in this case is that the more the tort-feasor pays, the less the widow, who has never been fully compensated, receives.

Under the facts of this case, the widow obtained a judgment against the tort-feasor in the amount of $750,000. The tort-feasor's insurer paid $100,000, which the widow receives. This $100,000 is deducted from the $250,000 underinsurance benefit, and the widow is paid $150,000 from the deceased's employer's underinsured coverage. However, the law also permits the workers' compensation carrier (Tri-State) to subrogate the $100,000 received from the tort-feasor against the workers' compensation payments. The widow nets $250,000 in underinsured benefits and $80,000 in workers' compensation benefits, for a total of $330,000.

Had the tort-feasor paid $10,000, the widow would still receive $250,000 in underinsured benefits, but the workers' compensation carrier could subrogate only the $10,000 from the tort-feasor. The result is that the widow would receive $90,000 more in workers' compensation benefits, or a total of $420,000 as compensation for the loss.

If the victim has been fully compensated by other sources, the workers' compensation insurer should get its money back

because the workers' compensation payments would amount to a double recovery. Here, subrogation takes away benefits from the family of a victim that has not been fully compensated for its loss.

WHITE, C.J., joins in this concurrence.

KRISTEN COX, APPELLEE, V. YORK COUNTY SCHOOL DISTRICT NO. 083, ALSO KNOWN AS MCCOOL JUNCTION PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

560 N.W.2d 138

Filed March 14, 1997. No. S-95-182.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in an error proceeding from an order terminating the contract of employment of a probationary certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Teacher Contracts: Termination of Employment.** The procedures set forth in Neb. Rev. Stat. § 79-12,111(2) (Reissue 1994) constitute a mandatory constraint on a school board's power to elect not to renew a probationary certificated employee's contract of employment.
3. ____: ____: ____. A school board which elects to amend or not renew the contract of a probationary certificated employee must have evaluated such employee at least once each semester in accordance with the following procedures: Such employee shall have been observed, and if the employee is a teacher, the evaluation shall have been based upon actual classroom observations for an entire instructional period. Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide, at the time of the observation, a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain. Such requirements are a prerequisite to the school board's election to amend or not renew such employee's contract pursuant to Neb. Rev. Stat. § 79-12,111 (Reissue 1994).

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

Dan Alberts, of DeMars, Gordon, Olson, Recknor & Shively, for appellant.

Scott J. Norby, of McGuire and Norby, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LUTHER, D.J.

WRIGHT, J.

York County School District No. 083 (District) did not renew the employment contract of Kristen Cox. Cox brought a petition in error, and the district court reversed and vacated the decision of the board of education of York County (Board) and reinstated Cox to her position. The District appeals.

SCOPE OF REVIEW

The standard of review in an error proceeding from an order terminating the contract of employment of a probationary certificated employee is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).

FACTS

Cox was hired by the District on June 1, 1993, as a music, band, and vocal activities teacher for the 1993-94 school year. As a first-year teacher, Cox was a probationary certificated employee. During the first semester, she taught fourth, fifth, and sixth grade music classes and band; seventh grade music; eighth grade music and choir; and high school band. She also organized a volunteer choir and other voluntary music activities.

During the first semester, Cox received no administrative feedback regarding her performance other than occasional positive remarks. However, she was told by another teacher that the high school band students were disturbed that she intended to make them take a test at the end of the first semester. Cox was under the impression that the students were upset because they had not previously been required to take a test for band class.

Cox became concerned and contacted Dan Ohlrich, the high school principal, to discuss the situation. Ohlrich told Cox it was the District's policy that all classes, including band, required a semester test. Therefore, Cox administered the semester test. However, to make the test as easy as possible,

Cox provided a review 1 week beforehand which was taken directly from the test.

Later, toward the end of the first semester, the administration learned that a number of band students were intending to drop out of band after the first semester. Without Cox's knowledge, the administration interviewed the students and their parents. At that time, the students allegedly complained to the administration that Cox had made demeaning remarks to them about their performance.

Following these interviews, Ohlrich and George Bauer, the superintendent and elementary school principal, discussed with Cox their concerns about the students dropping band. Cox was told that she might be able to remedy the situation with one student by visiting with the student. Bauer testified that Cox did not seem very receptive to this suggestion.

On January 28, 1994, which was during the second semester, Ohlrich conducted the first formal evaluation of Cox. This evaluation was based on one full instructional period, as well as alleged informal observations made during the first semester.

In the January 28, 1994, evaluation, Cox's performance was rated as satisfactory in all respects except that her "relationship with students" was marked as "needs improvement." Suggestions or comments on the form stated:

> Teacher was very well organized for class. Students were kept on task entire period. Teacher needs to improve communication with students. Be sure to list objectives on lesson plan. Directions were clear & specific. Guided practice was used. Teacher checked for understanding of parts (appropriate questioning). Be sure to use good closure. Use ~~appropriate~~ positive reinforcement when appropriate.

Cox testified that in response to this evaluation she requested more specific guidance on how to improve, but was not given any.

On March 14, 1994, the Board took formal action to renew the contracts of all certificated employees except Cox. The minutes of the board meeting, which described this formal action, were reported in the York News-Times on March 31.

On March 15, 1994, Bauer completed a second formal evaluation of Cox. This evaluation was based upon a full instructional

period observation. As with Ohlrich's evaluation, Bauer found Cox's "relationship with students" to be in need of improvement. He found Cox's performance in all other respects to be satisfactory. Bauer's comments on the evaluation stated: "Needs improvement in motivation of students. Needs to adjust to the students[']talents so that confidence is developed between the teacher and student through the period of instruction."

Cox testified that in response to this evaluation, she again asked for help as to how she might improve her "relationship with students." She stated that Bauer was unable to give her any guidance. Later that same day, Bauer allegedly told Cox that her contract would not be renewed for the next school year.

On April 1, 1994, Bauer sent formal notification to Cox stating that Bauer intended to recommend to the Board that it consider not renewing Cox's teaching contract for the 1994-95 school year. Upon receipt of the notice, Cox requested a hearing before the Board.

At a hearing held on May 3, 1994, Cox testified that she had always been and still was receptive to the idea of visiting with the students and their parents in order to remedy any problems they might have with her. In fact, Cox stated that after hearing that the students were dropping band, she had contacted them. Cox stated that none of the students ever expressed any complaint with her behavior. Rather, the students told her that band conflicted with other classes they wanted to take during the second semester. Cox also thought that some of the students may have dropped band because they were displeased with having to take a semester test.

Ohlrich testified at the hearing that in addition to the formal evaluation conducted on January 28, 1994, he had made multiple informal observations of Cox's professional performance during the first semester. It was his opinion that statements made by the students as to their relationship with Cox were consistent with his own observations and evaluations.

Ohlrich noted that when he first expressed concern to Cox about her relationship with the students, he understood Cox's reaction to his suggestion that Cox meet with the students to mean that Cox "did not care to visit with the students." Ohlrich

stated it was his belief that Cox did not talk with the students to see if the problems could be worked out.

Ohlrich opined that in terms of actual teaching proficiency and instructional methods, Cox had done an excellent job, and that he had never personally observed that Cox was demeaning, hurtful, or discouraging toward any student. Still, Ohlrich believed that Cox's inadequate communication skills ultimately led the students to drop band, and he did not feel that band enrollment would increase for the 1994-95 school year if Cox was the band teacher. Based upon this assessment, he recommended to the Board that it not renew Cox's contract for the 1994-95 year.

Following the hearing, the Board determined not to renew Cox's contract for the 1994-95 school year. Cox appealed the Board's decision to the district court, which reversed and vacated the decision of the Board and ordered Cox reinstated with the District as of May 3, 1994. The District appeals this decision.

ASSIGNMENT OF ERROR

The District assigns as error the district court's finding that the District failed to provide Cox due process as required by law in deciding not to renew her teaching contract.

ANALYSIS

The nonrenewal or amendment of the contract of a probationary certificated employee is governed by Neb. Rev. Stat. § 79-12,111 (Reissue 1994). Contracts of probationary certificated employees are deemed renewed unless the school board elects not to renew the contract. Section 79-12,111(4) provides in part: "The school board may elect to amend or not renew the contract of a probationary certificated employee for any reason it deems sufficient if such nonrenewal shall not be for constitutionally impermissible reasons and such nonrenewal shall be in accordance with sections 79-12,107 to 79-12,121."

We have previously determined that although § 79-12,111(4) allows a school board not to renew a probationary certificated employee's contract for any constitutionally permissible reason it deems sufficient, the employee still has procedural rights with which the school board must comply. See *Nuzum v. Board of*

Ed. of Sch. Dist. of Arnold, 227 Neb. 387, 417 N.W.2d 779 (1988). In *Kennedy v. Board of Ed. of Sch. Dist. of Ogallala*, 230 Neb. 68, 72, 430 N.W.2d 49, 51 (1988), we explained: "While the Legislature has not yet obliterated all distinctions between probationary and permanent employees, it has unquestionably given probationary teachers greater protection than they formerly enjoyed and has thereby correlatively limited the power of boards of education over them." The issue in this case is whether the Board violated any of those procedural rights in conjunction with its decision not to renew Cox's contract for the 1994-95 school year.

The procedural rights to which Cox was entitled are found in Neb. Rev. Stat. §§ 79-12,107 to 79-12,121 (Reissue 1994). One of the issues presented to the district court was whether the District and its administration failed to comply with the requirements of § 79-12,111(2) by failing to evaluate Cox based on actual classroom observations for an entire instructional period at least once each semester during the 1993-94 school year.

Section 79-12,111(2) requires:

> All probationary certificated employees . . . shall, during each year of probationary employment, be evaluated at least once each semester . . . in accordance with the procedures outlined below:
>
> The probationary employee shall have been observed and evaluation shall have been based upon actual classroom observations for an entire instructional period. Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide the [employee] at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain.

The District contends that although it did not evaluate Cox for a full instructional period during the first semester, the Board met and exceeded all of the procedural and due process requirements established by law in not renewing Cox's contract.

Thus, we examine the requirements of § 79-12,111 in the event that a school board elects not to renew the contract of a probationary certificated employee. Since our interpretation of

the requirements of § 79-12,111 is a matter of law, we reach such conclusion independent of that of the trial court. See, *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996) (statutory interpretation is matter of law in connection with which appellate court has obligation to reach independent, correct conclusion irrespective of determination made by court below).

In *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, supra*, we examined the requirements of § 79-12,111(2) in the context of the decision not to renew the contract of a school principal. We stated:

> It is clear from § 79-12,111 as a whole, without the need to resort to other sources, that its *purpose is to compel school system managers to engage in a specified process* of evaluating all probationary certified employees, identify such skill and performance areas in which the employee needs to improve, provide suggestions for and assistance in making those improvements, and eliminate from the system those who cannot become competent.

(Emphasis supplied.) *Nuzum*, 227 Neb. at 394, 417 N.W.2d at 784. Thus, we determined that the procedures of § 79-12,111(2) constituted a mandatory constraint on a school board's power to elect not to renew a probationary certificated employee's contract of employment.

However, the District points out that in *Nuzum* we held that an informal ongoing evaluation conducted on the employee in that case was sufficient to satisfy the requirement in § 79-12,111(2) that there be at least one evaluation each semester which is for an entire instructional period. The District asserts that *Nuzum* thus supports a legislatively intended wide-ranging flexibility for employment decisions during the probationary period and that, therefore, the informal observations conducted by Ohlrich during the first semester should be sufficient.

Contrary to the District's contention, our holding in *Nuzum* does not imply that something less than full compliance with the statutory provisions may form the predicate to a legal nonrenewal. Rather, in *Nuzum* we attempted to apply the require-

ments as nearly as possible to a principal whose primary duties did not entail instructional periods.

Based upon our decision in *Nuzum* and the plain language of the relevant statutory provisions, we conclude that a school board which elects to amend or not renew the contract of a probationary certificated employee must have evaluated such employee at least once each semester in accordance with the following procedures: Such employee shall have been observed, and if the employee is a teacher, the evaluation shall have been based upon actual classroom observations for an entire instructional period. Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide, at the time of the observation, a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain. Such requirements are a prerequisite to the school board's election to amend or not renew such employee's contract pursuant to § 79-12,111.

Having established the legal requirements for a decision not to renew the contract of a probationary certificated employee, we proceed to examine whether the evidence was sufficient to establish that the Board complied with the procedural requirements for Cox's nonrenewal. In a proceeding in error, both the district court and the appellate court review the decision of the school board to determine whether the board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support the school board's decision. See, *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988); *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

Our review shows it is undisputed that the Board did not meet the statutory requirement that Cox be evaluated at least once per semester based on actual classroom observations for an entire instructional period. The District's first semester for the 1993-94 school year ended January 14, 1994. Cox's first evaluation based on actual classroom observations for an entire instructional period occurred on January 28.

While the record indicates that the District may have violated other procedural rights as well, we uphold the district court's reinstatement of Cox on the grounds that the District failed to evaluate her for an entire instructional period during the first semester of the 1993-94 school year. We find that the evidence was insufficient to support the determination made by the Board for nonrenewal of Cox's employment contract.

CONCLUSION

The District failed to follow the requirements set forth in § 79-12,111(2). Because the District failed to follow the requirements as provided by law, its election not to renew Cox's employment contract was properly reversed by the district court. The judgment of the district court is affirmed.

AFFIRMED.

TERESA E.A. TEATER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

559 N.W.2d 758

Filed March 14, 1997. No. S-95-194.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
3. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
4. **Limitations of Actions: Words and Phrases.** In the context of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.
5. **Limitations of Actions: Torts.** A statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.
6. **Limitations of Actions.** The focal point for determining when a cause of action accrues, even under the application of the discovery rule, is when the actual injury occurs. The focus is not on when the injured party recognizes whose negligence is

responsible for the injury, but, rather, the statute of limitations begins to run on the date on which the party holding the cause of action discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.

7. **Judgments: Appeal and Error.** The factual findings of a trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

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

Michael N. Dolich, of Friedman Law Offices, for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and DeAnn C. Stover, Special Assistant Attorney General, for appellee.

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

WRIGHT, J.

Teresa E.A. Teater commenced a tort claim against the State of Nebraska for damages resulting from the alleged negligence of the Nebraska Department of Social Services (DSS) while Teater was a ward of the state. The district court held that the claim was time barred, and Teater appeals.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

FACTS

Teater was born on April 17, 1956. After her natural parents were incarcerated, DSS placed Teater in a foster home in Lincoln, Nebraska, on November 1, 1959. Thereafter, the foster parents attempted to adopt Teater. The adoption was apparently initially approved by the Lancaster County Court, but was appealed to the district court by the natural mother. Although the record is not clear, the foster parents apparently withdrew the adoption petition in order to avoid a contested case. In July 1963, the foster parents and Teater moved to Missouri. The foster parents were urged by DSS to pursue an adoption in Missouri, but they apparently never did. However, Teater remained with the foster parents under foster care.

From at least September 21, 1961, until February 1967, DSS did not maintain contact with the foster parents or Teater and did not monitor Teater's well-being. Although DSS sent a number of letters to the foster parents, the foster parents did not respond, and DSS did not pursue the matter further. Nevertheless, in February 1964, DSS informed Teater's natural mother that Teater was "well adjusted and well provided for."

This action was commenced by Teater pursuant to the Nebraska State Tort Claims Act for damages alleged to have been caused by the negligence of the employees and agents of DSS. Teater, who was 36 years old at the time she filed her claim, contended that she was subjected to continual sexual assaults by her foster father from the age of 6 until the age of 14. Teater alleged that DSS failed to supervise her foster home placement and that this failure permitted the continuation of the assaults by her foster father, causing Teater permanent psychological injury.

Teater's petition alleged that the State had been negligent in at least one of the following ways: (1) by failing to properly inspect and supervise Teater's placement with her foster parents, (2) by permitting Teater to remain in the foster parents' home despite the fact that they had not legally adopted her, (3) by failing to properly monitor the foster parents during the time Teater was placed with them, and/or (4) by failing to properly monitor Teater during the time she was placed with the foster parents.

The State denied the allegations and pled the affirmative defense that the statute of limitations applicable to tort claims against the State, Neb. Rev. Stat. § 81-8,227 (Reissue 1996), barred Teater's recovery.

At trial, Teater claimed that she did not become aware her adoption had failed—and that she was a ward of the State during the time she was allegedly sexually assaulted—until November 1992, when she requested her adoption files from the clerk of the Lancaster County District Court. Teater testified she was never informed by DSS or her foster parents that the adoption attempt had failed. Teater conceded, however, that when she was about 14 years old, she overheard a conversation in

which the speaker stated that the foster parents' adoption attempt had failed.

The parties presented expert testimony regarding the psychological and social effects Teater alleged were caused by her childhood sexual abuse. Dr. Peter Frazier-Koontz, Teater's counselor for the previous 3 years, testified that he believed she suffered from posttraumatic stress disorder and mixed personality disorder. Frazier-Koontz stated that Teater's pattern of dysfunctional social behavior included her inability to maintain employment, locate housing, or provide for herself, as well as numerous other symptoms.

Dr. Henry Balters, a clinical psychologist who had treated Teater, opined that Teater suffered from adjustment reaction with mixed emotional features and mixed personalities. He said that Teater's history of anxiety and difficulty with forming relationships was consistent with being sexually abused as a young child.

On the other hand, the State's expert, Dr. Eli Chesen, a psychiatrist, testified that he was not persuaded that Teater had been sexually abused as a child, and he opined that she was not suffering from mixed personality or other mental disorder. He opined that Teater was "malingering," that is, faking her symptoms.

Following a trial to the Lancaster County District Court, the court held:

> There is little doubt that [DSS] failed to supervise the placement of the plaintiff as required by its own rules. The state's feeble argument that it was acting under the assumption that the plaintiff had been adopted is contrary to its own records. Officials of [DSS] actively participated in a course of conduct to prevent the plaintiff's natural mother from obtaining any information about her children when such officials knew the adoption had been set aside on appeal. Despite possessing knowledge that the adoption had not been finalized and the deplorable actions towards the natural mother, they continued to fail to monitor the plaintiff's placement. Clearly, [DSS] was negligent with respect to the duty owed the plaintiff.

The district court found that the alleged sexual abuse started at age 6. Teater's petition was filed on December 15, 1992, which was 22 years following the first report of abuse and many years after Teater had reached the age of majority. Thus, the court held that Teater's claim was barred by the 2-year statute of limitations found in Neb. Rev. Stat. § 25-218 (Reissue 1995).

Teater had alleged in her petition that she was unaware of the sexual abuse because the traumatic nature of the conduct led her to repress the memory of such conduct until September 1991. However, in dismissing Teater's claim, the district court held that Teater had failed to meet the burden of proof that she suffered from a mental disorder which would prevent her from understanding her right to maintain a legal action. Rather, the court found that Teater was aware of the alleged abuse when she reported it to school officials at the age of 14. The court found that Teater's denial of knowledge of the abuse thereafter was inconsistent with her own actions, noting an essay written by her in 1985, as well as precautions Teater took with her own daughter when visiting her foster father several years earlier.

Finding that the statute of limitations barred the action, the district court dismissed Teater's petition and subsequently overruled her motion for new trial. Teater timely appealed.

ASSIGNMENTS OF ERROR

Teater assigns the following errors to the district court: (1) The court erred as a matter of law in failing to apply the "discovery rule" to the applicable statute of limitations in tolling Teater's claim against the State, and (2) the court erred as a matter of law in refusing to apply the equitable doctrine of fraudulent concealment to toll the applicable statute of limitations for Teater's claim against the State.

ANALYSIS

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. *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). The point at which a statute of limitations begins to run must be determined from the facts

of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Id.*

In the context of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996); *Zion Wheel Baptist Church v. Herzog, supra.* A statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996).

Teater's petition sets forth a cause of action against the State based upon negligent placement of Teater by DSS and negligent supervision while Teater was in foster care. Regarding the statute of limitations, Teater alleged she was unaware of the vacation of the adoption proceedings until 1992 and unable to recall the sexual abuse until 1991. The petition states:

> Plaintiff was unaware of the vacation of the adoption proceedings until 1992. Plaintiff was unable to recall the incidents because of a mental disorder which caused plaintiff to repress her memory of the sexual abuse because of the traumatic nature of said conduct and repressed that memory until September of 1991. Memory of said incidents was repressed by virtue of the conduct of the [foster parents] and the State of Nebraska.

The statute of limitations applicable to this case is § 81-8,227, which provides:

> Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. . . .
>
> . . . .
>
> (4) This section and section 25-213 shall constitute the only statutes of limitations applicable to the State Tort Claims Act.

The statute of limitations for claims under the State Tort Claims Act is tolled until a person reaches the age of 20. Neb. Rev. Stat. § 25-213 (Reissue 1995) provides:

> Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in this chapter . . . or the State Tort Claims Act . . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

The State's alleged failure to monitor Teater's foster care occurred, at the latest, when Teater was 14 years old, at which time she accused her foster father of sexual abuse and was returned to DSS by the foster parents. Therefore, based upon the applicable statutes of limitations, Teater had 2 years from April 17, 1976, the date she reached age 20, to commence this action. The present action was not filed, however, until December 15, 1992.

Teater argues that the district court failed to apply the discovery rule in determining when her cause of action against the State accrued. She argues that her claim against the State is not out of time, because it did not accrue until she discovered in November 1992 that her adoption had failed and because, until that time, she had not discovered facts that would have been necessary for her to know that the State was negligent in providing her foster care. This argument has no merit, because Teater relies on a misunderstanding of the discovery rule.

In *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984), we explained that the focal point for determining when a cause of action accrues, even under the application of the discovery rule, is when the actual injury occurs. The focus is not on when the injured party recognizes whose negligence is responsible for the injury, but, rather, the statute of limitations begins to run on the date on which the party holding the cause of action discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.

Thus, Teater's cause of action did not accrue on the date she alleged she discovered the actual nature of her relationship with her foster parents. Rather, Teater's cause of action accrued on the date of the discovery of her injuries. Under the facts alleged in this case, Teater's injuries occurred between the time that

Teater was 6 and 14 years old. Pursuant to § 25-213, however, the statute of limitations for claims under the State Tort Claims Act was tolled until Teater reached the age of 20, and she had 2 years from that date to commence an action against the State pursuant to the State Tort Claims Act. Teater failed to file her action within this 2-year period.

Teater alleged a cause of action ostensibly barred by a statute of limitations, and in order to state a cause of action, Teater must show some excuse tolling the operation and bar of the statute. See, *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). Teater alleged in her petition that she suffered from a mental disorder that prevented her from understanding her right to maintain a legal action and that therefore would qualify under the tolling provision of § 25-213. The district court found, however, that Teater had failed to meet her burden of proof that she suffered from such a mental disorder. The factual findings of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996). The district court's finding was not clearly wrong.

Teater has not alleged facts sufficient to establish another theory of why the statute of limitations has been tolled. Although Teater presented evidence of a number of actions by the State that, if true, suggest the State wrongfully concealed the failure of her adoption from her, she did not plead the existence of any of these facts. Her petition does not set forth a claim that DSS fraudulently concealed anything from Teater that would toll the statute of limitations.

Since Teater's petition did not allege facts sufficient to put the State or the district court on notice of the theory of fraudulent concealment and Teater never requested leave to amend her pleadings to conform to the evidence, the petition does not state facts establishing an excuse that would toll the statute of limitations. Therefore, the cause of action as pled is barred by the statute of limitations. The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurring.

I concur in the judgment, but write separately because I hold a different view of the application of the discovery rule when a defendant *intentionally* or *fraudulently conceals* either the tort or his or her identity in this type of case. The majority writes, in applying the discovery rule, that "[t]he focus is not on when the injured party recognizes *whose negligence* is responsible for the injury, but, rather, the statute of limitations begins to run on the date on which the party holding the cause of action discovers . . . the existence of the injury." (Emphasis supplied.) Such an application of the discovery rule contorts the very reason that the discovery rule was recognized by this court in *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984).

We adopted the discovery rule in *Condon v. A. H. Robins Co., supra*, so that a litigant would not be denied the right to sue before the litigant could determine, even in the exercise of due diligence, whether and whom to sue. *Id.*, citing with approval to *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983), and *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

There are many circumstances in which an injured party knows that he or she has been injured, but the injured party is *prevented* from knowing *who* is responsible for the injury because of intentional or fraudulent concealment by the wrongdoer. What good is it to a mugging victim or a victim of a hit-and-run automobile that he or she "knows of the existence of the injury" if the identity of the mugger or runaway driver is determined years after the statute of limitations has run? The law should not reward a wrongdoer who fraudulently or actively *conceals* either the tort or the wrongdoer's identity. See *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

I submit that the better rule is that the statute of limitations should not commence to run until the injured party, in the absence of wrongdoing on the part of the defendant *concealing* either the tort or the wrongdoer's identity, discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury. See, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992); *Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989), citing with approval to *Hansen v. A.H.*

Robins, Inc., supra. Justice is not done when an injured person loses the right to sue *before* that injured person reasonably discovers if he or she was injured or whom to sue.

However, even with the above rule in mind, I concur in the judgment, because this court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried. See *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). Teater alleged in her petition that she qualifies under the tolling provision of Neb. Rev. Stat. § 25-213 (Reissue 1995) because she suffered from a mental disorder that prevented her from understanding her right to maintain a legal action. The district court's finding that Teater did not suffer from such a mental disorder was not clearly wrong.

Teater did not set forth in her petition a claim that DSS fraudulently or intentionally concealed anything from her that would toll the statute of limitations, nor did Teater request leave to amend her pleadings at any time during the trial. Therefore, regardless of how the discovery rule is applied, the theory that Teater pled and tried did not establish an excuse that would toll the statute of limitations in the instant case.

CONNOLLY, J., joins in this concurrence.

MARILYN A. WINN, PERSONAL REPRESENTATIVE OF THE ESTATE OF LARRY D. WINN, DECEASED, APPELLANT, V. GEO. A. HORMEL & CO., APPELLEE.

560 N.W.2d 143

Filed March 14, 1997. No. S-95-416.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.

3. ____: ____. 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.
4. **Workers' Compensation: Judgments: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Under the provisions of the Nebraska Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury.
6. **Workers' Compensation: Words and Phrases.** An accident is defined in the Nebraska Workers' Compensation Act as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
7. ____: ____. For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force. The specification of suddenly and violently is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
8. **Employer and Employee: Health Care Providers: Negligence.** When an employer provides an emergency first-aid medical facility staffed by a licensed medical professional, the employer, by and through its licensed professional employee, owes a duty of reasonable care to those employees that present themselves for emergency medical services at the place of employment.
9. **Workers' Compensation: Negligence: Proof.** Negligent medical treatment, at an employer's first-aid medical facility, by a trained and qualified professional upon a coemployee, may constitute an "accident" as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1993) upon proof and a finding of such facts.
10. **Workers' Compensation: Proof.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
11. ____: ____. In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.

Appeal from the Nebraska Workers' Compensation Court. Judgment vacated, and cause remanded with directions.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

James L. Quinlan and John J. McCarthy, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

GERRARD, J.

Marilyn A. Winn, widow of Larry D. Winn (decedent), petitioned the Nebraska Workers' Compensation Court for benefits because of the decedent's sudden cardiac arrest and death while he was at work at the Geo. A. Hormel & Co. (Hormel) plant in Fremont, Nebraska. Winn alleged that the decedent's death was caused by the Hormel plant nurse's failure to timely diagnose and treat the decedent's symptoms of a heart attack. Following a trial, a single judge of the compensation court dismissed Winn's petition, finding that although the decedent suffered a fatal heart attack while on his employer's premises and during the hours of his employment, the heart attack was not an accident which arose out of and in the course of his employment with Hormel within the meaning of Neb. Rev. Stat. § 48-101 (Reissue 1993). The trial court further found that the term "accident," as defined in the Nebraska Workers' Compensation Act, does not include any omission by the plant nurse with respect to treatment of an accident and injury that has already occurred. A review panel of the compensation court affirmed the trial court's order of dismissal. This appeal follows.

We note that Winn initially filed a cause of action in the district court for Dodge County, alleging common-law negligence on the part of Hormel, by and through its employee-plant nurse for failure to timely diagnose and treat the decedent's symptoms of a heart attack. The district court sustained Hormel's demurrer and dismissed the suit, finding Winn's exclusive remedy to be workers' compensation. Winn appealed the district court's dismissal order, and the disposition of that appeal is pending our determination in the present case.

Thus, the posture of the instant case requires us to decide whether the nurse's alleged negligent medical treatment was an "accident," as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1993), that caused or contributed to the decedent's death, such

that Winn's exclusive remedy is under the Nebraska Workers' Compensation Act. Because we conclude that negligent medical treatment, at an employer's first-aid medical facility, by a trained and qualified professional upon a coemployee may constitute an "accident" upon proof and a finding of such facts, we reverse the compensation court's judgment of dismissal and remand the cause to the compensation court for specific findings of fact in light of our holding.

FACTUAL BACKGROUND

The decedent, Larry Winn, was a longtime employee of Hormel at its hog processing plant in Fremont. On the date of his death, the decedent's shift at Hormel began at 4 a.m., with a lunch break from approximately 10 to 10:36 a.m. After his lunch break, at about 11:30 a.m., the decedent began experiencing symptoms of what he thought was indigestion. The decedent sought treatment from the plant nurse, Lucy Klocke.

At about 11:30 a.m., after attending to another patient at the decedent's insistence, Klocke questioned the decedent about his symptoms. The decedent told Klocke that he thought he had indigestion and reported that he was experiencing chest pressure and aching in his arms. Klocke took the decedent's blood pressure and found it to be higher than normal. However, Klocke found the decedent's respiration and heart rates to be near normal. Klocke said that while in her office, the decedent did not seem to be in distress and that during this time, the decedent conversed normally with other coworkers.

Klocke testified that she told the decedent he was suffering from angina and heart problems, and should contact his doctor. Klocke said she offered to contact the security guards and have them take the decedent to the hospital emergency room. Klocke stated that the decedent refused her offer and instead chose to rest in her office. After about 15 minutes, Klocke again checked the decedent's blood pressure, respiration rate, and pulse rate. Although the decedent's blood pressure was still higher than normal, it had decreased from its former reading. Klocke testified that at approximately 11:50 a.m., the decedent elected to return to work and left her office.

At 11:55 a.m., the decedent was found in the smokehouse, collapsed face down in a caustic soda solution that he had been

draining from a tank. Klocke was summoned to the scene and immediately began cardiopulmonary resuscitation on the decedent. The Fremont rescue squad was called, and when it arrived a short time later, emergency medical technicians relieved Klocke and continued resuscitation efforts on the decedent.

Because the decedent had collapsed onto a metal walkway and was lying in a pool of caustic soda liquid, the medical technicians were unable to use their defibrillation equipment to resuscitate him. According to one of the medical technicians, the best course of treatment was to transport the decedent to the hospital emergency room. Upon arrival at the emergency room, the attending physician decided that the decedent had been without a pulse for too long and could not be revived. Thus, the physician did not initiate defibrillation and pronounced the decedent dead.

At the hearing before the single judge, Winn's nursing expert testified that Klocke's care of the decedent was violative of the standard of care for a professional registered nurse. Winn's cardiology expert, Dr. George Sojka, testified that based upon the record, the decedent was suffering a myocardial infarction while he was in the nurse's office and this myocardial infarction precipitated the subsequent cardiac dysrhythmia which resulted in his death. Dr. Sojka stated that the symptoms presented by the decedent to Klocke were the classic symptoms of a heart attack. Dr. Sojka testified that Klocke should have had the decedent stay in her office and should have immediately called the rescue squad or the decedent's physician. Dr. Sojka opined that the decedent's heart attack would have been survivable had he received immediate treatment. Dr. Sojka estimated the decedent's chances for survival at 80 to 90 percent had he received cardiac care prior to the onset of the dysrhythmia. It was Dr. Sojka's opinion that Klocke's failure to call the decedent's physician or the rescue squad immediately upon diagnosing the decedent's heart involvement contributed significantly to his death.

Hormel's cardiology expert, Dr. Thomas Sears, essentially agreed with Winn's expert that the decedent's death resulted from a myocardial infarction followed by dysrhythmia and circulatory arrest and that in all likelihood, it was a recoverable

infarction. However, Dr. Sears was critical of the care that the decedent received from the emergency medical technicians and the emergency room physician. A nursing expert testified, on behalf of Hormel, that Klocke met or exceeded the appropriate standard of care for an occupational health nurse because she was still assessing the decedent when he suffered his cardiac arrest and that Klocke was under no duty to persuade the decedent to stay in the nurse's office or to call a physician or the rescue squad.

In its order of dismissal, the trial court found that (1) Winn's evidence was insufficient to establish legal cause because no evidence was adduced indicating the decedent's heart attack was caused by a stress or exertion greater than what the decedent or any other person would have experienced in ordinary nonemployment and (2) the decedent's heart attack was not an accident which arose out of and in the course of his employment with Hormel.

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. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

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. *Kerkman v.*

Weidner Williams Roofing Co., 250 Neb. 70, 547 N.W.2d 152 (1996); *Cords v. City of Lincoln, supra.*

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996).

ASSIGNMENTS OF ERROR

Summarized and restated, Winn's 15 assigned errors essentially contend that the compensation court erred in (1) determining that the term "accident," as defined in § 48-151(2) and as used in § 48-101, does not include " 'any omission on the part of a co-employee with respect to treatment of an accident and injury that has already occurred' "; (2) failing to consider that the "accident" in the instant case was the plant nurse's failure to timely diagnose and treat the decedent's symptoms of a heart attack; and (3) sustaining certain objections raised in the depositions of the expert witnesses. The disposition of this case requires that we review only Winn's first two assigned errors.

ANALYSIS

Winn first asserts that she was effectively precluded from pursuing her theory of liability because the trial court failed to acknowledge the basis of her claim—that the decedent's injury was his death, and the "accident" which caused this injury was both the negligent nursing care provided by Hormel's employee and the inability of the emergency medical technicians to defibrillate and resuscitate the decedent, occasioned by the conditions of his employment. Winn contends that this is not the typical workers' compensation heart attack case, where the claimant's burden is to show that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury. See, e.g., *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

The dispositive issue in this appeal is whether negligent medical treatment by a trained medical employee upon a coemployee can itself be an "accident," as defined in § 48-151(2). More specifically, the issue is whether a medical employee's negligent failure to diagnose or treat a coemployee's medical condition, regardless of the source of the illness or injury, can

be considered an "accident" if there is a sufficient causal connection between the negligence and the death or disability for which compensation is sought. If our answer is in the affirmative, then Winn's exclusive remedy is under the Nebraska Workers' Compensation Act, and the compensation court would be obligated to make further findings of fact determining whether (1) the plant nurse contributed to the decedent's death with negligent medical treatment and (2) the element of causation has been satisfied in the instant case.

The following colloquy, after a relevancy objection early in the trial, is illustrative of the separate paths taken by Winn and the trial court regarding this crucial issue.

> [WINN'S COUNSEL]: Your Honor, this whole case is based upon a delay of recognizing symptoms and a delay in treatment and a delay that caused death.
>
> [TRIAL] COURT: I understand that, and I've tried to explain to you in my estimation, a review court or review panel of this court or Court of Appeal or Supreme Court may tell me I'm in error, but in my estimation it is not germane.
>
> . . . .
>
> [TRIAL] COURT: . . . [M]y point is whether there's a nurse, whether there's negligence on the part of the employee, whether there's negligence on the part of the employer or an employee is not germane to this issue. The question is did he have a heart attack, what caused the heart attack, did the heart attack cause his death.
>
> [WINN'S COUNSEL]: No, Your Honor, that is not the — what this case is about at all.
>
> [TRIAL] COURT: I understand that we disagree on that, but I've sustained the objection.

Under the provisions of the Nebraska Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury. § 48-101.

Under § 48-151(2), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or

without human fault, and producing at the time objective symptoms of an injury." The "unexpected or unforeseen" requirement of § 48-151(2) is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

The second specification of § 48-151(2) requires that an employee's injury must occur "suddenly and violently" to be compensable. This court has held that "suddenly and violently" does not mean instantaneously and with force. The specification of "suddenly and violently" is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Schlup v. Auburn Needleworks, supra.* See, also, *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). We recognized in *Sandel* that the nature of the human body being such as it is, not all injuries to the body are caused instantaneously and with force, but may indeed nevertheless occur suddenly and violently, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment.

Winn claims that the compensation court erred by not analyzing the term "accident" in its correct perspective. We agree. Hormel maintained an emergency first-aid medical facility for the convenience and welfare of its employees. The facility was staffed by a nurse, and care was provided to all employees regardless of the source of their illness or injury. During working hours, the decedent suffered physical distress and went to the nursing office for aid. The visit to Hormel's nursing office certainly is incidental to and arose out of the decedent's employment; i.e., the decedent's contact with Klocke was at a nursing office to which only employees are admitted, and, furthermore, the decedent would not have been examined by Klocke unless he was an employee of Hormel, as was Klocke. See *Dixon v. Ford Motor Co.*, 53 Cal. App. 3d 499, 125 Cal. Rptr. 872 (1975).

We determine that when an employer provides an emergency first-aid medical facility staffed by a licensed medical professional, the employer, by and through its licensed professional employee, owes a duty of reasonable care to those employees

that present themselves for emergency medical services at the place of employment. See *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995). This duty of reasonable care is owed to each employee regardless of the source of illness or injury, since healthy workers are of benefit to both the employer and all employees. See *Dixon v. Ford Motor Co., supra.*

The evidence suggests that the decedent was suffering a myocardial infarction while he was first in the nurse's office. However, the injury which is the basis of the instant claim is not the initial myocardial infarction, but, rather, the subsequent cardiac dysrhythmia and circulatory arrest which resulted in the decedent's death.

Certainly, the decedent's cardiac arrest 5 minutes after the decedent had departed from the nursing office was unexpected and unforeseen to both Klocke and the decedent. Further, the cardiac arrest clearly occurred at an identifiable point in time which would have required the decedent to discontinue employment and seek medical treatment had he survived. See *Schlup v. Auburn Needleworks, supra.* The trial court erred when it characterized the alleged negligence of Klocke as an "omission on the part of a co-employee with respect to treatment of an accident and injury that has *already occurred.*" (Emphasis supplied.) The "accident" allegedly occurred when Klocke failed to timely diagnose and treat the decedent's symptoms of a heart attack which, in turn, aggravated, accelerated, or combined with the preexisting heart condition to produce the death for which compensation is sought.

Winn produced evidence, if believed by the trier of fact, that (1) the symptoms presented by the decedent to Klocke were the classic symptoms of a heart attack recognizable by registered nurses, (2) Klocke's treatment fell below the standard of care when she did not have the decedent stay in her office and immediately call the rescue squad or the decedent's physician, and (3) the decedent's initial heart attack would have been survivable had he received timely medical treatment.

We hold that negligent medical treatment, at an employer's first-aid medical facility, by a trained and qualified professional upon a coemployee, may constitute an "accident" as defined in § 48-151(2) upon proof and a finding of such facts. However, in

view of the conflicting medical evidence regarding the effect of Klocke's actions, our holding does not conclusively establish that Winn has met the requisite burden of persuasion in this case.

To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Further, in a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). Thus, the compensation court shall be obligated to make further findings of fact to determine whether (1) Klocke contributed to the decedent's death with negligent medical treatment and (2) the element of causation has been satisfied in the instant case.

CONCLUSION

Because the compensation court erroneously concluded that the term "accident," as defined in § 48-151(2), did not include alleged negligent acts by Hormel's nurse in timely diagnosing and treating the decedent's symptoms of a heart attack, the findings of fact made by the trial court are insufficient to support the order of dismissal in the instant case. Accordingly, we vacate the compensation court's judgment of dismissal and remand the cause to the compensation court with the direction that the judge conducting the initial hearing make new findings of fact and enter an order consistent with those findings on the evidence adduced, and for such further review thereof as the parties may institute under law.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS R. ZAKRZEWSKI, RESPONDENT.

560 N.W.2d 150

Filed March 14, 1997. No. S-95-994.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline a lawyer is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** A disciplinary complaint against an attorney will be sustained only if the Supreme Court finds it to be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Any violation of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.
4. **Disciplinary Proceedings: Words and Phrases.** For purposes of attorney disciplinary cases, the term "knowingly" shall include conduct that is so carelessly and recklessly negligent as to lead only to the conclusion that it was done knowingly.
5. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney disciplinary proceeding, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law.
6. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.

Original action. Judgment of suspension.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for relator.

Thomas R. Zakrzewski, pro se.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BUCKLEY, D.J.

PER CURIAM.

Formal charges against respondent, Thomas R. Zakrzewski, were filed in this court on September 15, 1995. The allegations set forth concerned respondent's signing of an affidavit containing an allegedly false statement of fact. Respondent was

therefore charged with violating the following provisions of Canon 7 of the Code of Professional Responsibility:

> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
>
> . . . .
>
> (5) Knowingly make a false statement of law or fact.

This matter was heard by a referee on March 14 and 15, 1996. In his report, the referee found that respondent knowingly made a false statement of fact in his affidavit and therefore violated DR 7-102 (A)(1) and (5). In addition to these findings, the referee also noted his concern with respondent's attitude, as expressed in his brief to the referee, toward both the opposing counsel and the Nebraska State Bar Association. The referee made no recommendation regarding an appropriate penalty. Exceptions to the referee's report were filed by respondent on June 5, 1996.

STANDARD OF REVIEW

A proceeding to discipline a lawyer is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996).

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. At all times relevant to this matter, respondent was engaged in the private practice of law in Humphrey, Nebraska. In order to get a better understanding of

the disciplinary charges brought against respondent, it is necessary to examine the pertinent background facts.

UNDERLYING DIVORCE ACTION AND EVENTS OF JUNE 1, 1993

The underlying impetus of this disciplinary action involves respondent's representation of his brother, Evan Zakrzewski, in a divorce proceeding in the early part of 1993. Representing Evan Zakrzewski's former wife, Ronda Raff, in the divorce proceedings was Forrest Peetz, a practicing attorney in Holt County. Pursuant to a stipulation between Evan Zakrzewski and Raff, the district court for Holt County entered an order on March 30, 1993, awarding permanent custody of the parties' minor child, Heath, to Raff, who resided in Aberdeen, South Dakota. Evan Zakrzewski, then a resident of O'Neill, Nebraska, was to have visitation rights once a month from Tuesday until Sunday, for 2 months during the summer, and for alternating holidays.

Raff sent Heath to O'Neill several days prior to June 1, 1993, for his monthly visit with Evan Zakrzewski. Because Evan Zakrzewski was out of the state at the time for business purposes, Heath spent several days with Zakrzewski's parents, who also reside in O'Neill. Evan Zakrzewski returned to O'Neill on May 29. Despite requests from Raff, Evan Zakrzewski refused to return Heath to South Dakota on June 1. Although Raff contended the weeklong visitation period ended on that date, Evan Zakrzewski refused to comply, arguing that he had not seen Heath much in the last 8 months.

Upon Evan Zakrzewski's refusal to return Heath, Raff contacted Peetz for assistance. According to telephone records, Raff telephoned Peetz three times on June 1. Peetz testified that he told Raff she should contact the clerk of the district court and the sheriff's office to resolve the matter. Peetz was eventually contacted by the sheriff's office and by Tom Herzog, Holt County Attorney, in an attempt to seek information regarding the terms of the divorce decree. Telephone records introduced at trial establish that all calls between Peetz and county officials were made to Peetz' office.

Learning of the situation, Herzog examined the divorce decree provisions concerning visitation and called the district

court judge who granted the divorce decree. According to Herzog, the judge directed him to tell the sheriff to tell Evan Zakrzewski to give the child back. Following the orders of Herzog, Holt County Sheriff Charles R. Fox relayed this information to his deputies. Fox specifically stated that he instructed his deputies not to use physical force or intimidation against Evan Zakrzewski.

According to testimony from Holt County Deputy Alan Rowse, Evan Zakrzewski was then asked to return Heath that day by 4 p.m. Not surprisingly, Evan Zakrzewski recounts a different picture; one in which he was physically threatened with physical danger and jail time if he refused to return Heath that day. After Evan Zakrzewski's contact with Rowse, he called his brother, respondent herein, for advice. Respondent proceeded to make calls to Peetz, Herzog, and the sheriff's office to halt the return of Heath. In each instance, respondent made it a point to state that he would sue each individual if Evan Zakrzewski was forced to return Heath to South Dakota that day. Ultimately, Evan Zakrzewski complied with the requests of the law enforcement officials, and Heath was transported to Raff in South Dakota that evening by a third party.

Allegations of Child Abuse and Affidavit

Respondent followed up on his threats and filed a federal civil rights action against Peetz, Fox, Rowse, Herzog, and other Holt County officials. This suit alleged that the defendants named therein violated Evan Zakrzewski's constitutional rights while acting under color of state law. Eventually, summary judgment was granted in favor of all defendants. See *Zakrzewski v. Fox*, 87 F.3d 1011 (8th Cir. 1996). Prior to these dismissals and during the discovery period, respondent ascertained that Raff had filed a report of child abuse with the South Dakota Department of Social Services (South Dakota DSS) on June 2, 1993, the day after Heath was returned from his visit with Evan Zakrzewski. A letter from the South Dakota DSS dated June 10, 1993, was sent to Rowse informing him that the allegation would be investigated by Child Protective Services in Nebraska. A copy of this letter was also sent to Peetz. During the disciplinary proceedings, Raff testified that she wanted

Peetz to have a copy of the letter so that it could be placed in her divorce file.

Upon discovering the abuse allegation, respondent filed a motion in the district court for Holt County requesting an order to show cause as to why Raff and Peetz should not be held in contempt for violating the March 30, 1993, divorce decree because the abuse allegation was false and unsubstantiated. In support of the motion regarding Peetz, respondent prepared his own affidavit, wherein he alleged as follows:

> That during discovery being conducted for a Federal Civil Rights action I discovered that Ronda Raff, *in concert with Forrest Peetz and at his direction*, in order to injure and vilify the petitioner and to attempt to interfere with petitioner's rights granted by this court, had filed a false and malicious claim of child abuse of Heath Alexander Zakrzewski . . . .

(Emphasis supplied.)

A hearing on the motion was had in the district court for Holt County on October 13, 1994. After the hearing, the court refused to issue an order requiring Peetz to show cause why he should not be held in contempt. In reaching this conclusion, the court noted that the only evidence supporting respondent's contention that Peetz told Raff to file a false child abuse allegation was the June 10, 1993, letter from the South Dakota DSS that was copied to Peetz. According to the judge, that fact alone did not support respondent's contention.

Disciplinary Proceedings

Peetz thereafter filed a complaint with the Nebraska State Bar Association, alleging that respondent violated DR 7-102(A)(1) and (5) in that he signed an affidavit containing a false statement of fact. Although the Counsel for Discipline of the Nebraska State Bar Association dismissed the complaint, Peetz appealed to the Committee on Inquiry of the Third Disciplinary District. The committee held a hearing and thereafter filed the formal charges now before us.

A hearing was had before a referee on March 14 and 15, 1996. In his defense, respondent argued that the circumstantial evidence he had at the time he signed the affidavit supported his

allegation that Peetz directed Raff to file the child abuse allegation. The evidence respondent referred to was essentially the following: (1) the South Dakota DSS letter addressing the abuse allegation that was copied to Peetz, (2) the fact that respondent had threatened Peetz with a federal civil rights action the day before the report was made (thereby providing motive), and (3) the three telephone calls Raff made to Peetz' office on June 1, 1993 (thereby providing an opportunity for Peetz to direct Raff's actions). Peetz testified during the hearing that he in no way solicited the letter from the South Dakota DSS and that he did not suggest that Raff file a false abuse allegation. Raff also testified that she filed the report after she observed bruises on Heath on June 2, and not at the direction of Peetz. Furthermore, Raff stated that the reason Peetz was sent a copy of the June 10, 1993, letter from the South Dakota DSS was because she wanted him to have a copy for her divorce file.

As noted above, the referee concluded that respondent did, in fact, violate the disciplinary rules in question by signing the affidavit. In reaching this conclusion, the referee noted that the information available to respondent at the time he signed the affidavit did not support the allegation that Peetz instructed Raff to file a false child abuse allegation. Because no evidence existed that would substantiate the allegation, the referee concluded that respondent knowingly stated a false statement of fact in the affidavit to harass or maliciously injure Peetz. The report did not recommended a penalty.

In addition to addressing the formal charges against respondent, the referee also stated his concern with respondent's attitude to Peetz, other attorneys, and the Nebraska State Bar Association in general. Prompting the referee's concerns was respondent's brief to the referee, wherein he referred to Raff and Peetz as "congenital liars" and characterized the disciplinary proceedings before the Committee on Inquiry as a "sham proceeding." Respondent also wrote that the Committee on Inquiry told witnesses to disavow previous testimony and that the Nebraska State Bar Association told respondent that it "was going to destroy [respondent's] reputation and cause [him] considerable financial loss including the right to earn a living as an attorney." Brief for respondent to referee at 1.

In response to the referee's findings, respondent has filed exceptions with this court.

ANALYSIS

A disciplinary complaint against an attorney will be sustained only if this court finds it to be established by clear and convincing evidence. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997). Any violation of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Johnston, supra*; *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984).

For purposes of simplicity, we will address each disciplinary rule in question separately.

CANON 7, DR 7-102(A)(5)

In representing a client, an attorney shall not knowingly make a false statement of law or fact. For purposes of our review, we must determine whether respondent violated this rule in stating, in a sworn affidavit, that Raff filed a false and malicious claim of child abuse "in concert with Forrest Peetz and at his direction, in order to injure and vilify [Evan Zakrzewski]."

It is apparent that respondent possessed no actual knowledge that Peetz told Raff to file a child abuse allegation with the South Dakota DSS. Although respondent failed to discuss the allegations with either Raff or Peetz prior to signing the affidavit, the testimony of both at the disciplinary hearing makes it clear that Raff filed the report after she discovered bruises on Heath, and not at the direction of Peetz. Despite his failure to question either Raff or Peetz or to gather any direct evidence supporting his allegation, respondent signed the affidavit based on his belief that the circumstantial evidence in his possession supported his allegation.

Our examination of the record leads us to conclude that the circumstantial evidence respondent refers to simply does not support his allegation against Peetz. As set forth above, the evidence respondent relied upon in creating the affidavit consisted of the fact that a letter from the South Dakota DSS was copied to Peetz. Respondent argues that the South Dakota DSS would

send a copy of such a letter only to an actual complainant, in light of confidentiality requirements. We do not agree. According to the testimony of Raff, Peetz, as her divorce attorney, was sent a copy of the letter in order that it could be included in Raff's divorce file. Peetz testified repeatedly that he in no way solicited the letter or instructed Raff to file the claim. Had respondent made further inquiries, he would have discovered these facts.

The fact that Raff made several telephone calls to Peetz the day before the abuse claim was filed also provides no justification for respondent's allegation against Peetz. Respondent argues that these telephone conversations provided Peetz with the opportunity to direct Raff's actions regarding the abuse allegation. However, in respondent's affidavit, he makes no mention of knowledge as to the contents of those conversations. The testimony offered by Raff and Peetz at the disciplinary hearing establishes that Peetz only told Raff to contact the clerk of the district court and the sheriff's office for assistance in getting Heath back. Both testified that Peetz never told Raff to file the claim. Once again, had respondent made appropriate inquiries, he would have been made aware of these facts prior to signing the affidavit.

Finally, respondent contends that his threatening Peetz on June 1, 1993, with a federal civil rights lawsuit provided Peetz with a motive to instruct Raff to make a false abuse allegation against Evan Zakrzewski. We find this argument unrealistic at best. We are again faced with Peetz' testimony that he had nothing to do with the abuse report. In conformance with his repeated failures to thoroughly investigate, respondent did not attempt to become aware of Peetz' position until after the affidavit was signed.

Faced with both the evidence respondent had at the time he signed the affidavit and the evidence he would have possessed had he done a thorough investigation, we simply cannot conclude that he set forth truthful facts in his affidavit.

Respondent would nevertheless have us find that he did not violate DR 7-102(A)(5) because there was no showing that he "knowingly" made false statements of fact. In other words, respondent argues that his subjective belief that Peetz instructed

Raff to file the abuse allegation at the time he signed the affidavit makes it impossible to establish he made a knowingly false statement.

The definition of "knowingly" for purposes of DR 7-102(A)(5) was set forth by this court in *State ex rel. Nebraska State Bar Assn. v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975). At issue in *Holscher* was whether a county attorney violated DR 7-102(A)(5) when he received attorney fees for preparing tax foreclosure petitions when a statute provided that fees could be paid only when a decree of foreclosure was entered. Holscher argued that he was unaware of the statute and thus did not "knowingly" submit a claim for fees to the county which contained a false statement of law or fact. This court disagreed, stating:

> Respondent filed his claim for services prematurely, in some instances even before a tax foreclosure was even filed. We cannot believe that respondent would not know this was improper procedure. *At the very least it would be conduct so carelessly and recklessly negligent that we would have to find respondent did it knowingly.* Otherwise we might as well forget the Code of Professional Conduct.

(Emphasis supplied.) *Id.* at 735-36, 230 N.W.2d at 79.

Adoption of respondent's position would, in essence, allow an attorney to make any factual allegation provided he or she believed it to be true, regardless of an examination of the surrounding circumstances. We once again hold that for purposes of attorney disciplinary cases, the term "knowingly" shall include conduct that is so carelessly and recklessly negligent as to lead only to the conclusion that it was done knowingly.

Applying this definition to the instant case leaves no doubt that respondent violated DR 7-102(A)(5). Absolutely no effort was made on behalf of respondent to substantiate his allegations against Peetz. Such a failure to properly investigate rises to the level of extreme carelessness and surely constitutes recklessly negligent conduct. Had respondent made the appropriate and quite obvious investigation into the abuse allegation, he would have recognized that the evidence simply does not support the allegation that Peetz told Raff to file a false claim. Absent such proper investigation, we have little difficulty in concluding that

respondent knowingly made a false statement of fact in his affidavit in violation of DR 7-102(A)(5).

CANON 7, DR 7-102(A)(1)

Our next inquiry requires us to determine if respondent's actions also violated DR 7-102(A)(1). An attorney violates this provision if he or she asserts a position or takes any action on behalf of a client when it is known that such action will only serve to harass or maliciously injure another.

The record before us establishes the animosity of respondent toward Peetz. At the time respondent filed the affidavit in question, he was under investigation by the Nebraska State Bar Association for filing the federal civil rights complaint against Peetz. Respondent's response to that investigation reveals his malicious attitude toward Peetz. This is especially apparent upon the examination of a letter written to Peetz' attorney in the civil rights action. The letter stated:

> It appears that your client's desire to harm myself and other members of my family, and the propensity of your client to attempt to misuse the legal system and the Bar Association, are going to come back to haunt you. . . .
>
> Please be advised that I will being [sic] filing a motion for sanctions and attorney fees against both you and your client. Your client's contempt for the U.S. Federal Court for the District of Nebraska is obviously displayed by the complaint filed against me with the Nebraska State Bar Association. . . . I will also ask the Court to incarcerate Mr. Peetz for his contempt.

The lack of evidence upon which respondent filed the affidavit coupled with respondent's obvious animosity toward Peetz clearly supports the referee's determination that the affidavit and corresponding motion for an order to show cause were meant to harass or injure Peetz, in violation of DR 7-102(A)(1).

IMPOSITION OF PENALTY

Having determined the evidence clearly and convincingly establishes that respondent's actions in signing the affidavit were violative of DR 7-102(A)(1) and (5), we now address the appropriate disciplinary measures that must be taken. To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the

nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996). In the determination of an appropriate penalty, we must also consider any mitigating factors. See *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996).

The making of false statements by an attorney obviously reflects negatively on both that attorney's ability to practice law and the reputation of the entire bar in general. Such a practice must be deterred by this court. In addition, we are also concerned with the attitude and reactions of respondent throughout the entire disciplinary process.

Respondent's overall negative attitude in this matter is clearly reflected in his brief to this court in which he refers to Peetz as a "liar" on more than 16 occasions, states that Herzog lied under oath, and makes repeated remarks that all witnesses called by the Nebraska State Bar Association lied at their own volition or at the direction of the association. In fact, respondent goes so far as to state that "[c]learly the Third District Committee on Inquiry purposely and knowingly solicited perjury on March 2, 1995, in order to obstruct my prosecution of a Federal civil rights action." Brief for respondent at 24. At one point in his brief, respondent states his belief that the Nebraska State Bar Association has, through its agents, become a criminal organization obstructing federal civil rights actions. In fact, respondent went so far as to threaten the committee members with a civil action under the federal Racketeer Influenced and Corrupt Organizations Act for their actions. Respondent also refers to the committee prosecutor as a "prosecutor, obstructor of justice, tortfeasor and criminal." Reply brief for respondent at 1.

Respondent concludes with the following:

> This Court should require the State of Nebraska, ex rel. Nebraska State Bar Association to pay me the sum of Five Million Dollars ($5,000,000) for the damages sustained by me and proven in the record. . . . Anything less than

> $5,000,000 will do nothing but continue the three year rape that has been conducted under the color of this Court's black robes.

Id. at 11.

The repeated derogatory and inflammatory statements made by respondent both during hearings and through briefing cannot be ignored and will not be tolerated. Because such tactics reflect respondent's overall fault-finding attitude in this matter, we take them into consideration in determining an appropriate penalty.

Concerning the existence of mitigating factors, our de novo examination of the record leads us to conclude that respondent is relatively inexperienced in the practice of law. Furthermore, the underlying actions giving rise to this action, namely respondent's representation of his brother in personal matters regarding his brother's child, establishes the possibility that respondent was so personally involved that a proper level of objectivity was lost. Taking these factors into consideration, we hereby suspend respondent from the practice of law for a period of 18 months, effective immediately. Respondent is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1991).

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. THOMAS M. NISSEN, ALSO KNOWN AS MARVIN T. NISSEN, APPELLANT.

560 N.W.2d 157

Filed March 14, 1997. Nos. S-95-996, S-95-997.

1. **Judgments: Appeal and Error.** In connection with questions of law, a reviewing court has an obligation to reach its own conclusion independent of those reached by the lower courts.
2. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
3. **Moot Question.** The doctrine of mootness is a key component in determining whether an actual case or controversy exists.

4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Constitutional Law: Search and Seizure.** The provisions of both U.S. Const. amend. XIV and Neb. Const. art. I, § 7, protect against unreasonable seizures.
6. **Criminal Law: Arrests: Probable Cause.** An arrest without a warrant can be valid only if there existed at the time probable cause to believe both that a felony has been committed and that the person arrested committed it.
7. **Police Officers and Sheriffs: Arrests: Warrants: Proof.** When law enforcement personnel have acted without a warrant, the burden is upon the State to prove that the arrest was reasonable.
8. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
9. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
10. ____: ____: ____. Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.
11. **Constitutional Law: Arrests: Search and Seizure.** An arrest in reality effected as a pretext to search for evidence is unreasonable under the 4th and 14th Amendments to the U.S. Constitution.
12. **Police Officers and Sheriffs: Probable Cause.** Police conduct justified on the basis of probable cause is not invalidated by ulterior motives.
13. **Confessions: Appeal and Error.** The voluntariness of a statement is to be tested by looking at all the circumstances, and the finding of the trial court will not be set aside unless clearly erroneous.
14. ____: ____. In determining the voluntariness of a statement, 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.
15. **Motions to Suppress: Confessions: Police Officers and Sheriffs.** A statement must be suppressed if it is obtained by offensive police practices or is obtained under circumstances in which the free choice of the defendant was significantly impaired.
16. **Police Officers and Sheriffs: Confessions: Evidence.** Mere deception will not render a statement involuntary or unreliable; the test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.
17. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of an abuse of discretion.

18. **Trial: Judges: Evidence.** A trial judge should carefully refrain from expressing any opinion of or commenting on the evidence.
19. **Trial: Judges: Witnesses: Juries.** When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury.
20. **Trial: Judges: Evidence: Witnesses: Juries.** As a general rule, it is the duty of the trial court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury, but also on the examination of witnesses and otherwise during the course of the trial.
21. **Rules of Evidence.** In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
22. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact.
23. **Witnesses: Words and Phrases.** For the purpose of Neb. Rev. Stat. § 28-919 (Reissue 1995), a witness is anyone who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it.
24. **Trial: Judges: Juries.** It is the duty of a trial judge to see to it that the members of a jury are protected from outside influences and kept safe.
25. **Criminal Law: Trial: Jurors: Presumptions: Proof.** When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises, and the burden is on the State to prove that the communication was not prejudicial.
26. **Trial: Jurors: Witnesses: Verdicts.** Unauthorized communications between jurors and third persons or witnesses during the course of the jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear.
27. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense.

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

Peter K. Blakeslee for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BURKHARD and CASSEL, D. JJ.

PER CURIAM.

STATEMENT OF CASE

The plaintiff-appellee, State of Nebraska, charged the defendant-appellant, Thomas M. Nissen, also known as Marvin T. Nissen, in case No. S-95-996 with three counts of murder in the first degree, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1995), and in case No. S-95-997 with burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1995). The cases were consolidated for trial, and pursuant to verdict, Nissen was thereafter adjudged guilty in the first case of one count of murder in the first degree and two counts of murder in the second degree, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1995), and in the second case, of burglary. He was thereafter sentenced to imprisonment for life for each of the murders, the sentences to be served consecutively; to pay a fine of $25,000; and to imprisonment for a period of 20 years for the burglary, said sentence to be served consecutively to those imposed in the first case.

BACKGROUND

On December 25, 1993, one "Brandon," while at the home of Linda Gutierres, complained of having been assaulted to Chief Norman Hemmerling of the Falls City Police Department, who had responded to a call from one of Brandon's acquaintances. Brandon was not previously unknown to law enforcement personnel. She had been cited for forgery in Lancaster County, and a forgery charge was currently pending against her in Richardson County. In addition, she had falsely identified herself in traffic stops as Charles Brayman.

Seeing injuries consistent with a physical assault, Hemmerling had Brandon transported to a local hospital, where it was learned that Brandon was a female, Teena Brandon. At this point, Brandon complained that she had been sexually assaulted and kidnapped by Nissen and John Lotter. Although evidence suggesting a sexual assault on Brandon was discovered, and notwithstanding that on December 28, Nissen admitted that he had physically assaulted her, no charges were filed against either Nissen or Lotter.

On December 31, Brandon and two others, Lisa Lambert and Phillip DeVine, were found dead at Lambert's Richardson

County farmhouse. All three had been shot, and Brandon had been stabbed as well.

Reflecting on the investigation of Brandon's claims concerning the assault upon her, Assistant Chief John Caverzagie and other law enforcement personnel went to Nissen's house and arrested both Nissen and Lotter.

ASSIGNMENTS OF ERROR

In challenging his convictions, Nissen assigns 17 errors, which are summarized as claiming that the trial judge erred in (1) overruling Nissen's amended motion to quash, (2) overruling Nissen's motion to suppress certain evidence, (3) overruling Nissen's motion for mistrial during jury selection, (4) admitting certain evidence, (5) overruling Nissen's postevidence motions to dismiss certain of the charges, (6) improperly instructing the jury, (7) overruling Nissen's motion for mistrial because of misconduct during the jury's deliberations, and (8) imposing an improper sentence for the burglary conviction.

ANALYSIS

We supply with the analysis of each assignment of error such additional facts as are relevant thereto.

Motion to Quash.

As argued, Nissen urges in the first summarized assignment of error that the trial judge wrongly overruled his amended motion to quash the State's operative information improperly charging the murders under five separate theories of guilt.

As the amended motion to quash questions the validity of the operative information, the issue presented by this assignment of error is one of law, in connection with which we, as a reviewing court, have an obligation to reach our own conclusion independent of those reached by the lower courts. See, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996).

The operative information charges that Nissen committed purposeful murder under the provisions of § 28-303(1) or felony murder under § 28-303(2) by his having broken and entered with the intent to perpetrate the felonies of first degree assault, second degree assault, first degree false imprisonment, or tampering with a witness.

Section 28-303 provides that one commits murder in the first degree if one kills another "(1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any . . . burglary . . . ." Section 28-507(1) provides that one commits burglary if one "willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony . . . ." Neb. Rev. Stat. § 28-206 (Reissue 1995) provides that one who "aids, abets . . . another to commit any offense may be prosecuted and punished as if he were the principal offender." One aids and abets a crime by mere encouragement or assistance; physical participation in the crime is not required. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995); *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

Nonetheless, Nissen's premise is that an information such as presented here impermissibly allowed the jury unanimously to find him guilty of first degree murder without requiring it to reach unanimous agreement as to whether the killing was purposeful murder under § 28-303(1) or felony murder under § 28-303(2), and without requiring the jury, in the latter instance, to reach unanimous agreement on the existence of all the elements of any one of the several underlying felonies alleged.

However, this premise was rejected in *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). We reasoned therein that as under § 28-303 murder may be committed either by killing purposefully or in the commission of a felony, and as the charge arises under one set of facts, it is sufficient if there is evidence to support each of the methods. Thus, the jury need be unanimous only in its finding that the defendant violated § 28-303 by committing murder; it need not be unanimous concerning under which of the consistent theories the murder was committed.

The record fails to sustain this assignment of error.

Motion to Suppress.

Nissen argues in the second summarized assignment of error that the trial judge mistakenly overruled his motion to suppress the statements he gave on December 31, 1993, and January 2, 1994, because they were the fruit of Nissen's unlawful arrest, deception, improper inducement, and impermissibly prolonged detention.

The evidence adduced at the suppression hearings was that at approximately 2 a.m. on December 25, 1993, Nissen and Lotter went to the home of Gutierres to recover $6 from DeVine, the boyfriend of Gutierres' daughter, Leslie Tisdel. They told Gutierres that during a party at Nissen's house, they had proved to Gutierres' other daughter, Lana Tisdel, that Brandon was not male, as she had been representing herself, but female. Lotter had held Brandon while Nissen pulled her pants down in Lana Tisdel's presence, exposing a sock between Brandon's legs.

At 6 a.m. on December 25, Brandon appeared at Gutierres' house, and Gutierres saw that Brandon's face, lip, and jaw were swollen and bleeding and that her right back was reddened. Leslie Tisdel summoned the police, and Hemmerling responded.

Brandon was transported to the local hospital by ambulance, where she identified herself as Teena Rae Brandon and reported that she had been assaulted. Because on a prior occasion Brandon had represented herself to hospital personnel as male, they asked her to remove her clothing so that they could determine her gender. At this time, Brandon's demeanor changed from a very solemn state to an emotional one; although no mention of any sexual assault had been made, and it was the first mention in Hemmerling's presence, Brandon asked, "Who told you I was raped?" Examination revealed that she appeared to be bleeding from her vagina in the area of the hymen, a condition which suggested that vaginal penetration had occurred. Brandon named Nissen and Lotter as her attackers and said she believed that they had used condoms.

According to Hemmerling, Brandon said at the hospital that the two had raped and beaten her at two separate locations and that an automobile accident had intervened between the attacks. She reported that one attack took place in the back seat of an automobile in a field north of town by the Hormel plant. She denied any anal penetration and said she had been assaulted because of a dispute about a bond that had been posted for her. When they returned to Nissen's house, Brandon escaped by kicking out a bathroom window.

Hemmerling and Officer Sean Nolte later confirmed that the bathroom window had been broken out of Nissen's house. On

December 25, Richardson County Sheriff Charles Laux and Chief Deputy Thomas Olberding found two used condoms, a condom package, an empty Busch beer can, and a pair of rolled-up socks near the Hormel plant.

In the meantime, Caverzagie had seen Nissen at 1:10 a.m. at the police station on December 24, 1993. At that time, Nissen told Caverzagie that at Lana Tisdel's request, he had posted a bond to get Brandon out of jail and was trying to have the bond revoked. Nissen said that the money he used was obtained as the result of Lana Tisdel's changing the amount on and cashing a check from her father. He was afraid the father would be after him if Brandon should abscond. Nissen asked Caverzagie if he would get in trouble if he tied her up or forced her to stay at his house, as he wanted to keep Brandon from fleeing. As he left the police station, Nissen stated that he had discovered Brandon was female when he pulled her pants down and "felt the hair" or "fur."

In the written statement Brandon gave officers following interviews on December 25, 1993, she did not recite that she was assaulted at two locations and did not mention anal penetration. However, when talking to the interviewing officers, she said that Nissen may have penetrated her anally. According to Gutierres' statement, Brandon had told Gutierres' daughters that she had been both vaginally and anally assaulted. Because of concerns about inconsistencies in her version of the occurrence, Olberding scheduled another interview with Brandon during the afternoon of December 29, but Brandon did not keep the appointment.

On December 28, Nissen voluntarily went to the police station and, after being read his *Miranda* rights, gave a statement to police investigator Keith Hayes and Olberding. Nissen reported that he had been drinking alcoholic beverages, including either Miller, Busch Light, or Busch beer. He also admitted that he pulled Brandon's pants down at his house to determine what sex she was. He further revealed that during an argument at his house over Brandon's lying about her gender, he hit her in the mouth, slapped her cheek, and after she fell to the floor, kicked her in the back. In addition, Nissen confessed that when in the area of the Hormel plant, he punched Brandon in the

stomach. However, he denied that he had sexually assaulted Brandon or had forced her out of his house and into the automobile for the trip to the Hormel plant against her will. Nissen was allowed to leave at the conclusion of the interview.

On December 30, 1993, Caverzagie read the investigative reports prepared by Hemmerling, Nolte, and Hayes and the statements given by Brandon, Gutierres, Leslie Tisdel, and Lana Tisdel, then went home to sleep.

At approximately 10 a.m. on December 31, the victims of the murders at issue were discovered, and Caverzagie was called to work by the dispatcher. Later that day, Caverzagie, Hayes, Hemmerling, other members of the police department, Olberding, and Nebraska State Patrol Investigator Roger Chrans met at the police station.

Caverzagie was initially told that there had been warrants issued for the arrest of Nissen and Lotter and that he was to assist in making the arrests and perhaps in conducting a search. According to Caverzagie, the purpose of all the officers meeting at the police station that day was to execute search and arrest warrants. But once Caverzagie arrived at the station, Hemmerling told him that warrants had not been issued. Before leaving for Nissen's house, Caverzagie reviewed the physician's report, the photographs Hemmerling had taken of Brandon at the hospital, a photograph of Nissen's house, and two statements given by Lotter's girl friend.

At 4:15 p.m. on December 31, the officers surrounded Nissen's house and arrested both Nissen and Lotter. According to Caverzagie's report, he and "Officer Cowan then transported . . . Nissen to the Richardson County Sheriff's Office. He was also booked in for first-degree sexual assault and arrested as per warrant and lodged in the Richardson County Jail." When questioned as to why the report reflected that the arrests were made as the result of warrants, Caverzagie testified that he guessed it was "probably a habit or a paper glitch."

However, other law enforcement personnel believed that Nissen's arrest took place as per warrant. Chrans said that he would not have been at the arrest if he had known that warrants had not been issued. Hayes stated that he believed the warrants had been signed when they went to make the arrests. Moreover,

Hayes contradicted Caverzagie's statement that he knew there were no warrants by testifying that Caverzagie confided after the arrests that he was concerned because County Attorney Douglas Merz had recently told Caverzagie that the warrants had possibly not been obtained prior to the arrests. Hayes believed Caverzagie told him that he believed at the time he made the arrests that he was relying on existing warrants. Caverzagie has no memory of such a conversation.

As Olberding was returning from assisting in the arrests, he was met in the courthouse parking lot by Merz, who asked Olberding to accompany him to a hearing before Richardson County Judge Curtis Maschman. At the hearing, which began at 5:23 p.m. on December 31, 1993, Olberding swore to the accuracy of Merz' affidavit in support of his application for an arrest warrant, notwithstanding that Nissen had already been arrested and was in custody at the courthouse. When asked in his deposition what he thought of obtaining arrest warrants for persons who were already in custody, Olberding stated that he thought it was unusual and assumed that Merz was simply "covering law enforcement's ass."

Merz' affidavit recited that Brandon claimed that on December 25, Nissen physically attacked her and forced her into an automobile driven by Lotter, and both Nissen and Lotter then subjected her to nonconsensual sexual penetration. Olberding did not inform the county judge that Nissen was already in custody. Neither did Merz advise the county judge of Brandon's prior criminal history or that Nissen was already in custody and in the building. Merz claims that at the time, he did not know that Nissen was already in custody. The county judge was given no information concerning Brandon's prior history, her contradictory statements concerning the assault, her past false identification and statements to police officers, or Nissen's denial that he had sexually assaulted Brandon.

The county judge issued a warrant for Nissen's arrest for aiding and abetting a first degree sexual assault and kidnapping on December 25, 1993, and Olberding served it upon Nissen.

At around 10:15 p.m. on December 31, Hayes and Chrans interviewed Nissen after he was advised of his *Miranda* rights and had signed a waiver form. According to Chrans, Nissen was

coherent, did not refuse to cooperate, did not ask for an attorney, and at no time indicated a desire to remain silent. Although the jailer recalled no such requests, Nissen claims that in spite of his one or two requests that he be allowed to make telephone calls before giving the December 31 statement, such was not permitted. Nissen further claims that he was not allowed to make any telephone calls after the December 31 statement, stating that it was 3 or 4 days before he was allowed to make such calls. In addition, although denied by the investigators, Nissen testified that he was told by Hayes on December 31 that giving a statement would help him down the line. Chrans falsely told Nissen they knew he had told his wife to lie about the time he returned home on the night of the murders.

In the December 31 statement, Nissen said that he drove Lotter to the farmhouse to scare Brandon for filing the sexual assault complaint against them. When asked whether he and Lotter had killed the people found at the farmhouse, Nissen nodded his head up and down and quietly said yes. He provided a detailed description of the time he and Lotter spent together before the killings and described the killings in detail. For example, Nissen explained that after he and Lotter had left a bar, he drove to his house, and after he ate, he drove Lotter around and stopped at another house where Lotter picked up a gun stored in a box. Lotter said he wanted to take care of Brandon, and Nissen replied not to hurt anyone else. Nissen drove to what he described as Brandon's house, arriving at about 2 o'clock in the morning. Wearing gloves, they broke in through the front door. They found Lambert, who was then unknown to Nissen, lying in a bed and a baby nearby in a crib. Nissen picked up and held the baby to quiet it, gave it to Lambert when Lambert asked, and later took the baby from Lambert and again put the baby in the crib. Brandon was on the floor trying to hide. After a loud discussion between Brandon, Nissen, and Lotter, Lotter shot Brandon. Upon being asked by Nissen, Lambert said that DeVine was in the house, after which Lotter shot her. DeVine was taken into the living room, where Lotter shot him as well. The baby was left alive. The events took about 10 minutes, and Nissen drove back to his house, arriving at about 3 o'clock that morning. On the drive to his house, a pair

of gloves, the box, and the gun were thrown over a bridge, and the other pair of gloves was tossed out after passing the bridge. As a result of this statement, law enforcement personnel, in the early morning of January 1, 1994, recovered a pair of gloves, a pistol, a box, and a knife and knife sheath. Subsequent analysis showed the knife to have been bloodied.

The statement taken at approximately 7:10 on the evening of January 2 essentially repeated the information Nissen provided on December 31. However, the second statement added some details, such as that Lotter had shown Nissen a knife on the drive to the Lambert farmhouse. Nissen also made a drawing of the bedroom where Brandon and Lambert were killed, and on a drawing made by Hayes marked where Nissen parked his automobile and the location of the door through which he and Lotter entered the Lambert farmhouse.

Nature of Arrest.

We cannot, and do not, countenance the manner in which the warrant for Nissen's arrest was obtained. While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). The doctrine of mootness is a key component in determining whether an actual case or controversy exists. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State v. McCormick*, 246 Neb. 890, 523 N.W.2d 697 (1994).

In *Abram v. State*, 606 So. 2d 1015 (Miss. 1992), warrants were issued for the arrest of Abram on two charges of capital murder and one charge of armed robbery. The sheriff arrested and took Abram into custody that same day. However, the sheriff did not serve the warrants on Abram until 3 days after the arrest. Abram challenged the legality of the arrest, asserting that there was not probable cause for the warrants to issue. However, the court determined that the issue for consideration was whether the sheriff had probable cause to arrest Abram notwith-

standing the warrants. The court reasoned that the "validity of the warrants is a moot point . . . since Abram was not technically arrested by warrant until . . . three days after he was functionally arrested without a warrant." *Id.* at 1025.

Likewise, once Nissen was arrested and placed in custody, the issue as to whether there existed probable cause to issue a warrant for his arrest became a moot point. As a result, the court could not properly exercise judicial power to conduct the arrest warrant hearing. See *State v. Baltimore, supra.* We thus consider Nissen's arrest to have been effected without a warrant and further consider the arrest to have taken place when he was first taken into custody at his house.

The provisions of both U.S. Const. amend. XIV and Neb. Const. art. I, § 7, protect against unreasonable seizures. See *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996) (reasonableness of search). Thus, an arrest without a warrant can be valid only if there existed at the time probable cause to believe both that a felony has been committed and that the person arrested committed it. See, *State v. Russ*, 193 Neb. 308, 226 N.W.2d 775 (1975); Neb. Rev. Stat. § 29-404.02 (Reissue 1995). Moreover, when law enforcement personnel have acted without a warrant, the burden is upon the State to prove that the arrest was reasonable. See *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992) (reasonableness of search).

In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *Konfrst, supra.*

It must also be borne in mind that when a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* 510 U.S. 836, 114 S. Ct. 113, 126 L. Ed. 2d 78. Probable cause for a warrantless arrest is to be evaluated by the collective infor-

mation of the police engaged in a common investigation. *Van Ackeren, supra.*

With those rules in mind, we conclude on de novo review that the State sustained its burden of proving that law enforcement personnel had probable cause to arrest Nissen. It is true, as Nissen points out, that Brandon had made contradictory statements about the assault perpetrated upon her, that she had in the past made false statements to law enforcement personnel and engaged in criminal activity, that she failed to keep a scheduled appointment with Olberding, and that law enforcement personnel had not acted upon her assault complaint. But the findings upon the physical examination at the hospital; the recovery by law enforcement personnel of items of physical evidence corroborating the assault; and Nissen's own admissions, including his question to Olberding about keeping Brandon from fleeing, provided ample evidence to establish that he had at least aided and abetted in the felony of first degree sexual assault, Neb. Rev. Stat. §§ 28-205 and 28-319 (Reissue 1995), and committed the felony of kidnapping Brandon, Neb. Rev. Stat. § 28-313 (Reissue 1995). In so determining, we have noted Nissen's position that he was inside his house when he was seized. However, in view of the foregoing analysis, whether he was inside or outside his house at the time is immaterial. See *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (statement obtained while legally detained at police station after unconstitutional warrantless arrest in home not related to underlying illegality and thus not suppressible).

Neither is Nissen's contention that the arrest was pretextual of any significance. It is true that an arrest in reality effected as a pretext to search for evidence is unreasonable under the 4th and 14th Amendments to the U.S. Constitution. *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). However, the U.S. Supreme Court, citing *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), has observed that police conduct justified on the basis of probable cause is not invalidated by ulterior motives. *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

As we have determined that Nissen's arrest was made with probable cause for aiding and abetting a sexual assault and a

kidnapping, it necessarily follows that the arrest is not rendered invalid because the officers also suspected Nissen of having killed Brandon and the other victims.

We begin by recalling that the voluntariness of a statement is to be tested by looking at all the circumstances, and the finding of the trial court will not be set aside unless clearly erroneous. *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). See, also, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996) (other than findings of reasonable suspicion for stop and probable cause for warrantless searches, findings of trial court on motions to suppress to be upheld on review unless clearly erroneous). Moreover, in making this determination, 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. *Konfrst, supra*. With those rules in mind, we turn our attention to the three defects which Nissen claims make the two statements at issue inadmissible in evidence.

First, Nissen argues that the statements should have been suppressed because they were obtained as the result of deception. It is true that a statement must be suppressed if it is obtained by offensive police practices or is obtained under circumstances in which the free choice of the defendant was significantly impaired. *State v. Haywood*, 232 Neb. 97, 439 N.W.2d 511 (1989).

There is no question Nissen was deceived when falsely told that law enforcement personnel were aware that he had asked his wife to lie about when he returned to his house. Mere deception, however, will not render a statement involuntary or unreliable. *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992). The test for determining the admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement. *Mantich, supra*; *Haywood, supra*. Thus, in *Walker, supra*, we held that the district court was not clearly wrong in finding that falsely telling the defendant that to have sex was not to have committed rape did not render the statement invalid. And in *Haywood, supra*, we held that the interrogator's deception in falsely telling the

defendant that his fingerprints had been found on the bag containing cocaine was not such an offensive police practice as to have affected the trustworthiness of the defendant's subsequent statements.

Inasmuch as Nissen knew that law enforcement personnel were aware of his prior contacts with Brandon, we cannot say the trial judge was clearly wrong in finding that the falsehood in question did not render Nissen's subsequent inculpatory statements false or unreliable.

Nissen next urges that he was improperly induced to make the statements at issue by having been told that doing so would assist him. But analysis of this claim is not warranted other than to observe that the officers conducting the interviews denied that such a statement was made. The conflict in the evidence was for the trial judge to resolve. *Konfrst, supra.*

Lastly, Nissen argues that the statements were rendered inadmissible because he was detained more than 48 hours without a judicial determination of probable cause to continue his detention.

Neb. Rev. Stat. § 29-410 (Reissue 1995) provides:

> Any officer or other person having in lawful custody any person accused of an offense for the purpose of bringing him before the proper magistrate or court, may place and detain such prisoner in any county jail of this state for one night or longer, as the occasion may require, so as to answer the purposes of the arrest and custody.

However, the U.S. Supreme Court, in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), the U.S. Supreme Court explained that prompt means within 48 hours, at the longest. In that regard, the Court wrote:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was

> delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.
>
> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends.

500 U.S. at 56-57.

That there here existed no exigent or unusual circumstances which prevented the State from conducting a timely probable cause proceeding is strongly suggested by the fact that at 5:23 p.m., slightly more than an hour after Nissen was arrested, a hearing was convened before a county judge for the purpose of obtaining an arrest warrant for Nissen. Especially telling are the facts that one of the arresting officers was present at the hearing and that the hearing was held in the same building at which Nissen was being detained. Also suggesting that no extraordinary circumstances existed is the fact that at 3:55 p.m. on January 2, 1994, 47 hours 40 minutes after Nissen was arrested, the State conducted proceedings before Richardson County Court Clerk Magistrate Marjorie J. Eames, who seemingly purported to find that probable cause to continue Nissen's detention existed. The fact that a clerk magistrate has no authority to

make such a determination, Neb. Rev. Stat. § 24-519 (Reissue 1995), apparently escaped the State's attention, as well as that of the magistrate. Assuming without deciding that not holding a probable cause hearing was unreasonable in the instant case, the question becomes, what is the remedy? Nissen argues that the statements should be suppressed. However, other jurisdictions hold otherwise.

In considering the remedy for violating the 48-hour rule, some courts have interpreted the *McLaughlin* language quoted earlier as meaning that the failure to make a timely probable cause determination bears only upon the issue of the voluntariness of a confession, and is only one of several factors to be considered in that respect. See, *West v. Johnson*, 92 F.3d 1385 (5th Cir. 1996); *U.S. v. Perez-Bustamante*, 963 F.2d 48 (5th Cir. 1992), *cert. denied* 506 U.S. 1023, 113 S. Ct. 663, 121 L. Ed. 2d 588; *State v. Tucker*, 137 N.J. 259, 645 A.2d 111 (1994).

We adopt the reasoning in *West*, *Perez-Bustamante*, and *Tucker* that the failure to hold a probable cause hearing within a reasonable time is but one factor in the totality of the circumstances analysis to determine the voluntariness of the statements. As we concluded above, the State sustained its burden of proving that law enforcement personnel had probable cause to arrest Nissen. Therefore, if a probable cause hearing had been afforded Nissen within 48 hours of his detention, it is clear the State could have offered sufficient evidence that the continuing custody of Nissen would have been lawful. Moreover, we note that Nissen admitted within 6 hours of his detention his involvement in the crime, and his second statement added nothing of significance to his earlier statement.

Our finding that abundant evidence existed to justify Nissen's detention strongly supports the conclusion that the delay had little or no impact on the voluntariness of his statements. As discussed in the analysis regarding whether the deceptive comments or possible inducement coerced Nissen into confessing, the record does not reflect any such overbearing of Nissen's free will. Likewise, with the addition of the delay as a factor for the totality of the circumstances test, the record is absent any evidence that the failure of not holding a probable cause hearing within 48 hours, by itself or in conjunc-

tion with the other questionable police practices, overbore Nissen's free will.

Accordingly, it was not error for the January 2, 1994, statement or the December 31, 1993, statement to be admitted into evidence.

The record fails to sustain this assignment of error.

Jury Selection.

In the third summarized assignment of error, Nissen argues that because of the trial judge's improper comments during the selection of the jury, the trial judge erred in overruling Nissen's motion for mistrial.

We review this claim under the rule that the decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of an abuse of discretion. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993).

During voir dire, Nissen questioned a panel of five venirepersons concerning his right not to testify or present evidence. After both parties passed the five venirepersons for cause, the trial judge remarked, in pertinent part:

> Okay. I always feel kind of bad because I know we're at least sending one of you out of here with maybe a little distaste in their mouth. The thing I've got to worry about, you see, is saying too much, because the Court's got to go right down the middle of the road and the defendant's entitled to things and the State's entitled to things. For those 12 that are selected, I've always found — and I always go and talk to the jury after they've served and the process is over with — I've always found that a lot of the things that are probably running through your mind now are cleared up, and they're glad they've served. I might just mention this one thing, because you mentioned somethin' about the defendant's — it bothers a lot of people the defendant has a right not to take the witness stand. And I never did fully understand that even as a lawyer until I started tryin' cases and talkin' to jurors. And after the — especially criminal cases, these cases are tough. You know what I mean?

> They're not black and white. Cases that go to trial are tough. And jurors want as much as they can get their hands on to help them make that decision. And they always ask what kind of a guy or what kind of a gal was he? Well, if the defendant takes the witness stand, if they've got a history that would suggest they're not a nice guy, the jurors take that frequently and hold it against him, even though it has nothing to do with the trial. Do you see what I'm sayin'? So we think in terms of, well, gosh, he didn't testify. That isn't the reason a lot of time they don't testify. Do you see what I'm sayin'? So you can't always look at things at face value. Sometimes there's other reasons why it's a good rule of law. And it just so happens our Constitution says they don't have to testify. And it becomes very important that you, as lay people, understand that rule and not hold it against the defendant, even though it may be tough because of your surface perceptions. Do you follow me? Well, we can't get into — That'd take a semester in law school to discuss that one little issue, and we can't do that during jury voir dire. So I feel kind of bad sometimes that the 12 will understand a lot of this by the time they're through, but the poor people that don't get picked as the 12 leave here frustrated with the system, even more than when they come in. So I hope you just kind of keep an open mind.

Nissen then unsuccessfully moved for a mistrial, claiming that the remarks improperly suggested that the reason he might choose not to testify was because he had a bad history.

Of the five venirepersons who were subjected to the trial judge's remarks concerning a criminal defendant's rights, four were stricken. Nissen did not testify or present evidence in his defense.

Prior to the jury's commencing its deliberations, the trial judge properly instructed that Nissen's failure to testify could not be considered an admission of guilt and must not influence the verdict in any way.

Neb. Evid. R. 513, Neb. Rev. Stat. § 27-513(1) (Reissue 1995), provides, "The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject

of comment by judge or counsel. No inference may be drawn therefrom." Rule 513(3) further provides, however, that "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

We have repeatedly written that a trial judge should carefully refrain from expressing any opinion of or commenting on the evidence. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996); *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993); *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992). When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury. *Rodriguez, supra*. More specifically, we wrote in *Hansen v. State*, 141 Neb. 278, 286, 3 N.W.2d 441, 446 (1942): "As a general rule, 'It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury * * * but also on the examination of witnesses and otherwise during the course of the trial. . . .' "

However, Nissen's characterization of the comments at issue does not represent them fairly. Read as a whole, they advised that while sometimes defendants do not testify because of an unfavorable history, perhaps unrelated to the events in question, there are other reasons; they advised that cases go to trial because they are not clear; and they admonished the jury to keep an open mind. Thus, while the trial judge's comments were certainly unnecessary and ill advised, they did not permit the jury to draw an unfavorable inference from Nissen's failure to testify and adduce evidence.

That being so, the trial judge did not abuse his discretion in overruling Nissen's motion for mistrial, and this assignment of error thus fails.

Admission of Evidence.

In the fourth summarized assignment of error, Nissen argues that the trial judge improperly admitted evidence that Brandon had reported she had been assaulted or kidnapped and that Nissen and Lotter perpetrated the offenses, and the content of certain telephone conversations a freelance journalist claims to have had with Nissen.

This aspect of our review is controlled by the rule that in proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994).

The evidence in question is that Brandon reported to the police that she had been assaulted, kidnapped, and raped by Nissen and Lotter; that she was seen to have been injured; that Nissen was told of Brandon's report and was questioned about it; and that Nissen admitted having removed Brandon's pants, admitted being disgusted when he learned Brandon was female, and stated that Lotter raped Brandon in the automobile Nissen was driving at the time.

Nissen claims that the foregoing evidence was wrongly admitted because it was irrelevant and thus inadmissible under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995), which makes only relevant evidence admissible; that even if otherwise admissible, its probative value was substantially outweighed by the danger of unfair prejudice and thus excludable under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995); and that, in any event, the evidence was rendered inadmissible because no hearing was granted as required by Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995). Rule 404 provides, in relevant part,

> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

We deal first with whether rule 404(3) required a separate hearing. We most recently reviewed this matter in *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996), wherein we held that proof in a rule 404(3) hearing that there existed pending charges did not provide clear and convincing evidence that the defendant had committed the charged crimes. In *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995), we wrote that the hearing contemplated by the rule concerning a prior drive-by shooting need not be conducted prior to commencement of the trial, but could be conducted as part of the trial prior to admission of the evidence. And in *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995), we held that as no objection had been made at trial, the receipt of evidence following a rule 404(3) hearing that the defendant had previously stabbed the murder victim was not properly before us, but even if it had been, we could not say admitting the evidence constituted an abuse of discretion.

However, none of those cases are applicable to the situation here presented. In the foregoing cases, the purpose of the questioned evidence was to show that the claimed prior crimes, wrongs, or acts actually took place; here, the purpose of the questioned evidence was not to show that Nissen had in fact assaulted, kidnapped, or raped Brandon, but to establish that Brandon's report claiming those events provided the motive for the murders which followed. Stated another way, the gravamen of the evidence was not that the claimed crimes took place, but that they were represented and reported by Brandon as having taken place. It is the report, not the occurrence or nonoccurrence of the claimed events, which provides the motive. Under that circumstance, rule 404(3) has no application.

That brings us to whether the questioned evidence was relevant. As the motive for the crime charged is relevant to the issue of intent, see *McBride, supra*, the answer is in the affirmative. Moreover, while the evidence may well have been prejudicial to Nissen's defense, it cannot be said that it was unfairly so. In the context of rule 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis. That cannot be said to exist here. Whether Brandon's report provided a

motive for killing her was a legitimate matter for the jury to consider and resolve.

Eric Konigsberg, who was interested in writing about the crimes, testified that in the course of a telephone conversation with Nissen, Nissen said that he and Lotter went to the Lambert farmhouse to "scare the shit out of" Brandon; that after they had entered the bedroom, Nissen sat Brandon on the edge of the bed; that Lotter shot and Nissen stabbed her, but Nissen could not remember whether he stabbed her before or after she was shot; that Nissen talked to Lambert and gave her the baby to hold; and that Lambert was shot, as was DeVine.

Nissen asserts that the content of the telephone conversation should not have been admitted, as it was not properly established that he was the person with whom Konigsberg was talking. But we need not decide whether Nissen's identity was properly authenticated, as there was nothing in Konigsberg's testimony which came as a surprise to the jury, including the fact that Nissen had stabbed Brandon. Prior to Konigsberg's being called to the stand, the jury had heard from Harry David Foote, one of Nissen's fellow jail inmates, that while the two were sitting in a weight room and Nissen was talking about a variety of things, including how much he missed his family, he "blurted out in a low voice, 'If I hadn't have stabbed her, maybe [Lotter] wouldn't have started shootin'.' "

Thus, even if we were to assume that the telephone conversation had not been sufficiently authenticated, we would be unable to say that admitting the conversation into evidence would have constituted prejudicial error; since the evidence was cumulative, the error would have been harmless beyond a reasonable doubt. See *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996) (erroneous admission of evidence harmless error and does not require reversal if evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports finding of trier of fact).

For the foregoing reasons, the record fails to sustain this assignment of error.

Motion to Dismiss.

In the fifth summarized assignment of error, Nissen argues that the trial judge wrongly overruled the motions he made at

the close of the State's evidence, and after he elected not to adduce any evidence, for dismissal of the charges of first degree murder committed while perpetrating a burglary with the intent to commit false imprisonment or witness tampering, on the ground that the evidence fails to support either of those theories of guilt.

Inasmuch as the jury acquitted Nissen of the first degree murder charges related to Lambert and DeVine, we need not, and do not, consider this assignment of error as to those deaths, for any error with respect to those charges would necessarily be harmless.

In considering the issue with respect to Brandon's death, we recall that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence; that is to say, a directed verdict is proper only where an issue should be decided as a matter of law. See *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994). Thus, if there is any evidence which will sustain a finding for the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. See *id.*

First degree false imprisonment is committed when one "knowingly restrains or abducts another person . . . under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury." Neb. Rev. Stat. § 28-314 (Reissue 1995). Nissen confessed to the following, which was introduced at trial: He transported Lotter to the Lambert farmhouse. He and Lotter got out of the car, and Lotter had the gun in his hand. Lotter kicked open the door to the house and they went in. They discovered Brandon on the floor by the foot of the bed trying to hide. Brandon was made to get up off the floor, and then Brandon sat on the bed. A loud discussion ensued while Lotter pointed the gun toward the bed. Lotter then shot Brandon.

Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate. *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987); *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984). Thus, contrary to Nissen's posi-

tion, sufficient evidence was presented from which a jury could reasonably infer that Nissen, either alone or while aiding and abetting Lotter, intended to restrain Brandon, under terrorizing circumstances which exposed her to the risk of serious bodily injury, at the time he and Lotter broke into and entered the Lambert farmhouse.

That brings us to the matter of witness tampering, which occurs when one, "believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted . . . attempts to induce or otherwise cause a witness [or] informant . . . to," among other things, "[w]ithhold any testimony [or] information . . . ." Neb. Rev. Stat. § 28-919 (Reissue 1989). For the purpose of this statute, a witness is anyone who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it. *State v. McCoy*, 227 Neb. 494, 418 N.W.2d 250 (1988).

The evidence that Nissen went to the Lambert farmhouse to scare Brandon and that a loud discussion ensued before she was killed enabled the jury to conclude beyond a reasonable doubt, if it so chose, that Nissen, either alone or while aiding and abetting Lotter, intended to persuade Brandon to withhold any further information concerning the rape she had reported. Beyond that, under the evidence the jury could well conclude beyond a reasonable doubt that Brandon was killed while being falsely imprisoned to keep her from giving further information about the claimed assault; after all, killing a witness is the ultimate means of silencing that witness.

The record fails to sustain this assignment of error.

Jury Instructions.

In the sixth summarized assignment of error, Nissen urges that the trial court improvidently instructed the jury on each of the five theories of first degree murder pled by the State, refusing to instruct the jury as he requested concerning those theories, giving certain instructions related to those theories, refusing to submit special verdict forms related to those theories which would have required the jury to specify the element of each crime it found to exist, and improperly instructing the jury on the meaning of "premeditated."

With the exception of the instruction defining premeditated, Nissen's arguments reiterate the premises and positions resolved adversely to him earlier in this opinion, and therefore require no further analysis.

As to the remaining issue, the trial judge instructed: "'Premeditated' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." There are unquestionably more elegant ways of correctly defining the term, for example, as Nissen tendered, "conceived or thought of beforehand; already meditated upon before doing the act." But the trial judge's definition was not incorrect. Indeed, a number of our opinions define the term in essentially the same words as used by the trial judge. E.g., *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992); *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). Inasmuch as the instruction given in this regard is correct, no error can be predicated upon the trial judge's refusal to give Nissen's requested instruction. See *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992).

The record fails to sustain this assignment of error.

Jury Deliberations.

In the seventh summarized assignment of error, Nissen argues that the trial judge wrongly failed to sustain his motion for mistrial on the ground that the jury engaged in misconduct during its deliberations.

After the jury panel was selected and prior to its being sworn, the trial judge talked to the panel about the need to not discuss the case with each other or others and not expose themselves to outside information, saying:

> So I'm really gonna emphasize the fact that you shouldn't visit with your husbands, your best friend, with each other, with the neighbor, listen to the television or read the newspaper. And of course, that's the reason for sequestration. I've always felt jurors were, you know, mature and adult and intelligent enough that they could sort through all that. So we're not gonna do any sequestration. We're gonna let

> you come and go, and then while you're down there, we'll ask you to stay there from Monday through Friday. . . .
>
> . . . Well, anyway, we're not gonna sequester you, but we do ask you keep, you know, keep the faith with us on that other business.

At various times during the course of the proceedings, the trial judge admonished the jury not to visit about the case with each other or others. In submitting the case to the jury at approximately 11:15 in the morning, the trial judge instructed that until it reached a verdict, it would deliberate until 5 o'clock in the afternoon, or later if it wished, when it would "be conducted by the bailiff to [the] hotel for sequetration [sic]" and reconducted to the jury room the following morning to resume deliberations. The trial judge further "admonished that, during any periods of time that you are not all together in the jury room for deliberations, you shall not discuss this case with any person or with each other until you reconvene."

Having not finished deliberations, the members of the jury were kept together and provided with lodging. One juror complained in a note to the court that the husband of another juror had stayed in the latter's room the previous night. The complaining juror testified that her concern was that she was not even allowed to speak with her own husband on the telephone; however, she later stated, "I don't have a problem with [the offending juror]." The offending juror was sworn and admitted that the claim was true, but said that her husband had no interest in the case and that the two had no conversation about it except as to when the jury might reach a verdict. The juror also stated that she had mentioned her husband's staying the night to the clerk of the district court, the bailiff, and a security guard. These functionaries, however, denied on oath that such had occurred. The husband also testified on oath that he was not interested in the trial and that there was no discussion between his wife and him about what went on during the deliberations or about what went on during the trial, except that the wife had told him she would probably be finished deliberating the next day. The trial judge then instructed the entire jury that sequestration meant that during deliberations, the jury was to be isolated from the rest of the world.

Although Nissen characterizes the offending juror's behavior as misconduct, such is not the case. While when submitting the cause the trial judge instructed the jury that it was to be sequestered, after advising earlier that such would not occur, at no time until after the untoward event took place did the trial judge think to tell the jury what sequestration meant. The jury should have been instructed at the time the cause was submitted that, in the context used, sequestration meant that the jury would be in the custody of the court throughout its deliberations, that no jury member was to have any contact with anyone other than each other and the court personnel having charge of them, and that no member was to be exposed to any outside information about the case such as might be found in newspapers, magazines, radio programs, television programs, or electronic data bases.

Rather than jury misconduct, it is judicial trial error that is involved. Indeed, how those having charge of the jury could have permitted a nonjuror to enter any juror's room is difficult to comprehend. One of the major purposes of assigning personnel to take charge of a jury is to see to it that its members are protected from outside influences and kept safe, and it is a trial judge's responsibility to see that such is done. See *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991) (Neb. Rev. Stat. § 29-2022 (Reissue 1995) provides in effect once case submitted, jury to have no communication with nonjurors). Unhappily, this is the second time in the short span of 5 years that we have been confronted with situations in which personnel having charge of jurors appear to have had less than adequate training and less than a full appreciation of the role their duties play in securing a criminal defendant's constitutional right to a fair and impartial trial. See *Menuey, supra* (following submission of case, bailiff permitted discharged alternate juror to have lunch with jurors and to enter jury room to retrieve personal items). See, also, *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979) (fair trial before fair and impartial jury basic requirement of constitutional due process). We should not be presented with a similar failure of duty again.

Having made the foregoing observations, we turn our attention to the task of determining whether the dereliction of duty

which took place here requires that Nissen be granted a new trial. See *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995). While it is trial error and not jury misconduct which is involved, the fact remains that there was improper contact between a juror and a nonjuror. Thus, in making that determination, we look to jury misconduct cases to determine the appropriate remedy.

In the context of jury misconduct, we have written that whether the misconduct occurred is largely a question of fact, and the jurors may be questioned as to what happened during their deliberations. The determination as to whether the misconduct was prejudicial to the extent that the defendant was denied a fair and impartial trial is a question for the trial court, which question is to be resolved upon the basis of an independent evaluation of all the circumstances in the case. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). Consequently, we review this issue under a clearly erroneous standard as to the facts and under an abuse of discretion standard as to any finding of nonprejudicial misconduct.

When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises, and the burden is on the State to prove that the communication was not prejudicial. *Simants, supra*. It is the almost universal rule that unauthorized communications between jurors and third persons or witnesses during the course of the jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear. See *id.*

Here, the testimony demonstrates that the conversations had between the juror and her husband had nothing to do with the case except as to when a verdict might be returned. As there was no extraneous prejudicial information improperly brought to the juror's attention, the State has met its burden of proving that Nissen was not deprived of a fair and impartial trial by the conduct between the offending juror and her husband.

Nonetheless, Nissen urges that he is entitled to a new trial because the trial judge failed to make factual findings adequate to enable us to conduct our review.

In remanding the cause for a further hearing on the matter of jury misconduct, we wrote in *State v. Steinmark, supra*:

> When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

201 Neb. at 204-05, 266 N.W.2d at 754.

We reiterated that rule of judicial process in *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). But in this instance, the trial judge's failure to make express findings does not thwart our ability to conduct a meaningful review. There is here no dispute about the fact that a juror had her husband in her room and no dispute that nothing of significance was said by the husband to the wife. Under such a circumstance, we conclude on review, even in the absence of express findings of fact, that the trial judge's implicit finding that nothing significant was said by the husband to the wife is not clearly wrong. Nor is the trial judge's implicit finding that the complaining juror would be able to remain impartial clearly wrong. We further conclude that under the circumstances, the trial judge did not abuse his discretion in not granting Nissen a new trial.

The record fails to sustain this assignment of error.

Burglary Sentence.

In the eighth and final summarized assignment of error, Nissen urges, in essence, that while it is impossible to know whether the jury found Nissen guilty of first degree purposeful murder or felony murder in the killing of Brandon, it is clear that if the jury found that the killing constituted felony murder, then the burglary conviction merges with the felony murder, and the consecutive sentence imposed for the burglary was error and should be set aside.

In *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), in the course of holding that first degree false imprisonment was not a lesser-included offense of robbery, we wrote that the constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense. Thus, when a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated. Those observations were reiterated in *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989), a case in which we held that burglary was not a lesser-included offense of theft by receiving stolen property, nor the latter a lesser-included offense of the former.

Under the murder and burglary statutes set forth earlier, it is clear that as this case was charged and tried, burglary is a lesser-included offense of felony murder in the sense that it would have been impossible for the jury to find that Nissen committed felony murder without also finding that he committed the burglary. See *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (to be lesser-included offense, elements of lesser offense must be such that it is impossible to commit greater offense without at same time having committed lesser offense).

Thus, the record supports this assignment of error. However, since we cannot know if in the death of Brandon the jury found Nissen guilty of purposeful or felony murder, it is not necessary that the burglary conviction be vacated and set aside; such need be done only with respect to the sentence for that crime. Thus, even if the jury found that Nissen, either alone or while aiding and abetting Lotter, committed felony murder with respect to Brandon's death, he will not be subjected to double punishment by also punishing him for the burglary through which the felony murder was perpetrated.

CONCLUSION

For the foregoing reasons, we modify the judgment below by vacating and setting aside the sentence of imprisonment and fine for the burglary and, as so modified, affirm it.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES S. BERTAGNOLLI, RESPONDENT.

560 N.W.2d 179

Filed March 14, 1997. No. S-97-138.

Original action. Judgment of disbarment.

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

PER CURIAM.

James S. Bertagnolli was admitted to the practice of law in the State of Nebraska on June 24, 1968.

On May 10, 1993, Bertagnolli pled guilty to two counts of third degree sexual assault in the State of Colorado. On July 23, he was sentenced to serve 18 months in jail on each count, with the sentences to run consecutively. He was ordered to pay $7,230.59 in restitution, a $1,000 special advocate surcharge, and miscellaneous other costs.

On August 19, 1996, the Supreme Court of Colorado ordered that Bertagnolli be disbarred from the practice of law and that his name be stricken from the list of attorneys authorized to practice law in the State of Colorado.

On February 11, 1997, the Nebraska State Bar Association filed a motion for reciprocal discipline, seeking an order of disbarment against Bertagnolli. On February 24, Bertagnolli voluntarily surrendered his license to practice law in the State of Nebraska. In so doing, Bertagnolli specifically admitted that his conduct as hereinbefore set forth violated Canon 1, DR 1-102(A)(3) and (6), of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court. Bertagnolli waived his right to notice, appearance, or hearing prior to entry of this order.

We accept Bertagnolli's surrender of his license to practice law in the State of Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

D.K. BUSKIRK & SONS, INC., ET AL., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

560 N.W.2d 462

Filed March 21, 1997. No. S-94-270.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
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. **Tort Claims Act: Liability.** Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act.
4. **Tort Claims Act: Liability: Words and Phrases.** The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions.
5. **Tort Claims Act: Liability.** In cases where the facts are undisputed, the application of the discretionary function exemption of the State Tort Claims Act presents a question of law.
6. **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.
7. **Tort Claims Act: Liability.** The discretionary function or duty exemption in the State Tort Claims Act is inapplicable to a claim if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed, and cause remanded with directions.

Michael J. Franciosi, of Atkins, Ferguson & Carney, P.C., and James M. Carney, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellants.

Don Stenberg, Attorney General, Charles E. Lowe, and L. Jay Bartel for appellee.

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

GERRARD, J.

In this case, the Nebraska Court of Appeals reversed the order of the district court which had sustained a motion for summary judgment in favor of the State of Nebraska and dismissed 19 separate claims, based on the discretionary function exemption in the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990). *D.K. Buskirk & Sons v. State*, 96 NCA No. 6, case No. A-94-270 (not designated for permanent publication). The State has successfully sought further review in this court.

FACTUAL BACKGROUND

Nineteen plaintiffs brought separate actions against the State of Nebraska, Public Service Commission (PSC), pursuant to the State Tort Claims Act, with respect to the PSC's alleged negligent regulation of Quality Processing, Inc. (QPI), a grain dealer/warehouser. The plaintiffs are all farmers and ranchers who had entered into contracts with QPI for the sale or storage of dry edible beans and popcorn. The substance of the plaintiffs' claims was that the PSC was negligent in regard to its duty to enforce the Grain Warehouse Act, Neb. Rev. Stat. § 88-525 et seq. (Reissue 1987 & Cum. Supp. 1990), and the Grain Dealer Act, Neb. Rev. Stat. § 75-901 et seq. (Reissue 1990). As a consequence, when QPI filed for bankruptcy in February 1990, the plaintiffs collectively suffered losses of over $400,000.

QPI was licensed by the PSC as a grain dealer pursuant to the Grain Dealer Act, beginning in about July 1988. As a licensed grain dealer, QPI was permitted to purchase grain from producers for the purpose of selling such grain. QPI was not licensed by the PSC as a grain warehouse pursuant to the Grain Warehouse Act. Accordingly, QPI was not permitted to accept grain for storage. An individual or an entity that is licensed as a grain warehouse may also operate as a grain dealer.

The only evidence submitted in the summary judgment proceeding was the deposition of John Fecht, grain warehouse director for the PSC. Fecht was responsible for enforcing the terms of the Grain Warehouse Act. Fecht testified that during a September 8, 1989, telephone conversation with one of the owners of QPI, he learned for the first time that QPI was

engaged in the storage of beans. In order to bring QPI into compliance with the Grain Warehouse Act, Fecht arranged for the appropriate application forms and instructions to be sent to QPI. Fecht also dispatched two PSC inspectors to investigate and report on QPI's two grain storage facilities: one in Hemingford and the other in Ogallala.

QPI failed to return a completed application in a timely manner. On October 24, 1989, Fecht instructed a PSC staff accountant to contact QPI's accountant to discuss the status of QPI's grain warehouse license application. Specifically, the PSC staff accountant was to inform QPI that it should either complete the application and become licensed as a warehouse or use its grain dealer's license to purchase all the beans it was holding in storage.

QPI later informed Fecht that it had misplaced the application materials he had sent. Fecht provided QPI with another set of application materials on November 8, 1989. On December 11, the PSC received QPI's grain warehouse application. However, QPI failed to provide a required audited or reviewed financial statement with this application. QPI never corrected its omission, nor did it purchase all of the grain it was holding in storage. Notwithstanding, Fecht allowed QPI to continue functioning as a grain warehouse without a license, with the intent of eventually bringing it into compliance.

On February 12, 1990, Fecht was informed by a deputy sheriff in Alliance that QPI had issued insufficient-fund checks totaling $37,000. After further investigation, on February 27, Fecht filed a complaint with the PSC and set in motion proceedings for the suspension of QPI's grain dealer license.

Sometime after the suspension of its grain dealer license, QPI financially failed. Thirty-four individuals and businesses filed 44 claims with the PSC, seeking a share of QPI's forfeited grain dealer's bond. Only eight of these claims were allowed, and the bond covered approximately half of these allowed claims. The majority of the claims were denied for one of two reasons: either the claim was not filed in a timely manner or the claim was based on a contract for storage and not for the sale of grain. As a licensed grain dealer, QPI's bond could reimburse only those contracts in which QPI acted in its capacity as a

grain dealer. The bond could not be used to compensate losses occasioned by QPI's conduct as an unlicensed grain warehouse.

Nineteen of the individuals and businesses whose claims against QPI were denied filed suit against the State in the district court for Box Butte County, alleging negligence on the part of the PSC in its enforcement of the Grain Warehouse Act. On the State's motion, the matter was transferred to the district court for Lancaster County on November 12, 1991. The plaintiffs' individual claims were consolidated by order of the district court on January 12, 1992. The State answered and raised as an affirmative defense that it was acting within the meaning of the discretionary function exemption of the State Tort Claims Act.

The parties stipulated to bifurcate the issues of liability and damages. The State then moved the district court for summary judgment on the issue of liability. The State based its motion on the grounds that the undisputed facts show that the plaintiffs' claims may not proceed, as the State is exempted from suit pursuant to § 81-8,219(1), the discretionary function exemption of the State Tort Claims Act. Both parties offered in evidence the deposition of Fecht in support of their respective positions.

The district court granted the State's motion for summary judgment, finding in pertinent part:

> No rules or regulations have been established by the PSC setting forth a procedure to be used in issuing a grain warehouse license to an applicant. No rule or regulation exists which says that an application must be filled out and received by the PSC within "x" number of days after the PSC becomes aware that a person is operating without the appropriate license. No rule or regulation authorizes Fecht to allow a person to operate as a grain warehouse while the application process is ongoing. Conversely, no rule or regulation prohibits Fecht from trying to work with an operator while attempting to bring it into compliance.
>
> Broad discretion is to be afforded state agencies where the manner and method of carrying out the agencies' statutory duties is not specifically prescribed. When a statute does not prescribe the action to be taken, leaving the agency or employee to make a judgment and this judgment is based on social, economic or political considerations, it

> will be protected by the discretionary function. *See, Securities Investment Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *First Nat'l Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992); *Jasa v. Douglas County*, 244 Neb. 944, [510] N.W.2d [281] (1994).
>
> The court finds that Fecht's decision on how to handle the grain warehouse licensing procedure for QPI falls within the discretionary function exemption. The court will not second-guess Fecht's decisions in that regard.

The Court of Appeals reversed the judgment of the district court and remanded the cause for further proceedings. The Court of Appeals cited this court's decision in *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984), as standing for the proposition that in the context of a motion for summary judgment such as in the instant case, whether the State is entitled to the discretionary function exemption presents a question of fact. In reversing the judgment of the district court, the Court of Appeals found determinative "[t]he fact that both parties believed Fecht's deposition supported its position indicates that there were questions of material fact, which, when inferred in favor of Buskirk, would preclude summary judgment." *D.K. Buskirk & Sons v. State*, 96 NCA No. 6 at 10, case No. A-94-270 (not designated for permanent publication).

ASSIGNMENTS OF ERROR

In its petition for further review, the State assigns that the Court of Appeals erred in holding that in the context of a motion for summary judgment, application of the discretionary function exemption of the State Tort Claims Act presents a question of fact and that a genuine issue of material fact is presented in the instant case, precluding summary judgment.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997); *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997). 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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

ANALYSIS

The dispositive question in this appeal is whether the State's conduct in the instant case involves a discretionary function or duty for which the State cannot be liable due to the exclusion found in § 81-8,219:

> (1) The State Tort Claims Act shall not apply to:
>
> (a) Any claim based upon an act or omission of an employee of the state . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.

Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

That which is protected under the State Tort Claims Act, § 81-8,219(1), is the discretion of a governmental executive or administrator to act according to his or her judgment of the best course to be taken. Such discretion includes more than the initiation of programs and activities. Discretion includes determinations or judgments made in establishing plans, specifications, or schedules of operations. Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act. *Jasa v. Douglas County, supra.*

However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment. *Id.*

The Court of Appeals relied on our statement in *Wickersham v. State*, 218 Neb. 175, 182, 354 N.W.2d 134, 139 (1984), "[w]hether the State is entitled to the exemption for 'discretionary function or duty' under the State Tort Claims Act at this stage of the proceedings is a question of fact," to find that entitlement to the discretionary function exemption in the context of a motion for summary judgment presents a question of fact.

In *Wickersham v. State, supra*, blood samples taken from heifers sold at a sale barn arrived at the State laboratory in a condition rendering them unsuitable for brucellosis testing. The State did not order retesting of the animals, and the heifers became infected with brucellosis. When Wickersham removed them from quarantine, his cattle also became infected.

After the State Claims Board denied Wickersham's claim, he filed a petition against the State. The State answered and then moved for summary judgment based on the three affirmative defenses pled in its answer. The district court granted the State's motion. We reversed the district court's judgment and stated:

> Whether the State is entitled to the exemption for "discretionary function or duty" under the State Tort Claims Act at this stage of the proceedings is a question of fact. However, upon the same evidence presented at trial as has been presented in this appeal, the State will more than likely find the exemption of discretionary function or duty unavailable in any respect.

Id. at 182, 354 N.W.2d at 139. Thus, the *Wickersham* court's holding was necessitated because of the bare evidentiary record before it.

However, subsequent to *Wickersham v. State, supra*, we have uniformly maintained, in cases where *the facts are undisputed*, that the application of the discretionary function exemption of the State Tort Claims Act or Political Subdivisions Tort Claims Act presents a question of law. See, *Talbot v. Douglas County, supra*; *Jasa v. Douglas County, supra*; *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992).

In *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994), the district court entered a judgment against the county, concluding that the county's department of health had failed to take appropriate steps in regard to the presence of bacterial

meningitis in the population of a day care and nursery school, and that the county's negligence had caused the plaintiff to suffer permanent and catastrophic disability. We held that "whether the undisputed facts demonstrate that liability is precluded by the discretionary function exemption of the Political Subdivisions Tort Claims Act is a question of law." *Id.* at 946, 510 N.W.2d at 283. This is likewise true with respect to the discretionary function exemption of the State Tort Claims Act. Thus, we hold, in cases where the facts are undisputed, that whether liability is precluded by the discretionary function exemption of the State Tort Claims Act is a question of law, and, to the extent that the rule is stated or implied otherwise in *Wickersham v. State, supra*, it is disapproved.

In the instant case, both parties acknowledge that the facts are undisputed and that the applicability of the discretionary function exemption of the State Tort Claims Act is a question of law. We agree, and we conclude that the Court of Appeals erred in reversing the district court's judgment on the grounds that a genuine issue of material fact is presented.

Having concluded that the instant appeal presents only a question of law, we must now determine whether the district court erred in finding the discretionary function exemption of the State Tort Claims Act applicable in this case.

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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997). Thus, it is the State's burden to produce sufficient evidence showing it was acting as a matter of law within the discretionary function exemption of the State Tort Claims Act.

The discretionary function or duty exemption in the State Tort Claims Act is inapplicable to a claim if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct. *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

> [A]pplicability of the discretionary function exception in the State Tort Claims Act depends on the conduct in ques-

> tion, not on the identity of the actor. The discretionary function exception of the State Tort Claims Act includes a governmental regulatory agency and its action, conduct, and decisions. Judgment or choice is essential and indispensable for discretionary conduct excepted from negligence liability under the State Tort Claims Act. The discretionary function exception of the State Tort Claims Act protects or excepts only governmental decision, action, or conduct based on a permissible exercise of a public policy judgment.

Security Inv. Co. v. State, 231 Neb. 536, 546, 437 N.W.2d 439, 446 (1989).

In *Security Inv. Co. v. State, supra*, this court first took note of the fact that the State Department of Banking, while obligated to enforce Nebraska banking laws, is nonetheless vested with broad discretion to determine the method and manner of enforcing such laws and that public policy considerations necessarily operate whenever the department exercises its discretion in enforcement. Moreover, "none of the statutes . . . requires the Department to execute any of its authorized powers." *Id.* at 548, 437 N.W.2d at 447. Accordingly, we held that the asserted claims of negligence on the part of the department with respect to enforcement of the banking laws were excepted by the discretionary function exemption of the State Tort Claims Act.

In *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992), First National Bank of Omaha claimed that the State Department of Banking acted negligently with respect to the department's involvement in facilitating First National's acquisition of two state-chartered banking institutions which ultimately failed in the wake of the collapse of Commonwealth Savings Company. This court reaffirmed our decision in *Security Inv. Co. v. State, supra*, and added the conclusion that "operational level decisions made on the basis of a statute giving broad powers are not necessarily outside the discretionary function exemption." *First Nat. Bank of Omaha v. State*, 241 Neb. at 275, 488 N.W.2d at 348. Quoting *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), we explained: " 'Day-to-day management of banking

affairs, like the management of other businesses, regularly require [sic] judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. . . .' " *First Nat. Bank of Omaha v. State*, 241 Neb. at 275, 488 N.W.2d at 348.

In the instant case, the State argues that the PSC, much like the Department of Banking, was acting within a broad regulatory framework in which the individual charged with enforcement of the Grain Warehouse Act was to exercise his or her discretion in implementing the act and that this exercise of discretion necessarily involved public policy considerations.

In this regard, Fecht testified that there are no policies, rules, regulations, or handbooks which serve to guide his office in the inspection of a grain warehouse applicant. When Fecht learned QPI was operating as an unlicensed grain warehouse, he had two options: bring QPI into compliance or require it to purchase all stored grain pursuant to QPI's grain dealer's license. According to Fecht, neither option was mandated by an applicable statute, rule, or regulation. No timeframe is mandated by the law for an application to be received by the PSC from one operating as an unlicensed grain warehouse, and although there are no rules or regulations allowing an unlicensed grain warehouse to operate, there are likewise no rules or regulations which require such operation to be immediately shut down. The State contends that it is entirely within the PSC's discretion to work with an unlicensed grain warehouse and attempt to bring it into compliance.

On the other hand, the plaintiffs contend that the Grain Warehouse Act, in nondiscretionary terms, requires that the PSC "shall enforce the Grain Warehouse Act," § 88-545, and that "[n]o person shall operate a warehouse nor act as a warehouseman without a license issued pursuant to the Grain Warehouse Act," § 88-527. Section 88-545 provides that violation of the act constitutes a Class IV felony. The plaintiffs argue that because the plain language of the act makes its enforcement mandatory, the PSC is without discretion with respect to its duty to not allow QPI to act as a grain warehouse prior to issuance of the required license. We agree with the plaintiffs in this regard. The public policy judgments were made by the

Legislature in enacting the Grain Warehouse Act, including the mandatory nature of the act and the provision of criminal sanctions for violations of the act. Here, a statute prescribes a clear course of conduct for the PSC to follow. As such, the discretionary function exemption is inapplicable. See, *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

Furthermore, the State's argument fails because, contrary to its assertion, the PSC was not acting within a broad regulatory framework with respect to QPI's activity. The PSC is only authorized to regulate those entities which are licensed as grain warehouses. QPI was not so licensed and thus was not within the scope of the PSC's broad regulatory framework.

This is what distinguishes the result in the instant case from our holdings in *Security Inv. Co. v. State, supra*, and *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992). In those cases, the Department of Banking was exercising its discretion with respect to the regulation of an entity within its scope of authority. In contrast, the statutory scheme at issue in the instant case does not provide the PSC with discretion to permit the operation of an unlicensed grain warehouse, an entity outside the scope of its regulatory authority. Instead, the statutory scheme mandates that the PSC enforce the Grain Warehouse Act and not allow an unlicensed grain warehouse such as QPI to operate.

Thus, we hold that the State may not avail itself of the discretionary function exemption of the State Tort Claims Act in the instant case. Since the district court allowed the bifurcation of the liability and damage issues in this cause, we necessarily note that our holding is not a final determination regarding liability, as the issue of proximate cause was not presented nor was it considered by this court.

CONCLUSION

Accordingly, we affirm the judgment of the Court of Appeals, albeit on different grounds, and remand this cause to the Court of Appeals with directions to reverse the judgment of

the district court and remand the cause to the district court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating.

JENNY BROWN, APPELLANT, V. AMERICAN TELEPHONE & TELEGRAPH COMPANY ET AL., APPELLEES.

560 N.W.2d 482

Filed March 21, 1997. No. S-95-100.

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. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment, and as such, payment of workers' compensation benefits relieves the employer of tort liability in connection with an accident.
3. **Torts: Liability: Releases.** Generally, in a situation where two persons are not actively joint tort-feasors, but one person commits a tort and is primarily liable while the liability of the other person is secondary, the releasor's acceptance of satisfaction from one discharges the other as well.
4. **Workers' Compensation: Independent Contractor: Liability.** When an independent contractor is primarily liable and any liability of an owner is derived solely from the actions of its independent contractor, the protection of the workers' compensation laws that forms the sole remedy against the independent contractor also releases the owner from liability.
5. **Workers' Compensation: Negligence: Independent Contractor: Liability.** If there is evidence that an owner was directly or independently negligent through acts or omissions of persons unconnected to an independent contractor, the payment of workers' compensation arising from the independent contractor's employment does not release the owner from liability.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists and that such party is entitled to judgment as a matter of law.
7. **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.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

John P. Fahey, of Dowd, Dowd & Fahey, for appellant.

Timothy W. Marron, of Timmermier, Gross & Burns, for appellee American Telephone & Telegraph.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BUCKLEY, D.J.

WRIGHT, J.

Jenny Brown brought this negligence action seeking damages for injuries suffered in a slip-and-fall accident. American Telephone & Telegraph Company, Inc. (AT&T), was the owner of the premises where Brown worked as an employee of ARA Services, Inc. (ARA). The district court sustained AT&T's motion for summary judgment, and Brown 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. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996); *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996).

FACTS

On September 2, 1988, Brown was employed by ARA as a baker in the cafeteria located on the premises of AT&T. Brown allegedly slipped and fell on some standing water at or near her work station, which accident resulted in permanent injuries.

ARA had contracted with AT&T to provide cafeteria services for AT&T's employees at its Omaha location. The relevant provisions of the contract provided:

> EQUIPMENT PROVIDED BY [AT&T] - The cafeteria equipment listed in Attachment E, EQUIPMENT LIST AND FLOOR PLAN DRAWING (the "Equipment"), shall be furnished to [ARA] by [AT&T] at no charge. [ARA] agrees to indemnify [AT&T] for any claim made by [ARA's] employees, or by any other persons, for personal injury or property damage arising out of [ARA's] use of the equipment, which [ARA] agrees to accept at all

times during the term of this agreement as is, where is, and [AT&T] has no responsibility for its condition or state of repair except as set forth in the clause REPLACEMENT OF EQUIPMENT. [ARA] agrees not to remove it from [AT&T's] premises, to properly maintain it, and to return it to [AT&T] upon expiration or termination of this agreement or at such earlier time as [AT&T] may request, in the same condition as when received by [ARA], fair wear and tear excepted. Such use by [ARA] of the equipment shall be controlled by the clause entitled INSURANCE AND INDEMNITY.

. . . .

GENERAL - [AT&T] shall provide [ARA] with a cafeteria containing a kitchen, a serving area, and a dining area equipped with the appliances, fixtures, chinaware, glassware, flatware, trays, dining tables, and chairs listed on the attached inventory, together with the heat, hot and cold water, and utility services that may reasonably be required for the efficient performance of [ARA's] obligations under this agreement, and adequate, sanitary toilet facilities and dressing rooms for [ARA's] employees. Except as otherwise provided in this agreement, [AT&T] shall also furnish building and equipment maintenance, pest control, and janitorial services for the cafeteria, including the washing of walls, ceilings, filters, hoods and ducts of any ventilation systems in the kitchen, and, in the dining areas, table pedestals and chairs, and sweeping, mopping, stripping and refinishing floor area (exclusive of the area behind the serving counter). [AT&T] shall have full access, at all times, to the cafeteria premises and equipment with or without notice.

. . . .

[ARA] shall wash all cafeteria chinaware, glassware, flatware, trays, and utensils and wash or otherwise clean all kitchen equipment and all floors (except those which [AT&T] has agreed to wash or otherwise clean); remove garbage to the place [AT&T] shall designate; have all necessary laundering done; and wash all table tops in the dining area, and, during serving hours, keep all chair upholstery wiped clean.

In her amended petition, Brown alleged that AT&T was negligent in failing to repair or otherwise divert leaks from fixtures and equipment when AT&T knew or should have known of the leakage, which failure allowed water to accumulate on the floor at or near Brown's work station. She further alleged that AT&T failed to remove the accumulated water when it knew or should have known of the accumulated water on the floor.

AT&T's answer alleged that Brown had failed to state a cause of action and that Brown's exclusive remedy was against her employer for workers' compensation benefits. AT&T claimed it was entitled to the same defenses at law as Brown's employer.

AT&T moved for summary judgment, which the district court granted, and Brown appeals.

ASSIGNMENTS OF ERROR

Brown makes three assignments of error: (1) The district court erred in failing to hold that AT&T, as an owner in control of a premises where work performance under a contract with the owner is to be executed, is to exercise reasonable care to keep the premises in a safe condition; (2) the court erred in failing to hold that AT&T, as a possessor of land thus retaining control, is subject to liability for personal injuries to business visitors caused by a natural or artificial condition if AT&T knows, or by the exercise of reasonable care could discover the condition which, if known to AT&T, it should realize as involving an unreasonable risk of harm to the invitee; and (3) the court erred in failing to hold that where the principal, AT&T, is primarily liable, through acts or omissions of persons unconnected to the agent, ARA, the principal's liability is not derivative from the agency employment relationship, and the doctrine of respondeat superior does not apply.

ANALYSIS

ARA was an independent contractor hired to operate AT&T's cafeteria and vending machines, and Brown was an employee of ARA. As a result of her injuries, Brown received workers' compensation benefits from ARA. Therefore, ARA was released from any further liability for Brown's injuries. The Nebraska Workers' Compensation Act is an employee's exclusive remedy

against an employer for an injury arising out of and in the course of employment, and as such, payment of workers' compensation benefits relieves the employer of tort liability in connection with the accident. See *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995).

An issue remains as to whether the payment of workers' compensation benefits by ARA also discharged any liability on the part of AT&T. Whether AT&T has been relieved of liability through the release of ARA depends on the nature of AT&T's liability in this case.

Generally, in a situation where two persons are not actively joint tort-feasors, but one person commits the tort and is primarily liable while the liability of the other person is secondary, the releasor's acceptance of satisfaction from one discharges the other as well. See *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982). This is true because secondary liability does not indicate a degree of negligence, but, rather, a kind of wrong and a legal obligation which is imputed or constructive only, being based on some legal relation between the parties or arising from some positive rule of common or statutory law, such as under the doctrine of respondeat superior. See *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 207 Neb. 360, 299 N.W.2d 170 (1980).

Thus, when an independent contractor is primarily liable and any liability of an owner is derived solely from the actions of its independent contractor, the protection of the workers' compensation laws that forms the sole remedy against the independent contractor also releases the owner from liability. See, *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *Horvath v. M.S.P. Resources, Inc.*, 246 Neb. 67, 517 N.W.2d 89 (1994); *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993); *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled in part, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

However, if there is evidence that the owner was directly or independently negligent through acts or omissions of persons unconnected to the independent contractor, the payment of workers' compensation arising from the independent contractor's employment does not release the owner from liability. See,

Anderson v. Nashua Corp., supra; *Ashby v. First Data Resources, supra.*

Brown argues that AT&T was directly and independently negligent in failing to repair the leaking fixture and failing to remove the accumulated water which caused her to slip and fall. In other words, Brown contends that AT&T's liability was not derivative or secondary and that, therefore, the payment of workers' compensation benefits to Brown by ARA did not relieve AT&T of tort liability in connection with her accident.

In contrast, AT&T contends, in essence, that any liability possibly attributable to it was secondary because it had relinquished control of the cafeteria and its fixtures to ARA and because ARA had expressly accepted the direct obligation to repair all equipment and provide janitorial services. In granting summary judgment, the district court cited *Plock v. Crossroads Joint Venture, supra*, as being determinative. In *Plock*, the owner had relinquished actual control over day-to-day operations of a shopping mall to an independent contractor who was responsible for maintaining and repairing the premises. Under those circumstances, we held that where the employee of the independent contractor was injured as a result of a failure to maintain the premises or repair a patent defect, the liability of the owner was derived solely from the liability of the independent contractor. Therefore, the payment of workers' compensation benefits by the independent contractor relieved the owner of liability.

We thus consider whether AT&T had delegated to ARA responsibility for the repair and replacement of the appliances and for janitorial duties. If it had not, then AT&T would be primarily liable for the breach of such duties if, in fact, the breach caused Brown's injuries.

First, we consider the alleged duty to repair the leaking fixture. Brown does not allege that the appliances furnished were defective, but, rather, alleges that AT&T was negligent in failing to repair the leaks or otherwise divert the leakage. The contract between AT&T and ARA provides:

> [ARA] agrees to indemnify [AT&T] for any claim made by [ARA's] employees, or by any other persons, for personal injury or property damage arising out of [ARA's] use

> of the equipment, which [ARA] agrees to accept at all times during the term of this agreement as is, where is, and [AT&T] has no responsibility for its condition or state of repair except as set forth in the clause REPLACEMENT OF EQUIPMENT. [ARA] agrees not to remove it from [AT&T's] premises, to properly maintain it, and to return it to [AT&T] upon expiration or termination of this agreement . . . .

The clear language of the contract does not require AT&T to assume the duty to monitor and repair the equipment used by ARA and its employees. Rather, the contract clearly delegated that duty to ARA. Brown does not allege any active negligence on the part of AT&T with regard to the fixtures, nor does she contend that the fixtures constituted a latent defect. Thus, it is clear that ARA would not actively be a joint tort-feasor with AT&T, but, instead, ARA would be primarily liable for any failure to monitor and repair the fixture. Any liability of AT&T for failure to monitor and repair the allegedly leaking fixtures would be derived solely from the liability of ARA, and the payment of workers' compensation benefits relieved such liability.

We next consider whether, under the facts of this case, AT&T could be primarily liable for failing to remove the accumulated water. Under the language of the contract, AT&T incurred the duty to furnish janitorial services "for the cafeteria, including the washing of walls, ceilings, filters, hoods and ducts of any ventilation systems in the kitchen, and, in the dining areas, table pedestals and chairs, and sweeping, mopping, stripping and refinishing floor area (exclusive of the area behind the serving counter)." The contract further provided that ARA had the duty to "wash or otherwise clean all kitchen equipment and all floors (except those which [AT&T] has agreed to wash or otherwise clean)."

AT&T claims that "[p]ursuant to the contract, ARA was responsible to clean the floors behind the serving counter while, AT&T was obligated to clean the remaining areas." Brief for appellee AT&T at 10. It also claims that the evidence fails to pinpoint the exact location of Brown's fall, but contends that the deposition of Henry Davidson, Jr., manager of purchasing and transportation for AT&T, establishes that AT&T was not respon-

sible for cleaning in the area where Brown fell. It argues that since Brown did not rebut Davidson's testimony, AT&T is entitled to summary judgment.

Davidson testified that the contract in question was in effect in September 1988 and that prior to this contract period, AT&T had a contract with Midwest Maintenance Company (Midwest) to provide janitorial services in the cafeteria. He then stated: "We terminated that contract at — during this period . . . and arranged with ARA to provide that service themselves, and the service was provided." His recollection was that ARA then contracted out to Midwest itself.

Because this is an appeal from a summary judgment, we review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence. See *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996). The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists and that such party is entitled to judgment as a matter of law. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996). 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. *O'Connor v. Kaufman*, 250 Neb. 419, 550 N.W.2d 902 (1996).

Giving Brown all reasonable inferences regarding the evidence, we find no material issue of fact in dispute as to whether AT&T had any contractual obligations for janitorial services. The unrebutted testimony was that prior to the contract with ARA, AT&T had a contract with Midwest to provide janitorial services in the cafeteria. AT&T terminated that contract and arranged with ARA to provide that service. At this point, the burden shifted to Brown to rebut the fact that AT&T had transferred this responsibility for janitorial services to ARA. See *id.*

Brown did not sustain this burden. Although where Brown fell is a fact in dispute, the undisputed facts do not establish that AT&T had any contractual duty to provide janitorial services in the cafeteria area. Therefore, AT&T is entitled to judgment as a matter of law.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

SCOTT ROBERTSON ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA, COMMONLY KNOWN AS THE MILLARD SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND DIANA FAUST ET AL., ALL AS MILLARD SCHOOL DISTRICT BOARD MEMBERS, APPELLANTS.

560 N.W.2d 469

Filed March 21, 1997. No. S-95-108.

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. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
3. **Res Judicata: Judgments.** 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.
4. **Legislature: Schools and School Districts: Courts: Jurisdiction.** If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of the discretion reposed in it.
5. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
6. **Equity: Appeal and Error.** In equity actions, an appellate court reviews factual findings de novo on the record and reaches a conclusion independent of that of the trial court.
7. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court reaches a conclusion independent of that of the trial court.
8. **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 a judgment on the merits, and (4) the same parties and their privies were involved in both actions.

9. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
10. **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.
11. **Schools and School Districts: Statutes: Legislature.** The school district is a creature of statute and possesses no other powers than those granted by the Legislature.
12. **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.

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

Rex R. Schultze and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., and Malcolm D. Young and Jeff C. Miller, of Young & White, for appellants.

H. Daniel Smith and David A. Jarecke, of Sherrets, Smith & Gardner, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPRAGUE, D.J.

WHITE, C.J.

Millard School District No. 17 of Douglas County and the Millard school district board members (Millard) appeal the trial court's order in favor of the appellees, Scott Robertson, Gail Robertson, Kevin Moersch, Nancy Moersch, David Mawyer, Dory Mawyer, Joseph Konen, and Judith Konen (Robertson), granting Robertson's motion for summary judgment, issuing an injunction, and determining that Millard had no express or implied power to build a roadway to access an elementary school site. We reverse, and remand with directions.

In 1991, Millard's board of education decided that there was a need to build an elementary school in the northwest portion of the Millard school district to address overcrowding problems in two other elementary schools. Available property (Aldrich School Property) was located near 164th Street and West Dodge Road. The Aldrich School Property was bordered on the south

by West Dodge Road; on the west by 168th Street, a creek, and railroad tracks; on the north by Barrington Park; and on the east by private property owned by Nebraska Methodist Health System, Inc. (NMHSI).

Access to the property was limited, in that the State of Nebraska would allow only a temporary access road to be constructed on the south from West Dodge Road, and practicality and expense made it difficult to build an access road on the west toward 168th Street. Therefore, prior to purchasing the property, Millard attempted to acquire through condemnation a portion of an outlot to the north in order to obtain access to California Street. Several homeowners in the Barrington Park area complained and filed suit; in May 1992, the district court held that the property at issue was a public park and, as a result, could not be condemned by Millard.

Millard acquired the Aldrich School Property in September 1992. On October 14, Millard entered into an agreement with NMHSI, which provided in pertinent part for a right of access by Millard over NMHSI's property for the purpose of constructing Aldrich School; that NMHSI would construct a loop road around its outer perimeter; that Millard would have an easement to connect drives from the Aldrich School Property to the loop road so as to gain access to a public street; and that in consideration for these easements and the cost of construction of the loop road, Millard would pay NMHSI $600,000. The agreement also stated that NMHSI was free to dedicate the loop road to the public at some future point.

On June 15, 1993, Scott Robertson and others filed an action in the district court for Douglas County for declaratory and injunctive relief against NMHSI, the mayor, the city council, Millard, the Millard school board members, Douglas County, and the Douglas County commissioners. Robertson alleged that the construction of the loop road and its future dedication to the public constituted an unlawful and unconsented taking of Robertson's property, that none of the defendants to the action had undertaken the required condemnation proceedings, and that the plaintiffs had not been compensated for the taking. Robertson asked the court to declare which public entity received the benefit of the taking; to determine which entity had

the obligation to institute condemnation proceedings; and to enjoin Millard and NMHSI from continuing construction of the road, which allegedly damaged the private property, until the plaintiffs were compensated for the taking. The defendants demurred, and the district court dismissed the action without leave to amend because the petition did not state a cause of action or set forth circumstances which demonstrated that the plaintiffs were harmed by the future dedication of the loop road as a public way.

On October 11, 1993, Millard and NMHSI executed a supplement to the October 1992 agreement, which provided in pertinent part that NMHSI was unable to construct the loop road by January 1, 1994, due to a delay "caused by governmental authority." The supplement to the agreement stated that if NMHSI did not have a contract for the construction of the south half of the loop road before April 1, 1994, then NMHSI would grant Millard a permanent nonexclusive easement for the purpose of providing ingress and egress to the Aldrich School Property, and Millard would construct the south half of the loop road so that the school could open for the 1994-95 school year. The supplement to the agreement also provided that Millard's costs for the construction of the south half of the loop road would be deducted from the $600,000 which Millard had agreed to pay NMHSI in the first agreement and that Millard agreed to join in any subsequent dedication of the loop road as a public way.

In March 1994, Millard and NMHSI entered into an easement agreement which provided for Millard's construction of the south half of the loop road and granted Millard a permanent nonexclusive easement for vehicular and pedestrian traffic to provide ingress and egress to the Aldrich School Property. In April 1994, Millard and Hawkins Construction Company executed a contract regarding the construction of the south half of the loop road on the easement granted Millard by NMHSI.

On June 27, 1994, Robertson filed suit in the district court for Douglas County against Millard and Millard's school board members, alleging that the contracts in which Millard agreed to construct the loop road were ultra vires and void, and requesting that the court enter a permanent injunction enjoining

Millard from "planning, laying out, designing, constructing, [and] maintaining the street that is the subject of the agreements alleged or expending public funds for the same." A temporary injunction was granted on July 8, and Robertson posted a $15,000 bond.

Both parties filed motions for summary judgment. In its order dated January 9, 1995, the trial court overruled Millard's motion, granted Robertson's motion, found that the permanent injunction sought by Robertson should be granted, and held that Millard "has no power, whether implied or reasonably inferred, to build the road." The court ordered the $15,000 bond to remain as the bond in the appeal of the case, which Millard timely filed in the Nebraska Court of Appeals. Pursuant to our power to regulate the docket of the Court of Appeals, we removed the case to this court.

On appeal and as summarized, Millard alleges that the trial court erred in (1) failing to find that res judicata barred the claims in this action, (2) failing to find that Robertson did not join all necessary parties to the action, and (3) finding that Millard lacked either express or implied powers to construct the loop road in sustaining Robertson's motion for summary judgment and overruling Millard's motion for 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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

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. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996); *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995).

If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of the discretion reposed in it. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997).

An action for an injunction sounds in equity. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). In equity actions, an appellate court reviews factual findings de novo on the record and reaches a conclusion independent of that of the trial court. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). When reviewing questions of law, an appellate court reaches a conclusion independent of that of the trial court. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

In its first assignment of error, Millard alleges that this court lacks jurisdiction to hear the appeal because the trial court erred in failing to find that res judicata barred the claims in this action. We disagree.

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 a judgment on the merits, and (4) the same parties and their privies were involved in both actions. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996). 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. *Baltensperger, supra*; *Lincoln Lumber Co., supra*.

The doctrine of res judicata does not bar this appeal. While the June 15, 1993, action brought by Robertson was filed against Millard and the Millard school board members, and while we consider a dismissal after a demurrer without leave to amend to be a final judgment on the merits (see *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996)), the present case does not present the same issues as those directly addressed or which should have been included in the prior litigation. The June 1993 lawsuit involved a request for declaratory and injunctive relief because Robertson alleged a taking of property without just compensation. That action was dismissed in July 1993. This action was brought in June 1994 and concerns the legality of certain contracts entered into between Millard and NMHSI which obligate Millard to build the loop road. The first contract to obligate Millard to construct the road was entered into on October 11, 1993, well past the dismissal of the first petition. Therefore, this case involves an issue that could not have been litigated in June 1993 and is not barred by res judicata.

Millard next alleges that this court lacks jurisdiction to hear this case because Robertson failed to join all the necessary parties. In particular, Millard argues that Robertson should have joined NMHSI and Hawkins Construction Company. We disagree.

Neb. Rev. Stat. § 25-323 (Reissue 1989) states:

> The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995). The presence of necessary parties

is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995).

In the instant case, neither NMHSI nor Hawkins Construction Company is a necessary or indispensable party. The failure of Robertson to include them as defendants in the lawsuit does not affect their rights or interests. On July 25, 1994, Millard, NMHSI, and Hawkins Construction Company entered into a settlement agreement which provided for the assignment to NMHSI of the construction contract between Millard and Hawkins Construction Company; that NMHSI would complete the construction of the south half of the loop road pursuant to the construction contract; that NMHSI would pay Hawkins for any pending and unpaid pay applications and for any subsequent work performed; that if it was eventually determined in this case that Millard did not have the authority to construct the south half of the loop road, then Millard's access easement to the Aldrich School Property would terminate; and that, if it was eventually determined in this case that Millard did have the authority to construct the road, then both NMHSI and Millard would perform their respective obligations under the prior agreements. Clearly, the outcome of this suit will not affect the rights of either Hawkins Construction Company or NMHSI. NMHSI will still have the right to build its road on its own property, and Hawkins Construction Company will still be paid for its work. As a result, we find that in this case neither NMHSI nor Hawkins Construction Company is a necessary or indispensable party whose absence from this lawsuit deprives us of jurisdiction to hear this appeal.

In its last assignment of error, Millard argues that the trial court erred in finding that Millard lacked either express or implied powers to construct the loop road and in sustaining Robertson's motion for summary judgment, overruling Millard's motion for summary judgment on those grounds, and granting a permanent injunction. We agree.

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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997). 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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

An action for an injunction sounds in equity. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). In equity actions, an appellate court reviews factual findings de novo on the record and reaches a conclusion independent of that of the trial court. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). A de novo review of the record in this case reveals that there are no genuine issues as to any material fact or as to the ultimate inferences that may be drawn from those facts.

The sole question that must be resolved with regard to this assignment of error is whether the statutes which delineate the powers of school boards allow Millard to expend public funds to build the loop road. The school district is a creature of statute and possesses no other powers than those granted by the Legislature. *Rauert v. School Dist. 1-R of Hall Cty.*, 251 Neb. 135, 555 N.W.2d 763 (1996). 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. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *Rauert, supra.*

Several statutory sections are pertinent to the determination of whether Millard has the power to build the loop road. Neb. Rev. Stat. § 79-401 (Reissue 1994) (now codified at Neb. Rev. Stat. § 79-405 (Reissue 1996)) states in part, "Every duly organized school district shall be a body corporate and possess all the usual powers of a corporation for public purposes, may sue and be sued, and may purchase, hold, and sell such personal and

real estate as the law allows." Neb. Rev. Stat. § 79-440 (Reissue 1994) (now codified at Neb. Rev. Stat. § 79-525 (Reissue 1996)) states in part, "The school board or board of education shall (1) provide the necessary appendages for the schoolhouse, (2) keep the same in good condition and repair during the time school shall be taught in the schoolhouse, and (3) keep an accurate account of all expenses incurred." Neb. Rev. Stat. § 79-443 (Reissue 1994) (now codified at Neb. Rev. Stat. § 79-526 (Reissue 1996)), states in part, "The district school boards and boards of education shall have the general care and upkeep of the schools [and shall] devise such means as may seem best to secure the regular attendance and progress of children at school."

In the instant case, we find that the loop road is a necessary appendage for Aldrich School. The evidence is uncontroverted that Millard needed to build another school in the northwest portion of the school district to alleviate the overcrowding in two of its elementary buildings and that the only available real estate was the Aldrich School Property. Access to this property was prohibited or not feasible to the north, south, and west. The only access available was to the east across NMHSI's property. At the time of purchase, NMHSI was to build the loop road and Millard would have been responsible only for drives connecting the school property to the road. However, due to certain difficulties, NMHSI could not construct the road in conjunction with Millard's timeframe for the start of school. Millard had to have access to the Aldrich School Property and so contracted to perform the work. Omaha Mun. Code §§ 34-6 and 34-8 require that all paved streets be built to certain specifications, and Millard was obligated to comply with those standards.

Section 79-401 gives Millard the power to hold an easement in the portion of real estate where the south half of the loop road was to be built. Sections 79-440 and 79-443 give Millard the power to provide necessary appendages to the schoolhouse and to secure the regular attendance of students at school. Necessarily implied in these statutory sections is the power to construct an access road when the only access available was a road built to the specifications required by the Omaha Municipal Code across NMHSI's property, and the only party in

a position to build the road in the necessary timeframe was Millard.

If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to an abuse of the discretion reposed in it. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997). We hold that in this case, the purchase of the Aldrich School Property and the agreement to build the loop road across an easement owned by Millard are not actions so unreasonable and arbitrary as to amount to an abuse of Millard's discretion. The grant of summary judgment in favor of Robertson should be reversed, and summary judgment should be granted in favor of Millard. In addition, the injunction issued by the trial court in this matter is hereby vacated.

Robertson also filed two motions with this court. The first motion requests attorney fees for the services of counsel on appeal. This motion is denied.

Robertson's second motion requests the exoneration of the $15,000 bond that remained as the bond on appeal of this case. Such bonds are statutorily conditioned so that "the party or parties who obtained [the] injunction shall pay to the defendant, or defendants, all damages, which he or they shall sustain by reason of said injunction, if it be finally decided that such injunction ought not to have been granted." Neb. Rev. Stat. § 25-1079 (Reissue 1995). The motion to exonerate the bond is therefore denied, and this case shall be remanded to the district court for the determination of any damages that may have been sustained by Millard as a result of the injunction issued below.

Because we find that Millard does, in this instance, have the implied power to build the loop road, we reverse, and remand with directions to enter summary judgment in favor of Millard, vacate the injunction, and undertake further proceedings consistent with this court's opinion, including those necessary to address Millard's damages.

REVERSED AND REMANDED WITH DIRECTIONS.

JEANETTE L. RICHARDSON, DOING BUSINESS AS CHARLIE'S MOBIL SERVICE, APPELLEE, V. DARWIN D. MAST, APPELLANT.
560 N.W.2d 488

Filed March 21, 1997. No. S-95-333.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
2. ____: ____. An appellate court shall reach conclusions on questions of law independent of the trial court's conclusions on questions of law.
3. **Uniform Commercial Code: Contracts: Judgments.** Determination of whether there has been conformity of goods as required under the Uniform Commercial Code is a question of fact.
4. **Uniform Commercial Code: Contracts: Revocation.** The initial step in determining whether the buyer may revoke his acceptance is to assess whether there exists a nonconformity.
5. **Uniform Commercial Code: Contracts.** Goods are conforming or conform to the contract when they are in accordance with the obligations under the contract.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Judgment of District Court affirmed.

Mark R. McKeone, of Hart Law Office, P.C., for appellant.

Thomas J. Watson, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BUCKLEY, D.J.

WHITE, C.J.

On June 3, 1994, appellant, Darwin D. Mast, examined an Oldsmobile Toronado Trofeo at Charlie's Mobil Service. On June 6, appellant and Jeanette L. Richardson, appellee, entered into a contract for the sale of the red 1988 Oldsmobile Toronado Trofeo, VIN 1G3EV11C2JU310294, for $7,500. The vehicle had been driven more than 81,000 miles. Pursuant to the express language of the written contract, the vehicle was being sold "As Is." In addition, the contract expressly disclaimed all expressed and implied warranties. The contract also contained a

"Contractual Disclosure Statement" which provided: " 'The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.' " The contract was signed by both appellant and appellee.

The window form, entitled "buyers guide," was attached to the car purchased by appellant. The buyers guide stated that the car was being sold "AS IS-NO WARRANTY" and listed major defects that may occur in used motor vehicles, including various transmission defects. Both appellant and appellee signed this document.

As consideration for the automobile, appellant tendered a check in the amount of $7,500. Appellant then took possession of the automobile.

Appellant testified that prior to his purchasing the automobile, appellee told him that she had purchased the automobile from a friend and had driven the automobile from Des Moines, Iowa, to Kearney, Nebraska, without any problems. Appellee denied such a conversation. According to appellee, she purchased the automobile from a dealership in Omaha, Nebraska.

On June 7, appellant informed appellee that he was having problems with the transmission. While appellee offered to pay 25 percent of the repair costs, appellant rejected the offer and stopped payment on the check he had given appellee the previous day. On June 10, appellant's attorney sent a letter to appellee indicating that appellant notified appellee that acceptance of the vehicle was being revoked and that the automobile was available for appellee to reclaim.

Appellee filed her petition in the county court for Buffalo County on July 14 to collect the unpaid check. Appellant returned the automobile to appellee on July 23, at a cost of $65 to appellant. Appellant then filed an answer and counterclaim on August 10, denying allegations made by appellee in her petition and asserting an affirmative defense of revocation of acceptance. Appellant counterclaimed, arguing that he was entitled to attorney fees and damages for storing and towing the automobile to appellee's place of business.

On August 15, appellee demurred to appellant's affirmative defense and counterclaim. The county court sustained appellee's

demurrer. Appellant filed an amended answer and counterclaim, alleging that he had revoked his acceptance of the vehicle due to a nonconformity which substantially impaired the value of the automobile and was not discovered because of the difficulty of discovery and assurances made by appellee. He also set out three counterclaims: a claim for costs incurred for storing the automobile from June 10 through July 23 and for costs incurred for towing the automobile to appellee's place of business, a claim for consequential damages, and a claim for attorney fees as allowed under Nebraska's Uniform Deceptive Trade Practices Act. Appellee subsequently filed a reply to appellant's amended answer.

Appellee amended her petition in September, renewing her request for the cost of the vehicle and further requesting the court to award her judgment for costs of storing the automobile. Appellant then filed an answer to the amended petition and reply to the affirmative defense, denying appellee's claims and allegations.

The matter was tried to the county court for Buffalo County on October 3. The court found that the defect in the vehicle was a nonconformity substantially impairing its value, that acceptance was induced by the difficulty of discovery of the defect and by appellee's assurances, and that revocation was timely made. The court found against appellee on her cause of action for recovery of the purchase price and found for appellant in the amount of $65 for out-of-pocket expenses and $46.15 for court costs. Appellant was not awarded attorney fees. Appellee subsequently filed a notice of appeal.

The district court for Buffalo County concluded that there was no evidence that the automobile failed to conform to the contract of the parties. The court remanded the matter to the county court with directions that judgment be entered in favor of appellee in the amount of $7,500, plus interest and costs. Further, with regard to appellant's counterclaim, judgment was to be entered in favor of appellee. Appellant filed a notice of appeal in the district court for Buffalo County.

Appellant assigns the following errors: (1) The court erred in determining that the automobile delivered to appellant was not a nonconforming good as referred to in Neb. U.C.C. § 2-608

(Reissue 1992), (2) the court erred in failing to find that revocation of acceptance is a separate and distinct remedy from breach of warranty under the Uniform Commercial Code and in failing to grant appellant the remedy of revocation of acceptance, and (3) the court erred in not awarding the appellant the out-of-pocket expenses incurred as a result of the revocation of acceptance.

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992). An appellate court shall reach conclusions on questions of law independent of the trial court's conclusions on questions of law. *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996). Determination of whether there has been conformity of goods as required under the Uniform Commercial Code is a question of fact. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981).

It is clear that the instant case is governed by article 2 of the Uniform Commercial Code. See *Koperski, supra.*

Pursuant to § 2-608:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

As stated clearly by statute and interpreted by this court, the initial step in determining whether the buyer may revoke his acceptance is to assess whether there exists a nonconformity. *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984). The definition of "conforming" goods is set out in Neb. U.C.C. § 2-106(2) (Reissue 1992) as follows: "Goods . . . are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract."

The Oregon Court of Appeals applied this definition in *Clark v. Ford Motor Co.*, 46 Or. App. 521, 612 P.2d 316 (1980). In

Clark, the buyer of an automobile brought an action to recover the purchase price of an automobile manufactured by Ford Motor Company and sold by Beaty Ford-Mercury, Inc. The buyer purchased a new 1977 Ford Bronco from the dealer after selecting the vehicle in the showroom. The dealer expressly disclaimed all warranties. The buyer experienced problems with the vehicle: the radio antenna was missing and the automobile had significant rust stains. The buyer sought rescission of the installment sales contract, return of his downpayment, and return of his monthly payments.

The Oregon Court of Appeals concluded that the buyer could not recover from the dealer based on a revocation of acceptance theory. According to the court, the buyer failed to demonstrate that the vehicle did not conform to the requirements of the contract: the contract was for the sale of a Bronco selected by the buyer, the buyer received the Bronco he selected, and the dealer disclaimed all warranties.

Similarly, appellant in the instant case failed to demonstrate that the automobile did not conform to the requirements of the contract: the contract was for the sale of a red 1988 Oldsmobile Toronado Trofeo, VIN 1G3EV11C2JU310294, and appellant received that exact automobile. Further, appellee was not obligated by the sales contract to pay for any defects or damage to appellant's car as clearly expressed in the "As Is" provision. Finally, appellant was informed by means of the buyers guide that the automobile he was purchasing might have transmission problems. Appellant received what he contracted for: a 1988 Toronado Trofeo with possible transmission defects. The district court's findings were not clearly erroneous. We therefore affirm.

AFFIRMED.

IN RE ESTATE OF G. ROBERT MUCHEMORE, DECEASED. COUNTY OF DOUGLAS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT, V. AGNES B. MUCHEMORE, PERSONAL REPRESENTATIVE OF THE ESTATE OF G. ROBERT MUCHEMORE, DECEASED, APPELLEE.

560 N.W.2d 477

Filed March 21, 1997. No. S-95-610.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
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, correct conclusion irrespective of the determination made by the court below.
3. **Decedents' Estates: Wills.** Even though a power of appointment may be exercisable by will only, so that the donee cannot appoint to himself or herself, the power is nonetheless regarded as general if the donee can appoint the property in such a way that it will be distributed as a part of his or her own estate.
4. **Decedents' Estates: Wills: Presumptions.** Where no restriction on the possible appointees is indicated in an instrument creating a power of appointment, it is presumed that a general power of appointment is intended.
5. **Decedents' Estates.** A power of appointment is special (or limited) when the donee's appointment is limited to a group not unreasonably large which does not include himself or herself.
6. ____. Property passing to a surviving spouse subject to a general power of appointment shall be deemed a transfer from the decedent to the surviving spouse at the date of the decedent's death.
7. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged in to ascertain their meaning.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

James S. Jansen, Douglas County Attorney, Renne Edmunds, and Jeanne A. Burke for appellant.

David L. Hefflinger and J. Terry Macnamara, of McGrath, North, Mullin & Kratz, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPRAGUE, D.J.

GERRARD, J.

The decedent, G. Robert Muchemore, died testate in 1992 leaving a will and a revocable trust agreement. The trust agreement, as amended, created a pecuniary credit shelter trust and a marital deduction trust. The county court entered an order declaring that the property passing to the decedent's surviving spouse, Agnes B. Muchemore, the appellee, pursuant to the will and the trust agreement was not subject to Nebraska inheritance tax. The district court affirmed the order of the county court. Douglas County appealed the judgment of the district court to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the Court of Appeals and this court, we removed the case to our docket. For the following reasons, we affirm.

FACTUAL BACKGROUND

The decedent died testate on August 4, 1992. The decedent's will devised all personal effects to the appellee and the remainder of his estate to the First National Bank of Omaha as trustee of the G. Robert Muchemore revocable trust. This revocable trust was created pursuant to a February 12, 1980, revocable trust agreement, as amended on July 23, 1982. Article VII, sections B and C, of the revocable trust agreement, as amended, created both a "Pecuniary Credit Shelter Trust" and a "Marital Deduction Trust." The appellee is the decedent's surviving spouse and the personal representative of his estate.

The parties stipulated that under the will and amended trust agreement, the credit shelter trust received $600,000 of the decedent's estate, the total federal estate tax credit available, and the marital deduction trust received the balance of the decedent's estate. Following the decedent's death, the marital deduction trust contained property with a value of approximately $2,165,221. The parties stipulated, further, that the trust agreement provides that the trustee shall pay the income from the marital deduction trust to the appellee and may also pay to her the principal as the trustee deems necessary and in her best interests.

Article VII, section C, subsections 2 and 3, of the trust agreement provides as follows:

> 2. On the death of the [appellee], the Trustee shall pay the then remaining principal and the income . . . to, or hold the same for the benefit of, such person or persons or the estate of the [appellee] . . . as the [appellee] shall appoint by a Will, executed after the [decedent's] death, referring specifically to the power given to the [appellee].
>
> 3. On the death of the [appellee], if, or to the extent that, the [appellee] doesnot [sic] exercise her power to appoint by Will, the Trustee shall dispose of the then remaining principal and income . . . according to the terms and conditions, and as a part of the CREDIT SHELTER TRUST set forth in B of this ARTICLE.

Thus, under the terms of the trust, the appellee has the power to appoint by will the property remaining in the marital deduction trust at the time of her death, but if she does not exercise this power, the property will be placed in the credit shelter trust and distributed according to its terms. Under section B of article VII, if the appellee has not exercised the power of appointment at the time of her death, the credit shelter trust is to be paid in equal proportions to the decedent's nephew and nieces.

The appellee filed a petition for the determination of inheritance tax in the county court. The appellee contended that Neb. Rev. Stat. § 77-2008.03 (Reissue 1996) requires that the assets in the marital deduction trust that are subject to the power of appointment in the appellee be deemed transferred to the appellee as of the time of the decedent's death and are, accordingly, not subject to inheritance taxation. The parties stipulated that the inheritance tax worksheet executed by the appellee correctly shows the inheritance taxes due under this interpretation of the law as $10,137. However, Douglas County asserted that the trust provisions transfer a life estate to the appellee with a contingent remainder subject to defeasance in the beneficiaries of the credit shelter trust. Thus, Douglas County contended that the appellee is entitled to only a marital deduction for her life estate interest and that inheritance tax is due on the remainder interest.

The county court found that all property contained in the marital deduction trust passed to the appellee and was not subject to inheritance tax, thus determining that $10,137 was the

full amount of inheritance tax due from the estate of the decedent. The district court affirmed the county court's order, and Douglas County's appeal followed.

SCOPE OF REVIEW

On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record. *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996).

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. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

ASSIGNMENTS OF ERROR

Douglas County asserts that the district court erred in (1) finding that none of the property contained in the marital deduction trust is subject to Nebraska inheritance tax and (2) failing to correctly apply Neb. Rev. Stat. § 77-2008.01 (Reissue 1996), which requires the county attorney to calculate inheritance tax as if the contingencies or conditions were to occur in a manner that would produce the highest amount of tax.

ANALYSIS

The decedent had obviously planned his estate to minimize federal estate and state inheritance taxation. The decedent's assets were divided in two portions through a trust agreement with First National Bank of Omaha. The first portion (a pecuniary credit shelter trust) received the $600,000 amount which was exempt from federal estate taxation by virtue of the federal unified credit. See 26 U.S.C. § 2010 (1994). The balance passed to a marital deduction trust in order to qualify for the federal unlimited marital deduction. See 26 U.S.C. § 2056 (1994). Such planning, when done correctly, results in the elimination of federal estate taxation on the first spouse's death and, presumably, the elimination of Nebraska inheritance taxation with respect to the marital trust deduction on the first death.

In the instant case, the marital deduction trust required that all income be paid annually to the appellee and required the cor-

porate trustee to pay to the appellee such amounts of principal as were necessary and in the best interests of the appellee. The marital deduction trust also provided a testamentary power of appointment to the appellee, at issue in this case, as follows:

> On the death of the [appellee], the Trustee shall pay the then remaining principal . . . to . . . such person or persons or the estate of the [appellee], in such amounts and proportions . . . as the [appellee] shall appoint by a Will . . . .
>
> . . . On the death of the [appellee], if, or to the extent that, the [appellee] doesnot [sic] exercise her power to appoint by Will, the Trustee shall dispose of the then remaining principal . . . according to the terms and conditions . . . of the CREDIT SHELTER TRUST . . . .

Douglas County contends that these provisions in the marital deduction trust devised only a life interest to the appellee, with the power to dispose of by will the residual property at death or to allow the residual property to descend to the decedent's nephew and nieces. Thus, the remainder interest of the beneficiaries of the credit shelter trust would be subject to inheritance tax under § 77-2008.01. Conversely, the appellee asserts that the marital deduction trust provided a general testamentary power of appointment resulting in a transfer of the property and the marital deduction trust to the appellee pursuant to § 77-2008.03. Therefore, the appellee contends that the property is not subject to inheritance tax.

Section 77-2008.01 provides, in pertinent part, as follows:

> When property is devised, bequeathed, or otherwise transferred or limited in trust or otherwise in such a manner as to be subject to the tax prescribed in sections 77-2001 to 77-2008, and the rights, interests, or estates of the transferees, legatees, devisees, or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, an inheritance tax shall be imposed upon such transfer at the highest rate which, on the happening of any of the contingencies or conditions, would be possible . . . .

Douglas County argues that the property at issue must be taxed at the highest rate possible given the contingencies. Douglas County contends that the highest taxed contingency

would occur if the appellee failed to exercise her power of appointment and the property passed to the beneficiaries of the credit shelter trust. Thus, Douglas County argues that this remainder interest ought to be subject to inheritance taxation. In such a case, the tax would be charged against the trust corpus, and if a refund becomes necessary at the time of the appellee's death, it would be paid back into the trust corpus. See Neb. Rev. Stat. § 77-2008.02 (Reissue 1996).

The appellee relies instead on § 77-2008.03, which provides, in pertinent part, as follows:

> Whenever any person . . . shall be given a power of appointment [over property subject to these sections], such power of appointment shall be deemed a transfer of the interest in the property which is subject to such power from the donor to the donee of such power at the date of the donor's death; *Provided*, if at the date of the donor's death, the power of appointment is limited, in whole or in part, to be exercised in favor of one or more specific beneficiaries or classes of beneficiaries, then, to the extent it is so limited, such power of appointment shall not be deemed a transfer from the donor to the donee of the power, but shall be deemed a transfer of the interest in the property which is subject to the power from the donor of the power to the specific beneficiary or class of beneficiaries, as of the date of the donor's death.

The appellee contends that because the trust instrument created a general testamentary power of appointment in the appellee that was not limited in favor of any specific beneficiaries, the application of this section results in a transfer of interest in the property to the appellee.

This case requires us to decide whether the power of appointment at issue is a *general* testamentary power of appointment, such that an interest in the property subject to the power passes to the appellee, or whether it is a *special* (or limited) power of appointment, such that an interest in the property is not treated as passing to the appellee, but to the beneficiaries of the credit shelter trust. Neb. Rev. Stat. § 77-2004 (Reissue 1996) provides, in relevant part, that "[i]nterests passing to the surviving spouse by will . . . shall not be subject to [inheritance] tax." Thus, if all

property contained in the marital deduction trust is treated as passing to the appellee, then no inheritance tax is currently due on the transfer. However, if the property subject to the power of appointment is not treated as passing to the appellee, inheritance tax would now be due on the remainder interest of the nephew and nieces. See Neb. Rev. Stat. § 77-2005 (Reissue 1996).

Douglas County claims that the power of appointment devised to the appellee in the instant case is not the general power of appointment that is contemplated by § 77-2008.03, because the power of appointment is a testamentary power only and may not be exercised inter vivos. However, Douglas County's argument fails to recognize the fundamental distinction between general powers of appointment and special (or limited) powers of appointment. The basic distinction between powers of these two types consists in the difference in the extent of dispositive power over the appointive property. See, e.g., *Fiduciary Trust Co. v. First National Bank*, 344 Mass. 1, 181 N.E.2d 6 (1962).

It is well recognized that even though a power of appointment may be exercisable by will only, so that the donee cannot appoint to himself or herself, the power is nonetheless regarded as general if the donee can appoint the property in such a way that it will be distributed as a part of his or her own estate. See, Restatement (Second) of Property: Donative Transfers § 11.4 (1986); Roger A. Cunningham et al., The Law of Property § 3.14 (2d ed. 1993); Lewis M. Simes, The Law of Future Interests § 56 (2d ed. 1966). Where no restriction on the possible appointees is indicated in the instrument creating the power, it is presumed that a general power is intended. Simes, *supra*. On the other hand, a power is special (or limited) when the donee's appointment is *limited* to a group not unreasonably large which does not include himself or herself. Cunningham et al., *supra*; Simes, *supra*.

The donee of a general testamentary power of appointment must be able to appoint the property to anyone, including his or her own estate. See *Fiduciary Trust Co. v. First National Bank, supra*. In the instant case, the appellee was given complete control over the ultimate disposition of the property in the marital

trust. The power of appointment gave the appellee the right to determine the person or persons who would ultimately receive the marital trust property. No other person or entity, including the decedent, his nephew or nieces, or the corporate trustee, could in any way limit the appellee's right to control the ultimate disposition of the trust property. Thus, we conclude that the power of appointment in the marital trust was a *general* testamentary power of appointment because of its virtually unlimited power of disposition.

Section 77-2008.03 clearly provides that property passing to a surviving spouse subject to a *general* power of appointment shall be deemed a transfer from the decedent to the surviving spouse at the date of the decedent's death. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged in to ascertain their meaning. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997). The language of § 77-2008.03 is plain and unambiguous. In the instant case, the appellee, the decedent's surviving spouse, possessed a general testamentary power of appointment which constituted an interest in property passing from the decedent to the appellee, the surviving spouse. We hold that the district court was correct in affirming the county court's determination that such an interest in property passing to a surviving spouse is exempt from Nebraska inheritance tax.

Our holding does not, as Douglas County asserts, mean that the property in the marital deduction trust may pass to heirs or devisees inheritance-tax-free. If the appellee exercises her power to appoint the property remaining in the marital deduction trust by will, then at the time of her death, such property is subject to inheritance taxation as part of her estate. See, 26 U.S.C. § 2041(a)(2) (1994); Neb. Rev. Stat. § 77-2002 (Reissue 1996). In the event that the appellee fails to exercise the power of appointment prior to her death, the property will pass to the decedent's nephew and nieces pursuant to the terms of the credit shelter trust. In such an event, the trust assets will be subject to Nebraska inheritance tax at that time as a part of the appellee's

estate in accordance with Neb. Rev. Stat. § 77-2001 (Reissue 1996).

CONCLUSION

For the foregoing reasons, we conclude that the interest in property passing to the appellee, the surviving spouse of the decedent, pursuant to the marital deduction trust is not subject to Nebraska inheritance tax, and, finding no other error on the record, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT M. EARL, APPELLANT.

560 N.W.2d 491

Filed March 21, 1997. No. S-96-058.

1. **Trial: Minors: Witnesses: Appeal and Error.** The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion.
2. **Trial: Witnesses.** The question as to the competency of a witness must be determined by the court, while the credibility and weight of the testimony are for the jury to determine.
3. **Trial: Minors: Witnesses: Oaths and Affirmations.** While no certain age has been deemed to be the age at which a child becomes competent to testify in a court of law, the court generally takes into consideration whether he or she is able to receive correct impressions by the senses, to recollect and narrate accurately, and to appreciate the moral duty to tell the truth.
4. ____: ____: ____: ____. Inability to define such words as "testimony," "oath," or "obligation of an oath" is not determinative of want of capacity of a child to be a witness. It is sufficient if, without being familiar with the use and meaning of such words, he or she has an adequate sense of the impropriety of falsehood, sufficient intelligence, and a proper appreciation for the obligation of an oath.
5. **Rules of Evidence.** Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
6. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
7. **Trial: Evidence: Witnesses: Appeal and Error.** An offer of proof must demonstrate to the court that questions put to a witness call for competent evidence. Unless it does so without equivocation, it is not error for the court to overrule the offer.
8. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support

the verdict. On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such a verdict is supported by relevant evidence.

9. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
10. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
11. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

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

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

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

GERRARD, J.

STATEMENT OF CASE

Scott M. Earl appeals his conviction by jury for first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(a) and (b) (Cum. Supp. 1994). Earl was sentenced to 10 to 12 years' imprisonment. Earl contends, in summary, that the district court erred in (1) overruling his competency objection to the testimony of the 6-year-old complainant, (2) excluding evidence of the complainant's sexual history, and (3) imposing an excessive sentence. Earl also asserts that the evidence adduced at trial was insufficient to support the conviction. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

On May 24, 1995, the male complainant, 6-year-old N.E., disclosed to his mother that Earl, who had lived with the family from December 1994 until February 1995, had given him "bad touches." N.E. reported that Earl had fondled his penis and fellated him. N.E. was subsequently interviewed by a Grand Island

police officer and made similar disclosures about sexual abuse by Earl.

Earl was charged with first degree sexual assault in the district court, and after he pled not guilty, his case was set for a jury trial.

Prior to trial, Earl gave notice that he intended to offer evidence at trial of specific instances of N.E.'s past sexual behavior. This notice was in conformance with Nebraska's rape shield law, which requires that a defendant who intends to offer evidence of specific instances of a complainant's past sexual behavior give notice not later than 15 days before trial. Neb. Rev. Stat. § 28-321 (Reissue 1995).

A § 28-321 hearing was held regarding the admissibility of N.E.'s prior sexual behavior. For purposes of the hearing only, Earl offered, and the court received in evidence, the police reports in the instant case. Earl also requested that the court take judicial notice of the information filed in the district court, and the court did so. In relevant part, the police reports state that N.E.'s mother reported that N.E.'s 5-year-old female cousin had previously been sexually assaulted and had "taught [N.E.] all about sex" the previous summer. The mother reported she had discovered that N.E. and his cousin "were playing 'husband and wife' and pretending to have sex while they were totally nude" and that they took their clothes off and lay on each other. She reported that N.E. and his cousin had performed "some of the acts" that N.E. told her Earl had done to him.

At the § 28-321 hearing, Earl's counsel asserted the following grounds for admission of N.E.'s past sexual behavior:

> [B]asically, what we are asking for is to be allowed to *look into* the alleged victim's past sexual history regarding his exposure to the type of offense that Mr. Earl is accused of performing on the alleged victim here.
>
> The evidence will show that the alleged victim had contact with, I believe, two young ladies of approximately the same age of the alleged victim. These two young ladies had supposedly been sexually abused themselves and engaged in this type of conduct with the alleged victim and now the alleged victim is pointing a finger at Mr. Earl

> saying, that this type of behavior occurred between the alleged victim and Mr. Earl.
>
> The evidence we would be using is various witnesses in the case and perhaps the parents of the alleged victim and the two girls mentioned, two girls themselves, the alleged victim himself and anybody else involved in the police reports who have knowledge of this type of activity.

(Emphasis supplied.)

Earl argued that this "evidence" would explain how N.E. could have "come up" with the allegations against him. The State responded that the tendered "evidence" did not meet either of the exceptions to the rape shield law and was not relevant because it was not the same type of conduct as that charged against Earl.

The trial court held that neither of the statutory exceptions provided in § 28-321 was met because the tendered "evidence" did not go to the issue of consent or to an issue of physical evidence. Consequently, the trial court ruled that evidence of N.E.'s past sexual behavior with other children would not be allowed at trial. Earl renewed his offer of proof, i.e., the police reports, at trial, and the offer of proof was rejected by the court.

At trial, N.E. testified in the State's case in chief. Because Earl objected to N.E.'s competency as a witness, the court initially questioned N.E. outside of the presence of the jury. N.E. was able to tell the court his name, his age, the street on which he lived, and the city in which he lived. He was able to tell the court that he lived with his parents and sister, and to report his sister's name and age. N.E. was not able to tell the court his date of birth. He was able to tell the court the name of his school, his grade, his teacher's name, and the principal's name. N.E. was also able to inform the court of the occupations of both his mother and his father, although he could not identify the specific name of his mother's place of employment.

The court then questioned N.E. about veracity. N.E. knew that it was bad to tell a lie and that it was good to tell the truth. N.E. knew that one should keep a promise, and he correctly identified most of the trial judge's hypothetical statements as being either truthful or untruthful. The trial judge overruled

Earl's competency objection and allowed N.E. to testify based on the court's own examination of the witness.

N.E. testified that on one occasion Earl unzipped N.E.'s pants and "played with" and "thumped" N.E.'s "wiener," "sucked" N.E.'s "wiener" with his mouth, and placed his "wiener" in N.E.'s mouth. N.E. testified that Earl had told him that Earl would "beat [N.E.] up" if he told his parents. N.E.'s mother testified that when Earl first came to live with them, he was N.E.'s "hero," but that later N.E. did not want to be around Earl. She testified that after Earl left in February 1995, she asked N.E. several times whether Earl had given him "bad touches" and that N.E. ultimately disclosed the abuse to her on May 24, 1995.

The State also offered the testimony of the Grand Island police officer who interviewed N.E. The officer testified that he had discussed good touching and bad touching with N.E. and that N.E. reported the incidents with Earl to him. The officer testified that N.E. told him that the alleged abuse had occurred on five occasions.

Earl testified on his own behalf and denied sexually abusing N.E. during his stay with the family or at any other time. He testified that his relationship with N.E's mother had deteriorated and that he was asked to leave the residence as a result of disagreements with N.E.'s mother over financial matters.

A jury convicted Earl of first degree sexual assault. Earl timely appealed.

ANALYSIS

Competency of Witness

In his first assignment of error, Earl asserts that the district court erred in allowing 6-year-old N.E. to testify at trial.

The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion. *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992); *In re Interest of M.L.S.*, 234 Neb. 570, 452 N.W.2d 39 (1990). The question as to the competency of a witness must be determined by the court, while the credibility and weight of the testimony are for the jury to determine. *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988).

While no certain age has been deemed to be the age at which a child becomes competent to testify in a court of law, the court generally takes into consideration whether he or she is able to receive correct impressions by the senses, to recollect and narrate accurately, and to appreciate the moral duty to tell the truth. *State v. Roenfeldt, supra*; *In re Interest of M.L.S., supra.*

The record reveals that N.E. was able to accurately perceive and convey relevant information. He was able to report his name, his age, his street and city, his sister's name and age, his school and grade, the names of his teacher and principal, and the name of his father's workplace. While he was not able to identify the name of his mother's workplace, he did describe her occupation.

N.E. correctly answered a number of questions about the distinction between telling the truth and lying. While he was not able to eloquently define the concepts of lying, the truth, and a promise, he is not required to do so. Inability to define such words as "testimony," "oath," or "obligation of an oath" is not determinative of want of capacity of a child to be a witness. It is sufficient if, without being familiar with the use and meaning of such words, he has an adequate sense of the impropriety of falsehood, sufficient intelligence, and a proper appreciation for the obligation of an oath. See *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). N.E. knew that lies were bad and that the truth was good; he demonstrated that he could distinguish between truths and untruths, and he promised to tell the truth in court.

N.E. adequately demonstrated that he was able to receive correct impressions by his senses, could recollect and narrate intelligently, and appreciated the moral duty to tell the truth. Accordingly, we find no abuse of discretion in the district court's determination that N.E. was a competent witness.

Evidence of N.E.'s Prior Sexual Behavior

In his next assignment of error, Earl asserts that the district court erred in excluding evidence of N.E.'s past sexual behavior under Nebraska's rape shield law. See § 28-321. Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion,

except where judicial discretion is a factor involved in assessing admissibility. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). The admissibility of evidence is reviewed for an abuse of discretion where, as here, the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

Earl's stated purpose for attempting to elicit testimony regarding N.E.'s sexual history was to establish an alternative source for N.E.'s sexual knowledge, in order to rebut the inference that a child of such tender years could not possess the explicit sexual knowledge he had unless Earl sexually assaulted him. Earl contends that his right to present such evidence is grounded in the Confrontation and Compulsory Process Clauses of article I, § 11, of the Nebraska Constitution and the Sixth Amendment to the U.S. Constitution.

Article I, § 11, provides:

> In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

Nebraska's rape shield law provides, in pertinent part, as follows:

> Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evi-

> dence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

§ 28-321(2).

Under this statute, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions; i.e., source of physical evidence, or consent. The legislative purpose and history of the rape shield law is amply discussed in *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), and *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986). Stated briefly, the statutory purpose was to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicited evidence of questionable relevance to the case being tried. See *id.*

Despite the virtue of the general rule that evidence of a victim's prior sexual behavior is inadmissible, Earl contends that in the circumstances of a particular case, evidence of a victim's prior sexual behavior may be so relevant and probative that the defendant's right to present it is constitutionally protected. Because we conclude that Earl's offer of proof did not adduce evidence of sufficient relevance, i.e., evidence establishing that N.E. had prior knowledge of the same kind of sexual activities of which the defendant is accused, we do not decide the constitutional question in the instant case.

Section 28-321 further provides:

> (1) If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of such intention shall be given to the prosecuting attorney and filed with the court not later than fifteen days before trial.
>
> (2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, *to determine the rele-*

vance of evidence of the victim's or the defendant's past sexual behavior.

(Emphasis supplied.)

In the instant case, the police reports offered at both the § 28-321 hearing and the trial set forth that N.E.'s mother had discovered that N.E. and his cousin "were playing 'husband and wife' and pretending to have sex while they were totally nude" and that they took their clothes off and lay on each other. The mother also said that N.E.'s 5-year-old cousin had previously been sexually assaulted and had "taught [N.E.] all about sex" the previous summer. Based on the police reports, Earl wanted to "look into" N.E.'s sexual history at trial. Specifically, Earl's counsel stated that the proposed evidence would consist of "various witnesses in the case and perhaps the parents of the alleged victim and the two girls mentioned, two girls themselves, the alleged victim himself and anybody else involved in the police reports who have knowledge of this type of activity."

An offer of proof must demonstrate to the court that questions put to a witness call for competent evidence. Unless it does so without equivocation, it is not error for the court to overrule the offer. See *State v. Eggers*, 175 Neb. 79, 120 N.W.2d 541 (1963). Even assuming arguendo that some type of incidents occurred between N.E. and his 5- and 6-year-old female cousins, there can be no showing that N.E. had prior knowledge of having an adult male's penis stuck in his mouth, as N.E. claimed Earl had done to him. The trial court correctly found that neither of the statutory exceptions provided in § 28-321 was met. Furthermore, we determine that Earl did not offer evidence of N.E.'s prior sexual behavior that would be so relevant and probative that Earl's constitutional right to present it would be triggered.

Thus, we conclude that the trial court did not abuse its discretion in not allowing evidence of N.E.'s past sexual behavior with other children at trial and in refusing Earl's offer of proof at trial.

SUFFICIENCY OF EVIDENCE

Earl next asserts that the evidence adduced at trial was insufficient to support the conviction.

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such a verdict is supported by relevant evidence. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

Section 28-319 provides that

> [a]ny person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree.

Neb. Rev. Stat. § 28-318(6) (Reissue 1989) defines "sexual penetration" to include fellatio.

The evidence adduced at trial included N.E.'s testimony that Earl fondled N.E.'s penis, fellated N.E., and forced N.E. to fellate Earl. Earl argues that the State never established that N.E.'s use of the word "wiener" meant sex organ or intimate part as defined by statute. We categorically reject this argument. As in the past, we decline to require that a victim, especially a youthful victim, testify about a sex act in vocabulary used by a physician or provide a detailed description which might otherwise be found in some sordid novel. See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). Earl also contends that N.E.'s testimony was so self-contradictory and doubtful as to make it insufficient to support a conviction as a matter of law. The record does not support this contention. We have often held that, in reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. See, *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). N.E.'s testimony, viewed in the light most favorable to the State, clearly supports the finding that Earl subjected N.E. to sexual penetration, in violation of § 28-319. Accordingly, we conclude that this assigned error is without merit.

EXCESSIVENESS OF SENTENCE

Finally, Earl asserts that the sentence imposed by the district court is excessive.

Earl was convicted of first degree sexual assault, in violation of § 28-319(1)(a) and (b), a Class II felony. Neb. Rev. Stat. § 28-105 (Reissue 1989) provides that a Class II felony is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. The district court's sentence in the instant case of not less than 10 nor more than 12 years' imprisonment was well within the range of possible penalties for a Class II felony.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997); *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Cook, supra*; *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). We have reviewed Earl's personal and criminal history and have taken into consideration the debilitating effect of this crime on the victim. Earl was sentenced within the statutory limit, and the record reveals no abuse of discretion.

CONCLUSION

Consequently, as noted above, the judgment of the district court is affirmed.

AFFIRMED.

OMEGA CHEMICAL COMPANY, INC., APPELLEE AND CROSS-APPELLANT, V. UNITED SEEDS, INC., AND NEBRASKA SEED COMPANY, APPELLANTS AND CROSS-APPELLEES.

560 N.W.2d 820

Filed March 28, 1997. No. S-94-822.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent

of the factual findings of the lower 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.

3. **Equity: Trial: Evidence: Appeal and Error.** Erroneous admission of evidence in a bench trial in an equity case does not require reversal where other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.
4. **Actions: Equity: Nuisances.** With respect to an action in equity, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
5. ____: ____: ____. With respect to a nuisance in the context of an action in equity, the invasion of or interference with another's private use and enjoyment of land need only be substantial.
6. **Claims: Nuisances.** The exercise of due care is not a defense to a claim based on nuisance.
7. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
8. **Property: Improvements: Damages.** Where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellant United Seeds.

Duane M. Katz for appellee.

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

GERRARD, J.

Appellee Omega Chemical Company, Inc. (Omega), in its amended petition in equity, complains that appellants United Seeds, Inc., and Nebraska Seed Company (both hereinafter United Seeds), constructed a large grain bin on its own property in such close proximity to Omega's already existing structure that it constituted a nuisance. Omega prayed for the removal of

the grain bin and an award of general damages. Following a 5-day bench trial, the district court agreed with Omega and ordered United Seeds to completely remove its grain bin and assessed damages against United Seeds in the sum of $13,000. For the reasons that follow, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

Omega and United Seeds own and operate businesses on separate properties which share a common boundary. A metal building on a block foundation was located on Omega's property at all times relevant to the instant case. Omega's building sits parallel to and slightly over the common property line between these corporate neighbors.

At one time, two Quonset huts sat on United Seeds' property directly adjacent to the Omega building. In the fall of 1986, United Seeds decided to remove the Quonset huts and prepare the site for construction of a large grain bin. United Seeds hired an excavation contractor to remove the Quonset huts, level and prepare the site for construction, and dig the footing and foundation for the grain bin. In addition, United Seeds hired a soil testing laboratory to conduct a subsurface investigation and determine whether the soil structure was sufficient to support the load of a large grain bin. Pursuant to the testing laboratory's report, soil was removed from under the foundation excavation for the grain bin and replaced with soil capable of bearing the projected load.

United Seeds obtained the requisite building permits from the city of Ralston; however, it is unclear from the record what, if any, plans city officials reviewed prior to issuing the permits. The decision concerning precisely where to locate the grain bin on United Seeds' property was made by United Seeds' president, Richard Berry, and vice president, John Jones. The location ultimately selected caused the grain bin to be constructed less than 4 feet from the east wall of Omega's already existing building.

United Seeds hired a structural engineer, Eldon Schroder, to design the footing and foundation for the grain bin. Schroder was experienced in foundation design for grain bins. The record indicates that United Seeds did not supply Schroder with suffi-

cient information concerning the site so as to allow Schroder to account for all relevant design considerations. Specifically, Schroder was unaware that Omega's building was located either on the property line or slightly encroaching onto United Seeds' property. However, Schroder was aware that United Seeds wanted the grain bin located as close as possible to its common property line with Omega. Schroder's foundation design included a footing flange that extended 4 feet beyond the circumference of the foundation which directly supported the grain bin. Thus, the closest Schroder could place the grain bin to the property line was 4 feet.

United Seeds hired Dale Wall of Wall Construction to construct the grain bin. Wall stated that placement of the grain bin was the decision of either Berry or Jones. Wall acknowledged that the foundation excavation directly supporting the grain bin was less than 4 feet from Omega's building; thus, the footing flange in the area of Omega's building was less than 4 feet wide, as required by the design specifications. Wall testified that the footing or wall of Omega's building and the grain bin footing flange were only 1½ inches apart.

Construction of the grain bin was completed in December 1986. Berry testified that United Seeds began using the bin immediately upon completion. It took 6 weeks to fill the grain bin to capacity, and it remained full for the next 18 months. United Seeds emptied the bin in 1988 and has not used it since then for grain storage.

Omega's president, Alan Doub, testified that from 1985 until 1988, Omega leased its building adjacent to United Seeds to other businesses. It was not until Omega took over occupancy of the building, nearly 3 years after the construction of the grain bin, that Doub became concerned about the appearance of cracks in the east wall and basement floor of his building. In addition, Doub testified that he had no knowledge of United Seeds' plan to erect a grain bin until after the grain bin was constructed. Doub admitted that his building was in poor repair notwithstanding any damage allegedly caused by the grain bin.

The testimony of each party's expert witnesses was a focal point of the trial and will be discussed in conjunction with our analysis.

II. FINDINGS OF DISTRICT COURT

In its findings of fact and conclusions of law, the trial court found that United Seeds had constructed its grain bin in such close proximity to Omega's building that the grain bin's foundation was within inches of Omega's building's foundation.

The court determined that both Berry and Jones knew United Seeds' grain bin was to be constructed in close proximity to Omega's building and found United Seeds to be "negligent in allowing and/or authorizing the construction of the subject grain bin." The court further determined that the grain bin presented a fire or explosion hazard constituting an unreasonable risk to Omega.

The court issued its findings in letter form and provided United Seeds a choice of remedies. It could either pay $84,763 in damages and not remove its grain bin, or remove the grain bin and pay $13,000 in damages. When United Seeds failed to elect a remedy, the court granted the injunctive relief prayed for and ordered United Seeds to completely remove the grain bin, as well as to pay Omega $13,000 in damages plus court costs.

III. SCOPE OF REVIEW

An action for injunction sounds in equity. *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997); *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower 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. *Sid Dillon Chevrolet v. Sullivan, supra*; *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995).

IV. ASSIGNMENTS OF ERROR

Restated and summarized, United Seeds asserts that the district court erred in finding it was liable for the creation or continuance of a nuisance by (1) allowing evidence of building codes other than the particular code in effect at the time of construction, (2) finding that the construction of a grain bin placed

Omega's building in a hazard zone, and (3) finding that grain storage presents an unreasonable risk of fire or explosion to Omega. In addition, United Seeds contends that the district court erred by granting Omega injunctive relief and in its application of the measure of damages.

Omega cross-appeals the trial court's order in which United Seeds was provided the choice of two remedies before judgment was entered.

V. ANALYSIS

United Seeds first asserts that the building code in effect for the city of Ralston at all pertinent times was the 1967 National Building Code and that the trial court erred in admitting other building codes in evidence. Over United Seeds' hearsay objection, the trial court received in evidence a certified copy of a Ralston city ordinance adopting the 1967 National Building Code together with attached copies of the relevant portions of the 1967 code, as well as uncertified copies of portions of the 1976 and 1985 National Building Codes. There is no question that the uncertified copies of the 1976 and 1985 building codes were offered for their truth; that being, the codes are the standard of due care for contractors and engineers. As such, the texts of these codes are hearsay, and it was error for the trial court to admit the texts of the codes in evidence.

However, the trial court stated in its findings that it was the opinions of the experts that it relied on in its factual determinations, not an independent examination of the codes. Neb. Rev. Stat. § 27-703 (Reissue 1995) provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Omega's two engineering experts testified that in forming their respective opinions, they relied on the 1976 and 1985 building codes, as well as the 1967 code adopted by the city of Ralston. One of the engineers explained that a building code

adopted by a particular municipality represents a minimum requirement and that good engineering practices require consideration of any uniform codes promulgated thereafter. Further, both experts testified that the 1976 and 1985 building codes are model building codes that are routinely relied upon by engineers in forming opinions on structural issues in the field.

Thus, even though we determine that the trial court erred in admitting copies of the 1976 and 1985 building codes in evidence, we are mindful of the presumption that in an equity case, the trial court will disregard inadmissible evidence in resolving a factual issue or question. See *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976). The trial court did not make a factual determination or resolve a factual issue by utilizing or relying upon either the 1976 or 1985 building code. Erroneous admission of evidence in a bench trial in an equity case does not require reversal where other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. See *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980). The admission of the text of the 1976 and 1985 building codes did not constitute reversible error in the instant case.

1. Existence of Nuisance

Omega's amended petition states a cause of action in equity. With respect to an action in equity, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968). Furthermore, with respect to a nuisance in the context of an action in equity, the invasion of or interference with another's private use and enjoyment of land need only be substantial. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Hall v. Phillips*, *supra*.

Omega identified three conditions which it asserts unavoidably resulted from or existed because of the manner of United Seeds' operation, and caused a substantial invasion or interference with the use of Omega's property. Those conditions are

that United Seeds' grain bin presents an unreasonable risk of (1) further damage to the foundation, basement floor, and east wall of its building due to footing encroachment; (2) damage to its building's roof structure from increased snow load; and (3) fire or explosion.

(a) Footing Encroachment

Our de novo review of the record convinces us that construction of the grain bin so close to Omega's building caused specific, identifiable, and continuing injury to the building's foundation, basement floor, and east wall. In this regard, the testimony of Omega's engineering expert, James Hossak, was particularly convincing.

Hossak described the cause of the circular cracking found on the basement floor of Omega's building next to the east wall and the vertical cracks running through the middle of the concrete blocks of the east wall immediately adjacent to the grain bin. A drawing prepared by Hossak demonstrated that the circular cracks in the basement floor paralleled the circumference of the grain bin and that the vertical cracks through the concrete block in the east wall all appear directly adjacent to the closest point between the Omega building and the grain bin's footing flange.

Hossak testified that the phenomenon which caused the circular cracking in the floor is explained by the transfer of the load from the footing of the grain bin to the footing of Omega's building. Hossak further testified that by driving rods into the ground, he determined the relative footing depths of the two structures. He found that the bottom of the footing for the grain bin was 10 inches above the top of the footing for Omega's building and that the two footings were separated by a horizontal distance of 1½ to 2 inches. Because of this spatial relationship, 80 percent of the load of the grain bin was being transferred to the footing of Omega's building and to the soil below this footing. Hossak testified that this caused settlement in Omega's building and stress to the wall of the building. Hossak also opined that this condition will further deteriorate if the grain bin is used again.

United Seeds attempted to refute Hossak's claim in cross-examination when it suggested that Omega's building was in

poor repair prior to the construction of the grain bin and that the damage alleged to have been caused by the grain bin is no different from the damage attributable to other causes. In addition, United Seeds, through testimony of Jones, disputed Hossak's claim that the grain bin footing was at a higher elevation in relation to the building's footing.

However, United Seeds' claims do not comport with the evidence. The damage alleged to be specifically caused by the grain bin is the circular cracking in the basement floor and the vertical cracks through the middle of the concrete blocks in the east wall. The evidence clearly demonstrates that such damage appears only in proximity to the grain bin. The other nonspecific damage that United Seeds points to consists of horizontal and vertical cracks through the mortar joints of other walls, not through the concrete block in those walls. The expert testimony revealed that damage to mortar joints can be attributed to shrinkage or other factors. However, vertical cracks through the concrete block on the east wall were attributed solely to the stress of the grain bin.

United Seeds also offers as a defense evidence of due care in the design and construction of its grain bin. However, it is well settled that the exercise of due care is not a defense to a claim based on nuisance. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989). Furthermore, the evidence presented does not support United Seeds' contention that it exercised due care.

United Seeds failed to inform the engineer it hired to design the grain bin's foundation, Schroder, that it intended to locate the structure within 4 feet of an already existing building. Thus, Schroder was unable to design a foundation which would minimize an encroachment onto the footing of Omega's building.

Accordingly, we conclude that the encroachment onto the footing of Omega's building by United Seeds' grain bin, resulting in damage to the footing, basement floor, and east wall of the building, was a substantial and ongoing invasion of the private use of Omega's building and thus constitutes a nuisance.

(b) Snow-load Effect

Hossak also testified in regard to the snow-loading effect of United Seeds' grain bin on Omega's building. Hossak testified that whenever a smaller building is designed to stand in close

proximity to a taller structure, proper engineering practice requires that consideration be given to the snowdrift effect the taller building will have on the shorter building. To this extent, the shorter building's roof must be designed to accommodate a heavier snow load.

Hossak testified that various building codes contain formulas used by engineers to calculate the minimum necessary structural requirements for differential roof heights of separated buildings to accommodate snow-load effects. Specifically, Hossak stated that, based on the building codes, prior to the construction of the grain bin, the snow-load requirement for the Omega building's roof structure was between 20 and 25 pounds per square foot. With the grain bin in place, the snow-load requirement is now between 80 and 90 pounds per square foot. Hossak opined that in time and under the right conditions, the grain bin could cause snow to accumulate on Omega's building and collapse its roof.

United Seeds attempted to discredit Hossak's testimony by positing that only winter snowstorms driven by an east wind could cause a snow-load effect on Omega's building situated directly west of United Seeds' grain bin and that the climatological data received in evidence indicates that a snowstorm which occurred on March 13, 1991, was driven primarily by northwest winds.

However, contrary to United Seeds' claim, close examination of the climatological data indicates that the March 13, 1991, snowstorm was at times driven by winds 10 degrees to the east of north. Further, photographs received in evidence clearly demonstrate that after the March 13 snowstorm, a disproportionate amount of snow had been deposited on that portion of Omega's building situated directly southwest of the grain bin. Thus, the evidence does not support United Seeds' claim that only winter snowstorms driven by an east wind could cause a significant snow-load effect on Omega's building. The data support Hossak's opinion that the proximity of the grain bin creates a viable danger that during certain winter storms, additional snow may be loaded onto Omega's building.

Omega's claim in regard to the snow-load effect is one of an anticipatory nuisance. In *City of Syracuse v. Farmers Elevator,*

Inc., 182 Neb. 783, 157 N.W.2d 394 (1968), the defendant constructed an anhydrous ammonia fertilizer distribution facility within the 400-foot minimum setback required by the Agricultural Ammonia Institute from already existing places of public assembly. We held that the defendant's actions constituted an anticipatory nuisance.

As in *City of Syracuse v. Farmers Elevator, Inc., supra*, we determine that United Seeds' actions constitute an anticipatory nuisance. United Seeds chose to locate its grain bin so close to Omega's already existing building that, according to the standards utilized by engineers in the profession, the structural integrity of Omega's building was necessarily compromised. Accordingly, we find that by reason of the conditions implicit in and unavoidably resulting from its operation, United Seeds' grain bin effects a substantial invasion in the private use of Omega's building by placing its roof structure at risk of collapse due to an increased snow-load potential.

(c) Risk of Fire or Explosion

Finally, Omega claims that United Seeds' grain bin places Omega's building in a hazard zone or creates an unreasonable risk of fire or explosion. The record does not support such a contention. In support of its claim, Omega called another engineering expert, Thomas Lang, who testified that corn was a combustible material and that explosions have been known to occur in grain storage facilities.

However, on cross-examination, Lang admitted that corn, although combustible, is not highly combustible or explosive. In addition, Lang admitted that the building codes generally categorized uses as "high hazard" when such uses involve materials such as aluminum powder, cellulose nitrate, alcohol, petroleum distillates, and gasoline. Only those occupancies which process or handle grain or wood so as to generate dust were identified by the codes as high hazards. In that regard, Lang testified that the distinction between a grain elevator and a grain bin is that a grain bin is used for storage of grain and an elevator for the transfer of grain. The significant distinction is that an elevator's grain handling machinery is internal to its operation, whereas a bin's machinery is external.

Sanford Goshorn, a grain elevator inspector for the Nebraska State Fire Marshal, testified on behalf of United Seeds. Goshorn testified that United Seeds' grain bin did not present a fire or explosion hazard. Goshorn recognized the same distinctions between a grain elevator and a grain bin as did Lang. However, Goshorn stated that the risk of ignition is much greater in a grain elevator than in a grain bin because, unlike a grain bin, elevators generate a large amount of grain dust, and the mechanical contrivances of an elevator are internal to its structure, thus increasing the chance of a spark source for ignition.

We are persuaded by Goshorn's testimony and conclude that the district court erred in determining that United Seeds' grain bin created a hazard zone with respect to fire and explosion which endangered Omega's building.

2. Injunctive Relief

An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Ben Simon's, Inc. v. Lincoln Joint-Venture*, 248 Neb. 465, 535 N.W.2d 712 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

We conclude that the district court properly issued injunctive relief to Omega in this matter. The record establishes that Omega's building will continue to suffer an actual and substantial injury to its foundation due to the footing encroachment and increased snow-load potential to its roof structure resulting from a nontrespassory invasion of its property by United Seeds. As such, Omega's right to relief is clear.

Omega's remedy at law is inadequate to prevent a failure of justice. The evidence suggests that, should both structures remain in their present locations, Omega's building will continue to suffer damage due to footing encroachment. Obviously, one structure must be relocated. Accordingly, an award of damages alone is insufficient to prevent a failure of justice in the instant case.

Furthermore, the damage to Omega's building is irreparable without the benefit of equitable relief. This is so because if the

grain bin is not removed, it will continue to damage Omega's building. In addition, the trial testimony revealed that the cost of making structural improvements to Omega's existing building, so that both structures may remain in place, exceeds the cost of relocating and rebuilding a like structure.

3. Measure of Damages

Where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982).

Lang testified that the cost of repairs to Omega's building, assuming the removal of the grain bin, was $13,000. Additionally, Lang testified that he and Hossak designed modifications to Omega's building which would allow the structure to withstand the snow-load and footing encroachment effects should the grain bin remain in place. Lang stated that the cost of constructing these modifications would be $89,700. Finally, Lang estimated that the cost to construct a building with a similar number of square feet at a safe distance from United Seeds' grain bin would be $84,763.

In fashioning a remedy, we are mindful that Omega's building can be modified to accommodate the effects of the grain bin. However, this alternative is not equitable, since the foregoing testimony suggests that this choice would be the most expensive alternative. Second, Omega's building could be removed and relocated. This alternative also is not equitable, since it effects a private taking of Omega's property by the wrongdoer, United Seeds.

Thus, the district court chose the most equitable means through which Omega's property could be restored and repaired when it ordered United Seeds to completely remove its grain bin and pay Omega the cost of repairs to the basement floor and east wall of its building, i.e., $13,000. Having balanced the equities involved in this matter, and having determined that the

trial court did not err in granting the relief that it did, we need not address Omega's cross-appeal concerning the propriety of the trial court's invitation to United Seeds to choose between two remedies.

VI. CONCLUSION

For all of the foregoing reasons, after reviewing this cause de novo on the record, we affirm the judgment of the district court.

AFFIRMED.

WHITE, C.J., and FAHRNBRUCH, J., concur in the result.

SIFFRING FARMS, INC., APPELLANT, V. DONALD L. JURANEK AND JOAN M. JURANEK, HUSBAND AND WIFE, APPELLEES.

561 N.W.2d 203

Filed March 28, 1997. No. S-95-096.

1. **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.
2. **Landlord and Tenant: Words and Phrases.** A payment made in exchange for the use of land is rent.
3. **Landlord and Tenant: Time.** Rent accrues when the right to receive it vests, even though the time for payment has not yet arrived.
4. **Judicial Sales: Deeds: Time.** A purchaser at a judicial sale is not entitled to rent which has accrued but has not yet been paid at the time of the sheriff's deed.
5. **Records: Judgments: Appeal and Error.** Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, District Judge, Retired. Affirmed.

Barry L. Hemmerling, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant.

Donald L. Juranek and Joan M. Juranek, pro se.

Terrence L. Michael, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amicus curiae Farm Credit Services of the Midlands, FLCA.

WRIGHT, CONNOLLY, and GERRARD, JJ., and FLOWERS, D.J., and BOSLAUGH, J., Retired.

FLOWERS, D.J.

Siffring Farms, Inc. (Siffring), brought suit to recover certain sums due Donald L. Juranek (Juranek) under a contract to grow seed corn on property owned by Juranek and his wife, Joan M. Juranek, which property was purchased by Siffring at a foreclosure sale. The district court found against Siffring on its claim, and Siffring appeals.

SCOPE OF REVIEW

In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996); *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996).

FACTS

In April 1993, Juranek and his son entered into an agreement with J.C. Robinson Seed Company (Robinson) to grow seed corn. The land on which the seed corn was to be grown was owned by Juranek and his wife. The contract identified Juranek's son as the grower and Juranek as the landlord. The contract was signed by both Juranek and his son, as well as by a representative of Robinson. While the contract provided that Robinson would supply the seed and would at all times remain owner of the crop unless Robinson chose to release it, the grower was required, among other things, to plant and fertilize according to Robinson's timing and specifications; to "rogue

out" volunteer corn near the seed acreage; to protect the crop against insects, weeds, and other conditions that could damage the crop; and to destroy all male plants. Payment under the contract was based upon a formula and the work that had been required by Robinson. The contract further provided that the payment would be divided, with 20 percent going to Juranek's son as the grower and 80 percent to Juranek as the landlord. Under the formula for payment, the grower had the ability to establish a settlement price (or prices) per 5,000 bushels at any time (or times) between May 1, 1993, and April 21, 1994. Regardless of when the settlement price was determined, however, payments under the contract could not be made before December 16, 1993.

In April 1993, Juranek was in the midst of a foreclosure action involving the real estate subject to the contract with Robinson. A decree of foreclosure on the property was signed on March 20, 1992, and the real estate was sold to Siffring at a foreclosure sale held September 3, 1993. The sale was confirmed on October 8, and a sheriff's deed to the property was delivered to Siffring on November 16. On November 10, Siffring filed suit against Donald and Joan Juranek, Robinson, and Farm Credit Bank of Omaha. Farm Credit, the former mortgagee of the property, disclaimed any interest in the suit, stating that it had been paid in full by proceeds from the foreclosure sale. Robinson tendered the money due Juranek into the court and did not participate further in the proceedings.

Siffring argued that as the purchaser at the foreclosure sale, it is entitled to all cash rents due Juranek on the date of the sheriff's deed. The district court found generally for Juranek and the other defendants and against Siffring. The court determined that (1) the agreement between Juranek, Juranek's son, and Robinson was "a crop share arrangement or agreement" and that (2) because the crop had been harvested prior to November 16, 1993, the date the sheriff's deed was executed and delivered, the proceeds from the contract had already become the personal property of Juranek. The district court also found that the petition failed to state a cause of action against Joan Juranek.

ASSIGNMENTS OF ERROR

Siffring claims the district court erred in (1) finding that the payment due Juranek under the Robinson contract was personal property and not rent, (2) failing to find that the payment due Juranek was rent and that the right to it passed to Siffring with the delivery of the sheriff's deed, and (3) finding the lease to be a crop share arrangement.

ANALYSIS

The first question we must decide is whether the payment due Juranek under the Robinson contract is rent. Juranek and amicus curiae, Farm Credit Services of the Midlands, suggest that it is something different. The contract identifies Juranek as the landlord and his son as the grower. The contract imposed no obligations upon Juranek. The payment due him was for the use of the land. While the testimony at trial shows that Juranek may not have been as passive as the Robinson contract contemplated, it does not necessitate a different conclusion. In this case, the payment due Juranek was for the use of his land, which, by definition, is rent.

The next question is whether the rent was unaccrued at the time the sheriff's deed was delivered to Siffring. At the time the sheriff's deed was delivered, Juranek and his son had done all that was required of them to receive payment. The seed corn had been grown, harvested, and delivered to Robinson. The right to receive payment was a fully vested and enforceable right, and Robinson was no longer using Juranek's land for any purpose under the contract. We find that under the circumstances the rent had accrued, even though the time for payment had not yet arrived. Siffring cites *Conservative Sav. & Loan Assn. v. Karp*, 218 Neb. 217, 352 N.W.2d 900 (1984), for the proposition that a purchaser at a judicial sale is entitled to all rents collected after the date the purchaser receives the sheriff's deed. What *Conservative Sav. & Loan Assn.* actually held was that the purchaser was entitled to all rents collected *for the period* after the date of the sheriff's deed. The case says nothing about the right to receive rents that had accrued for a prior period but had remained unpaid. In the instant case, the rent due Juranek was for the 1993 corn crop season. That season ended

with the harvest of the seed corn, which was prior to the delivery of the sheriff's deed to Siffring. Robinson was no longer using Juranek's land when Siffring took title, and there was no rent due under the contract for the period that commenced on November 16, 1993.

Because the rent had accrued prior to the date Siffring took title and was for a period of time during which Juranek was the owner, we need not determine whether the rent was crop share or cash, or what difference, if any, that would make.

CONCLUSION

In evaluating a case on appeal, an appellate court is not bound by the grounds stated by the district court as the basis for its decision. Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm. *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985).

The payment due Juranek for the crop grown under the contract with Robinson covered a period of time prior to Siffring's ownership and had accrued prior to November 16, 1993. The payment did not pass to Siffring with the sheriff's deed.

AFFIRMED.

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

MAPES INDUSTRIES, INC., A NEBRASKA CORPORATION, APPELLANT, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A MARYLAND CORPORATION, ET AL., APPELLEES.

560 N.W.2d 814

Filed March 28, 1997. No. S-95-469.

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. **Insurance: Liability.** An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable inves-

tigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.

3. **Insurance: Contracts: Appeal and Error.** The construction of an insurance contract or policy presents questions 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.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Tyler J. Sutton and Kerry L. Kester, of Woods & Aitken, for appellant.

Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPRAGUE, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

In this declaratory judgment action, the plaintiff-appellant insured, Mapes Industries, Inc., seeks a declaration that its insurers, the defendants-appellees United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc., and Fidelity and Guaranty Insurance Company, hereinafter collectively referred to as USF&G, are obligated to defend Mapes in a suit brought against it by the defendant-appellee Harmon Contract, W.S.A., Inc. The district court sustained the defendants' motion for summary judgment, thereby dismissing Mapes' action. Mapes thereupon appealed to the Nebraska Court of Appeals, which, in an unpublished memorandum opinion, reversed the judgment of the district court and remanded the matter for further proceedings. See *Mapes Indus. v. United States F. & G. Co.*, 4 Neb. App. xviii (case No. A-95-469, July 3, 1996). USF&G then successfully sought further review by this court, asserting that the Court of Appeals erred in ruling that the district court improvidently overlooked Mapes'

potential liability to Harmon. We now reverse, and remand with direction.

II. SCOPE 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. *Central Neb. Broadcasting v. Heartland Radio*, 251 Neb. 929, 560 N.W.2d 770 (1997).

III. FACTS

Mapes, a manufacturer of laminated insulating panels for use in building construction, sold certain panels which were eventually installed in a building erected in Chicago, Illinois. Subsequently, Harmon filed a complaint against Mapes in an Illinois court, alleging that the panels had "delaminated and caused the exterior surface to 'ripple,' " that the "defect manifested itself throughout the building," and that Harmon "was compelled to rectify the problem." Mapes tendered the defense of the suit to USF&G.

USF&G denied coverage and any duty to defend the suit, writing that it had "carefully reviewed the complaint" and concluded that it was "evident that the only damages claimed [were] to 'rectify the problem' of the delaminated panels manufactured by Mapes" and that the damages claimed did not arise out of an " 'occurrence,' " as defined in the policy.

Harmon then amended its complaint against Mapes, adding, so far as is relevant, that Harmon "was forced to correct the defect to avoid and minimize a loss of use of the building and mitigate damages which were caused by the product failure of the panels manufactured by" Mapes and the defendant-appellee Kalco Specialty Sales, Inc., "after the panels had been put to their specified use." Mapes again tendered the amended suit to USF&G, and USF&G again declined to defend Mapes.

At the relevant time, the subject comprehensive general liability policy of insurance provided, so far as relevant, that USF&G would pay on behalf of Mapes all sums which Mapes shall become legally obligated to pay as damages because of

"property damage" caused by an occurrence subject to certain exclusions as set forth in parts IV(2)(a) and (b) hereinafter. The policy additionally grants USF&G the right and imposes upon it the "duty to defend any suit against [Mapes] seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any suit as it deems expedient . . . ."

IV. ANALYSIS

1. Nature of Duty to Defend

We begin by analyzing the nature of an insurer's duty to defend a suit brought against its insured. Such a study begins with a review of *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). In the course of holding therein that an insurer's obligation to indemnify an insured could not be determined until there is a final determination of the insured's obligation to respond in damages and the basis of that obligation, we, in considering insuring language very similar to that in question here, wrote:

> It occurs to us that there are two separate and distinct obligations provided for by this contract of insurance. In the first instance, Allstate agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of bodily injury. That is one contractual obligation existing between Allstate and [the insured]. The second obligation, which is separate and apart from the obligation to pay, is the "right *and duty* . . . to defend any suit against the Insured." . . .
>
> Not only does the carrier have a right to defend but it has a corresponding duty to do so. This duty is rather broad in that the policy provides that the carrier has a duty to defend even though the suit is "groundless, false or fraudulent." That is to say, the duty to defend is greater than the obligation to pay. There is no requirement that there must be a reasonable likelihood of recovery or even a good faith claim. It is possible by reason of the language of this policy that the company may be obligated to defend a groundless, false, or fraudulent claim though it may not ultimately be required to make any payment.

(Emphasis in original.) *Id.* at 187-88, 313 N.W.2d at 638.

We again noted in *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 295, 543 N.W.2d 173, 179 (1996), that an insurer has a duty to defend its insured whenever the insurer ascertains facts which give rise to the potential for liability under the policy, and further wrote:

> More specifically, as suggested by one writer, under [*Allstate Ins. Co. v.*] *Novak*, an insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.

As observed in *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 784, 502 N.W.2d 484, 487 (1993):

> [T]he nature of the duty to defend is defined by the insurance policy as a contract . . . . In determining whether a defense duty exists, "[t]he rule is well settled in Nebraska that an insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured." . . . However, an insurer's decision whether to defend against a claim cannot be based solely on the allegations of a petition. Rather, "[a]n insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." . . . Nevertheless, if, according to facts alleged in a petition and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured. . . . Although an insurer is "obligate[d] . . . to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy."

Thus, in determining its duty to defend, an insurer not only must look to the petition, but must investigate and ascertain the relevant facts from all available sources. Mapes' president stated that the panels which Harmon claimed presented aesthetic problems "were not replaced, but instead were covered

up, and this process involved disturbing other components of the . . . [b]uilding which were not manufactured, supplied or installed by Mapes, including disturbing the curtain wall and the removal of the exterior tinted glass on the outside of the building." In addition, Harmon's senior project manager stated that since the occupancy rate for the building was in excess of 76 percent and increasing, the problem with the panels had not affected the leasing of the building.

The question, then, is whether the allegations or additional information establishes, or raises an inference, that there was or may be "property damage" as the result of an "occurrence," as those terms are defined in the subject policy. In making those determinations, we are bound by the rule that the construction of an insurance contract or policy presents questions 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. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

2. Property Damage

So far as relevant, "property damage" is defined in the policy as "(1) physical injury to or destruction of tangible property . . . including the loss of use thereof . . . resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence . . . ."

(a) Physically Injured Tangible Property

We turn our attention first to whether the allegations in the Harmon suit or the additional information set forth in subpart 1 above establishes or raises an inference that property was or may be damaged as described in clause 1 of the foregoing definition of property damage. Relevant to that determination is the policy language reading that

> [t]his insurance does not apply:
>
> . . . .
>
> (n) to property damage to [Mapes'] products arising out of such products or any part of such products;
>
> (o) to property damage to work performed by or on behalf of [Mapes] arising out of the work or any portion

> thereof, or out of materials, parts or equipment furnished in connection therewith . . . .

The insurer in *Thos v. Employers Mutual Cas. Co.*, 215 Neb. 424, 338 N.W.2d 784 (1983), had issued a comprehensive liability policy with substantially the same language as involved here. The insurer refused to defend an action brought against the insured which arose from the insured's erection of a hog confinement structure which was later wind damaged. At issue was whether the structure had been erected in a workmanlike manner and conformed to a rather general warranty. The *Thos* policy provided completed operations coverage by language like that contained in the policy now before us, namely, for

> bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to [Mapes].

We concluded that because loss to the insured's product itself was not covered, and because neither the petition nor the record disclosed damage to other property of the building owner, the insurer was correct in determining that there was no potential liability under the policy and, in turn, refusing to defend the underlying claim. In so reasoning, we recalled our earlier determination that completed operations language did not afford coverage for damage to the product itself, but only for damage to other property or for bodily injury, observing further that the coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss and that the policy was a liability policy, not a contract in the nature of a performance bond or guarantee of satisfactory construction.

Although, unlike the policy at issue here, the policy in *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 188 N.W.2d 699 (1971), provided products liability and completed operations coverage, the reasoning of the case is nonetheless instructive. The insurer therein had issued a policy to a roofing contractor who had furnished the materials for and constructed and installed a roof deck and covering on the owner's manufac-

turing plant. About a year after completion of the roof, the owner discovered that some roof panels had "cupped" or warped, causing cracks and checkmarks to appear. The warranty period of the construction contract had expired. The owner nonetheless brought an action against the contractor. In claiming coverage, the contractor urged that the damage was not confined to its product or completed work. In rejecting that contention and concluding that as there was no possibility of coverage, the insurer had no obligation to defend the contractor, we wrote:

> Let us analyze the language of the insuring provisions of the policy. It is clear that the "damage" which the policy covers must be "caused by an occurrence." If we then relate this language to the allegations of [the owner's] petition, we note that the "occurrence" which is the basis of [the owner's] claims is the alleged false representation [about the quality of the roof]. The "damages" for which recovery is sought is the roof deterioration or damage to the building. . . . It seems perfectly clear that under the language of the policy the "occurrence," in this case the "alleged representations and reliance" thereon, must have resulted in the physical damage. The deterioration of the panels and the consequent damage clearly was not caused by the representations. It was not caused by reliance upon such representations. It occurred in spite of such representations or reliance thereon. There is obviously no cause and effect relationship between the representations and the deterioration and none is claimed.
>
> . . . If [the contractor] made such representations (or warranties) this might make [the contractor] liable to [the owner] for the falsity or breach thereof, but the hazard covered is obviously property damage which occurs on account of the reliance as where some other property is damaged or personal injury occurs because of the product failure. If, for example, a representation had been made that the panels had certain weight-bearing characteristics and, not having such qualities, materials resting upon the roof break through damaging persons or property below, the contractor's insurer in this case would be liable for the

> damage to the property or persons injured, but not for the loss of the panels themselves. The policy provisions in question clearly do not cover the liabilities contained in the usual construction contract warranties.
>
> [The contractor] contends that exclusions (l) and (m) do not apply because the damage is not confined to the product or work, but that there is damage to the premises as a whole by reason of depreciation in its market value and therefore the exclusions are inapplicable. The evidence is uncontradicted that the defect is confined to the roof itself. No other portion of the building suffered physical damage. It is only physical damage which the policy covers. Further the evidence is uncontradicted that the replacement of the deck and four-ply roof will completely restore the premises both physically and as to market value.

Id. at 184-86, 188 N.W.2d at 702-03. (Exclusions (l) and (m) in the *Hartford Acc. & Ind. Co.* policy were the same as the exclusions found in subparagraphs (n) and (o) of the policy at hand, as set forth above.)

Harmon's amended complaint fails to allege, and the additional information set forth in subpart 1 above fails to establish or provide us with a basis to infer, the existence or possible future development of physical injury to or destruction of the building or tangible property other than to the panels manufactured by Mapes. As a consequence, the property damage otherwise covered by clause 1 of the definition falls within exclusions (n) and (o); thus, clause 1 does not impose upon USF&G an obligation to defend Mapes.

(b) Tangible Property Not Physically Injured

We thus turn to the coverage provided by the definition of property damage contained in clause 2 of the property damage definition, which covers occurrences not otherwise excluded resulting in the loss of use of tangible property not physically injured or destroyed. The policy provides that such coverage does not apply

> (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from

(1) a delay in or lack of performance by or on behalf of [Mapes] of any contract or agreement, or
(2) the failure of [Mapes'] products or work performed by or on behalf of [Mapes] to meet the level of performance, quality, fitness or durability warranted or represented by [Mapes];

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of [Mapes'] products or work performed by or on behalf of [Mapes] after such products or work have been put to use by any person or organization other than [Mapes.]

In other words, while exclusion (m) initially denies coverage for the loss of use of tangible property neither physically injured nor destroyed by the failure of Mapes' products or work, the language beginning with the word "but" exempts from the operation of the exclusion such loss of use resulting from the sudden and accidental physical injury or destruction of Mapes' products or work put to use by others.

Here, the Harmon complaint fails to allege, and the additional information set forth in subpart 1 above fails to establish or provide us with a basis to infer, that the delamination of the panels resulted from a sudden and accidental event. As a consequence, USF&G has no obligation to defend under clause 2 of the property damage definition.

Because no possibility of coverage has been either alleged or otherwise shown, we need not concern ourselves with whether the delamination of the panels otherwise qualifies as an "occurrence," as that term is defined in the policy.

V. JUDGMENT

Accordingly, as first noted in part I above, the judgment of the Court of Appeals is reversed and the cause remanded thereto with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA EX REL. EDWARD A. FICK AND KATHLEEN F. FICK, APPELLEES AND CROSS-APPELLANTS, V. SUSAN MILLER ET AL., APPELLANTS AND CROSS-APPELLEES.

560 N.W.2d 793

Filed March 28, 1997. No. S-95-502.

1. **Judgments: Costs: Attorney Fees.** Attorney fees taxed as costs are part of a judgment.
2. **Jurisdiction: Appeal and Error.** Irrespective of whether raised by the parties, an appellate court has the power and duty to determine its jurisdiction.
3. **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 court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders.** In order to be final, a judgment for money must specify the amount awarded or the means for determining the amount.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Appeal dismissed.

Dan Alberts, of DeMars, Gordon, Olson, Recknor & Shively, for appellants.

Max G. Dreier, of Dreier Law Office, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and CHEUVRONT, D.J.

CAPORALE, J.

The plaintiffs-appellees and cross-appellants, relators Edward A. Fick and Kathleen F. Fick, seek an alternative writ of mandamus commanding the defendants-appellants and cross-appellees, Larry Kaczor, Karen Sladek, Mark Durre, Rod Gartner, Wayne Green, and Bruce Waldo, the duly elected and qualified members of the board of education of Holt County School District No. 137, to either reimburse relators the cost of transporting their son to his high school class or provide him with transportation, and to do the same with respect to any other of their children as might in the future attend a school in that district. Susan Miller, the superintendent of the district, was originally named a defendant, but was later dismissed pursuant to stipulation. The district court in part dismissed the petition and in part granted an alternative writ and taxed costs against

the defendants, including "the amount of attorneys fees for the benefit of the relators' attorney to be determined in a supplementary proceeding at a later date . . . ." The defendants appealed to the Nebraska Court of Appeals. The relators cross-appealed. Under our authority to regulate the caseloads of this court and the Court of Appeals, we, on our own motion, removed the matter to our docket. We now dismiss the appeal for lack of jurisdiction.

Given that attorney fees taxed as costs are part of a judgment, *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970), the district court's unusual treatment of the issue requires that we initially consider whether we have jurisdiction over this appeal, see *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996) (irrespective of whether raised by parties, appellate court has power and duty to determine jurisdiction). It is axiomatic that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997).

The question is whether an order granting an attorney fee in an amount to be determined at some future time constitutes a final, appealable order. Our precedent suggests not.

For example, we have held that a judgment which looks to the future in an attempt to judge the unknown is a conditional judgment and as such is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be. *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995). We thus concluded in *Dietz* that a judgment imposing a fine which could be reduced by the defendant's actions was not final. In *Bass v. Dalton*, 218 Neb. 379, 355 N.W.2d 225 (1984), we observed that an order granting an accounting does not become final until the accounting is conducted.

Courts that have considered the precise question now before us have concluded that a final judgment for money must specify the amount awarded. *U.S. v. Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721 (1958) (final judgment for money must, at the least, determine amount or specify means

for determining amount); *Lee Way Motor Freight, Inc. v. Welch*, 764 P.2d 191 (Okla. 1988) (money judgment must state with certainty amount to be paid); *Roach v. Roach*, 164 Ohio St. 587, 132 N.E.2d 742 (1956); *H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678 (Tex. App. 1991) (judgment awarding unascertainable amount not final). We adopt that reasoning and hold that in order to be final, a judgment for money must specify the amount awarded or specify the means for determining the amount.

Because the judgment here leaves the amount of the attorney fees to be awarded undetermined, the judgment is not final, and we consequently lack jurisdiction to entertain this appeal.

APPEAL DISMISSED.

IN RE ESTATE OF CONNIE Y. WEST, DECEASED.
CHERILYN J. FROSH, PERSONAL REPRESENTATIVE OF THE ESTATE OF CONNIE Y. WEST, DECEASED, AND JAMES H. WEST ET AL., BENEFICIARIES, APPELLANTS, V. TED HANEY ET AL., HEIRS AT LAW, APPELLEES.

560 N.W.2d 810

Filed March 28, 1997. No. S-95-575.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Trusts.** Whether a trust has been created is a question of fact.
3. ____. The interpretation of the words of a trust is a question of law.
4. **Equity: Appeal and Error.** In an equitable proceeding, an appellate court makes an independent determination of both the facts and the applicable law.
5. **Trusts: Perpetuities.** A trust requires that a beneficiary be definitely ascertained at the time of the trust's creation or definitely ascertainable within the period of the rule against perpetuities.
6. **Contracts.** Instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.

Appeal from the District Court for Keith County, DONALD E. ROWLANDS II, Judge, on appeal thereto from the County Court for Keith County, KRISTINE R. CECAVA, Judge. Judgment of District Court affirmed in part, and in part reversed.

Kelly Michael Hogan for appellants.

Richard A. Dudden for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and COADY, D.J.

WHITE, C.J.

Decedent, Connie Y. West, executed a document entitled "D & C Living Trust" (living trust document) on July 16, 1989. The living trust document named decedent and Cherilyn J. Frosh as cotrustees, but did not name beneficiaries.

Decedent also executed a declaration of homestead (declaration) and a trust registration (registration). These documents were dated July 16, 1989, were notarized by a neutral party on August 14, and were filed in the office of the clerk for Keith County on August 18.

The declaration stated that decedent was a cotrustee of the D & C living trust (trust). In addition, she claimed her homestead, described as "Lot 5, Block 3, William's 4th Subdivision, City of Ogallala, County of Keith, State of Nebraska," for the benefit of herself and for the benefit of James H. West, Heather Lynn West, Quincy West, Jacob West, and Hope West. The declaration was signed by decedent in her capacity as cotrustee.

The registration listed decedent and the Wests as cotrustees and as beneficiaries of the trust. Pursuant to the registration, the trust property included all real estate recorded in the clerk's office and all personal property belonging to decedent. The registration was signed by decedent in her capacity as cotrustee.

Evidence demonstrates that decedent attempted to transfer the homestead to the trust by means of a grant deed on July 16, 1989. The grant deed was signed by decedent in her capacity as grantor and in her capacity as a cotrustee of the trust, but was not acknowledged.

Two bills of sale evidence that decedent intended to transfer all personal property to the trust. Included within that attempted transfer were a mobile home and an automobile. There appears to be no evidence, however, that title to these vehicles was transferred to the trust. Furthermore, the vehicles were not in decedent's possession at the time of her death. For these reasons, the vehicles will not be relevant to this court's analysis.

Finally, decedent named the trust as beneficiary of an insurance policy with Jackson National Life Insurance Company. The beneficiary of the policy was changed in October 1989 to carry out decedent's intention.

Decedent executed a last will and testament on August 14, 1989. The will provided that decedent's entire estate was to be held, administered, and distributed according to the terms of the trust dated July 16.

Decedent died on June 7, 1993. Her will was filed for probate in Keith County Court on August 9. Shortly thereafter, an application for informal probate of will and informal appointment of personal representative was filed. Frosh, who was appointed personal representative, filed an application for determination of heirs and devisees. Frosh also sold all personal property belonging to decedent at the time of her death.

On December 30, 1993, the court held that the will devised the estate to the cotrustee, Frosh, if the trust was in existence at the time of decedent's death. The court found that the living trust document did not constitute a trust because it failed for lack of beneficiaries. It also found that the living trust document did not dispose of the property in the will and that the property passed by the laws of intestacy. The court then determined that the heirs of decedent were as follows: Landon H. Hardman, Janet E. Griffin, Janey S. Kuehn, Ted Haney, Dwayne Hardman, Lee Lenoid David, and Sharon Lovelady (appellees).

A motion for new trial was filed by Frosh and the Wests (appellants). Appellants alleged that a new trial was warranted, considering that new evidence, namely the registration, had been discovered. The county court agreed and ordered a new trial.

The court again found on September 15, 1994, that there were no beneficiaries named in the living trust document, that beneficiaries could not be established by examining the will or living trust document, and that decedent's property would pass as intestate property. The heirs at law were again determined to be appellees.

The decision was appealed to the district court, which affirmed the county court's decision on April 26, 1995. Appellants appealed to this court on May 25.

Appellants' assignments of error can be summarized as follows: (1) The court erred in determining that the will and trust did not designate any beneficiaries, (2) the court erred in determining that the living trust document was the only trust instrument executed by the decedent, (3) the court erred in failing to construe all the documents to determine decedent's intent, (4) the court erred in failing to determine that the trust did not direct how decedent's estate should be managed or distributed, and (5) the court erred in affirming the decision of the county court.

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). Whether a trust has been created is a question of fact. *Matter of Estate of Binder*, 386 N.W.2d 910 (N.D. 1986). The interpretation of the words of such a trust is a question of law. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). In an equitable proceeding, an appellate court makes an independent determination of both the facts and the applicable law. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996).

Pursuant to Restatement (Second) of Trusts § 2 at 6 (1959), a trust is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Such an arrangement requires that a beneficiary be definitely ascertained at the time of the trust's creation or definitely ascertainable within the period of the rule against perpetuities. *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986). See *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993).

The living trust document clearly did not designate any beneficiaries. Appellants contend, however, that the trust does not fail, because the registration and declaration may be considered part of the trust and because those documents amply set out the beneficiaries. As support for this argument, appellants rely on this court's consistent rulings that

> instruments executed at the same time, by the same parties, for the same purpose, and in the course of the

> same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.

Properties Inv. Group v. Applied Communications, 242 Neb. 464, 475, 495 N.W.2d 483, 491 (1993). We hold, as do other jurisdictions, that such a ruling applies to trust instruments and may be applied in this case. See, *Wynekoop v. Wynekoop*, 407 Ill. 219, 95 N.E.2d 457 (1950); *First Federal, Etc. v. Great Northern, Etc.*, 282 Pa. Super. 337, 422 A.2d 1145 (1980); *Reagh v. Kelley*, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1970).

There is sufficient evidence to demonstrate that decedent intended that the registration and living trust document be considered one document. The registration stated that the cotrustees of the trust were decedent and the Wests. The living trust document, however, stated that there were only two cotrustees, decedent and Frosh. Nevertheless, the registration was subtitled "D & C Living Trust," addressed the distribution of the entire estate of decedent, and was dated July 16, 1989. For these reasons, we find that the registration was intended to be read as part of the trust.

It also appears that decedent intended that the declaration be read as part of the trust. The declaration, like the living trust document, was executed by decedent, stated that decedent was a cotrustee of the trust, and was dated July 16, 1989. Therefore, we conclude that the declaration must be read in conjunction with the living trust document.

After examining the entire instrument, we find that the trustor of the trust was unequivocally decedent. The cotrustees, as well as the beneficiaries, were decedent and appellants.

With regard to distribution of the trust property and distribution of decedent's estate, we recognize that the declaration provides that decedent's homestead was to be held in trust for the benefit of decedent and appellants. While the beneficiaries under the trust are ascertainable as to the homestead, unfortunately the trust was not funded with the homestead property.

Pursuant to Neb. Rev. Stat. § 76-211 (Reissue 1996), "Deeds of real estate . . . must be signed by the grantor . . . and be acknowledged or proved and recorded as directed in sections 76-216 to 76-237." More specifically, acknowledgment is

essential when conveying a homestead. See *Lindquist v. Ball*, 232 Neb. 546, 441 N.W.2d 590 (1989). The grant deed, although signed by decedent, was never acknowledged. As a result, the homestead was never conveyed to the trust and remained part of decedent's estate. The homestead must then be distributed as directed by decedent's will. The will, however, directed that all of decedent's property be conveyed to the trust and failed to provide a residuary clause. Because the trust was not funded with the homestead property and because the will failed to provide for a circumstance in which decedent's property was not placed in the trust, the homestead passes intestate. See Neb. Rev. Stat. § 30-2301 (Reissue 1995).

The declaration designated beneficiaries solely with regard to decedent's homestead, and the registration adequately designated beneficiaries with regard to the remaining property. Therefore, appellants are entitled to all personal property which had been properly transferred to the trust. Said property includes the miscellaneous cash found in decedent's house at the time of her death, proceeds from the Jackson National Life Insurance policy, the sum of $1,255.52 which had been deposited into the D & C Living Trust account, and proceeds from the sale of personal property by auction.

We hold that the homestead was not conveyed to the trust; therefore, appellees are entitled to the proceeds from its sale. In addition, because decedent's personal property was properly transferred to the trust, appellants are entitled to such property. For these reasons, the district court's decision is affirmed in part, and in part reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. M. BERRI BALKA, TAX COMMISSIONER OF THE STATE OF NEBRASKA, AND STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEES.

560 N.W.2d 795

Filed March 28, 1997. No. S-95-588.

1. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
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. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes: Taxation.** Tax exemption provisions are to be strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
6. **Statutes: Taxation: Proof.** One claiming an exemption from taxation of the claimant or claimant's property must establish entitlement to the exemption, because a statute conferring an exemption from taxation is strictly construed.
7. **Administrative Law: Statutes.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation.

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

Ronald E. Bucher for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPRAGUE, D.J.

SPRAGUE, D.J.

Plaintiff-appellant Metropolitan Utilities District of Omaha (MUD) filed a claim seeking a $159,931.21 refund of Nebraska retail sales tax paid on electricity MUD purchased between October 1, 1991, and September 30, 1992, to use in its business. The Tax Commissioner (Commissioner) approved $14,426.92 of the requested refund, but denied the remainder of the claim because MUD's use of electricity to transport treated water from two treatment facilities into storage did not constitute "manufacturing" or "processing" under Neb. Rev. Stat. § 77-2704.13 (Cum. Supp. 1992), and therefore, the electricity was not exempt from Nebraska retail sales tax. On appeal, the district court for Lancaster County affirmed the Commissioner's decision. We affirm.

ASSIGNMENTS OF ERROR

MUD's four assignments of error can be consolidated into the following issue: Whether Nebraska Sales and Use Tax Regulation 1-089.02A(1), 316 Neb. Admin. Code, ch. 1, § 089.02A(1) (1994), is consistent with § 77-2704.13.

STANDARD OF REVIEW

On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996).

When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Rainbolt v. State, supra*; *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996).

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. *Van Ackeren v. Nebraska Bd. of*

Parole, 251 Neb. 477, 558 N.W.2d 48 (1997); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

FACTS

MUD is a municipal corporation of the State of Nebraska engaged in the business of water treatment and distribution. The MUD water treatment system (1) obtains raw water from the Missouri River and wells along the Platte River; (2) transforms the raw water into treated water using sedimentation, clarification, disinfection, and filtration techniques; (3) transports the treated water from a treatment facility into covered storage tanks; (4) transports the treated water from storage into a distribution system; and (5) distributes the treated water to Omaha and the surrounding area.

MUD pays Nebraska sales tax on the electricity it purchases to transport treated water from its treatment facilities into storage. Between October 1, 1991, and September 30, 1992, MUD paid $159,931.21 in sales tax on electricity—a majority of which was purchased to transport treated water into storage at three of its treatment facilities: the "Platte River Plant," the "Florence Pumping Station," and the "Liquified Natural Gas Plant."

As a result, in June 1993, MUD filed a "Claim for Overpayment of Sales and Use Tax" form with the Department of Revenue, seeking a $159,931.21 sales tax refund. MUD contended that § 77-2704.13 permitted a refund of state sales tax because "[m]ore than 50 percent" of the amount of electricity purchased for use at its treatment facilities "was used . . . directly in processing, manufacturing, or refining tangible personal property." Section 77-2704.13 provides, in relevant part:

> Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of:
>
> . . . .
>
> (2) Sales and purchases of such energy sources or fuels . . . when more than fifty percent of the amount purchased *is for use directly in processing, manufacturing, or refining* tangible personal property, in the generation of electricity, or by any hospital.

(Emphasis supplied.)

The Commissioner approved a $14,426.92 refund for sales tax MUD paid on electricity it purchased for use at the Liquified Natural Gas Plant but denied a refund of state sales tax on the electricity MUD purchased to use at the Platte River Plant and the Florence Pumping Station because, according to the record, more than 50 percent of the electricity used at these two treatment facilities went into "high service pumping," i.e., energy expended exclusively to transport treated water from the treatment facility into storage. Furthermore, citing § 089.02A(1), the Commissioner determined that the electricity MUD used at the Platte River and Florence treatment facilities was used merely to transport already treated water from a treatment facility into storage rather than for manufacturing or processing and that, therefore, the purchase of electricity was not exempt from sales tax under § 77-2704.13.

MUD appealed the Commissioner's decision to the district court for Lancaster County. After a hearing on the record, the district court affirmed the Commissioner's decision. The court found that the electricity at issue was "[purchased and] used [by MUD] merely to [transport] an already finished product [treated water] from the [Platte River and Florence treatment facilities into storage]." The court also concluded that the water underwent no change in form after being transformed from raw water into treated, drinkable water.

MUD appealed the judgment of the district court. We removed the case to this court's docket pursuant to the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the Nebraska Court of Appeals and this court.

ANALYSIS

MUD contends that the district court erred in failing to find § 089.02A to be inconsistent with § 77-2704.13. The issue in this matter is whether MUD's use of electricity to transport treated water from its Platte River and Florence treatment facilities into storage warranted an exemption from state sales tax under § 77-2704.13.

In general, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are

plain, direct, and unambiguous. See, *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997); *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996). Specifically, tax exemption provisions are to be strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Moreover, one claiming an exemption from taxation of the claimant or claimant's property must establish entitlement to the exemption, because a statute conferring an exemption from taxation is strictly construed. See, *Omaha Pub. Power Dist., supra; Nebraska State Bar Found., supra.*

Under its authority to adopt regulations implementing the sales and use tax statutes, the Department of Revenue promulgated § 089.02A(1) which provides, in relevant part: "[Manufacturing or processing is] an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing."

Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation. *Omaha Pub. Power Dist., supra*; *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983).

Section 089.02A(1) is congruous with the generally accepted definition of manufacturing and processing. See, e.g., 68 Am. Jur. 2d *Sales and Use Tax* § 146 at 140 (1993) (stating that "[t]he terms 'manufacturing' and 'processing' imply essentially a transformation or conversion of material or things into a different state or form from that in which they originally existed—the actual operation incident to changing them into marketable products"); *So. Sioux Cty. Rural Water v. Dept. of Rev.*, 383 N.W.2d 585 (Iowa 1986) (concluding that pumping of treated water into holding tanks for eventual distribution involves

delivery of finished product and that delivery of product does not involve "processing"; electricity used subsequent to water treatment process was merely used to preserve treated water for distribution). We hold therefore, as a matter of law, that the definitions of "manufacturing" and "processing" contained in § 089.02A are in conformance with § 77-2704.13.

In interpreting § 77-2704.13, we consider whether the transportation stage of MUD's water treatment operation involves the manufacturing or processing of water according to § 089.02A(1), thus permitting MUD to obtain a refund of sales tax paid on the electricity it purchased and used to move treated water from its Platte River and Florence treatment facilities into storage.

MUD admits that the treated water pumped from its Platte River and Florence treatment facilities undergoes no subsequent transformation during or after transportation into storage. Thus, the electricity at issue before the court is used to transport a finished product from the treatment facility into storage to await distribution. MUD's contention, that the transportation of treated water constitutes either manufacturing or processing because without such transportation no additional raw water could be treated, fails. This contention fails to take into account § 089.02A(1).

Under § 089.02A(1), the mere transportation of treated water from MUD's treatment facilities into storage constitutes neither manufacturing nor processing because the treated water undergoes no substantive change in state, quality, form, property, or thing after it has been converted from raw sewage. Accordingly, we find that the electricity MUD purchased and used in order to transport treated water from the Platte River Plant and the Florence Pumping Station into storage does not constitute "manufacturing" or "processing." The transportation of water from the Platte River and Florence treatment facilities involves the use of electricity to store treated water awaiting distribution. MUD's use of electricity for this purpose cannot qualify for an exemption from Nebraska sales tax under § 77-2704.13.

CONCLUSION

MUD does not qualify for an exemption from state sales tax under § 77-2704.13 because the electricity purchased and used

by MUD to transport treated water from MUD's treatment facilities into storage does not constitute manufacturing or processing. The district court did not err in so holding.

AFFIRMED.

NADEAN J. HAWKES, APPELLANT, V. KIRK C. LEWIS, M.D., AND JEFFREY B. ITKIN, M.D., APPELLEES.

560 N.W.2d 844

Filed March 28, 1997. No. S-95-649.

1. **Directed Verdict: Evidence.** A directed verdict is properly granted 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. **Witnesses: Testimony: Juries.** Where a witness makes contradictory statements, the question of what the facts really were is for the jury.
3. **Negligence: Physicians and Surgeons: Liability.** The surgeon in charge of an operation is liable for the negligence of the assistant surgeon.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded for a new trial.

Daniel G. Dolan and Stephen Leuchtman for appellant.

J. Joseph McQuillan and Scott A. Calkins, of Walentine, O'Toole, McQuillan & Gordon, for appellee Lewis.

William M. Lamson, Jr., and William R. Settles, of Kennedy, Holland, DeLacy & Svoboda, for appellee Itkin.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and GRANT, J., Retired, and SPETHMAN, D.J.

CAPORALE, J.

The plaintiff-appellant, Nadean J. Hawkes, seeks to recover damages for the alleged medical malpractice of the defendant-appellee surgeon, Kirk C. Lewis, M.D., and the defendant-appellee assistant surgeon, Jeffrey B. Itkin, M.D. At the close of the plaintiff's case, the district court directed a verdict in favor of Itkin and dismissed the action as to him. In accordance with the verdict rendered at the conclusion of the trial in favor of

Lewis, the district court subsequently dismissed the action against him as well. In appealing to the Nebraska Court of Appeals, Hawkes assigned to the district court a number of errors, including that it had improvidently directed a verdict in favor of Itkin. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, moved the matter to our docket. For the reasons hereinafter set forth, we now reverse the judgment of the district court and remand the cause for a new trial as to both Lewis and Itkin.

Lewis and Itkin performed an abdominal hysterectomy on Hawkes. After making a low transverse incision, dissecting the skin and subcutaneous tissue, and separating certain muscles, the abdominal wall was opened and the small bowel packed away from the pelvis and into the abdominal cavity. The packing was done by using cotton packs to hold the bowel away from the pelvic cavity, leaving the bowel approximately 3 inches below the mesenteric artery. Lewis then completed the operation. At that point, Itkin's involvement in Hawkes' care ended, and Lewis became responsible for her postoperative care.

Believing Hawkes had recovered to a stable condition, Lewis released her from the hospital. A few days later, Hawkes was rehospitalized on an emergency basis and found to have suffered a tear to the mesenteric artery. The tear was thereupon repaired.

There was evidence that the tear would not have occurred in the absence of negligence in pushing the bowel, while it was being packed, either too far, too hard, or both too far and too hard.

During the presentation of her case, Hawkes offered portions of Itkin's and Lewis' pretrial deposition testimony. With regard to who packed the bowel, Itkin stated:

> "The operating surgeon is generally the person who would pack away the operative bowels, or the bowels. It would be unusual for an assistant to be responsible for packing the bowels away. And I believe in . . . Lewis' testimony he stated that he packed away the bowels from the operative field, sir.
>
> . . . .

"Q. . . . [D]o you feel that you had any participation in packing off of the bowel in this surgical procedure?

"A. I was an assistant surgeon in this operation. I cannot tell you that I packed the bowel away.

"Q. Do you think you did?

"A. No, sir.

. . . .

"Q. So is it safe for me to assume that you neither participated in the packing of the bowel or the unpacking of the bowel?

"A. I think that's a fair statement."

However, when asked if he had to move Hawkes' "transverse colon" during the surgery, Lewis answered in his deposition:

"A. Not directly by hand. In other words, I can't grab it and move it. What you do is whatever is in the way, you reach in with your packs and push it back.

"Q. Are you doing that on one side and . . . Itkin doing it on the other side?

"A. *We're both doing it.*

"Q. Do you recall how many packs you were using?

"A. My guess is three.

. . . .

"Q. Would he be using the lap packs on the right side and you on the left?

"A. Not necessarily.

"Q. Well, you tell me. You were there. I wasn't.

"A. I'm telling you not necessarily. *I can't remember whether he put in one pack or two or whether I put in three.* Generally speaking we're both busy working at this at the same time to conserve on time.

. . . .

"[Q.] So in this particular operative report, can any of us safely assume who did the lap packing on any portion of this lady's abdomen?

"A. . . . '*You can assume that I did at least part of it.*[']

. . . .

"[Q.] Do you recall who removed the packs?

"A. I don't recall. Could have been both of us; it could have been me. . . ."

(Emphasis supplied.)

This appeal is controlled by the rule that a directed verdict is properly granted 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. See, *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996); *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995).

While Itkin denied that he did any packing of the bowel, Lewis' testimony is self-contradictory, stating at one point that both he and Itkin were doing it, and at another point that he, Lewis, could not remember how many of the three packs he himself inserted. It has long been the rule that where a witness makes contradictory statements, the question of what the facts really were is for the jury. See *Gibbons v. Chicago, B. & Q. R. Co.*, 98 Neb. 696, 154 N.W. 226 (1915). See, also, *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995), and *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986) (good faith self-contradiction of expert witness presents question for trier of fact).

Thus, the district court erred in granting Itkin's motion for a directed verdict.

Having so determined, we move on to the matter of the judgment in Lewis' favor and recognize in that regard that he comes before us with the benefit of a verdict in his favor. However, as the surgeon in charge of the operation, he became liable for the negligence, if any, of his assistant, Itkin. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994) (delegation does not relieve physician of nondelegable duty of care); *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994) (in absence of own negligence, supervising surgeon could not be liable when assistant surgeon not shown to be negligent); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991) (surgeon in charge of operation liable under doctrine of respondeat superior for negligent acts of those who assist in operation).

The district court's improper ruling on Itkin's motion deprived the jury of the opportunity to consider whether he had been negligent and whether as a result, Lewis, even in the absence of his own negligence, was vicariously liable to Hawkes.

As a consequence, as noted in the first part of this opinion, the judgment of the district court must be reversed in its entirety and the cause remanded for a new trial as to both Lewis and Itkin. This issue being dispositive, we need not, and do not, address Hawkes' other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

WILLIS LUEDKE, APPELLANT, V.
UNITED FIRE & CASUALTY COMPANY, APPELLEE.
561 N.W.2d 206

Filed March 28, 1997. No. S-95-786.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below.
2. **Insurance: Contracts: Motor Vehicles: Damages: Public Policy.** An underinsured motorist provision in an automobile insurance policy which states that any amount payable for damages shall be reduced by all sums paid or payable under any workers' compensation, disability benefits, or similar law is void as against public policy.
3. **Insurance: Motor Vehicles: Damages.** The purpose and policy of the Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 60-571 through 60-582 (Reissue 1988), is to provide a means to make the victims of less than adequately insured motorists as nearly whole as reasonably possible.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

Alan L. Plessman, of Plessman Law Offices, for appellant.

Randall L. Goyette and Stephanie F. Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIVINGSTON, D.J.

WRIGHT, J.

This is a dispute between United Fire & Casualty Company (United) and its insured, Willis Luedke, over the amount of

underinsured motorist benefits to which Luedke is entitled under his automobile insurance policy. United contends that the law and the express terms of the policy require that the underinsured motorist benefits be calculated by taking the difference between the policy limits and all amounts paid as compensation for Luedke's injuries by both the workers' compensation carrier and the tort-feasor. Luedke asserts that his benefits should be calculated by taking the difference between the policy limits and those amounts paid to and actually retained by him.

SCOPE OF REVIEW

The issue in this case presents a question of law, in connection with which an appellate court reaches a conclusion independent of the lower court's ruling. *Muller v. Tri-State Ins. Co.*, *ante* p. 1, 560 N.W.2d 130 (1997).

FACTS

On July 18, 1988, Luedke was a passenger in an automobile which was traveling southbound on a county road in Seward County, Nebraska. Aleen Gleason was operating her automobile in a northbound direction at the same time and place. Gleason's automobile made a left turn in front of the automobile in which Luedke was a passenger, and a collision occurred which resulted in injuries to Luedke.

At the time of the accident, Luedke was acting in the course and scope of his employment with Garst Seed Company. Luedke sustained medical and hospital expenses. He was temporarily totally disabled and permanently partially disabled, and he lost income from work. In connection with these injuries, the workers' compensation carrier for Garst Seed Company paid a total of $38,711.77 in workers' compensation benefits.

Luedke commenced an action in the district court for Seward County against Gleason, seeking compensation for his injuries and damages. On May 5, 1993, a judgment was entered by agreement in favor of Luedke and against Gleason in the amount of $150,000. At the time of the judgment, Gleason's insurance carrier, Allied Insurance Company (Allied), had received notice from Garst Seed Company's workers' compensation carrier of its workers' compensation subrogation lien for

the sums it had paid to or on behalf of Luedke. Allied paid to Luedke and Garst Seed Company $25,000, the limits of Gleason's liability insurance coverage, in partial satisfaction of the judgment entered against Gleason. Since Garst Seed Company's lien exceeded the $25,000 payment, Garst Seed Company received the entire payment, leaving an outstanding lien of $13,711.77. The balance of the judgment against Gleason, $125,000, remained outstanding at the time of trial.

United and its predecessor disputed what amount was due Luedke and have not paid Luedke any sum under his automobile insurance policy for the claims arising from the accident with Gleason. At the time of the accident, Luedke carried underinsured motorist insurance through United in the amount of $100,000 per person. The relevant policy provision for the underinsured motorist coverage provided: "Any amounts otherwise payable for damages under this coverage shall be reduced by all sums paid or payable because of the 'bodily injury' under any of the following or similar law: 1. Workers' compensation law; or 2. Disability benefits law."

On June 22, 1993, Luedke, by and through his attorney, made a written offer of settlement upon United by certified mail for the amount of $61,288.23. Such offer was not accepted. On December 8, United, by and through its attorney, made a written offer to Luedke to allow judgment to be taken in the amount of $36,300, which offer was rejected by Luedke. Luedke then commenced this action against United to collect underinsured motorist benefits due under the policy issued by United.

The district court found that the plain and ordinary meaning of Neb. Rev. Stat. § 60-578 (Reissue 1988), as well as United's policy, required that the coverage limits of $100,000 be reduced by the $38,711.77 paid by Luedke's employer's workers' compensation carrier as well as the $25,000 paid on behalf of Gleason's liability insurance carrier, leaving due and owing to Luedke from United the sum of $36,288.23. The court found that since United rejected the offer made by Luedke and the amount of the judgment did not exceed Luedke's offer of settlement, no prejudgment interest would be awarded. The court further found that since Luedke had failed to obtain a judgment for more than the amount offered by United, Luedke should pay

United's costs from and after the December 8, 1993, offer. Lastly, the court found that since Luedke failed to obtain a judgment for more than the amount of his settlement offer, he could not recover any attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1993). The court entered judgment in favor of Luedke and against United in the sum of $36,288.23 plus costs up to and through December 8, 1993. Costs after such date were taxed to Luedke.

Luedke appealed, and under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, we removed the matter to our docket.

ASSIGNMENTS OF ERROR

Luedke makes two assignments of error: (1) The trial court's order is contrary to law, and (2) the trial court's order is unsupported by the evidence.

ANALYSIS

This case presents an issue as to the application of the setoff provision in Luedke's underinsured motorist coverage. The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994).

The provision in question states in relevant part: "Any amounts otherwise payable for damages under this coverage shall be reduced by all sums paid or payable because of the 'bodily injury' under any of the following or similar law: 1. Workers' compensation law; or 2. Disability benefits law." Gleason's insurance carrier paid $25,000 in partial satisfaction of the $150,000 judgment against her, and Luedke received $38,711.77 from his employer's workers' compensation carrier.

Luedke contends that it was error for the district court to allow a setoff of his underinsured motorist benefits in the amount of both Gleason's insurance carrier's payment and his workers' compensation benefits when the workers' compensation carrier had already subrogated against the $25,000 paid on behalf of Gleason. Luedke claims that under the plain and ordi-

nary meaning of the policy or, if ambiguous, its reasonable interpretation, United's coverage should first be reduced by the $25,000 paid on behalf of Gleason and should then be reduced by only $13,711.77, the amount of the workers' compensation carrier's outstanding lien. Because we have recently determined that a similar setoff provision was void, we need not determine whether the setoff provision in this case should be construed to allow a setoff of the entire $38,711.77 or of only $13,711.77.

In *Muller v. Tri-State Ins. Co., ante* p. 1, 6, 560 N.W.2d 130, 134 (1997), we held that an underinsured motorist provision in an automobile insurance policy which stated that "'[a]ny amount payable for damages shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law'" was void as against public policy. In that case, we noted that the policy was issued after the Underinsured Motorist Insurance Coverage Act (Act), Neb. Rev. Stat. §§ 60-571 through 60-582 (Reissue 1988), was enacted, which required that an automobile liability carrier offer underinsured motorist coverage to its insured. As a result, the underinsured motorist coverage was necessarily drawn by the insurer to comply with statutory requirements, and it was construed in light of the purpose and policy of the Act. See *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

In *Muller*, we determined that the purpose and policy of the Act is to provide a means to make the victims of less than adequately insured motorists as nearly whole as reasonably possible. We noted that although the Legislature retained a provision allowing the underinsured motorist insurance carrier to set off against payments made by the tort-feasor, which is a person or organization which may be held "legally liable," see § 60-578, the Legislature had struck language which would have allowed reduction by amounts paid under workers' compensation or other similar law. Therefore, an underinsured motorist coverage provision drawn pursuant to the Act which allows such a reduction is void as against public policy.

Luedke's policy of insurance was issued on February 14, 1988. The Act became operative on January 1, 1987. See 1986 Neb. Laws, L.B. 573. Thus, as in *Muller*, Luedke's policy was necessarily drawn by his insurer to comply with the statutory

requirements of the Act and must be construed in light of the purpose and policy of the Act.

By agreement, Luedke obtained a judgment against Gleason in the amount of $150,000. Only $25,000 was paid on behalf of Gleason. The $25,000 payment was not retained by Luedke, but, rather, went directly by right of subrogation to Garst Seed Company's workers' compensation carrier, which had paid Luedke $38,711.77 in benefits. Under such circumstances, to allow United to reduce amounts otherwise payable to Luedke by amounts paid under workers' compensation would defeat the intended purpose of underinsured motorist insurance, which is to make the victims of less than adequately insured motorists as nearly whole as reasonably possible. As already determined in *Muller*, such a provision is void as being against public policy.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded with directions that judgment be entered for Luedke in the amount of $75,000, which represents the amount of his underinsured motorist coverage through United ($100,000) reduced by the amount paid on behalf of Gleason ($25,000). The court is also directed to award prejudgment interest as provided for in Neb. Rev. Stat. § 45-103.02 (Reissue 1993) and attorney fees as provided for in § 44-359.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. KEVIN L. ALLEN, APPELLANT.
560 N.W.2d 829

Filed March 28, 1997. No. S-96-600.

1. **Rules of Evidence.** 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.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.

4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Trial: Witnesses: Proof.** It is within the discretion of the trial court to determine whether the unavailability of a witness has been shown.
6. **Trial: Witnesses: Testimony: Depositions.** Neb. Rev. Stat. § 29-1917(4) (Reissue 1995) governs only the appropriate use of a discovery deposition when the deponent is an available, testifying witness.
7. **Constitutional Law: Rules of Evidence: Hearsay.** When a hearsay declarant is unavailable to testify at trial, the declarant's out-of-court statements may be admitted without violating the Confrontation Clause, so long as those statements bear a sufficient indicia of reliability.
8. **Constitutional Law: Rules of Evidence: Hearsay: Presumptions.** Firmly rooted hearsay exceptions are presumptively reliable and trustworthy; therefore, inferring reliability of a hearsay statement which falls within such an exception will not violate a defendant's confrontation rights.
9. **Rules of Evidence: Hearsay.** Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995), is a firmly rooted hearsay exception.
10. **Evidence: Words and Phrases.** Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered.
11. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
12. **Jury Instructions: Pleadings: Evidence.** It is the duty of the trial court to instruct the jury on the issues presented by the pleadings and the evidence and on the pertinent law of the case.
13. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
14. **Trial: Testimony.** It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and thus produce a fair trial.
15. **Trial: Polygraph Tests.** The results of polygraph examinations are not sufficiently reliable and are thus unfairly prejudicial to the factfinding process whether it is the State or defense that attempts to introduce the results.
16. **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.
17. **Rules of Evidence: Appeal and Error.** Because exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy, and the trial court's decision will not be reversed absent an abuse of that discretion.

18. **Constitutional Law: Criminal Law: Juries.** A criminal defendant has no right to a jury composed in whole or in part of persons of his or her own race.
19. **Juries: Discrimination: Prosecuting Attorneys: Proof.** To make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a race-neutral explanation for challenging the jurors. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.
20. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** A trial court's determination of the adequacy of the State's race-neutral explanation of its peremptory challenges will not be reversed upon appeal unless clearly erroneous.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

CONNOLLY, J.

The appellant, Kevin L. Allen, was convicted by a jury of the first degree murder of Omaha police officer James B. "Jimmy" Wilson, Jr., and of the use of a firearm to commit a felony. The district court for Douglas County sentenced Allen to life in prison on the murder charge and to 18 to 20 years to be served consecutively on the firearm charge. We determine that all of Allen's assigned errors are without merit. As a result, we affirm.

I. BACKGROUND

1. THE SHOOTING

At 8 p.m., on August 20, 1995, Wilson radioed for a check on a license plate that he observed on a brown Chevy van. At 8:01 p.m., Wilson was informed that the plate had been assigned to a blue Mazda and was expired. Wilson notified the dispatcher that

he would stop the van in question. Wilson began to radio in the location of his stop but never completed the communication. The dispatcher was unable to reestablish radio contact with Wilson. At 8:03 p.m., police officers in the area reported hearing multiple gunshots.

At 8:05 p.m., officers responded to an "officer needs assistance" signal from radio dispatch. The responding officers discovered Wilson's police cruiser at 40th and Blondo Streets. Wilson was found dead with his seatbelt still on and the microphone to his police radio still in his hand. His cruiser had been struck with 11 rounds of gunfire. In the course of the shooting, four bullets passed through the windshield and struck Wilson in the right shoulder area, the right lateral aspect of the right jaw, the right temple area, and over the left frontal area of the skull.

2. Preshooting Chronology

At trial, Allen's theory of defense was that Quincy Hughes shot Wilson. Allen is a member of a street gang which calls itself South Family Bloods. Allen's street name is "Dumb." Ronney Perry testified that on Sunday afternoon, August 20, 1995, Allen, Dion Harris, Tavais Minor, and Perry decided to "roll around" in the South Family Bloods' brown and tan Chevy van. Allen drove the van first. In the course of the afternoon, the group stopped at a Kwik Shop to purchase gasoline. Allen entered the store and paid for the gas. That afternoon, various members of the group drove the van, but eventually, Harris took the wheel and continued to drive throughout the remainder of the day.

They drove to Harris' mother's house, and "Tavais went in to get the guns — some guns." Minor returned with a bag containing a "long and brown" rifle with a banana-shaped ammunition clip. The group then headed to North Omaha. While in North Omaha, they stopped at Goodies to buy gas at approximately 7:35 p.m. Perry went in and paid for the gas. When Perry got back in the van, everyone resumed their previous seats: Harris was in the driver's seat; Perry was in the front passenger seat; Minor was in the back, seated behind the driver; and Allen was in the back, seated next to the sliding door.

Shortly thereafter, Minor observed that the van was being followed by a police cruiser. The cruiser's lights were activated, and Harris pulled the van over to the curb. The following colloquy occurred during the direct examination of Perry at trial:

Q. Okay. And after Dion pulled over, did anybody say anything?

A. [Perry]: Kevin said he ain't going back to jail.

Q. Okay. What happened then?

A. He got out and started shooting.

Q. Who did?

A. Kevin.

Q. Kevin Allen?

A. Yeah.

. . . .

Q. Okay. So Kevin Allen, or Dumb, got out. Did he have a gun with him when he got out of the van?

A. Yep.

Q. What gun?

A. The rifle.

Q. Okay. And what door did he get out of, Ronney?

A. Sliding door.

Q. All right. And when he got out of that van, did he run around, run back to the cruiser, or did he stay in one place, basically?

A. Stayed in one place.

. . . .

Q. How fast did this happen?

A. Fast. . . .

Q. Do you remember how many shots he fired?

A. About 10.

Q. And was there time between those shots, or did he fire them one after the other?

A. One after the other.

. . . .

Q. Then what did he do?

A. He got back in the van.

. . . .

Q. When Dumb jumped back into the van, what happened?

A. We drove off and he said he could see him taking them in the chest.

Q. Dumb said that?

A. Yeah.

Q. He could see who taking them in the chest?

A. The cop.

Q. Did he say anything about the gun?

A. That it jammed.

Four eyewitnesses, LaKeisha Lucas, LaTasha Lucas, Tyron McClendon, and Stephanie Bean, were at the scene of the murder. Three of the witnesses, the Lucases and Bean, immediately told the police that they saw one gunman exit the van through the sliding door and shoot Wilson.

3. Postshooting Chronology

Because of the inconsistent rendition of facts given by key witnesses at various times, a chronology of events that occurred after Wilson was shot will be helpful to an understanding of both the State's and Allen's theories of the case. A summary of the record reflects the following:

August 20, 1995, after 8 p.m. The van is sighted and chased into the South Omaha Projects by the police. The occupants abandon the van and escape. LaKeisha and LaTasha Lucas and Stephanie Bean are taken to the projects and identify the van as the one involved in the shooting.

August 21, prior to 2 p.m. Police conduct door-to-door interviews and searches in the South Omaha Projects. Perry, Otis Simmons, Minor, Harris, and Charles McSpadden (owner of the van) are all either arrested or taken to the police station for questioning. Under questioning by Officer Bruce Ferrell, Simmons says that he was at the movies at the time Wilson was murdered.

August 21, 6 p.m. The Lucases and Bean view four lineups that include Allen, Simmons, Harris, and Minor. No identifications of the shooter are made by Bean or the Lucases.

August 21, 8 p.m. Simmons states to Officer Michael Hoch that Simmons, Perry, Harris, Minor, and Hughes all participated and that Allen was the shooter.

August 21, 10 p.m. Simmons is sent to Perry's interrogation room. Perry then states that Hughes and Allen jumped out of van; Allen was the shooter; and Simmons, Harris, and Minor were also at the scene of the murder.

August 21, midnight. A search warrant on Hughes' home is executed by the police. Hughes is arrested and rap lyrics are seized.

August 22, 8 a.m. Hughes is interviewed and gives a detailed alibi.

August 22, 6 p.m. Hughes is identified in a lineup as the shooter by Bean, Tyran McCleton, and LaKeisha Lucas. LaTasha Lucas states that Hughes closely resembles the shooter.

August 23, 9 a.m.-noon. Interviews with Simmons and Perry are conducted by Hoch and Officer William Jadlowski. Simmons and Perry each change his story to Hughes was the shooter, not Allen.

August 23, 8-10 p.m. Taped statements are taken from Simmons and Perry with their attorneys present. Each identify Hughes as the shooter and elaborate that after being pulled over, Allen stated that he was "not wanting to go back [to jail]," and then Hughes and Allen jumped out of the van; Hughes had the rifle.

September 13, preliminary hearing. Hoch outlines the probable cause evidence against Hughes: Harris, Hughes, Simmons, Allen, Minor, and Perry were in the van pulled over by Wilson. Witnesses from the scene of the shooting identify Hughes as the shooter. Perry and Simmons said on August 23 that Hughes shot Wilson, but on August 21, each had said it was Allen. State summation: Hughes shot the rifle that killed Wilson.

November 15. Simmons and Perry are given polygraph exams. Simmons has recanted everything and reverts to his original story that he was at the movies. Perry has reverted to his August 21 statement that Allen shot Wilson. Polygraph exams indicate that Simmons and Perry are deceptive in denying that Hughes was the shooter.

December 4. The State decides to reopen the investigation of Simmons' and Hughes' alibis. Twelve alibi witnesses are interviewed over the next few weeks.

December 28. Minor agrees to testify for the State that Allen shot Wilson and that Simmons and Hughes were not there, in exchange for time served.

December 28. Charges against Hughes are dismissed.

February 15, 1996. Minor is deposed by Allen's counsel.

4. TRIAL

At trial, Perry testified that Allen was the shooter. The State introduced Minor's deposition testimony which corroborated Perry's trial testimony. Security photographs were introduced that verify Allen was present at a North Omaha Kwik Shop on August 20 and that Perry and the South Family Blood's van were at Goodies purchasing gas at 7:35 p.m. that evening. The police lab identified nine latent prints from the van as being Allen's. Allen's prints were found around the area of the driver's seat and the rear, passenger-side seat next to the sliding door. Allen's prints were not found at any other position within the van. No prints from Hughes were found in or upon the van. LaKeisha and LaTasha Lucas testified that they could not positively identify Hughes as the shooter.

As stated, Allen's theory of defense was that Hughes shot Wilson. The defense centered around Bean's and McCleton's in-court identification of Hughes as the shooter, the inconsistent accounts given by Perry and Simmons, and the fact that the State initially charged Hughes.

In rebuttal, the State called Jacqueline Lott, a friend of Hughes, who testified that she patched a long distance call from Meika Clark, another friend of Hughes, to Hughes through her phone beginning at 4:21 p.m. on August 20 and ending at 5:17 p.m. Teresa Carson, manager of the complex where Hughes lived in South Omaha, testified that she saw and spoke with Hughes outside his apartment between 7:15 and 7:30 p.m. on August 20.

The murder weapon was never recovered. Police experts determined from shot patterns and shell casing studies that the weapon that killed Wilson was an SKS semiautomatic rifle.

Additional facts pertinent to the analysis of each assigned error will be presented throughout the opinion.

II. ASSIGNMENTS OF ERROR

Rephrased and reorganized, Allen alleges that the district court erred in (1) refusing to instruct the jury that it could not speculate as to what the people who were identified but not called as witnesses at trial as alibis for Hughes and Simmons might have said had they testified; (2) refusing to instruct the jury that the charges against Hughes had been dismissed without prejudice and that the State had a right to refile charges; (3) allowing the State to read into evidence the deposition testimony of Minor after he took the Fifth Amendment part way through his testimony at trial; (4) excluding from evidence four of the five offered exhibits that contained rap lyrics written by Hughes and refusing Allen's requested jury instruction that a felon (Hughes) in possession of a gun with a barrel less than 18 inches in length is guilty of a Class IV felony; (5) excluding from the cross-examination of Jadlowski any inquiry into the fact that Simmons and Perry failed polygraph examinations when they denied Hughes was the shooter; (6) excluding from evidence the State's position at the preliminary hearing that Hughes shot Wilson, the information filed against Hughes, and Hughes' docket sheet; (7) denying several of Allen's motions that would have allowed African-American jurors to have a fair and proportionate chance to be seated; (8) applying the rule that minorities can be peremptorially challenged as long as a race-neutral reason for the challenge can be articulated; and (9) permitting the peremptory challenge of juror No. 43, an African-American.

III. STANDARD 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. *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the eviden-

tiary question at issue to the discretion of the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995).

IV. ANALYSIS

1. Assignment of Error No. 1

Allen first asserts that the district court erred in refusing to instruct the jury that it could not speculate as to what the people who were identified but not called as witnesses at trial as alibis for Hughes and Simmons might have said had they testified. Allen argues that by identifying these people as alibis but not calling them as witnesses, the jury might have speculated that their testimony would have supported the State's position that Hughes was not at the scene of the murder.

During his testimony, Jadlowski explained to the jury what interviews occurred when the State decided to reassess Hughes' and Simmons' alibis. Jadlowski did not recite the content of the interviews. However, Jadlowski identified the six people that he interviewed with reference to Hughes, along with the six people that he interviewed with reference to Simmons. Allen called one of the witnesses, Ireesha Fox, identified as Hughes' alibi, and the State called two other witnesses, Lott and Carson, identified as Hughes' alibi. This left a group of six Simmons' alibi witnesses and three Hughes' alibi witnesses that were identified but not called at trial. Allen requested the following instruction No. 2:

> Officer Jadlowski testified of police interviews of witnesses allegedly providing Otis Simmons or Quincy Hughes alibies [sic]. If any such witnesses were not called to the stand, you are not to speculate as to what testimony such persons may have given if called. You are not to take any inference whatsoever because the State represents it has taken action in this or related cases based in whole or in part on any information such person mentioned but not called as a witness may have had.

While the district court refused to give Allen's requested instruction, it did give the jury instruction No. 1, which states in part: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculations, conjectures,

or inferences not supported by the evidence," and jury instruction No. 13, which states: "Certain witnesses and co-defendants in this case were not called as witnesses in this case. You cannot speculate as to the reasons they were not called and you cannot speculate as to what their testimony would have been."

It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996).

Instructions Nos. 1 and 13 clearly and accurately instructed the jury that they were not to speculate, conjecture, or make inferences about what the uncalled Simmons' and Hughes' alibi witnesses would have testified to had they been called at trial. Thus, we conclude that the district court did not err in refusing to give Allen's proposed instruction because the substance of the proposed instruction was contained in the instructions actually given. See *id.*

2. ASSIGNMENT OF ERROR NO. 2

Allen next asserts that the district court erred in refusing to instruct the jury that the charges against Hughes had been dismissed without prejudice and that the State had a right to refile charges. This request was apparently intended to alleviate concern that the jury might be compelled to convict Allen so that Wilson's death would not go unatoned. Specifically, the district court refused the following instruction No. 1 requested by Allen: "On December 28, 1995, on the State's motion, all charges against Quincy Hughes in connection with the 8/20/95 death of Officer Wilson were dismissed; however, they were not dismissed with prejudice. The State retains the right to refile those charges against Quincy Hughes at a future date."

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

Clearly, the State did not believe that Hughes shot Wilson as evidenced by the dismissal of the charges against Hughes. In fact, after reexamining Hughes' alibis, the State came to the conclusion that Hughes was not at the scene of Wilson's murder. However, the record does not reflect that the State argued to the jury that it could not refile charges against Hughes or that Wilson's death would go unatoned if they acquitted Allen. Thus, the tendered instruction is not warranted by the evidence.

Furthermore, Allen had the opportunity to argue to the jury that the State could refile charges against Hughes if additional evidence pointed to Hughes. Accordingly, Allen was not prejudiced by the district court's refusal to give the tendered instruction. For these reasons, the district court did not err in refusing Allen's requested instruction.

3. Assignment of Error No. 3

Next, Allen contends that the district court erred in allowing the State to read into evidence the deposition testimony of Minor after he took the Fifth Amendment part way through his testimony at trial.

At trial, Minor testified that on the day Wilson was murdered, Minor, Harris, Perry, and Allen hung out around the projects and then drove to Harris' mother's house in the van. At that point, Minor asserted his Fifth Amendment privilege and refused to testify any further. The district court declared Minor an unavailable witness. Over objection, the State was allowed to read Minor's deposition testimony to the jury. That deposition was taken by Allen's defense counsel while Minor was under oath and in the presence of his own legal counsel. Minor's testimony was that after the van was pulled over by the police, Allen said, "I ain't going back to jail," picked up the gun, opened the door, jumped outside by himself, and shot the gun a number of times.

Allen alleges that (1) Neb. Rev. Stat. § 29-1917(4) (Reissue 1995) precludes the use of Minor's deposition for any purpose other than to impeach Minor and (2) Minor's deposition testimony is not sufficiently trustworthy, rendering its use at trial a violation of the Sixth Amendment's Confrontation Clause.

(a) § 29-1917(4)

Allen first alleges that Minor's deposition testimony is precluded from use as substantive evidence by § 29-1917(4), which states that "[a] deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness." The State argues that Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1995), and not § 29-1917(4) is applicable, because Minor was unavailable as a witness at trial.

Rule 804(1) states that "[u]navailability as a witness includes situations in which the declarant: (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement." It is within the discretion of the trial court to determine whether the unavailability of a witness has been shown. *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984). The district court's finding that Minor was unavailable as a witness at trial is not challenged by Allen.

The issue as to whether rule 804(2)(a) or § 29-1917(4) controls the use of a deposition when the deponent is unavailable as a witness at trial is one of first impression. When the declarant is unavailable as a witness, rule 804(2)(a) allows into evidence

> [t]estimony given . . . in a deposition [1] taken in compliance with law [2] in the course of the same or a different proceeding, [3] at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

It is true that Allen's counsel never had the opportunity to cross-examine Minor; however, in a note to Fed. R. Evid. 804(b)(1), the federal equivalent to Nebraska's rule 804(2)(a), the advisory committee stated:

> If the party against whom [the deposition is] now offered is [not the one who took the deposition], no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. . . . If the party against whom [the deposition is] now offered is the one [who took the deposition], a satisfactory answer becomes somewhat more difficult. . . . [The

> most] direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness . . . .

In the instant case, Minor's deposition was taken by Allen's counsel (1) in compliance with Nebraska law and (2) in the course of the same criminal proceeding in which it was being offered, and (3) Allen's counsel, in Minor's deposition, had an adequate opportunity to examine Minor with similar, if not exact, interest and motive on matters relative to Allen's defense. Thus, the requirements of rule 804(2)(a) were met.

We determine that the language of § 29-1917(4), that a deposition may be used solely for the purpose of impeaching the testimony of the deponent as a witness, necessarily contemplates that the deponent is available as a witness at trial. Thus, we hold that § 29-1917(4) governs only the appropriate use of a discovery deposition when the deponent is an available, testifying witness. As a result, we conclude that § 29-1917(4) is not applicable because Minor was unavailable as a witness at trial.

For these reasons, the district court did not err in admitting Minor's deposition testimony under rule 804(2)(a).

(b) Trustworthiness

Allen further alleges that Minor's deposition testimony is not sufficiently trustworthy, rendering its use at trial a violation of the Sixth Amendment's Confrontation Clause. Allen argues that Minor's deposition is not trustworthy because Minor made a deal with the State in which the State would recommend a sentence of time served in exchange for Minor's testimony. Allen's counsel also argues that Minor originally told his cellmate, Shaun O'Doherty, that Hughes shot Wilson. However, the record does not reflect that any such incident ever occurred.

When a hearsay declarant is unavailable to testify at trial, the declarant's out-of-court statements may be admitted without

violating the Confrontation Clause, so long as those statements bear a sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987). No independent inquiry into reliability is required under the Confrontation Clause, however, when the out-of-court statements fall within a firmly rooted hearsay exception. *Id.* Firmly rooted exceptions are presumptively reliable and trustworthy; therefore, inferring reliability of hearsay statements which fall within such an exception will not violate a defendant's confrontation rights. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993), *cert. denied* 512 U.S. 1235, 114 S. Ct. 2738, 129 L. Ed. 2d 859 (1994).

Federal rule 804(b)(1) is a firmly rooted hearsay exception. *Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); *U.S. v. Lombard*, 72 F.3d 170 (1st Cir. 1995); *U.S. v. Kelly*, 892 F.2d 255 (3d Cir. 1989), *cert. denied* 497 U.S. 1006, 110 S. Ct. 3243, 111 L. Ed. 2d 754 (1990). Therefore, we determine that testimony properly admitted under Nebraska's rule 804(2)(a), a firmly rooted hearsay exception, does not violate the Confrontation Clause.

Furthermore, in allowing the admission of Minor's deposition testimony, the district court found

> this [deposition] is under oath, in front of a court reporter and it was done with the defendant — with the defendant's lawyer actually taking the deposition on behalf of the defendant. . . . Mr. Minor's lawyer certainly was present and it was done pursuant to a bargain that apparently had been struck, and it was under oath, it was recorded, and counsel for the defendant had the opportunity and asked almost all of the questions involved in the case. . . . [T]he court would have to find that . . . it does have the indications of reliability and that it has to be admitted.

The agreement that Minor made with the State relates to the credibility of Minor's deposition testimony. However, the record reflects that this evidence was known by Allen's counsel prior to deposing Minor and that Allen's counsel explored this evidence during the deposition. As a result, the district court did not err in finding that Minor's deposition testimony was suffi-

ciently trustworthy for purposes of the Sixth Amendment's Confrontation Clause.

4. ASSIGNMENT OF ERROR NO. 4

Allen contends that the district court erred in (a) excluding from evidence four of the five offered exhibits that contained rap lyrics written by Hughes and (b) refusing Allen's requested instruction that a felon (Hughes) in possession of a gun with a barrel less than 18 inches in length is guilty of a Class IV felony. Allen asserts that this evidence and instruction would have demonstrated to the jury that Hughes had a motive to shoot Wilson.

(a) Rap Lyrics

The district court admitted exhibit 179, rap lyrics written by Hughes, into evidence. Those lyrics provided in pertinent part:

> **[Gates Of Hell.]** My life has been hell in and out of jail so all I got is a fuck it mentality and kill tha devil when he comes for me Im gona have to hold court in the street G, Ill be dam if I go back to a cell . . . .

However, the court refused to admit exhibits 180, 181, 182, and 183, rap lyrics written by Hughes, into evidence. Respectively, those lyrics provided in pertinent part:

> **It's On.** Just out of "da pen," pulled over by a cop who lets him go, got back south and told a friend "it's on." . . .
>
> . . . **F on my Back.** "[O]uta the pen," he knows he has an "F" [felony] on his back.
>
> . . . **Fresh out of da Pen.** He wants them years back, won't go back to that again, prison is like being buried alive.
>
> . . . **City of Cross Fire.** He lays in wait and, as a sniper, then puts a bullet in police chief's head because he lied on a gang member.

Brief for appellant at 27.

The district court held that "exhibits 180, 181, 182 and 183 are not relevant to the case . . . and I'm specifically so ruling that the probative value is outweighed . . . by the prejudicial value." Assuming arguendo that exhibits 180, 181, 182, and 183 are relevant, nonetheless, Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), states: "Although relevant, evidence

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*." (Emphasis supplied.)

Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). Exhibit 179 incorporates the same substantive themes that appear in exhibits 180 through 183, i.e., "won't go back" to jail and willing to shoot a police officer. Thus, exhibits 180 through 183 are cumulative evidence because they tend to prove the same point for which exhibit 179 was offered.

Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993). See *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). Therefore, the district court did not err in refusing to admit the cumulative rap lyrics proffered by Allen.

(b) Felon in Possession of a Handgun Instruction

Testimony adduced at trial reveals that a handgun with a barrel less than 18 inches in length was in the van the night Wilson was murdered. The State stipulated that Hughes had a previous felony conviction. The following instruction No. 3 requested by Allen, for the purpose of demonstrating Hughes' alleged motive to shoot Wilson, was refused by the district court:

> You are advised that the Laws of the State of Nebraska applicable on August 20, 1995, included the following:
>
> 28-1206: Any person who possesses any firearm with a barrel less than 18 inches in length . . . and who has previously been convicted of a felony . . . commits the offense of possession of a firearm by a felon . . . [this] is a Class IV felony.

It is the duty of the trial court to instruct the jury on the issues presented by the pleadings and the evidence and on the perti-

nent law of the case. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

Whatever alleged motive Hughes may have had to shoot Wilson is simply not pertinent to the law of the case against Allen who had the opportunity to introduce evidence and to argue Hughes' motive to the jury. As a result, the district court was under no duty, and Allen was not prejudiced by the district court's refusal, to give Allen's requested instruction. See, *State v. Adams, supra; State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. White, supra.*

5. ASSIGNMENT OF ERROR NO. 5

Next, Allen asserts that the district court erred in excluding, from cross-examination of Jadlowski, any inquiry into the fact that Simmons and Perry failed polygraph examinations when they denied that Hughes was the shooter.

On November 15, 1995, polygraph examinations were administered to both Simmons and Perry. The examinations indicated that Perry and Simmons were deceptive when they denied that Hughes was the shooter. The district court did not allow Allen's counsel to cross-examine Jadlowski on the implications of the polygraph exams. The district court ruled:

> The Court finds that we're pretty well established that lie detector tests are not reliable and that the prejudicial effect of lie detector tests is such that it might affect the possibility of even having a fair trial. . . .
>
> . . . .
>
> . . . I think you can ask about the interviews, but I don't believe that you — you can ask whether or not he was aware of interviews, but I don't think the fact that lie detector tests were given or weren't given is admissible, and it's too prejudicial to allow it to go in front of the jury.

It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and

thus produce a fair trial. See *State v. Smith*, 192 Neb. 794, 224 N.W.2d 537 (1974). We have previously held that the results of polygraph examinations are not admissible. *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992); *State v. Houser*, 234 Neb. 310, 450 N.W.2d 697 (1990). We determine that polygraph examinations are not sufficiently reliable and are thus unfairly prejudicial to the factfinding process whether it is the State or defense that attempts to introduce the results. Thus, the trial court did not abuse its discretion in refusing to permit Allen to cross-examine Jadlowski on the implications of the polygraph examinations.

6. Assignment of Error No. 6

Allen next contends that the district court erred in excluding from evidence the State's position at Hughes' preliminary hearing that Hughes shot the rifle that killed Wilson, the information filed against Hughes, and Hughes' docket sheet.

The district court ruled that the proffered evidence was not relevant. 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. Newman,* 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995).

What the prosecution believed at the time of Hughes' preliminary hearing, as evidenced by its argument, the information filed, and the docket sheet, is not relevant because this proffered evidence does not have the tendency to make it more or less probable that Allen shot Wilson. What is relevant is the testimony of the eyewitnesses that picked Hughes out of a lineup as the shooter and the statements made by Simmons and Perry to the police that Hughes was the shooter, because this evidence has the tendency to make it less probable that Allen shot Wilson.

Furthermore, throughout the trial, the State admitted that it mistakenly charged Hughes. Thus, assuming arguendo that the proffered evidence was relevant, it was cumulative to evidence already adduced. It is not error to refuse to admit cumulative evidence. Rule 403. See discussion herein under subpart 4(a), titled "Rap Lyrics." We conclude that the district court did not abuse its discretion in excluding the proffered evidence.

7. Assignment of Error No. 7

Allen next asserts that the district court erred in denying several of his motions that would have allowed African-American jurors to have a fair and proportionate chance to be seated. Essentially, Allen argues that the district court should have abandoned random selection of jurors in favor of a system of juror selection which affirmatively increases the odds of African-Americans' being selected for the jury.

However, a criminal defendant has no right under our federal Constitution to a jury composed in whole or in part of persons of his or her own race. *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). See *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879). The district court observed and honored the well-established jury selection practices of this jurisdiction. Those procedures are consistent with the dictates of our federal Constitution. For this reason, the district court did not err in denying Allen's motions.

8. Assignment of Error No. 8

Allen asserts that the district court erred in applying the rule articulated in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and its offspring that minorities can be peremptorially challenged as long as a race-neutral reason for the challenge can be articulated. Allen argues that a mere race-neutral reason should not suffice to effectively challenge a minority juror.

To make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the panel

members of the defendant's race, and (3) that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a race-neutral explanation for challenging the jurors. *Batson v. Kentucky, supra; State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. Rowe, supra.* If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

Essentially, Allen is asking this court to depart from existing state and federal law. We decline to depart from the dictates of *Batson* and its offspring. Thus, the district court did not err in applying the *Batson* test.

9. Assignment of Error No. 9

Finally, Allen contends that the district court erred in permitting the State to make a peremptory challenge to juror No. 43, an African-American.

At the *Batson* hearing, Allen established his prima facie case and the State offered the following reasons for the striking of juror No. 43: "[He] was struck because he had a drug charge within the last 10 years and also has a close relative, his brother, who was convicted of a theft offense and did time for that offense." Ultimately, the district court determined that "the striking of [juror No. 43] . . . was not racially motivated and that there's insufficient evidence to show that it was racially motivated."

A trial court's determination of the adequacy of the State's race-neutral explanation of its peremptory challenges will not be reversed upon appeal unless clearly erroneous. *State v. Lopez, supra*; *State v. Rowe, supra.* We determine that the district court was not clearly erroneous in finding that the State's race-neutral explanation was adequate and that Allen failed to prove purposeful racial discrimination. It follows that the district court did not err in permitting the peremptory challenge of juror No. 43.

V. CONCLUSION

We conclude that all of Allen's assigned errors are without merit. As a result, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. SYDNEY L. THIESZEN, APPELLANT.
560 N.W.2d 800

Filed March 28, 1997. No. S-96-713.

1. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
2. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Evidence: Mental Health: Proof: Intent.** Evidence of an accused's mental condition at the time the offense was committed is admissible to prove absence of intent.
4. **Trial: Appeal and Error.** An appellate court cannot speculate as to how a trial court would have ruled on objections not made to questions not asked.
5. **Evidence: Words and Phrases.** Relevant evidence is that evidence which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
7. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.

Appeal from the District Court for York County: ROBERT R. STEINKE, Judge. Affirmed.

James H. Truell, of Law Offices of James H. Truell, and Daniel E. Pullen, York County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Sydney L. Thieszen, was adjudged guilty of and sentenced for committing a first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1995), and for using a firearm in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). In challenging those convictions, Thieszen asserts, in summary, that the district court erred in (1) failing to suppress his statement to police, (2) failing to rule that the use of a firearm charge was barred by the statute of limitations, (3) excluding certain evidence and receiving certain other evidence, and (4) failing to direct a verdict against the plaintiff-appellee, State of Nebraska, on the murder charge. We affirm.

II. BACKGROUND

Thieszen's parents had six children, three of whom were adopted. The adopted children include Thieszen, who was 14 years old on September 17, 1987, and his sister and victim, Sacha, who was then 12 years old.

After school on that day, Thieszen and the victim were left home together while the father and another son went to do some farm fieldwork. Because the mother had earlier left a note telling the father to punish Thieszen, he decided to run away from home. In preparation for doing so, he collected various items from the upstairs of the family home, including a .22-caliber revolver which another brother owned and kept in his locked room. Thieszen took the gun so he could "live off the land."

When Thieszen went back downstairs, he told the victim that he was running away; the victim threatened to call the police if he tried, and the two began arguing. According to Thieszen, it was at this time that he got the idea that he would have to stop the victim from calling the police by knocking her out with a wooden dowel. Within minutes of the argument while in the kitchen area of the house, Thieszen hit the victim on her head with the dowel.

Bleeding from her head, the victim left the kitchen and went upstairs to a bathroom. Thieszen testified that he followed the

victim up the stairs and that the next thing he remembered was the shot which "awakened" him and caused the victim to fall backward. To prevent a large amount of blood from getting on the carpet, he put the victim into the bathtub. After shooting her two more times, he left the farm in the family van.

A complaint and arrest warrant were lodged on September 18, 1987. On September 21, Thieszen was found sleeping in a post office in Salina, Kansas. Believing Thieszen to be a runaway, the Salina police took him and the missing family van into custody. Thieszen told the arresting officer that he was in trouble with the law because they thought he shot his sister. After arriving at the police station, he also gave the Salina police a statement in which he admitted shooting the victim and described the events leading to the shooting.

On December 8, 1987, an information was filed charging Thieszen with first degree murder and the use of a firearm in the commission of a felony. On May 3, 1988, pursuant to a plea bargain, an amended information was filed charging Thieszen with second degree murder and use of a firearm in the commission of a felony. Thieszen thereafter pled guilty and was adjudged accordingly. His convictions were later affirmed by this court in *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989).

Subsequently, on September 9, 1994, Thieszen filed a motion for postconviction relief pursuant to the provisions of Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) on the ground that the amended information was defective in that it failed to allege he had acted with malice. The district court sustained that motion on July 25, 1995, thereby vacating and setting aside the second degree murder and use of a firearm convictions. On August 1, a second amended information was filed, once again charging Thieszen with first degree murder and use of a firearm in the commission of a felony.

With that background, we turn our attention to the assignments of error, supplying other pertinent facts with the analysis of each assignment.

III. ANALYSIS

1. Nonsuppression of Statements

In the first assignment of error, Thieszen asserts that the district court erred in failing to suppress the inculpatory statements

he made to the Salina police because he was neither advised that he could be tried as an adult nor asked whether he wished to confer with an adult before making any statement.

However, as Thieszen did not object to the admission of the statements into evidence, he is foreclosed from assigning their receipt as error. As noted in *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991), the failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.

2. Statute of Limitations

We therefore move on to the second assignment of error, the claim that the use of a firearm charge is barred by the statute of limitations.

(a) Scope of Review

The interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below. *Robertson v. School Dist. No. 17, ante* p. 103, 560 N.W.2d 469 (1997); *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996); *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996).

(b) Application of Law to Facts

Neb. Rev. Stat. § 29-110(1) (Reissue 1995) provides, in relevant part:

> [N]o person or persons shall be prosecuted for any felony, excepting only treason, murder, arson, and forgery, unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed or unless a complaint for the same shall be filed before the magistrate within three years next after the offense shall have been done or committed and a warrant for the arrest of the defendant shall have been issued . . . . If any indictment, information, or suit is quashed or the proceedings in the same set aside or reversed on writ of error, the time during the pendency of such indictment, information, or suit so quashed, set aside,

> or reversed shall not be reckoned within this statute so as to bar any new indictment, information, or suit for the same offense.

The question thus is whether the words "set aside . . . on writ of error" include proceedings vacated and set aside upon a motion for postconviction relief.

Section 29-1110(1) finds its genesis in Gen. Stat. ch. 58, § 256, p. 783 (1873), which provided, in relevant part:

> No person or persons shall be prosecuted for any felony, (treason, murder, arson and forgery excepted), unless the indictment for the same shall be found by a grand jury, within three years next after the offense shall have been done or committed. . . . *And provided, also*, That where any indictment, information, or suit shall be quashed, or the proceedings in the same set aside or reversed, on writ of error, the time during the pendency of such indictment, information or suit so quashed, set aside or reversed, shall not be reckoned within this statute, so as to bar any new indictment, information, or suit, for the same offense.

Gen. Stat. ch. 58, § 503, p. 833 (1873), provided, in relevant part:

> When a person shall be convicted of an offense, and shall give notice to the court of his intention to apply for a writ of error, the court may, at its discretion, on application of the person so convicted, suspend the execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session of the court, nor beyond the next term of the supreme court, as will give the person so convicted a reasonable time to apply for such writ.

The word "appeal" was substituted for the phrase "writ of error" by 1982 Neb. Laws, L.B. 722, as now found in Neb. Rev. Stat. § 29-2301 (Reissue 1995), which states in part: "When a person is convicted of an offense and gives notice of his or her intention to appeal to the Court of Appeals or Supreme Court, the execution of the sentence or judgment shall be suspended until such time as the appeal has been determined."

It is also important to understand that the Nebraska Constitution of 1866 provided in article I, § 18: "The writ of

error shall be a writ of right in all capital cases, and shall operate as a supersedeas to stay the execution of the sentence of death until the further order of the Supreme Court in the premises." In 1875, the language was moved to article I, § 23, and provided: "The writ of error shall be a writ of right in all cases of felony; and in capital cases shall operate as a supersedeas to stay the execution of the sentence of death until the further order of the supreme court in the premises." Pursuant to a proposal submitted to the electorate in 1972 through L.B. 196, § 23 was amended to read as follows: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court." Pursuant to a proposal submitted to the electorate in 1990 through L.R. 8, § 23 was again amended and currently provides, in relevant part: "In all capital cases, appeal directly to the Supreme Court shall be as a matter of right and shall operate as a supersedeas to stay the execution of the sentence of death until further order of the Supreme Court."

In the context of reviewing a judgment of contempt, we, in *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984), observed that the 1972 amendment of Neb. Const. art. I, § 23, abolished writs of error in this court, and therefore our review was by appeal. In fact, in 1961, the Legislature had, in effect, abolished the writ of error and provided that appeals under the criminal code be the same as in civil cases. *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965).

In view of that legislative and constitutional history, we must conclude that under current law, the words "set aside . . . on writ of error" in § 29-110(1) mean proceedings set aside on appeal.

Having so determined, the question for us becomes whether appeal, as contemplated by § 29-110(1), includes proceedings for postconviction relief. Such relief was created in 1965; § 29-3001 provides, in relevant part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United

> States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

There is no question that proceedings for postconviction relief differ in many respects from appeal proceedings. For example, postconviction proceedings are available only where the prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable, *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989); postconviction proceedings are not available to secure review of issues which were or could have been litigated on direct appeal, no matter how these issues may be phrased or rephrased, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); neither may such proceedings be used as a substitute for an appeal or to secure a further review of issues already litigated, *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987); nor may one pursue postconviction relief while one has a direct appeal pending, *State v. Moore*, 187 Neb. 507, 192 N.W.2d 157 (1971).

Yet, the ultimate purpose of postconviction proceedings is the same as the ultimate purpose of an appeal proceeding, that is, to review the validity of a conviction. Indeed, where a defendant is denied his or her right to appeal because his or her lawyer fails, when requested, to timely file a notice of appeal, the proper means to attack that denial is the postconviction proceedings. *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990).

We thus conclude that postconviction proceedings fall within the ambit of the phrase "proceedings . . . on writ of error," as used in § 29-110(1).

Excluding, under the language of § 29-110, the period between September 18, 1987, and July 25, 1995, only 1 day passed between the date of the offense and the date that the original complaint was filed and the arrest warrant was issued, and only 7 additional days passed between the day the conviction was vacated and set aside and the day the second amended information was filed.

(c) Resolution

Thus, the operative second amended information was filed well within the 3-year period of limitations specified in § 29-110(1), and there is no merit to this assignment of error.

3. EVIDENTIAL RULINGS

In the third assignment of error, Thieszen complains that the district court wrongly excluded psychiatric testimony concerning specific abuses to which Thieszen was subjected, and improperly received evidence interpreting certain photographs.

(a) Evidence Excluded

Thieszen offered the testimony of psychiatrist David Kentsmith, who stated that he examined Thieszen when the latter was 14 years old and reviewed his prior history as recorded by other counselors, physicians, and police reports. Based on his observations and review, Kentsmith concluded that Thieszen suffered from a conduct disorder, including adolescent antisocial behavior. Moreover, at the time of the killing, Thieszen was, in Kentsmith's opinion, "pseudo mature":

> Because of [Thieszen's] life experiences and various emotional trauma, the abuse that he had experienced as a child, the foster homes that he had been in, and the various things that had happened to him, both physically and emotionally, that he had learned to put on an air of seeming to be somewhat older than he really was, but as you were able to get beneath that, you saw him to be a very immature young person who basically was behaving in a way that was not reflective of maturity.

Subsequently, Thieszen asked Kentsmith what kind of history caused the pseudo maturity. Kentsmith answered, "What we are referring to is the abuse that [Thieszen] experienced as a child from the time of his birth."

At this point, at the request of the State, an off-the-record bench conference was held, after which Thieszen moved in open court to strike the question, and the State moved to strike Kentsmith's previous answer. These motions were sustained. Thieszen then asked Kentsmith to describe what could cause stress for an immature, impulsive youth. During Kentsmith's

attempt to answer, the State requested another bench conference, after which the jury was removed from the courtroom. Thieszen then elicited the following from Kentsmith:

> The history that [Thieszen] could recall and provide to me, and the other information that I have been able to glean from other people who had examined him, included being born into a family where the mother was a severe alcoholic, and during her alcoholic binges would be very physically abusive to him, including one time trying to burn his eyes with a cigarette lighter; and another instance stomping him; and another instance throwing him into a swimming pool when he couldn't swim and having to have somebody rescue him. This was all before the age of five. And other instances where she would take him with her to burglarize places; and also instances where she neglected him completely, so that he was physically dirty and was not bathed, and his clothes were not changed. These are instances of the type of abuse that he had experienced before age five.

Kentsmith further explained that when one is physically beaten and punished by adults as a child, the child learns how to behave as those adults, stating:

> If they teach you that that's how adults interact with children, as you begin to mature you may use that same form to interact with other people in terms of your reaction, and instead of using more thoughtful reflective approaches to things, you may act, in other words, if his mother was violent and exploded anytime she was frustrated or angry, and result in physical actions, then that would be a sort of format for him if he was in a situation later on, because that's how he is learning, he's learning from adults how to behave.

The State urged that such specific instances of abuse testimony was not relevant and was designed primarily to engender sympathy for the accused. The district court ruled that Thieszen could

> present evidence of and explain any diagnosis that this particular witness had of . . . Thieszen after he examined him. This witness can explain and testify as to whether or

> not [Thieszen] had or suffered any severe mental disease or defect and, if so, what are the characteristics of such mental disease or defect, and certainly this witness can testify as to the personality problems of one who might be impulsive or suffer any of the other traits which might be attributed to . . . Thieszen.

When asked whether the ruling meant that Kentsmith could not relate the various episodes of abuse Thieszen claimed to have suffered from his natural mother, the district court stated, "Well, we're going to have to ask the questions and the court will have to rule during the trial."

After the jury returned, Thieszen asked Kentsmith to give examples that would create a "no-win" situation for him and his impulsive personality. The State objected to specific examples being given, and the district court ruled that Kentsmith could relay general examples. Kentsmith testified:

> As it relates to an immature young person adolescent, an example would be being expected to get straight A's in school and in all subjects and not really having the intellectual ability to do that, or maybe even the background to do that if you do have the intellectual ability, and as a consequence then facing punishment because you didn't get straight A's.
>
> Or being told that you have to keep your room perfect with not a piece of clothing out of place or anything on the floor, and bed perfectly made under certain restrictions, and for a young person to be able to do this perfectly would not be possible, and as a consequence there would be punishment as a result of that.
>
> Those would be examples of a person who would feel trapped, being asked, demand placed on them to do something in a way, or being required to do something that they couldn't do as perfectly as was expected and then knowing they are going to get punished and feeling trapped.

Kentsmith further testified that one who is immature and impulsive would resort to either fight or flight, trying to run away or fight like a trapped or cornered creature.

Thieszen then called psychiatrist William Logan. He testified that he interviewed Thieszen and one of his long-term thera-

pists; went to Thieszen's home; talked to members of his family; and reviewed a variety of materials, including police reports, Thieszen's statement to the police, an earlier psychological evaluation, Kentsmith's evaluation and testing, and Thieszen's adoption documents; and based on the foregoing, diagnosed Thieszen as having a conduct disorder.

Logan further testified that Thieszen was impulsive, quick to react to things, and not one to use very much judgment or think before he acted. When asked what causes impulsive reactions to worsen in an individual, he answered:

> Oh, it can be a whole host of things. It can be things that are troubling the individual about his relationship with his peers; it can be things that are troubling him about his relationship with his parents; many times it may go back to earlier issues, particularly if there has been a history of sexual abuse or physical abuse, as there had been in this case in both the natural family and in the adoptive family.

After the State unsuccessfully moved to strike the foregoing statement on the basis that it was volunteered, Thieszen changed the topic of his direct examination.

Thieszen argues that the district court erred in refusing to allow his psychiatric experts to testify at trial about specific abuses to which Thieszen was subjected, as that would have enabled the jury to better understand their opinions and better understand how Thieszen would react under stressful conditions. It appears Thieszen further urges that evidence concerning how the events of his family life had affected his personality and conception of reality was admissible under *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), holding that evidence of an accused's mental condition at the time the offense was committed is admissible to prove absence of intent.

But under this record it is not necessary for us to determine whether testimony concerning specific acts of abuse was admissible, for, as the foregoing review of the relevant testimony demonstrates, notwithstanding that the district court made clear it would not rule on the admissibility of the evidence until trial, that is, when the jury was present, Thieszen made no such inquiry.

It is true that Thieszen asked Kentsmith in the presence of the jury for examples of what would create a "no-win" situation, but that is a far different matter than asking for examples of past abuse that resulted in Thieszen's condition. Similarly, asking Logan what can cause impulsive reactions to worsen is different than asking for examples of past abuse which produced the impulsivity. We cannot speculate as to how a trial court would have ruled on objections not made to questions not asked. See *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

(b) Evidence Admitted

(i) Scope of Review

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by rule, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

(ii) Application of Law to Facts

Thieszen urges that the district court improvidently permitted Jerry L. Kreps to interpret certain photographic evidence as an expert. Thieszen objected to receipt of this testimony on the grounds that Kreps lacked expert qualifications and that the evidence was not relevant.

Kreps testified that he had a master's degree in science with a major in biochemistry and had major hours in physics, mathematics, and biology; his education included training with regard to the physics of flowing fluids, the viscosity of fluids, and the "absorbtivity of fluids." Although he had had no formal training in the area of forensic interpretation of evidence, he studied forensic science on his own "[t]hrough the University of Nebraska, through the law libraries; in the understanding of physics and the teaching of physics at the college level; and other self-motivated and self-interested avenues."

He was certified by the state to teach chemistry, physics, mathematics, biology, and general science, and at the time of trial was employed as a substitute teacher for the Lincoln public school system. Prior to taking on such work, Kreps spent 16

years in his own consulting business, in which he performed computer consulting, electronics consulting, and criminal forensics investigations. For 8 years, he taught engineering, physics, electronics, computer science, anatomy, physiology, microbiology, organic chemistry, inorganic chemistry, general science, and astronomy at York College. Although Kreps had not prior to this case testified about the flow of fluids, his work had required the examination and evaluation of photographs of crime scenes.

The evidence includes photographs of the victim with the front of her denim shorts unzipped and her underpants pulled down. After examining photographs of the victim's clothing and body and other aspects of the crime scene, Kreps explained that the location of various blood stains established that the shorts had been unzipped and the underpants pulled down after she had been shot.

Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Thieszen does not argue that Kreps' testimony would not help the jury understand the photographic evidence, only that Kreps was not an expert, that the evidence is not relevant, and that even if relevant, it should be excluded under the provisions of rule 403 as unfairly prejudicial.

There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). We cannot say that under the circumstances of this case, the district court was clearly wrong in concluding that Kreps was qualified as an expert to interpret the photo-

graphic evidence so as to explain the condition of the clothes at the time of the shooting.

We thus move on to the question of whether his testimony was relevant, and recall that such evidence is that evidence which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). Kreps' testimony suggests that there was a sexual component to the shooting and thus bears on the issue of Thieszen's deliberation and premeditation. Deliberation and premeditation are elements of the crime of first degree murder, § 28-303; therefore, the evidence was relevant, notwithstanding that Thieszen ascribed a different motive to the killing.

However, as Thieszen correctly notes, under the provisions of rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." See *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992). In the context of this rule, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995). It cannot be said that legitimate inferences drawn from evidence bearing upon the existence of the elements of the crime charged, in this case deliberation and premeditation, suggest a decision on an improper basis. Thus, the district court did not abuse its discretion in receiving Kreps' testimony.

(c) Resolution

Accordingly, there is no merit to the third assignment of error.

4. Nondirection of Verdict

In the fourth and final assignment of error, Thieszen claims the district court erred in failing to direct a verdict in his favor.

However, he has not argued this assignment in his brief. The dispositive rule is that absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1996); *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). The quantum of evidence pointing to Thieszen's guilt precludes any suggestion that it was plain error to not direct a verdict in his favor. Thus, this assignment of error is also meritless.

IV. JUDGMENT

Consequently, as first noted in part I above, the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GAIL ELIZABETH COLLINS FOR ADMISSION TO THE NEBRASKA STATE BAR.

561 N.W.2d 209

Filed April 4, 1997. No. S-34-960001.

1. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
2. ____: ____. The North American Free Trade Agreement is not a basis for a private party to argue that the restrictions of Neb. Ct. R. for Adm. of Attys. 5A(2) (rev. 1996) are invalid as applied against the party.
3. ____: ____. Neb. Ct. R. for Adm. of Attys. 5A(2)(b) (rev. 1996) requires that at the time of an applicant's admission to another state's bar, the applicant must have attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.

Original action. Application denied.

Gail Elizabeth Collins, pro se.

Harold L. Rock for Nebraska State Bar Commission.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIVINGSTON, D.J.

WRIGHT, J.

FACTUAL BACKGROUND

Gail Elizabeth Collins brings this original action seeking admission to the Nebraska bar without examination. The Nebraska Supreme Court is vested with the sole power to admit

persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. See, *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996); *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993); Neb. Const. art. II, § 1, and art. V, §§ 1 and 25.

Ordinarily, applicants must direct their applications for admission to the bar to the Nebraska State Bar Commission (Commission), pursuant to the Nebraska Court Rules for Admission of Attorneys. However, Collins was apparently instructed by the Commission's secretary to file her application directly with this court. Collins has not attached an affidavit verifying that her factual allegations are true, and the parties have not stipulated to any facts.

In her letter and materials submitted to the court, Collins alleges that she graduated from the University of Saskatchewan Law School with a bachelor of laws degree in 1981. She states that she was admitted to the bar in Newfoundland in 1981 following a period of professional training she refers to as an "Articles of Clerkship" and an examination by the Law Society of Newfoundland regarding local laws and procedures.

According to her curriculum vitae, Collins was admitted to the Saskatchewan bar in 1984 following an Articles of Clerkship. She then worked full time as a legal staff member for 2 years with the rules revision committee of the Court of Queen's Bench of Saskatchewan. From 1984 to 1989, she worked as a barrister and solicitor in private practice and with the Saskatchewan Legal Aid Commission. From 1989 until she moved to Nebraska, she served as a crown attorney in Newfoundland, where she prosecuted criminal cases.

Collins states that she is licensed and in good standing in the bars of both Saskatchewan and Newfoundland and that she is currently working with the Madison County Attorney's office in an unidentified capacity. She has not been admitted to the practice of law in any state in the United States, nor has she passed any formal bar examination in the United States.

ANALYSIS

In her application, Collins seeks admission to the Nebraska bar without examination pursuant to the provisions of Neb. Ct. R. for Adm. of Attys. 5 (rev. 1996), which provides as follows:

> A. Classification of Applicants.
>
> . . . .
>
> (2) Class I-B applicants who may be admitted to practice in Nebraska upon approval of a proper application are those:
>
> (a) who have been licensed in the practice of law in another state, territory, or district of the United States preceding application for admission to the bar of Nebraska and have actively and substantially engaged in the practice of law in another state, territory, or district of the United States for 5 of the preceding 7 years immediately preceding application for admission, and
>
> (b) who at the time of their admission had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.

Collins admits she has not been licensed to practice law in another state, territory, or district of the United States preceding application for admission to the Nebraska bar; nor has she actively and substantially engaged in the practice of law in another state, territory, or district of the United States for 5 of the preceding 7 years immediately preceding application for admission. Collins also admits that she received her bachelor of laws degree from the University of Saskatchewan Law School, a school which is not accredited by the American Bar Association.

Nevertheless, Collins requests admission to the Nebraska bar on the grounds that the North American Free Trade Agreement (NAFTA) requires that Collins be treated the same as a person from a state within the United States and that, accordingly, she would be eligible for admission without examination. The Commission argues that Collins does not have standing to enforce a provision of NAFTA against the Commission, because NAFTA does not provide a private remedy.

The explicit language of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3301 et seq. (1994), states that NAFTA does not provide a private remedy and may not be invoked in order to invalidate any "action or inaction by any . . . instrumentality of . . . any State . . . ." See § 3312(c)(2).

Section 3312(c) explicitly precludes Collins' invocation of NAFTA to avoid the exercise of rule 5A(2) against her application. Section 3312(c) indicates that

> [n]o person other than the United States—
>
> (1) shall have any cause of action or defense under [NAFTA or]
>
> . . . .
>
> (2) may challenge, in any action brought under any provision of law, any action or inaction by any . . . instrumentality of . . . any State . . . on the ground that such action or inaction is inconsistent with the Agreement . . . .

Therefore, NAFTA is not a basis for Collins, as a private party, to argue that the restrictions of rule 5A(2) are invalid as applied against her.

In addition, Collins may not meet the educational qualifications referred to in rule 5A and defined in rule 5C. Rule 5A(2)(b) requires that at the time of the applicant's admission to another state's bar, the applicant must have "attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska." The educational qualifications contained in rule 5C when Collins applied were stated as follows:

> Educational Qualifications . . . . Every applicant must have received at the time of the examination a professional degree from a law school approved by the American Bar Association. The standards for approval which must be met are set forth in Appendix B and are incorporated here by reference. . . . An applicant without a degree from an approved law school shall be permitted to take the examination if such applicant will receive a degree from an approved law school within 60 days after the date of the examination taken.

Neb. Ct. R. for Adm. of Attys. 5C (rev. 1992). We do not decide whether Collins has attained educational qualifications at least equal to those required by rule 5.

For the reasons set forth herein, Collins' present application is denied.

APPLICATION DENIED.

ROGER GUSTAFSON, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLEE.

561 N.W.2d 212

Filed April 4, 1997. No. S-94-1089.

1. **Trial.** The submission of special findings rests within the discretion of the trial court.
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 (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.
3. **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.
4. **Negligence: Juries.** If reasonable minds might draw different conclusions from the facts, the issues of negligence and contributory negligence are for the jury.
5. **Federal Acts: Railroads: Damages: Negligence.** The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity.
6. **Federal Acts: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
7. **Federal Acts: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act.
8. **Appeal and Error.** A party cannot complain of error which he has invited the court to commit.
9. **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.
10. **Jury Instructions: Negligence: Proof.** Although a defendant is entitled to a contributory negligence instruction if there is any evidence to support the theory, to receive such the defendant must produce evidence of the plaintiff's lack of due care.
11. **Negligence: Proof: Testimony.** The plaintiff's testimony may constitute evidence of the plaintiff's own negligence.
12. **Jury Instructions: Appeal and Error.** In evaluating a claim of an improper jury instruction, the jury instructions must be read together as a whole.
13. **Jury Instructions.** The apportionment instruction is appropriate where there is evidence of a preexisting condition but the degree to which that condition may have been aggravated could not be determined.
14. ____. In the absence of proof of aggravation, an instruction on apportionment of damages would be inappropriate.

15. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.

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

C. Marshall Friedman, Douglas K. Rush, Bret E. Taylor, and John J. Higgins, for appellant.

Cheryl R. Zwart, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BURKHARD and CASSEL, D. JJ.

CASSEL, D.J.

The appellant, Roger Gustafson, brought this action in the district court for Douglas County against the appellee, Burlington Northern Railroad Company, for personal injuries pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1994). The injuries emanated from three incidents occurring in the course of Gustafson's employment as a carman. From a judgment upon the jury's general verdict in his favor in the amount of $63,500, Gustafson appeals.

This case was originally filed with the Nebraska Court of Appeals. We removed the case to this court's docket pursuant to statutory authority to regulate the caseloads of this court and the Court of Appeals. Finding no reversible error by the trial court, we affirm.

I. FACTUAL BACKGROUND

Gustafson worked as a carman in Burlington's Havelock shops in Lincoln, Nebraska. In that capacity, Gustafson performed repairs on railroad cars at the Havelock facility. He worked primarily in a particular area repairing "heavy wrecks." Each carman works with another carman in a two-person team. For over 5 years before the first accident at issue, Gustafson worked with Gary Knippel.

On October 2, 1989, Gustafson and Knippel were engaged in the repair of a scale car, which is used to calibrate scale facilities over which rail cars are weighed. The scale car was lifted

by a crane, the wheels removed, and stands placed under the car. In each of four wheel wells, two spring cup pads were to be removed, repaired, and then reinstalled. When reinstalling the last spring cup, Gustafson suffered an injury to his lower back, later diagnosed as a herniated lumbar disk, while lifting the spring cup.

On February 16, 1990, Gustafson and Knippel attempted to clear the drive mechanism on the door gate of a C-6 hopper car (a grain car with three "hopper" gates at the bottom which can be opened for unloading). After repair, the hopper car was blasted with metal fragments (shot) to remove paint and rust prior to repainting. Some of the shot worked into each of the hopper gate mechanisms, causing them to bind and stick. Two of the gates opened easily. The third gate resisted Gustafson's efforts. While using a 30-inch pry bar to loosen the gate, Gustafson reinjured his back.

On April 24, 1991, Gustafson was assigned to a pipe-bending station. Gustafson used a rolling toolbox which had a rack on top to hold pieces of pipe. He loaded the rack with eight 57-inch pieces of pipe, each pipe being 1¼ inches in diameter. He then attempted to move the toolbox a short distance to align the toolbox with the pipe-bending machine. The toolbox tipped over, and in attempting to move out of the way, Gustafson again reinjured his back.

Additional facts will be discussed as required by the analysis.

II. ASSIGNMENTS OF ERROR

Gustafson asserts that the trial judge erred in (1) submitting the cause using a general verdict form without special interrogatories or separate verdict forms, (2) failing to give requested instructions concerning the unavailability of an assumption of risk defense, (3) submitting the issue of contributory negligence as to each of the three incidents, and (4) refusing to give the "apportionment" portion of the preexisting condition instruction.

III. STANDARD OF REVIEW

The submission of special findings rests within the discretion of the trial court. *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978); *Masonic Bldg. Corporation v. Carlsen*,

128 Neb. 108, 258 N.W.2d 44 (1934). Unless the record shows an abuse of that discretion, the trial court's decision should stand. *Langenheim v. City of Seward, supra; Hedrick v. Strauss*, 42 Neb. 485, 60 N.W. 928 (1894).

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. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

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. *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). If reasonable minds might draw different conclusions from the facts, the issues of negligence and contributory negligence are for the jury. *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996).

IV. ANALYSIS

1. Preemption by Federal Law

We begin by observing that the applicable principles are controlled by federal law.

> The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity. . . .
>
> . . . .
>
> Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act. 45 U.S.C. § 56. In disposing of a claim controlled by the Federal Employe[r]s' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act [citations omitted], but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions

> of the act and interpretative decisions of federal courts construing the Federal Employers' Liability Act . . . .

Chapman v. Union Pacific Railroad, 237 Neb. 617, 621-23, 467 N.W.2d 388, 392-93 (1991).

2. USE OF GENERAL VERDICT FORM

Gustafson asserts that the trial court erred by submitting the cause upon a general verdict form rather than by propounding special interrogatories or by submitting separate verdict forms for each claim.

Gustafson submitted requested instructions, including a verdict form incorporating special interrogatories. However, during the instruction conference, Gustafson focused his efforts toward three verdict forms, one for each cause of action, without special interrogatories, as follows:

> THE COURT: [Instruction No.] 25? We'll have to clean that up, and then we'll give them the two verdict forms.
>
> [Plaintiff's counsel]: No objection.
>
> [Defendant's counsel]: Defendant would object to not submitting special interrogatories. . . .
>
> . . . .
>
> [Plaintiff's counsel]: I have a concern somewhat along those lines, but it doesn't have to go to special interrogatories. I drafted special interrogatories because I thought that was normally used in Nebraska. I would prefer to simply not giving [sic] special interrogatories.
>
> The problem I have is along the lines of [defendant's counsel's]. We have a three-count lawsuit, three separate injuries. . . .
>
> THE COURT: Do you want to give three verdict forms?
>
> [Plaintiff's counsel]: With three verdict forms with the plaintiff's claim on October 2nd, 1989 —
>
> . . . .
>
> [Defendant's counsel]: If you're going to do that, why not do the interrogatories?
>
> . . . .
>
> [Plaintiff's counsel]: Because the interrogatories go on and on and on and are very long[,] confusing[,] and doesn't [sic] add anything other than what the court instructed in

the earlier instructions about what the elements are and the claims.

. . . .

[Plaintiff's counsel]: Having now received the final set of instructions and the verdict forms that are used, plaintiff notes that the Court is tendering one verdict form and there are three separate counts in this case.

Plaintiff would object to tendering only one verdict form with only one finding of gross damages without submitting separate verdict forms for each of the three injuries and the three claims that are in the lawsuit.

(a) Special Interrogatories

Gustafson's attorney succinctly stated why special interrogatories should not be given. We agree, as did the trial court, that the proposed special interrogatories were long and confusing. The trial court did not abuse its discretion in declining to submit special interrogatories. Moreover, a party cannot complain of error which he has invited the court to commit. *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994). Gustafson cannot now complain of that which he previously urged.

(b) Separate Verdict Forms

To sustain his claim of error regarding the use of a single general verdict form, Gustafson points to the questions submitted by the jury. The jury inquired if they must agree on the particular elements of negligence or contributory negligence regarding each incident. They later queried whether their verdict must identify the issues upon which they based their award. We are persuaded, however, that the jury questions demonstrate that the jury *did* understand its task. The submission of one general verdict form was not an abuse of discretion.

3. Requested Instructions Nos. 14 and 15

Gustafson submitted requested jury instructions. Requested instruction No. 14 provided:

> If [p]laintiff undertook his duties in a manner and in a place ordered and furnished by [d]efendant railroad, any notice of [sic] knowledge on his part of risk and dangers

> incident thereto or unsafe condition of the place may not form the basis of a finding that doing his assigned work with such knowledge was negligent on his part. In other words, where the employer adopts a means and method of carrying out assigned work or selects or maintains the place where the work must be done, the employer may not claim that its employee was negligent because he did not refuse to do his assigned work in the manner and at the place selected by the employer since the employee is expected to follow orders and do his assigned job at the assigned time and place.

Requested instruction No. 15 was identical to requested instruction No. 14, with the exception of the word "or" substituted for "of" after the word "notice" in the first sentence.

The trial court gave instruction No. 15, as follows:

> You may not find [p]laintiff contributorily negligent in doing his assigned work having notice or knowledge of the dangerous conditions existing. In other words, [p]laintiff's doing his assigned work knowing of the dangerous conditions existing may not form the basis of a finding that he was negligent.

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. *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996). The substance of the requested instructions was included in instruction No. 15. Gustafson had no right to particular language. The parties were entitled to nothing more or less than a fair, impartial, and complete statement of the applicable law. The trial court's instruction on this issue complied in all respects.

4. Submission of Contributory Negligence

Gustafson's next assignment of error centers on the distinction between an employee's contributory negligence and his assumption of the risks of employment. FELA utilizes a mandatory rule of comparative negligence, which reduces the employee's recovery by that part of the injury which is attributable to the employee's own negligence. 45 U.S.C. § 53.

However, FELA eliminates an injured employee's assumption of risk as a defense to a claim. 45 U.S.C. § 54.

Although a defendant is entitled to a contributory negligence instruction if there is any evidence to support the theory, to receive such the defendant must produce evidence of the plaintiff's lack of due care. *Birchem v. Burlington Northern R. Co.*, 812 F.2d 1047 (8th Cir. 1987).

Gustafson focuses on one statement by the Eighth Circuit in *Van Boening v. Chicago & North Western Transp. Co.*, 882 F.2d 1380, 1382 (8th Cir. 1989), in which the court stated that "[t]he issue of contributory negligence is submissible to the jury only if a defendant offers *some evidence independent of the plaintiff's testimony* from which a jury could reasonably find a lack of due care by the plaintiff." (Emphasis supplied.) (Citing *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780 (8th Cir. 1982), *cert. denied* 457 U.S. 1120, 102 S. Ct. 2934, 73 L. Ed. 2d 1333.)

We initially observe that the emphasized statement appears nowhere in *Wilson*. Moreover, in *Van Boening*, contributory negligence was not an issue. The issue on appeal concerned the plaintiff's claim that an instruction stating " 'evidence concerning the manner and way in which Van Boening used the equipment is proper for your consideration,' " *Van Boening v. Chicago & North Western Transp. Co.*, 882 F.2d at 1382, improperly introduced the issue of contributory negligence. The federal appeals court rejected the argument, noting that concerning the proper issues of the defendant's negligence and causation, "it would be impossible to preclude the jury from considering the manner and way in which the accident occurred . . . ." *Id.*

Nor is Gustafson's contention consistent with the law of other federal courts. See, *Gish v. CSX Transp., Inc.*, 890 F.2d 989 (7th Cir. 1989); *Hurley v. Patapsco & Back Rivers R. Co.*, 888 F.2d 327 (4th Cir. 1989); *Jones v. Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir. 1986). These cases consistently hold that contributory negligence may not be supported by simply attacking the plaintiff's credibility. However, we determine that the plaintiff's testimony may constitute evidence of the plaintiff's own negligence. Whether Gustafson's testimony actually pre-

sents evidence of contributory negligence depends upon the content of the testimony.

We therefore consider whether there was sufficient evidence to submit the issue of contributory negligence regarding each incident.

(a) October 2, 1989 (Scale Car)

The trial court submitted two specifications of contributory negligence concerning the scale car incident: (1) failing to take reasonable lifting precautions for his own safety and (2) failing to request additional assistance if that assistance was necessary.

Gustafson testified that he lifted the spring cup pad by himself. His teammate, Knippel, testified that they worked together. Knippel also testified that no additional assistance was requested. Although Knippel testified that Gustafson could not use his legs for lifting in the crouched position required by the work area, Gustafson testified that he did use his legs for lifting to the extent possible.

Gustafson's testimony also stated that there was not room for two persons to work as a team in lifting the spring cup pad into place. Gustafson's foreman, Gary Sydzyik, testified that there was room for two people to get up inside of the wheel well and that two persons could make a complete lift of the spring cup pad inside the wheel well. Sydzyik testified that he expected Gustafson and Knippel to use teamwork to install the spring cup pad. Gustafson's testimony showed that he lifted the spring cup pad alone. In addition, the parties introduced photographs showing the work area involved.

This disputed testimony supports Burlington's theory that Gustafson failed to take reasonable lifting precautions for his own safety and that he failed to request additional assistance. The trial judge properly submitted these issues to the jury. The weight of the evidence and the resolution of conflicts in the evidence devolved on the jury.

(b) February 16, 1990 (Hopper Car)

The trial court submitted three specifications of contributory negligence concerning the hopper car incident: (1) failing to request additional physical assistance if that assistance was

indicated, (2) failing to request or utilize additional equipment if indicated, and (3) failing to avoid work in a crouched and awkward position.

The parties adduced testimony that Gustafson did not request assistance from his teammate, Knippel. Knippel's and Gustafson's testimony concurs in that regard. Although there was testimony that a 5-foot pry bar was available, the evidence showed that Gustafson continued to use a 30-inch pry bar, which did not provide maximum leverage. This evidence reasonably could be viewed in a light consistent with Burlington's first two specifications of contributory negligence. Similarly, Gustafson's testimony and the exhibits concerning Gustafson's location and position reasonably could be viewed in a light consistent with Burlington's contention that Gustafson continued to work in a crouched and awkward position. The inferences to be drawn from this evidence were reserved to the jury. The trial court properly submitted these allegations of contributory negligence.

(c) April 24, 1991 (Toolbox)

Regarding the last incident, the trial judge submitted as a specification of contributory negligence that Gustafson failed "to utilize reasonable precautions for his own safety by loading 8 sections of pipe on top of the tool box, and then pulling the tool box." The trial court had submitted the issue of Burlington's negligence upon the specification that Burlington was negligent in "furnishing the [p]laintiff with a tool box which was unstable and unsteady."

It would have been erroneous to submit Gustafson's mere use of the toolbox as contributory negligence. That usage, standing alone, would constitute an impermissible assumption of risk defense. However, Burlington theorized that Gustafson added to the danger by stacking eight sections of pipe upon the toolbox and by pulling with only one hand upon the device thus loaded. This defense does not require expert testimony. Burlington's contention rests upon a commonsense approach within the knowledge and understanding of a layperson. It is also supported, to some degree, by the testimony of Knippel.

Although by no means compelling, Gustafson's testimony reasonably may be viewed in a light consistent with Burlington's theory of contributory negligence and was therefore sufficient to support the submission of the contributory negligence defense to the jury. The law assigns the determination of such questions to the jury.

In addition, as noted above, instruction No. 15 submitted by the trial court directed the jury that merely doing assigned work with knowledge of the dangerous conditions then existing could not form the basis of a finding that Gustafson was negligent. In evaluating a claim of an improper jury instruction, the jury instructions must be read together as a whole. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). When read together, the instructions adequately instructed the jury regarding the additional danger necessary to support a finding of contributory negligence regarding the toolbox incident.

5. Preexisting Condition Apportionment Instruction

Gustafson also assigns error regarding the trial court's instruction concerning Gustafson's preexisting back condition. In instruction No. 16, the trial court instructed the jury that

> [a] person who has a condition or disability at the time of an injury is not entitled to recover damages for that condition. However, he is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.
>
> This is true even if the person's condition or disability made him more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.
>
> Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.

Gustafson submitted requested instruction No. 23, which stated:

> The [d]efendant takes the [p]laintiff as it finds him, that is, if the [d]efendant is liable to [p]laintiff, the [d]efendant is liable for all of the consequences which its negligence

> played any part, even the slightest, in producing [p]laintiff's injury and [p]laintiff is entitled to be compensated for all injury and damage suffered by him, even the improbable or unexpectedly severe consequences of [d]efendant's negligence or wrongful act.
>
> If you find for [p]laintiff, you should compensate him for any aggravation of an existing disease or physical defect (or activation of any such latent condition), resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of [p]laintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. *However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.*

(Emphasis supplied.) Gustafson specifically complains regarding the refusal of the trial court to give the emphasized portion of the instruction. We have previously referred to similar language as the "apportionment" instruction.

We have held that the apportionment instruction is appropriate where there is evidence of a preexisting condition but the degree to which that condition may have been aggravated could not be determined. *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). We have also held that in the absence of proof of aggravation, an instruction on apportionment of damages would be inappropriate. *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992).

In the present case, the evidence clearly demonstrates that Gustafson suffered three injuries, presented three separate causes of action, and was asymptomatic prior to the first accident. While the general verdict in this case does not provide information as to whether the jury found that the injuries arose as a result of one or more of the incidents, whether the jury awarded damages for the aggravation of a preexisting injury occurring in one of the first two incidents, or whether Burlington was not negligent and therefore not responsible for any preexisting condition, Gustafson suffered no prejudice by the court's refusal to give his requested instruction. Neb. Rev.

Stat. § 25-1122 (Reissue 1995) specifically states that a jury, by its general verdict, "pronounce[s] . . . upon all or any of the issues either in favor of the plaintiff or defendant." Because the jury through its general verdict presumptively held all causes of action in favor of the plaintiff, Gustafson, the apportionment language in this instance was irrelevant, and the court committed no reversible error in refusing to give the instruction.

Finding no reversible error, we affirm the judgment of the trial court upon the verdict of the jury.

AFFIRMED.

WHITE, C.J., concurring.

I respectfully concur. Although I agree with the majority that a general verdict pronounces all issues in favor of the prevailing party and so negates the necessity in this case of giving the apportionment instruction, I submit that the apportionment instruction should still be given in situations such as this.

CYNTHIA S. MAHLIN AND RICHARD J. MAHLIN, APPELLANTS, V. CAROLINE GOC, APPELLEE.

561 N.W.2d 220

Filed April 4, 1997. Nos. S-95-173, S-95-174.

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. **Invitor-Invitee: Liability.** A business proprietor may be held liable for the intentional or criminal acts of third parties only if the proprietor knew or should have known that such acts were going to occur.

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

Richard K. Watts and Julie L. Nicolas, of Mills, Watts & Nicolas, for appellants.

Thomas A. Otepka and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPETHMAN, D.J., and GRANT, J., Retired.

CONNOLLY, J.

The appellants, Cynthia S. Mahlin and Richard J. Mahlin, brought this premises liability action against the appellee, Caroline Goc, contending she owed them, as business invitees, a duty to warn them of the dangerous propensities of her husband, Jerome Goc. The district court for Hamilton County granted summary judgment in favor of Caroline Goc, finding no material issue of fact. We affirm, concluding that there exists no evidence that Caroline Goc knew or should have known of Jerome Goc's intentions to harm the Mahlins while they were on the Goc property.

BACKGROUND

The Mahlins, both attorneys, filed a replevin action on behalf of their clients Clyde and Kathleen Brandon and Benjamin Saner against Jerome Goc. In the petition, it was alleged that Jerome Goc had unlawfully detained property, including certain thoroughbred racehorses, owned by the Brandons and Saner. The petition thus prayed for return of the goods, as well as $100,000 in damages.

Rather than proceed with the replevin action, Jerome Goc entered into a stipulation with the Brandons and Saner. Pursuant to the agreement, the Brandons, Saner, and Jerome Goc were to meet at the Goc residence on July 26, 1993, to arrange for the return of the horses and to sign mutual releases. The Mahlins and the attorney for Jerome Goc were also to attend the meeting.

On the morning of the meeting, all parties met at the Goc residence before traveling to the pastureland in which the horses were kept. Throughout the morning, the Brandons proceeded to round up the horses and property. Shortly before noon, the parties agreed to break for lunch and meet back at the Goc residence to finish loading the horses and property.

Tragic events began to unfold after lunch when the Brandons and the Mahlins were the first to return to the Goc residence. When the Mahlins entered onto the property, Jerome Goc shot Richard Mahlin in the face, chest, arm, and upper body with a 12 gauge shotgun. Jerome Goc also shot Cynthia Mahlin in the face with the shotgun and repeatedly kicked her in the head and body while she lay on the ground. Jerome Goc was subsequently killed when Richard Mahlin ran over him with a pickup truck.

Caroline Goc testified during her deposition that Jerome Goc was upset at the prospect of giving back the horses when the Brandons had failed to pay him rent for keeping them and that he stated, "'I don't understand why these deadbeats can get away without paying their bills when we have to pay our bills.'" Concerning Jerome Goc's demeanor on the day of his death, Caroline Goc stated that he was extra quiet that day and did not have much to say.

The Mahlins brought suit against Caroline Goc for the injuries they suffered due to Jerome Goc's actions. Although the Mahlins filed separate petitions, each asserts the Mahlins were business invitees when they entered the Goc residence on July 26, 1993. As such, the Mahlins contend that Caroline Goc, as a landowner, owed them a duty to warn them of a dangerous condition on the land, namely her husband, Jerome Goc. Caroline Goc asserted in her answer that the Mahlins' injuries were the result of the unforeseeable criminal acts of Jerome Goc and thus filed motions for summary judgment. The district court granted Caroline Goc's motions as to both of the Mahlins' actions. The Mahlins appeal. As was the case in the district court, these appeals have been consolidated.

ASSIGNMENT OF ERROR

The Mahlins' sole assigned error is that the district court incorrectly sustained Caroline Goc's motions for summary judgment because issues of material fact exist.

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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

ANALYSIS

The issue before us is whether Caroline Goc can be held liable for the criminal actions of Jerome Goc under a premises liability theory. Asserting they were business visitors of Caroline Goc's, the Mahlins argue she owed them a duty to warn of Jerome Goc's intentions to harm them while on her land.

The operative petitions of the Mahlins are identical with the exception of the damage request made by each. The pertinent paragraphs of each allege the following:

> 3. . . . Plaintiff was, at all times relevant hereto, an invitee of Defendant. At all times relevant . . . Defendant owed Plaintiff a duty to exercise reasonable care to keep the premises at 1240 Sunset Terrace Rd. safe for Plaintiff and to warn Plaintiff of dangerous conditions . . . .
>
> 4. That at the time that Plaintiff entered onto the premises at 1240 Sunset Terrace Rd., there existed a dangerous condition of which Defendant knew, or reasonably should have known, namely, that Plaintiff's [sic] spouse . . . had threatened violence toward Plaintiff and, in fact, planned to assault Plaintiff with a shotgun when [she/he] entered onto the premises. Further, that such condition posed an unreasonable risk of harm to Plaintiff, and Defendant knew, or should have known, that Plaintiff was not likely to discover such dangerous condition prior to coming onto the property.

An issue extensively briefed by both parties in this matter is whether Jerome Goc constituted a "condition" for purposes of premises liability. However, the Mahlins, during oral argument, abandoned this contention, and therefore we do not address this issue.

The remaining issue is whether Caroline Goc was under a duty to warn the Mahlins, who assert they were business invitees, of the dangerous propensities of Jerome Goc. The Mahlins direct us to Restatement (Second) of Torts § 344 (1965), which provides that a possessor of land who holds it open to the public for entry is liable for the intentional harmful acts of third persons toward members of the public who are on the land for business proposes. See *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). In its entirety, § 344 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. at 223-24.

According to Caroline Goc, § 344 does not apply because the Goc residence was not "open to the public" for a business purpose on the day in question. Conversely, the Mahlins argue that the Gocs were in the business of keeping horses for rent and that all parties were on the land that day in furtherance of that business. Assuming but not deciding that the Mahlins were actually business invitees of Caroline Goc and that the principles set forth in § 344 apply to activities conducted at a private residence, we conclude that there exists no evidence that Caroline Goc knew or should have known of Jerome Goc's criminal and intentional acts toward the Mahlins.

In applying § 344, this court has noted that a business proprietor may be held liable for the intentional or criminal acts of

third parties only if those acts are foreseeable, that is, only if the proprietor knew or should have known that such acts were going to occur. See, e.g, *Hulett v. Ranch Bowl of Omaha, supra* (business liable for injuries to patron when criminal activity was foreseeable); *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994) (supermarket owes duty to warn customers of criminal attack in light of numerous previous attacks in parking lot). Accord *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946) (restaurant owner not responsible for injuries to third party resulting from a third-party fight because such incidents had not occurred before).

Accordingly, for the Mahlins to overcome a motion for summary judgment they must show a genuine issue of material fact as to whether Caroline Goc knew or should have known that Jerome Goc would intentionally harm the Mahlins on the day in question. In addressing this question, we are reminded 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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

In her motion for summary judgment, Caroline Goc offered portions of her own deposition. Similarly, the Mahlins, in response to the motion, also offered portions of Caroline Goc's deposition. The applicable portions of the deposition offered by both parties reveal the extent of Caroline Goc's knowledge as to Jerome Goc's attitude and demeanor on the day in question. As noted above, Jerome Goc made it known that he was upset at the prospect of returning the Brandons' and Saner's property without receiving compensation. When Caroline Goc was specifically asked what Jerome Goc thought of the replevin action initiated by the Brandons, she replied that he called them "deadbeats" and "was mad which would be normal." Caroline Goc stated that Jerome Goc "wasn't real happy" the weekend prior to the incident with the Mahlins but that he nevertheless readied the horses for the exchange. Concerning the day of the

incident, the following exchange took place during Caroline Goc's deposition:

> Q So let's move then to Monday the 26th. What time generally did you and your husband get up most work days?
>
> A Between 6:30 and 7.
>
> Q And was there anything different about this date?
>
> A No, there wasn't.
>
> Q Did you talk that morning before he went outside about the fact that these people were coming for the horses and equipment?
>
> A No.
>
> . . . .
>
> Q What was your husband's general mood, attitude or demeanor that day before you went out to the shop?
>
> A He didn't have a whole lot to say.
>
> Q Was there anything different about him than say had been a week before?
>
> A Well, he was more quieter because he always had a personality, he was easy going. But he didn't have a whole lot to say.
>
> Q Did he seem upset?
>
> A Well, I guess you'd say he was upset. He didn't say a whole lot.
>
> Q What was it about him that told you that?
>
> A Well, it wasn't him just being quiet.
>
> Q He was just quiet, extra quiet that day, is that true?
>
> A That's true.
>
> Q Did you talk to him about his mood?
>
> A No.

The only information that can be gleaned from this exchange is the fact that Jerome Goc was upset at the prospect of returning property to the Brandons and that he was unusually quiet on the day of the exchange. Even when viewed in a light most favorable to the Mahlins, the testimony of Caroline Goc fails to reveal any knowledge on her part of Jerome Goc's intentions to harm the Mahlins. Moreover, we fail to see how one's being extra quiet, in and of itself, should create the suspicion that the individual is about to commit a criminal act. As such, we con-

clude that the facts concerning Caroline Goc's knowledge of Jerome Goc's dangerous propensities are undisputed and establish that she did not know, nor should she have known, that Jerome Goc would brutally attack and assault the Mahlins.

CONCLUSION

Because there exists no issue of fact as to whether Caroline Goc knew or should have known of Jerome Goc's intentions to harm the Mahlins, we conclude the district court correctly entered summary judgment in this matter.

AFFIRMED.

ETHANAIR CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. RICHARD N. THOMPSON, APPELLEE.
561 N.W.2d 225

Filed April 4, 1997. No. S-95-527.

1. **Motions to Dismiss: Directed Verdict.** A motion to dismiss in a bench trial is the same as a motion to direct a verdict in a jury trial.
2. **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.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Corporations: Collateral Attack.** A private party may collaterally attack the legal stature of a corporate entity if it has been dissolved and retains neither a de jure nor a de facto existence.
5. **Corporations.** A corporation de jure is created when there has been both an apparent attempt to perfect an organization under law and substantial compliance with statutory requirements.
6. ____. A corporation de facto exists when there has been a good faith attempt to organize the corporation, statutory requirements have been colorably complied with, and the corporation has exercised the functions or conducted the business that it was organized to perform.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Leonard Dunker for appellant.

Terrance A. Poppe and Joel G. Lonowski, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIVINGSTON, D.J.

CONNOLLY, J.

Appellant Ethanair Corporation brought this action against appellee Richard N. Thompson contending that he usurped a corporate opportunity through his private dealings. The district court for Lancaster County held that Ethanair could not bring this action because it was a dissolved corporation that had not been properly revived in accordance with statutory requirements. The issue before us is whether Ethanair has the legal capacity to file a lawsuit. We affirm, concluding that Ethanair is a dissolved corporation and is neither a corporation de facto nor a corporation de jure and, therefore, does not have the capacity to bring this legal action.

BACKGROUND

Ethanair filed articles of incorporation with the Secretary of State on November 6, 1987. These articles were signed by four incorporators, including Thompson. According to the articles, the purpose of Ethanair's formation was threefold: to produce ethanol from agricultural products, to produce feed and other products from ethanol and its coproducts, and to engage in any lawful activities allowed by the Nebraska Business Corporation Act. In furtherance of these intentions, Ethanair made several efforts to purchase an ethanol plant, known as the ADC-1 plant, located in Hastings, Nebraska.

Prior to April 1990, Ethanair, along with several other corporations, made several bids for the ADC-1 plant. All bids were rejected. However, those entities that had made previous bids were subsequently contacted and offered the opportunity to resubmit another bid. This information was conveyed in a letter personally addressed to Thompson in which he was invited, as a previous bidder or as one having recently inquired about the ADC-1 plant, to offer another bid for the plant. Although Thompson, as president of Ethanair, desired to submit another bid, the new bidding process required each bidder to submit a $200,000 deposit with the bid. Because Ethanair had no assets and could not afford to place such a large deposit with its bid, it began negotiations with Chief Industries, Inc., whereby the cor-

porations would purchase the ADC-1 plant together. Thompson was informed by the chief executive officer of Chief on May 13 that Chief had no desire to enter into such a business agreement with Ethanair.

On May 14, 1990, Thompson drove to Chief's corporate offices in Grand Island, Nebraska. That was the final day in which bids for the ADC-1 plant could be submitted. After discussions with executives at Chief, Thompson entered into an agreement whereby the bidding rights to the plant which were possessed by Ethanair were assigned to Chief. This assignment document was signed by Thompson as president and individually. According to article II of the assignment, Ethanair and Thompson were eligible to present a bid for the plant. At the same meeting, Thompson also entered into a compensation agreement with Chief that provided him with compensation should Chief's bid be accepted. According to the terms of this agreement, Chief was to pay Thompson $850,000 over a period of time should the bid be accepted. If the bid was accepted but Chief was not provided with notification that a bank loan to the plant would remain in place, Thompson would receive $350,000 over a period of years.

Although delays occurred and Chief's original bid was not accepted, Chief did eventually purchase the ADC-1 plant and paid Thompson $850,000. Thompson did not pay any of these funds to Ethanair. As a result, Ethanair brought this action against Thompson, alleging that his actions in assigning the bidding rights to Chief constituted a conversion of corporate funds in violation of his fiduciary duty as Ethanair's president, and therefore sought injunctive relief and recovery of the money paid to Thompson. In his answer, Thompson asserted, inter alia, that there was a defect in parties plaintiff and that Ethanair does not have legal capacity to file a legal cause of action.

The evidence adduced at trial revealed that Ethanair was dissolved on April 16, 1990, by the Secretary of State for nonpayment of occupation taxes. However, on October 25, 1991, a certificate of revival or renewal was filed with the Secretary of State by William A. Scheller as vice president and Stanley Sipple as secretary-treasurer of the corporation. This document was not signed by Thompson as president, nor was it filed with

the Lancaster County clerk's office. In addition, the testimony of the shareholders of Ethanair established that no shareholder meetings were held, no board of directors was elected, no stock was issued, and no corporate activity was carried on after Ethanair was dissolved. Thompson thus moved for a directed verdict alleging that Ethanair was not properly revived at the time he entered into the agreements with Chief and, as such, that he did not usurp a corporate opportunity.

The district court agreed and issued an order dismissing the claim against Thompson. In granting what was considered to be a motion to dismiss, the district court found that Ethanair lacked the legal capacity to bring this action because it was not properly revived. Furthermore, the court held that the evidence failed to establish that Ethanair's activities after the dissolution created a corporation de jure or a corporation de facto.

ASSIGNMENTS OF ERROR

Ethanair contends the district court erred in the following particulars: (1) finding that Ethanair was not a corporation de jure, (2) finding that Ethanair was not a corporation de facto, (3) finding that Thompson could collaterally attack the legal existence of Ethanair, and (4) granting Thompson's motion to dismiss.

STANDARD OF REVIEW

A motion to dismiss in a bench trial is the same as a motion to direct a verdict in a jury trial. See *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997).

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. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997).

ANALYSIS

The issue before us is whether Ethanair has the capacity to bring this action against Thompson. Ethanair contends the district court erred in failing to determine that only the State of Nebraska can collaterally attack the legal existence of a corporation. Ethanair also contends that even if its legal existence can be challenged by Thompson, the record establishes that it was either a de jure or a de facto corporation capable of bringing the present action.

Generally, the legal existence of a corporation can only be brought into question by the state. However, this court has held that a private party may collaterally attack the legal stature of a corporate entity if it has been dissolved and retains neither a de jure nor a de facto existence. *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965). See, also, *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954); *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N.W. 509 (1935). Thus, in addressing Ethanair's assignment of error concerning the ability of Thompson to collaterally attack its legal existence, we must first determine whether Ethanair was either a de jure or a de facto corporation at the time this action was initiated.

Corporation De Jure

A corporation de jure is created when there has been both an apparent attempt to perfect an organization under law and substantial compliance with statutory requirements. *Baum v. Baum Holding Co., supra*; *Parks v. James J. Parks Co., supra*. As noted above, Ethanair filed articles of incorporation on November 6, 1987. However, due to the failure of the corporation to pay occupation taxes, the Secretary of State dissolved Ethanair. A certificate of revival or renewal was subsequently filed by Scheller and Sipple on October 25, 1991.

The revival of a dissolved corporation is governed by statute. According to Neb. Rev. Stat. § 21-20,135 (Reissue 1991), a corporation that is dissolved for failure to pay taxes may procure a revival of its corporate existence by filing a certificate requesting such with the Secretary of State. This certificate is to be signed by the corporation's last acting president and secretary or treasurer unless one of those officers should neglect or fail

to do so, in which case successors to those individuals may be elected. See Neb. Rev. Stat. § 21-20,140 (Reissue 1991). Ethanair failed to comply with these requirements, as evidenced by the fact that the certificate of revival or renewal filed with the Secretary of State was not signed by Thompson, the last acting president of Ethanair. Although the certificate was signed by Scheller as vice president and Sipple as secretary-treasurer, the record is void of any election whereby Thompson was replaced as president.

In addition to this requirement, Neb. Rev. Stat. § 21-20,136 (Reissue 1991) requires, in part, that a copy of the revival certificate "shall be recorded in the office of the county clerk in and for the county in which the original articles of incorporation of such corporation are recorded." Likewise, Neb. Rev. Stat. § 21-20,143 (Reissue 1991) provides:

> Such certificate for the renewal and continuance of the existence of any such corporation shall be filed in the office of the Secretary of State, who shall furnish a certified copy of the same under his hand and seal of office; such certified copy shall be recorded in the office of the county clerk of the county in which the principal office of such corporation is located in this state . . . .

The record before us reveals that neither of these requirements was met. According to the testimony adduced at trial, at no time did an officer or shareholder of Ethanair file a copy of the revival certificate in Lancaster County or any other county in this state.

Finally, we note that Neb. Rev. Stat. § 21-20,142 (Reissue 1991) states that after a revival of a corporation, the then president shall call a meeting of the stockholders, who shall elect a board of directors and officers. Each shareholder of Ethanair who testified at trial stated that no such meetings or elections occurred.

Ethanair failed to strictly comply with the statutory requirements for revival. Indeed, based on Ethanair's failure to properly file a certificate of revival with either the Secretary of State or the proper county clerk and its failure to hold required meetings and elections, we determine that it was not in substantial compliance with the statutory revival process and is thus not a

corporation de jure. As such, the first assigned error is without merit.

CORPORATION DE FACTO

A corporation de facto exists when there has been a good faith attempt to organize the corporation, statutory requirements have been colorably complied with, and the corporation has exercised the functions or conducted the business that it was organized to perform. *Thies v. Weible*, 126 Neb. 720, 254 N.W. 420 (1934); *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N.W. 85 (1894).

As our previous cases establish, the existence of a de facto corporation depends, to a great extent, on the degree that the entity conducts itself in accordance with its articles of incorporation. For example, a de facto corporation was found to exist in *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N.W. 509 (1935), where the evidence established that the corporation in question held an organizational meeting, elected officers, and subsequently carried on the business of the corporation. Likewise, the corporation at issue in *Thies v. Weible, supra*, was held to be a de facto corporation even though two of its incorporators were infants because it was continuously engaged in carrying on the business it was incorporated to perform. Moreover, the corporation had adopted and used a corporate seal and had made and published statements as to its financial condition. See, also, *Haas v. Bank of Commerce, supra* (recognizing bank as de facto corporation when it conducted business under articles of incorporation for period of years).

In the instant case, the evidence does not support Ethanair's contention that it is a de facto corporation. Unlike the above-cited cases, Ethanair has conducted virtually no business since its dissolution. Testimony from the shareholders of the corporation disclose that there were no shareholder meetings and that Ethanair did not possess a board of directors. Furthermore, no corporate activity took place with the exception of the bringing of this lawsuit. In addition to having no assets, the tax returns of Ethanair for the years 1990 through 1993 reflect no business activity whatsoever. In light of this continuous inaction, we agree with the district court's conclusion that Ethanair was not

a de facto corporation. The second assignment of error is therefore without merit.

COLLATERAL ATTACK OF CORPORATE EXISTENCE

As set forth above, a third party may collaterally attack the legal existence of a corporate entity if that entity has been dissolved and is neither a de jure nor a de facto corporation. Thus, in accordance with our conclusion that Ethanair is neither a de jure nor a de facto corporation, we conclude that the district court did not err in allowing Thompson to challenge the ability of Ethanair to bring this action as a corporation.

GRANTING OF MOTION TO DISMISS

Remaining is Ethanair's assertion that the district court erred in granting Thompson's motion to dismiss. A motion to dismiss in a bench trial is the same as a motion to direct a verdict in a jury trial. See *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997). 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. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996).

As set forth above, Ethanair is dissolved and no longer exists as a corporate entity. Where a corporation has been dissolved and no longer exists, its capacity to sue or be sued terminates. *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 322 N.W.2d 373 (1982). See, also, *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995) (holding that unless statute provides otherwise, no law action can be maintained by or against dissolved corporation). Because Ethanair has been dissolved, its ability to bring a legal action against Thompson was extinguished as a matter of law. For this reason, the district court correctly dismissed this action.

CONCLUSION

While the evidence might call into question the business practices of Thompson, Ethanair's dissolution and failure to adequately meet the statutory revival requirements require us to

conclude that the district court committed no error in dismissing this action, and we therefore affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. WILLIAM A. WIELAND, RELATOR, V. SCOTT MOORE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

561 N.W.2d 230

Filed April 4, 1997. No. S-96-429.

1. **Pleadings.** Neb. Rev. Stat. § 25-820 (Reissue 1995) permits a plaintiff to file a reply in order to affirm or deny any new matter contained in a defendant's answer. Where the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by the plaintiff; and the plaintiff may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer.
2. ____. A reply cannot be used to plead a request for different relief.
3. ____. A plaintiff cannot shift positions by means of a reply or use the reply to introduce new causes of action.
4. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** Except in the exercise of its appellate jurisdiction, the Nebraska Supreme Court is one of limited and enumerated powers.
5. **Constitutional Law: Supreme Court: Jurisdiction.** Where a cause of action is not listed in article V, § 2, of the Nebraska Constitution, the limitations of the constitutional provision are effective in prohibiting the original jurisdiction of the Nebraska Supreme Court.
6. **Constitutional Law: Supreme Court: Jurisdiction: Declaratory Judgments.** Bringing an action pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995), does not, in and of itself, satisfy the jurisdictional requirements of Neb. Const. art. V, § 2, because article V, § 2, does not include declaratory relief as one of the grounds for relief that the Nebraska Supreme Court may address pursuant to its limited original jurisdiction. Consequently, absent a concurrent basis for jurisdiction over the subject matter of a declaratory judgment action, the Supreme Court has no original jurisdiction under article V, § 2, to address declaratory judgment actions.
7. **Constitutional Law: Statutes: Jurisdiction.** Neb. Const. art. V, § 2, does not convey original jurisdiction on cases involving the constitutionality of a statute.
8. **Constitutional Law: Jurisdiction: Public Officers and Employees: Parties.** The jurisdiction conferred by the Nebraska Constitution in all civil cases in which the State is a party is not confined to cases in which the State has a mere pecuniary interest, but the jurisdiction may extend to all cases in which the State, through its proper officers, seeks the enforcement of public right or the restraint of public wrong.

9. **Supreme Court: Jurisdiction: Parties.** Jurisdiction will not be entertained by the Nebraska Supreme Court in cases where the State is a nominal party. The State must have a direct interest in having the matter determined.
10. **Constitutional Law: Public Officers and Employees: Parties: Declaratory Judgments.** When a private citizen files an original action for declaratory judgment against a state officer, the State is not necessarily a party for purposes of Neb. Const. art. V, § 2.
11. **Constitutional Law: Public Officers and Employees: Parties.** Merely suing the Secretary of State and making the Secretary a party does not necessarily make the State a party to a civil action for purposes of Neb. Const. art. V, § 2.
12. **Actions: Public Officers and Employees.** An action against a state officer to obtain relief from an invalid act or from an abuse of authority by the officer is not a suit against the State.

Original action. Writ of mandamus denied. Petition dismissed.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, for relator.

Don Stenberg, Attorney General, L. Steven Grasz, and Dale A. Comer for respondent.

Patrick B. Griffin and Richard P. Jeffries, of Kutak Rock, for amici curiae E. Benjamin Nelson, Governor of Nebraska, and Executive Board of the Legislative Council, Nebraska Legislature.

WHITE, C.J., CAPORALE, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

WRIGHT, J.

William A. Wieland commenced this original action requesting, inter alia, a writ of mandamus instructing the Secretary of State (Secretary) to withhold a number of legislatively proposed constitutional amendments from the May 14, 1996, election ballot. A second amended petition requested, in the alternative, a declaratory judgment that certain legislatively proposed amendments to the Nebraska Constitution which appeared on the May 14, 1996, ballot were null and void as a matter of law.

FACTS

During the first session of the 94th Legislature, the Nebraska Legislature passed the following legislative resolutions proposing amendments to the Nebraska Constitution: Legislative Resolution 1CA (permitting Legislature to provide for enforce-

ment of "mediation, binding arbitration agreements, and other forms of dispute resolution" which are entered into voluntarily), Legislative Resolution 3CA (creating Tax Equalization and Review Commission), Legislative Resolution 4CA (providing that legislative bills, resolutions, and amendments thereto should be read at large unless three-fifths of members of Legislature vote to dispense with such reading), and Legislative Resolution 21CA (providing list of rights for crime victims).

After these legislative resolutions passed, the Executive Board of the Legislative Council of the Legislature met and approved explanatory statements for each resolution. The legislative resolutions, along with the respective explanatory statements, were transmitted to the Secretary's office. The Secretary accepted these ballot items without editing and transmitted them to the county clerks and election commissioners for inclusion on the May 14, 1996, ballot.

On April 10, 1996, Wieland wrote to the Secretary, alleging that the Legislature had failed to comply with mandatory constitutional and statutory provisions in adopting the resolutions at issue, and requesting the removal of these items from the May 14 ballot. The Secretary advised Wieland that the ballot items would not be removed from the ballot.

Wieland then filed with this court an initial verified petition which alleged constitutional and statutory violations relating to the manner of adoption and the content of the proposed ballot items and a motion requesting leave to file the action as an original action in this court. The original action request was based upon the allegation that the action is a civil case in which the State is a party and that the action is for mandamus relief. We granted leave for Wieland to file an original action.

On May 7, 1996, Wieland filed an amended petition adding an additional cause of action to the effect that if this court did not issue a writ of mandamus prior to the impending election, the court should after the election issue a declaratory judgment that each of the legislative resolutions are unconstitutional and, therefore, null and void. Wieland did not request leave to file this amended petition. Without leave of court, Wieland also filed a second amended petition restating the three causes of action in the two previous petitions and adding additional allegations regarding the deficiencies of the various ballot items.

The Secretary's answer to the second amended petition alleged, inter alia, that the provisions of the second amended petition requesting a writ of mandamus were moot because the election and tabulation of the vote count had already occurred prior to the filing of the second amended petition. The answer further alleged that Wieland's amended petition and second amended petition should be stricken because they contained new matter and were filed without obtaining leave of court, as required by Neb. Ct. R. of Prac. 15A (rev. 1996).

Wieland's reply denied that the request for a writ of mandamus was moot and alleged that the Secretary had a duty not to "enroll" any amendments that were not adopted according to statutory guidelines. The reply modified Wieland's original request for mandamus and requested that this court issue a writ of mandamus directing the Secretary not to enroll any of the challenged amendments or to remove from the rolls any of these amendments that had already been enrolled.

ANALYSIS

WRIT OF MANDAMUS

Wieland initially requested leave of this court to docket the case as an original action pursuant to rule 15A. After reviewing the petition to determine whether it could be filed as an original action under Neb. Const. art. V, § 2, we granted leave to file the petition in this court.

Rule 15A, which governs a request for the court to exercise its original jurisdiction, provides:

> 15. ORIGINAL ACTIONS.
>
> A. How Commenced.
>
> (1) An original action may not be commenced except by leave of court.
>
> (2) Application for leave to commence an original action shall be made by filing with the Supreme Court Clerk a verified petition setting forth the action. Applicant must also file with the clerk a statement setting forth the basis of the court's jurisdiction and the reasons which make it necessary to commence the action here. Seven copies of each must accompany the petition and the statement. No oral argument will be permitted except as may be ordered by the court.

Therefore, an applicant who requests leave to file an original action must provide this court with a petition that will serve as the basis for the action for which the applicant requests leave. One of the purposes of rule 15A is obvious: The court must determine whether the cause of action and theory of relief that the party intends to pursue are within the range of issues that article V, § 2, permits this court to address pursuant to our limited original action jurisdiction.

Article V, § 2, provides in part: "The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, election contests involving state officers other than members of the Legislature, and such appellate jurisdiction as may be provided by law." The petition provides the basis for the determination of the court's jurisdiction of original actions permitted by article V, § 2.

This court can make an accurate determination of whether to grant leave to file an original action only if it is fully informed of the issues that the applicant intends to raise in the proposed action at the time the determination of whether to grant leave is made. If a party obtains leave to file a case as an original action based upon a permitted cause of action and subsequently amends the petition to allege additional causes of action, the party is still subject to the restrictions of article V, § 2.

The first two causes of action in Wieland's second amended petition correspond to the two causes of action raised in his initial petition. We have determined that these issues may be addressed under our original jurisdiction. We will begin our analysis by addressing these two causes of action and then address whether the third cause of action in the second amended petition is appropriate for our original jurisdiction under the restrictions of article V, § 2.

The first and second causes of action in the second amended petition requested a writ of mandamus to enforce one of two alternative types of relief. Wieland asked this court to issue a writ of mandamus directing that the Secretary remove the ballot issues in question from the May 14, 1996, ballot. Wieland alleged that

> [a] writ of mandamus from this Court is the only reasonably available remedy in the ordinary course of law available to timely compel Respondent to perform the duties of his Office to either withhold the said Legislative Resolutions from the ballot of the May primary election, or otherwise direct that any vote thereon not be tabulated and published.

We conclude that the mandamus relief sought in the second amended petition is moot. The ballot issues were placed on the May 14, 1996, ballot, and vote counts from that election have been tabulated and published. Thus, it is impossible for the court to grant Wieland the relief he requested in the initial petition.

Wieland alleges that the mootness problem was alleviated by his reply to the Secretary's answer. The reply requested that the Secretary be enjoined to remove from the rolls any of the ballot items that won approval by the voters that the Secretary had already enrolled. Wieland argues that this new request for relief saves his petition from mootness. We disagree.

Wieland's attempt to use a reply pleading for this purpose is not permitted by our statutory rules of pleading. A defendant is permitted to deny material allegations in the answer or raise affirmative defenses. See Neb. Rev. Stat. § 25-811 (Reissue 1995). Thus, an answer may contain additional facts that are not raised by the plaintiff in the plaintiff's petition. Neb. Rev. Stat. § 25-820 (Reissue 1995) permits a plaintiff to file a reply in order to affirm or deny any new matter contained in a defendant's answer:

> [W]here the answer contains new matter the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer.

The Secretary's answer asserted that Wieland's allegations and request for relief were moot as a matter of law. Wieland's reply does not introduce new facts which controvert this claim. Instead, the reply changed the basic nature of the relief this court was asked to provide. In response to the Secretary's allegation that the requested relief was moot, the reply amended the

requested relief by asking that the Secretary be enjoined to remove from the rolls any of the ballot items in question. A reply, however, cannot be used to plead a request for different relief. Such use of a reply constitutes an untimely attempt to amend the pleading. A plaintiff cannot shift positions by means of the reply or use the reply to introduce new causes of action. *Exchange Bank & Trust Co. v. Tamerius*, 200 Neb. 807, 265 N.W.2d 847 (1978). See, *Wigton v. Smith*, 46 Neb. 461, 64 N.W. 1080 (1895); *Reed Bros. Co. v. First Nat. Bank of Weeping Water*, 46 Neb. 168, 64 N.W. 701 (1895). As a result, the mandamus relief requested in Wieland's initial petition is moot.

ORIGINAL ACTION JURISDICTION

Next, we address the declaratory relief requested in the third cause of action in Wieland's second amended petition. We have original jurisdiction if a lawsuit raises a cause of action permitted by article V, § 2. Article V, § 2, limits our jurisdiction for original actions to "all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, election contests involving state officers other than members of the Legislature, and such appellate jurisdiction as may be provided by law."

As we noted in *Sorensen v. Swanson*, 181 Neb. 205, 211-12, 147 N.W.2d 620, 624-25 (1967), our original jurisdiction is limited:

> "[T]he original jurisdiction of the supreme court is confined to the cases specified in the constitution, and . . . under another name no additional jurisdiction can be conferred. This is a court the primary object of which is to review cases tried in the district courts. It is an appellate tribunal and it is given original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice. . . ."

We specifically recognized that "[e]xcept in the exercise of its appellate jurisdiction, the Supreme Court is one of limited and enumerated powers." *Id.* at 212, 147 N.W.2d at 625. Accord *State, ex rel. Good, v. Conklin*, 127 Neb. 417, 255 N.W. 925 (1934). "Where a cause of action is not listed in Article V, section 2, of the Constitution, the limitations of the constitutional

provision are effective in prohibiting the original jurisdiction of the Supreme Court." *Sorensen*, 181 Neb. at 212, 147 N.W.2d at 625. *Sorensen* reaffirmed the determination that the limits of the jurisdiction conferred by the Constitution may not be increased or extended by consent of the parties or legislative enactment. For example, in *Miller v. Wheeler*, 33 Neb. 765, 51 N.W. 137 (1892), an election contest was originally filed with this court. We decided that neither the Legislature nor the parties could clothe the court with the power to hear contests of elections and that original jurisdiction is confined to cases specified in the Constitution.

In addition to the mandamus relief discussed above, the second amended petition in the present case requested relief pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995). Bringing an action pursuant to the Uniform Declaratory Judgments Act does not, in and of itself, satisfy the jurisdictional requirements of article V, § 2, because article V, § 2, does not include declaratory relief as one of the grounds for relief that we may address pursuant to our limited original jurisdiction. Consequently, absent a concurrent basis for jurisdiction over the subject matter of a declaratory judgment action, this court has no original jurisdiction under article V, § 2, to address declaratory judgment actions. See, *State ex rel. Douglas v. Gradwohl*, 194 Neb. 745, 235 N.W.2d 854 (1975) (declaratory judgment action proper as original action where subject matter of action was "relating to the revenue" for purposes of article V, § 2); *Anderson v. Herrington*, 169 Neb. 391, 99 N.W.2d 621 (1959) (same); *State, ex rel. Smrha, v. General American Life Ins. Co.*, 132 Neb. 520, 272 N.W. 555 (1937) (same).

We acknowledge that a declaratory judgment action was commenced as an original action in order to consider the constitutionality of a state statute in *State Securities Co. v. Ley*, 177 Neb. 251, 128 N.W.2d 766 (1964). However, a review of *Ley* demonstrates that the court's holding in that case that article V, § 2, grants original jurisdiction to this court regarding all actions involving the constitutionality of a statute was an overextension of article V, § 2. The *Ley* court apparently arrived at this conclusion based on a sentence in article V, § 2, which

states: "The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute and all appeals involving capital cases and may review any decision rendered by a division of the court." The court apparently read this sentence to supply original jurisdiction for any case involving the constitutionality of a state statute.

Article V, § 2, includes a provision which states that in certain situations, this court may divide the court into two divisions, supplement each division with judges from Nebraska's lower courts, and address cases that come to the court. The clause apparently relied on in *Ley* is simply a qualification on the court's authority to address cases in divided panels; certain types of cases must be addressed by the Supreme Court without division. The portion of article V, § 2, quoted above requires that when such cases reach the Supreme Court, they must be addressed by the court sitting without division. It does not convey original jurisdiction on cases involving the constitutionality of a statute. To the extent that *Ley* stands for such a proposition, it is overruled.

Moreover, if the drafters of article V, § 2, had intended to convey original jurisdiction upon this court for actions involving the constitutionality of a statute, the drafters surely would have included such actions in article V, § 2. They did not do so.

Wieland's statement of jurisdiction alleged two theories for this court's having original jurisdiction regarding this action: (1) The action is for mandamus relief, and (2) the action is a civil case in which the State is a party. We have held above that the mandamus relief requested is moot.

Thus, one question regarding jurisdiction remains: When is the State a party for purposes of article V, § 2? In *State v. Pacific Express Co.*, 80 Neb. 823, 115 N.W. 619 (1908), we held that the jurisdiction conferred by the Constitution in all "civil cases in which the state is a party" is not confined to cases in which the State has a mere pecuniary interest, but the jurisdiction may extend to all cases in which the State, through its proper officers, seeks the enforcement of public right or the restraint of public wrong. However, in *In re Petition of Attorney General*, 40 Neb. 402, 58 N.W. 945 (1894), we stated that such jurisdic-

tion would not be entertained by this court in cases where the State was a nominal party. The State must have a direct interest in having the matter determined.

As a result, when a private citizen files an original action for declaratory judgment against a state officer, the State is not necessarily a party for purposes of article V, § 2. In *Wilson v. Marsh*, 162 Neb. 237, 75 N.W.2d 723 (1956), for example, a group of taxpayers brought an original action in this court against the Secretary of State requesting that the court enjoin the Secretary from certifying the names of a number of district court judges from an upcoming election ballot. Upon reviewing the acceptable grounds for original jurisdiction under article V, § 2, including the provision for original jurisdiction over "civil cases in which the state is a party," the court emphasized that the only possible basis upon which it could find original jurisdiction was if the case was one "relating to the revenue." Thus, *Wilson* implies that merely suing the Secretary of State and making the Secretary a party does not necessarily make the State a party to the civil action for purposes of article V, § 2. See, also, *Sorensen v. Swanson*, 181 Neb. 205, 147 N.W.2d 620 (1967) (suit against, among others, Governor, did not have adequate basis for original jurisdiction where suit was not one in nature of quo warranto); *State v. Tabitha Home*, 78 Neb. 651, 111 N.W. 586 (1907) (where State had no direct legal interest in matter, State was not proper party to original action and court did not have original jurisdiction over matter). Similarly, we have held in other contexts that an action against a state officer to obtain relief from an invalid act or from an abuse of authority by the officer is not a suit against the State. See *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

Here, the Secretary was sued in his official capacity regarding his responsibilities with respect to an election. Such a lawsuit against the Secretary is not a civil action in which the State is a party for purposes of establishing original jurisdiction under article V, § 2. See *Wilson v. Marsh, supra*.

CONCLUSION

We conclude that the causes of action for a writ of mandamus are moot and that this court does not have jurisdiction to con-

sider the declaratory relief requested in the third cause of action.

WRIT OF MANDAMUS DENIED.
PETITION DISMISSED.

GERRARD, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. TERRENCE D. MALCOM, RESPONDENT.

561 N.W.2d 237

Filed April 4, 1997. No. S-96-489.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Words and Phrases.** Misappropriation is defined as any unauthorized use of client funds, including not only stealing, but also any other unauthorized temporary use by the attorney for personal purposes, whether or not the attorney derives any personal gain or benefit therefrom.
3. **Disciplinary Proceedings: Proof.** In order to sustain a complaint in a lawyer discipline proceeding, the Nebraska Supreme Court must find the complaint to be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
6. **Disciplinary Proceedings: Intent.** Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.
7. **Disciplinary Proceedings.** The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
8. **Disciplinary Proceedings: Presumptions.** Mitigating factors will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances.

9. **Disciplinary Proceedings.** A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.
10. ____. Multiple acts of attorney misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents.

Original action. Judgment of disbarment.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

Dennis G. Carlson, Counsel for Discipline, for relator.

WHITE, C.J., CAPORALE, CONNOLLY, and GERRARD, JJ., and ENSZ, D.J., and BLUE, D.J., Retired.

PER CURIAM.

This is an attorney discipline case in which the relator, Nebraska State Bar Association (NSBA), seeks to disbar the respondent, Terrence D. Malcom, on the basis that he violated those sections of the Nebraska Code of Professional Responsibility pertinent to the maintenance of trust funds, specifically Canon 1, DR 1-102, and Canon 9, DR 9-102. The referee's report recommends disbarment of Malcom. Malcom takes exception to this recommendation, arguing that the evidence was insufficient to show a disciplinary rule violation and that the referee's recommendation of disbarment was excessive.

BACKGROUND

Malcom was admitted to the Nebraska bar in 1974. During the dates at issue, Malcom practiced law in McCook, Nebraska, with the Colfer firm, where he was also a partner. The Colfer firm maintained one trust account at the McCook National Bank. Malcom opened two additional trust accounts at AmFirst Bank and First National Bank, both in McCook. Malcom stated that he opened these additional accounts because he and/or his firm provided legal services to each of the banks and a member of the firm was on the board of directors of each of the banks. These accounts were used only by Malcom because he was the only one permitted to draw funds from the accounts.

Malcom did not reconcile the accounts on a regular basis. Malcom received monthly statements from both additional

accounts but did not notice a negative balance. On October 22, 1995, the NSBA, by and through its Committee on Inquiry of the Sixth Disciplinary District, recommended filing formal charges against Malcom.

Formal charges were filed against Malcom on May 9, 1996. Count I: Between March and June 1989, Malcom placed client funds in his attorney trust account at First National and failed to maintain a balance in the account equal to or greater than those client funds. Specifically, on March 30, $14,756.47 from the Ruth D. Masters estate was deposited in the First National trust account, but on June 2 and 5, the First National trust account had a negative balance. On July 31, Malcom issued five distribution checks out of the First National trust account totaling $9,535.11. These checks related to the Masters estate. Payment on these checks was possible due to the deposit of funds unrelated to the Masters estate.

Count II: Malcom represented Dr. James S. Carson and served as the personal representative for the Charles A. Barber estate. Dr. Carson settled his case with the Federal Deposit Insurance Corporation by agreeing to pay $130,000 to Grand Ho, Inc. Grand Ho, by agreement, would then pay $130,000 to the Federal Deposit Insurance Corporation. On March 18, 1991, Malcom issued a check in the amount of $130,373.47 payable to the "Malcom Trust Acct." out of the Barber estate checking account. This check was then deposited on March 18 into Malcom's trust account at AmFirst. At the time of said deposit, the trust account balance was $916.91. On March 26, Malcom wrote check No. 1334 out of the AmFirst trust account payable to AmFirst in the amount of $120,000, with the notation "Grand Ho, Inc. wire" on the memo portion of the check. The deposit from the Barber estate made it possible for the Grand Ho wire to be honored.

On May 17, 1991, Malcom issued check No. 1384 in the amount of $10,000 payable to AmFirst out of his AmFirst trust account. This memo portion stated "Grand-Ho." This count alleged that Malcom could not make a reasonable explanation as to why funds paid to him for his representation of the Barber estate were used to pay the Carson settlement.

Count III: Malcom represented Howard B. and Charlotte A. Wyss, husband and wife, regarding a real estate purchase. The Wysses were to pay $53,000 for the real estate, paying $1,000 as earnest money and $52,000 on closing. On June 11, 1991, the Wysses' earnest money of $1,000 was deposited into Malcom's AmFirst trust account. On June 28, the AmFirst trust account had a balance of $760.48; however, no funds related to the Wysses' transaction had been paid from the account. On or about July 30, the Wysses gave Malcom $52,000 for the real estate purchase. On July 30, a $52,000 deposit was made into Malcom's AmFirst trust account, with a notation on the deposit slip which read "H. Wyss." At the time of deposit, the AmFirst trust account balance was $1,196.72. No additional deposits were made into this account until August 5. On July 30 and 31, Malcom issued three checks totaling $34,031.94 out of his AmFirst trust account. Two of the checks were payable to Malcom and totaled $12,847. The other check was payable to the "Charles A. Barber Trust" in the amount of $21,184.94. On September 17, the AmFirst account balance was $942.50, even though no funds had been paid out of the account for the Wysses transaction. On December 17, Malcom issued four checks out of his AmFirst trust account to the sellers of the real estate purchased by the Wysses totaling $51,932.51. This count alleges that without deposits to the account unrelated to the Wysses transaction, there would have been insufficient funds to cover these checks.

Count IV: Malcom represented Audrey Jean Allen with regard to the sale of certain real estate to Larry and Shirley Brooks. Pursuant to a written installment sale agreement, the Brookses were to pay annual payments in the amount of $24,102.64 to Allen. On December 16, 1991, a deposit was made into Malcom's AmFirst trust account in the amount of $24,102.64, with the notation "Jean Allen - Larry Brooks" on the deposit slip. On December 19, Malcom's trust account balance was $23,384.08, even though no funds related to the "Jean Allen - Larry Brooks" transaction had been paid out of the account. On December 23, Malcom issued a check in the amount of $24,102.64 to Allen, with the note "Larry Brooks Contract" in the memo portion of the check.

Count V: On December 27, 1991, a deposit was made into the AmFirst trust account in the amount of $65,000, with the notation "Logan - Messinger Gateway" on the deposit slip. On December 31, the account balance was $54,053.44, and on January 2, 1992, the account balance was $244.64, even though no funds related to the "Logan - Messinger Gateway" transaction had been paid out of the account. On January 28, Malcom issued two checks out of the AmFirst account for the "Logan - Messinger Gateway" transaction. The two checks, one payable to McCook National in the amount of $28,212.50 and one to the Farmers Home Administration in the amount of $36,787.50, would not have been payable without deposits unrelated to the "Logan - Messinger Gateway" transaction.

Count VI: On January 30, 1992, Malcom deposited client funds in the amount of $65,000 into the AmFirst trust account, with the note "Barber Trust - FNB Trust" on the deposit slip. On January 31, the account balance was $119.70 even though no funds related to the "Barber Trust - FNB Trust" had been paid out of the account. From January 31, 1992, through January 1993, the account balance remained below the $65,000 which should have remained in the account.

Count VII: On January 7, 1992, a deposit in the amount of $46,000 was placed into Malcom's AmFirst trust account, with the note "Barber Seidner Farm" on the deposit slip. On January 9, the account balance was $37,836.93 even though no funds related to the "Barber Seidner Farm" had been paid out of the account. On January 13, Malcom issued a check out of the AmFirst trust account to McCook National in the amount of $46,000, with the note "Barber Est./Seidner rent" on the memo portion of the check.

Count VIII: On January 21, 1992, a deposit was made into the AmFirst trust account in the amount of $29,490.04, with the note "Barber Trust Templeton Fund" on the deposit slip. On January 22, the account balance was $244.64, even though no funds had been paid relating to the "Barber Trust Templeton Fund."

Count IX: On February 18, 1992, there was a deposit into Malcom's AmFirst trust account in the amount of $34,000, with the note "Wegener - Cappel Farm" on the deposit slip. On

March 31, the account balance was $180.85, even though no funds relating to the "Wegener - Cappel Farm" had been paid out of the account. On April 30, Malcom issued two checks out of his AmFirst trust account. One was issued to Gene and Charlene Wegener in the amount of $965.83, with the note "Cappel/Wegener" on the memo portion of the check. The second check was issued to Farmers Home Administration in the amount of $33,034.17, with the note "Wegener/Cappel" on the memo portion of the check.

Count X: On February 25, 1992, a deposit in the amount of $10,000 was made to Malcom's AmFirst trust account, with the notation "Palic - H. Koch" on the deposit slip. On March 31, the account balance was $180.85, even though no funds related to "Palic - H. Koch" had been paid out of the account. On April 6, Malcom issued a check payable to Jim Palic for $7,018.94 out of the AmFirst trust account, with the notation "Henry Koch real estate" on the memo portion of the check. On April 20, Malcom issued a check out of his AmFirst trust account to Henry Koch in the amount of $594.87. On May 1, Malcom issued a check out of his AmFirst trust account in the amount of $2,386.19 payable to the Red Willow County Treasurer, with the note "Palic - Koch RC."

The NSBA states that the acts in each of the several counts constitute violations of Malcom's oath of office as an attorney licensed to practice law in Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 1991). The NSBA alleges violations of the Code of Professional Responsibility, specifically DR 1-102 and DR 9-102.

Malcom's answer was filed on May 29, 1996, and an amended answer was filed on August 29. A motion for leave to amend formal charges was filed on September 4. On September 20, the referee entered an order permitting the amendments as set forth in the motion. Malcom subsequently filed an answer to amended formal charges on October 18.

A hearing was held before the referee on October 2, 1996. At issue was whether the evidence was sufficient to establish that the respondent violated the disciplinary rules with respect to misappropriating client trust funds, segregating client trust funds, and keeping adequate trust fund records. Malcom was

charged with 10 counts of attorney misconduct related to his handling of client funds.

The referee found that Malcom violated DR 9-102(A) and (B). With respect to count I, the referee found that Malcom had insufficient funds on deposit in the First National trust account to cover the trust deposit of the Masters estate. With respect to count II, the referee found that Malcom made use of the trust account for improper purposes and did not segregate client funds. With respect to counts III, IV, and V, the referee found that Malcom failed to preserve client trust funds. With respect to the remaining counts, the referee generally found a violation of DR 9-102(A) and (B) without particularity. The referee then recommended that Malcom be disbarred. Malcom filed exceptions to the referee's report on October 28, 1996.

The NSBA filed an application for temporary suspension of Malcom on December 19, 1996, until final disposition of the pending disciplinary proceedings. This court issued an order to show cause on December 27 and an order of temporary suspension on January 23, 1997.

Malcom takes exception to the referee's findings and recommendation, arguing that the evidence is insufficient to support a finding that he violated disciplinary rules and that the recommendation for disbarment is excessive and probation or suspension is reasonable. Malcom does not dispute the factual allegations in the charges.

STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnston,* 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996); *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995).

ANALYSIS

Malcom is charged with violation of DR 1-102 and DR 9-102 of the Nebraska Code of Professional Responsibility. DR 1-102 is entitled "Misconduct" and provides as follows:

> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

DR 9-102 is entitled "Preserving Identity of Funds and Property of a Client" and provides in pertinent part:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

Malcom's first exception to the referee's findings and recommendation is in regard to the sufficiency of the evidence. Malcom argues that the conclusion that the account discrepancies were the result of misconduct on his part must be estab-

lished by clear and convincing evidence and that here the evidence is insufficient to establish that Malcom violated disciplinary rules. He states that in order for a misappropriation charge to make sense, the complainant must establish that the missing funds were actually converted by Malcom.

Misappropriation is defined as any unauthorized use of client funds, including not only stealing, but also any other unauthorized temporary use by the attorney for personal purposes, whether or not the attorney derives any personal gain or benefit therefrom. *State ex rel. NSBA v. Bruckner, supra.*

In order to sustain a complaint in a lawyer discipline proceeding, we must find the complaint to be established by clear and convincing evidence. See *State ex rel. NSBA v. Johnson, supra.* In the present case, Malcom acknowledges the deficiencies in the bookkeeping of the various trust accounts containing his clients' funds. Malcom does not deny the factual claims in each of the 10 counts; rather, he admits that there were not sufficient funds in his trust accounts to cover obligations to those clients whose funds he had previously deposited in the accounts. Malcom explains that the deficiencies in the account balances were inadvertent and that his inability to explain or reconstruct the financial transactions for his clients was due to the passage of time and the loss or unavailability of adequate records.

Those explanations are simply not sufficient to justify the account balances in Malcom's trust accounts after the deposit of client funds and without payment regarding those clients' accounts. From our de novo review, we find the evidence clearly and convincingly established that the manner in which Malcom handled the trust accounts violates DR 1-102 and DR 9-102.

Malcom also takes exception to the severity of the sanction of disbarment recommended by the referee, arguing that a sanction of probation or suspension would be reasonable.

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's pre-

sent or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997); *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996); *State ex rel. NSBA v. Gregory*, 251 Neb. 41, 554 N.W.2d 422 (1996); *State ex rel. NSBA v. Ramacciotti*, 250 Neb. 893, 553 N.W.2d 467 (1996); *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996); *State ex rel. NSBA v. Bruckner, supra*; *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995). Similarly, misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing. *State ex rel. NSBA v. Bruckner, supra*. The fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction. *State ex rel. NSBA v. Gridley, supra*; *State ex rel. NSBA v. Bruckner, supra*; *State ex rel. NSBA v. Woodard, supra*.

Mitigating factors, however, will overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary and, when aggravating circumstances are present, substantially outweigh as well those aggravating circumstances. *State ex rel. NSBA v. Bruckner, supra*; *State ex rel. NSBA v. Woodard, supra*.

We have also held that a lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds. *State ex rel. NSBA v. Gridley*, supra. Similarly, the number of times these transactions occurred is an important factor in our consideration. Multiple acts of attorney misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents. *State ex rel. NSBA v. Bruckner, supra*.

In the present case, we are unable to find mitigating circumstances which will overcome the presumption of disbarment.

The charges against Malcom include 10 counts of misconduct and encompass several years, indicating multiple acts of misconduct. Malcom has presented no circumstances which would allow a less severe sanction. We give no weight to Malcom's arguments claiming that the deficiencies were inadvertent and that he was unable to explain the financial transactions because of the passage of time and loss or unavailability of records.

When we balance the nature of Malcom's acts with the need to protect the public, the need to deter others, the reputation of the bar as a whole, and Malcom's privilege to practice law, we can only conclude, based on the nature and multiple occurrences of the misconduct, the only appropriate judgment is to disbar Malcom. Accordingly, we enter a judgment of disbarment.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating.

GARY E. ACKLES, APPELLANT, V.
RICHARD F. LUTTRELL ET AL., APPELLEES.
561 N.W.2d 573

Filed April 11, 1997. No. S-95-257.

1. **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 on appeal in the absence of an abuse of that discretion.
2. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Federal Acts: Claims.** Failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.
5. **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.
6. **Negligence: Pleadings.** A bare allegation of proximate cause and damages without providing information as to what negligence occurred fails to set forth a negligence cause of action.
7. **Summary Judgment.** A motion for summary judgment is not intended to be used as a substitute for a demurrer or motion for judgment on the pleadings.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and remanded with directions.

Mandy L. Strigenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., and J. Marvin Weems, P.C., for appellant.

Brian D. Nolan, of Nolan, Roach & Lautenbaugh, and Daniel J. Connolly and Mark J. Carpenter, of Faegre & Benson, P.L.L.P., for appellee Elf Atochem North America, Inc.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and COADY, D.J.

CONNOLLY, J.

The appellant, Gary E. Ackles, brought this negligence and strict liability action against, among others, the appellee Pennwalt Corporation, now known as Elf Atochem North America, Inc. (Pennwalt), seeking damages for personal injuries sustained as the result of being exposed to an insecticide manufactured by Pennwalt. The district court granted Pennwalt's motion for summary judgment, finding that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted Ackles' failure-to-warn and labeling-based claims. We affirm in part, because we conclude that FIFRA preempts labeling-based claims. However, we remand Ackles' negligence cause of action because it did not effectively state a cause of action, thereby making a summary judgment disposition inappropriate.

BACKGROUND

On August 2, 1991, Ackles, a U.S. mail carrier, was delivering mail when he became exposed to Penncap-M which was being sprayed on an adjacent cornfield by a crop duster. Penncap-M is an insecticide manufactured by Pennwalt. Upon being exposed to the insecticide, Ackles experienced nausea, shaking, diarrhea, and vomiting. Since the exposure, Ackles has experienced severe physical ailments and has been declared disabled from his job as a postal carrier.

Penncap-M, like all insecticides, is subject to regulation and approval by the federal Environmental Protection Agency (EPA). See 7 U.S.C. § 136a(a) (1988). Pursuant to FIFRA,

7 U.S.C. § 136 et seq. (1988 & Supp. II 1990), the EPA must review and approve proposed labeling prior to any sale or distribution of the product. In the instant case, it is undisputed that the EPA reviewed and approved the Penncap-M labeling prior to Ackles' injury.

Ackles filed suit against the crop duster and Pennwalt. In his sixth amended petition, Ackles brought two causes of action against Pennwalt: one sounding in negligence, with the second based on strict liability in tort. The crux of these causes of action was that Pennwalt failed to warn or convey appropriate information regarding Penncap-M to those persons applying the insecticide. Ackles contended in both causes of action that this failure was the proximate cause of his personal injuries.

In its order, the district court overruled the crop duster's motion for summary judgment, but granted Pennwalt's motion for summary judgment, holding that

> [Ackles'] failure to warn and labeling claims, found in . . . Causes of Action 2 and 3 of the 6th Amended Petition, present a state law challenge to the EPA-approved Penncap-M label, which challenge is expressly preempted by §136v(b) of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S. Code §136 et seq.

In a later order, the district court overruled Ackles' motion for new trial. Ackles appeals.

ASSIGNMENTS OF ERROR

Ackles contends the district court erred in overruling his motion for a new trial because (1) it was error to find that his failure-to-warn claim, in the second cause of action, was expressly preempted by FIFRA and (2) it was error to find that his labeling claim, in the third cause of action, was also preempted by FIFRA.

STANDARD OF REVIEW

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996).

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997).

ANALYSIS

This appeal presents the issue of whether failure-to-warn and labeling-based claims brought against the manufacturer of a chemical that is regulated by FIFRA are preempted.

We begin with Ackles' assigned error concerning the granting of summary judgment in favor of Pennwalt against Ackles' strict liability cause of action. In this cause of action, Ackles contends Pennwalt is strictly liable for placing a defective product, namely Penncap-M, into the stream of commerce. According to the sixth amended petition, the defects referred to are the following, and Pennwalt was negligent:

> a. In failing to adequately and properly warn users of, and other persons who will forseeably [sic] be endangered by, the product known as Penncap-M of the toxic nature of the product;
>
> b. In failing to provide written instructions to aerial applicators of the product known as Penncap-M as to the manner in which the product should be applied; and,
>
> c. In placing on the market for use a product which is toxic and creates an unreasonably dangerous condition when human beings such as the Plaintiff become exposed to the product.

The district court granted summary judgment in favor of Pennwalt on the third cause of action, holding that FIFRA preempted the claim. Ackles appeals that ruling, contending FIFRA does not preempt his labeling claim put forth in the third cause of action. We note that an examination of subparagraph c of paragraph 34 reveals that it deals exclusively with the allega-

tion that Penncap-M is "unreasonably dangerous" and as such does not appear, on its face, to be a labeling claim. However, because Ackles' sole assigned error concerning his strict liability action relates only to the district court's entering summary judgment against his labeling claim in the strict liability cause of action, we offer no opinion as to whether subparagraph c is itself preempted by FIFRA, insofar as that issue was not preserved for appeal. See *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996) (errors not assigned will not be considered by appellate court). Therefore, our concern in this appeal is whether FIFRA preempts labeling-based strict liability claims against a manufacturer of an insecticide, such as those claims set forth in subparagraphs a and b.

Originally enacted in 1947, FIFRA establishes a comprehensive scheme for the regulation of pesticide labeling and packaging. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991). The administrative agency in charge of setting appropriate regulations is the EPA. Before a pesticide may be sold, it must be registered and its labeling approved by the EPA. § 136a(a). The review process requires that an applicant submit a proposed label to the EPA for approval. This label must address numerous concerns, including ingredients, directions for use, and adverse effects of the product. See, § 136a(c); 40 C.F.R. § 152.50 & part 156 (1996). In addition to the written material on the actual container, the term "label" also includes written, printed, or graphic material accompanying the container, to which reference is made. § 136(p). Once the label is approved, FIFRA makes it unlawful for any person to alter it without the prior approval of the EPA. See § 136j(a)(2)(A).

FIFRA specifically sets forth the authority the states shall have concerning the labeling of pesticides. Section 136v provides, in part:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> **(b) Uniformity**

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

It is the preemption effect of subsection (b) that is at issue in this case. We are asked to determine whether this provision preempts a common-law cause of action brought against a manufacturer based on inadequate labeling if the manufacturer complied with the requirements of FIFRA.

The U.S. Supreme Court has not had the occasion to address the FIFRA preemption issue concerning common-law causes of action against an insecticide manufacturer. However, in 1992 the Court decided *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), which involved a suit brought against three cigarette manufacturers by the husband of a woman who died of lung cancer after having smoked for 40 years. The action was based on the common-law claims of design defects, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. The defendant manufacturers argued that the Public Health Cigarette Smoking Act of 1969 (Act) preempted the common-law causes of action. The preemption clause of the Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." 15 U.S.C. § 1334(b) (1994).

A plurality of the Court held that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Cipollone*, 505 U.S. at 521. See, also, *id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.) (" 'the language of the [1969] Act plainly reaches beyond [positive] enactments' "). The Court went on to note, however, that the preemption clause does not preempt all common law, but, rather, only those actions predicated on a theory that necessarily interferes with the Act. Thus, it was determined that the plaintiff's failure-to-warn claim was preempted because it was specifically at odds with the labeling

requirement set forth in the Act, with which the manufacturer complied.

While not identical, the language employed in the preemption clause of FIFRA, § 136v(b) ("shall not impose or continue in effect any *requirements* for labeling" (emphasis supplied)), closely parallels that used in 15 U.S.C. § 1334(b) of the Act ("[n]o *requirement or prohibition* based on smoking and health shall be imposed under State law" (emphasis supplied)). Cognizant of this similarity, every federal court of appeals that has addressed the issue before us has, in the wake of the *Cipollone* decision, held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by § 136v. See, *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Intern.*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. dismissed* 510 U.S. 985, 114 S. Ct. 490, 126 L. Ed. 2d 440; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied* 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30.

In addition, our research reveals that numerous state appellate courts in other jurisdictions have also held that FIFRA preempts labeling-based common-law causes of action. See, e.g., *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996); *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593 (Ind. App. 1996); *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263 (1995); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994).

Subsequent to the decisions of these courts, the U.S. Supreme Court has revisited the field of preemption analysis

with its decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The Court, in *Medtronic, Inc.*, was asked to determine whether the preemption clause of the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act precluded common-law damage claims against the manufacturer of a cardiac pacemaker which was regulated by the MDA. The preemption language at issue provided:

> **(a) General rule**
>
> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement under this chapter to the device . . . .

21 U.S.C. § 360k (1994).

Aware of its previous decision in *Cipollone*, the *Medtronic, Inc.* Court focused on the term "requirement" in concluding that the common-law actions against the manufacturer were not preempted. A plurality of the Court reasoned that

> if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any "remedy" under state law relating to medical devices. "Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state "requirements" could also pre-empt common-law damages claims, see *Cipollone*, 505 U.S., at 521-522 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

518 U.S. at 487-88.

According to the plurality, the Act at issue in *Cipollone* prohibited state requirements that were "based on smoking and health." 15 U.S.C. § 1334(b). The plurality was quick to point out that those common-law claims not based on smoking and health were not preempted. Concerning the MDA in *Medtronic,*

Inc., however, it was determined that an examination of the entire act makes it apparent that the term "requirements," as used throughout, "is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries." 518 U.S. at 489. However, five Justices of the Court reiterated the sentiments put forth in *Cipollone* that state common-law claims can be equated with state requirements. See *Medtronic, Inc., supra* (Breyer, J., concurring in part and concurring in the judgment) and (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

Thus, while at first blush *Medtronic, Inc.* appears to retreat from the preemption analysis put forth in *Cipollone*, it was the separate and distinct statutes that were involved in each case that were the determining factor. We therefore must determine whether the preemption language used in FIFRA preempts labeling-based common-law actions, as was the case in *Cipollone*, or whether FIFRA is more analogous to the statutory scheme of the MDA, which was at issue in *Medtronic, Inc.*

Two courts have recently examined FIFRA's preemption language in the aftermath of *Medtronic, Inc.* and have concluded that common-law actions for failure to warn and labeling-based claims are preempted. In *Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 682 A.2d 724 (1996), the court ruled that a failure-to-warn claim against a manufacturer was preempted by FIFRA. Recognizing the U.S. Supreme Court's apparent retreat from preemption in *Medtronic, Inc.*, the court concluded that the preemption language employed in FIFRA was more similar to the statutory language examined in *Cipollone*. The court reasoned that

> [l]ike the preemption clause at issue in *Cipollone* and unlike that in *Medtronic*, the preemption provision of FIFRA is precise and explicit; *i.e.*, a State "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Furthermore, FIFRA, like the *Cipollone* statutes, leaves unconstrained all state common law causes of action for defective products except

> those based on inadequate labels. Finally, FIFRA has no escape clauses like the "grandfathering" and "substantially equivalent" provisions of MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . . .

294 N.J. Super. at 66, 682 A.2d at 731.

The *Lewis* court also expressly rejected the contention that a common-law action imposing damages was not a state "requirement," writing that

> since FIFRA would preempt a state statute or regulation which imposes a monetary penalty on a manufacturer for not using a pesticide label different from that approved by the EPA, FIFRA also preempts a common law rule that would subject a manufacturer to a damage judgment for the same adherence to federal rather than state law.

294 N.J. Super. at 67, 682 A.2d at 732.

The First Circuit reached a similar conclusion in *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996), wherein the plaintiff brought negligence and warranty causes of action against a builder after the plaintiff suffered injuries from the chemicals used to treat the wood. The builder filed a third-party complaint against the manufacturer of the chemical. The manufacturer contended that the actions were preempted by FIFRA. In determining that the third-party plaintiff's claims, as set forth in the complaint, were preempted, the court stated that "[i]t was once an open question, but is now settled by the Supreme Court in *Cipollone* and [*Medtronic, Inc.*], that 'requirements' in this context presumptively includes state causes of action as well as laws and regulations." 96 F.3d at 563. Thus, the court found that because the negligence and warranty actions dealt specifically with labeling-based claims, they were preempted. In so doing, the court was quick to point out that not every misdesign or mismanufacturing claim would be preempted by FIFRA, but, rather, only those that are labeling based.

Despite the strong trend finding preemption before *Medtronic, Inc.* and the adherence to the practice by two courts after *Medtronic, Inc.*, Ackles urges this court to take a different path and hold that his labeling-based strict liability claims are

not preempted. In support of this argument, Ackles asserts that in determining whether preemption exists, a court must examine only the language of the pertinent preemption clause, and that there exists a strong presumption against preemption. Because § 136v does not explicitly state that FIFRA preempts common-law causes of action concerning pesticide labeling, Ackles argues that his claim against Pennwalt should be allowed.

We disagree. If Ackles' labeling-based cause of action against Pennwalt were allowed to proceed and be successful, Pennwalt would be stuck between the proverbial rock and hard place in that it would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was not sufficient. This result would obviously run contrary to the intentions of Congress in passing FIFRA, namely, that labeling information will be regulated solely by the federal government.

We therefore hold, in accordance with virtually all courts that have ruled on this issue both before and after the U.S. Supreme Court's decision in *Medtronic, Inc.*, that Ackles' labeling-based cause of action against Pennwalt is preempted by FIFRA and that the district court was correct in entering a summary judgment in favor of Pennwalt on that cause of action.

In his remaining assignment of error, Ackles argues that the district court erred in dismissing his failure-to-warn claim alleged in the second cause of action, which was based on a negligence theory, because FIFRA does not preempt such claims.

Ackles' negligence cause of action against Pennwalt is set forth on pages 5 through 7 of the sixth amended petition, containing paragraphs 17 through 28. Paragraph 27 of the petition alleges that Ackles' injuries were a proximate result of Pennwalt's negligence. Subparagraphs a through i list the various manners in which Pennwalt was allegedly negligent. However, pursuant to a district court order dated October 25, 1994, paragraphs 19 through 27 of the sixth amended petition were stricken. No further amended petition was filed.

As a result of the October 25 order, there remain only three paragraphs within the second cause of action, which provide:

> 17. Plaintiff For his Second Cause of Action incorporates paragraphs 1 through 16 of his Introductory Allegations as if fully set forth herein.
>
> 18. Defendant Pennwalt manufactured, marketed and sold the product known as Penncap-M for use by individuals such as Defendants Brady Coen, Air Care, Inc., Pletcher Flying Service and Richard F. Luttrell.
>
> . . . .
>
> 28. As a direct and proximate result of the Defendant Pennwalt Corporation, as set forth above, Plaintiff has sustained damages as set forth in paragraph 11, above.

The record does not contain an amended petition after the order of October 25.

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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997). Obviously, the three remaining paragraphs for Ackles' negligence cause of action fail to plead necessary elements. A bare allegation of proximate cause and damages without providing information as to what negligence occurred fails to set forth a negligence cause of action.

The record before us does not reflect whether Pennwalt's motion for summary judgment also challenged the sufficiency of the pleadings or the failure of the petition to state a cause of action in negligence. We have repeatedly held that a motion for summary judgment is not intended to be used as a substitute for a demurrer or motion for judgment on the pleadings. See *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). We have, however, held that when it is asserted in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings. See *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Unique to the instant case is the fact that Pennwalt has never challenged the sufficiency of Ackles' pleadings regarding the negligence cause of action. We are thus left with a procedural muddle.

A motion for summary judgment is to be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Because the petition fails to set forth a negligence cause of action in its current form, the entertaining of a motion for summary judgment was inappropriate. See, *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997) (court may not enter summary judgment on issue not presented by pleadings); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987). Remaining, however, is the issue of whether the negligence claim can be amended such that it does state a cause of action.

Consequently, we conclude that the district court erred in granting summary judgment on a petition which fails to state a cause of action. We therefore reverse the district court's granting of summary judgment against Pennwalt as it relates to the negligence cause of action and remand the cause with orders that Ackles be given an opportunity to amend his petition. For purposes of remand, we note that, in accordance with the foregoing analysis, a failure-to-warn or labeling-based cause of action is preempted by FIFRA.

CONCLUSION

Through its enactment of FIFRA, Congress has preempted labeling-based common-law causes of action against chemical manufacturers that abide by the regulations of FIFRA. We therefore affirm the summary judgment in favor of Pennwalt regarding Ackles' strict liability cause of action. Because summary judgment was inappropriately entered against Ackles' negligence action, we remand the cause with directions.

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

THOMAS M. HUDDLESON, APPELLEE, V. ALVIN ABRAMSON, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

561 N.W.2d 580

Filed April 11, 1997. No. S-95-580.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
3. **Records: Pleadings: Appeal and Error.** Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment.

Appeal from the District Court for Garden County: JOHN D. KNAPP, Judge. Affirmed.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellant.

Dean S. Forney, of Forney Law Office, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and CHEUVRONT, D.J.

CONNOLLY, J.

The appellee, Thomas M. Huddleson, was originally charged with driving while under the influence of alcohol (DUI) pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1993). Prior to trial, his operator's license was revoked for 90 days by the director of the Department of Motor Vehicles pursuant to Nebraska's administrative license revocation statutes, Neb. Rev. Stat. §§ 60-6,205 through 60-6,208 (Reissue 1993). On appeal, the district court for Garden County affirmed.

An amended complaint of reckless driving (Neb. Rev. Stat. § 60-6,213 (Reissue 1993)) was later filed, to which Huddleson pled guilty and was sentenced. Huddleson then filed a motion with the director, seeking reinstatement of his operating privileges. This motion was denied. Huddleson appealed to the district court, which held that the amended complaint constituted a dismissal of the original DUI charge pursuant to § 60-6,206(4)(b)

and, thus, that Huddleson was entitled to have his operating privileges reinstated. The director appeals from the district court's order.

A bill of exceptions was not made part of the appellate record before this court. Absent a bill of exceptions, we affirm because we determine that the pleadings are sufficient to support the district court's order.

BACKGROUND

On June 6, 1994, a complaint was filed in the county court for Garden County, charging Huddleson with DUI. Prior to trial, the director revoked Huddleson's operating privileges for a period of 90 days pursuant to the administrative license revocation statutes, §§ 60-6,205 through 60-6,208. On November 9, the original complaint was amended from the charge of DUI to a charge of reckless driving. That same day, the county court accepted Huddleson's guilty plea to, and sentenced Huddleson on, the amended charge.

Thereafter, Huddleson filed a motion with the director for reinstatement of his operating privileges, claiming that the DUI charge had been dismissed pursuant to § 60-6,206(4)(b). The director denied Huddleson's motion for reinstatement on the basis that "[t]he amendment of the [DUI] charge is not in accordance with the Department's Rules & Regulations, Title 247 NAC 1, 025.01 to dismiss the Administrative License Revocation."

Huddleson filed an appeal with the district court under the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994), challenging the director's denial of his motion for reinstatement. The district court held that the amended complaint constituted a dismissal of the original DUI charge and, therefore, that the administrative license revocation must be dismissed pursuant to § 60-6,206(4)(b).

ASSIGNMENT OF ERROR

The director asserts that the district court erred in finding that a certified copy of an amended complaint accompanied by a form indicating a guilty plea to a separate charge constitutes a dismissal of the original DUI charge for purposes of § 60-6,206(4)(b).

STANDARD OF REVIEW

An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record. *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994).

ANALYSIS

A bill of exceptions was not made part of the appellate record before this court. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994). Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment. *Latenser v. Intercessors of the Lamb, Inc., supra.*

Huddleson pled that his DUI charge was dismissed by amendment pursuant to § 60-6,206(4), which states in pertinent part: "A person whose operator's license is subject to revocation pursuant to subsection (3) of section 60-6,205 shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee . . . (b) if the charge is dismissed . . . ."

Huddleson prayed for the district court to reverse the director's decision by finding that he provided suitable evidence that his DUI charge was dismissed by amendment and to order the reinstatement of his license. In its order, the district court found that "the record is silent as to the reason for the filing of the amended complaint; that the filing of the amended complaint effectively dismissed the original complaint and that, the original complaint having been dismissed, §60-6206 (4) (b) requires the dismissal of the administrative license revocation proceedings."

CONCLUSION

Absent a bill of exceptions, we affirm because we conclude that the pleadings are sufficient to support the district court's order.

AFFIRMED.

BONNIE JOLLY AND NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61, OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

562 N.W.2d 61

Filed April 18, 1997. No. S-95-385.

1. **Administrative Law: Courts: Statutes.** A court or commission which is of statutory construction has only such authority as has been conferred upon it by statute.
2. **Administrative Law: Commission of Industrial Relations: Summary Judgment.** The Commission of Industrial Relations is an administrative body performing a legislative function and can grant a motion for summary judgment only if statutorily authorized to do so.
3. ____: ____: ____. Neb. Rev. Stat. § 48-801 et seq. (Reissue 1993) does not give authority to the Commission of Industrial Relations to enter summary judgments.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded for further proceedings.

Ray Simon, of Tietjen, Simon & Boyle, for appellants.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This case involves a claim by the plaintiffs, Bonnie Jolly and the union of which she is a member, Nebraska Association of Public Employees, Local 61, of the American Federation of State, County and Municipal Employees, as appellants, alleging that Jolly's employer, the Nebraska Department of Revenue, engaged in prohibited practices in violation of Neb. Rev. Stat. § 81-1386 (Reissue 1994). The issue was reclassification of Jolly's position with the Department of Revenue. The Nebraska Commission of Industrial Relations (Commission), acting on a motion for summary judgment filed by the State of Nebraska, entered a summary judgment in favor of the State.

No party raised in the pleadings, nor assigned as error, the question of whether the Commission had the authority to entertain or grant motions for summary judgment. We find that plain

error exists in this case on said issue and, therefore, reverse and remand the cause for further proceedings.

ANALYSIS

Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Estate of Morse, supra*; *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

Plain error exists where there is 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. *Law Offices of Ronald J. Palagi v. Dolan, supra*; *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996); *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996); *In re Estate of Morse, supra*; *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

Since the time that the appellants' brief was filed in this case, this court has held that a statutorily created court has only such authority as has been conferred upon it by statute. Thus, its powers are limited to those delineated by statute. *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995). Administrative bodies, likewise, have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *PLPSO v. Papillion/LaVista School Dist., post* p. 308, 562 N.W.2d 335 (1997); *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778

(1996); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), *cert. denied* 517 U.S. 1191, 116 S. Ct. 1681, 134 L. Ed. 2d 783 (1996); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995). In *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985), we stated that the Commission is an administrative body performing a legislative function; therefore, the Commission can grant a motion for summary judgment only if statutorily authorized to do so.

To determine if the Commission has the statutory authority to grant a motion for summary judgment, we must examine the Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 1993), which explains the powers of the Commission. Because the appellants alleged a violation of the prohibited practices statute, § 81-1386, we must also examine the State Employees Collective Bargaining Act, Neb. Rev. Stat. § 81-1369 et seq. (Reissue 1994), which is cumulative to the Industrial Relations Act, see § 81-1372, and confers the authority upon the Commission to hear prohibited practices complaints, § 81-1387. A review of these applicable statutes clearly shows the statutes do not give the Commission the authority to entertain or grant motions for summary judgment. There is no construction of this act which would give rise to the authority to entertain or grant motions for summary judgment. See *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev., supra.*

CONCLUSION

Based upon the above, the decision of the Commission is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHEN VILCINSKAS, APPELLANT, V. HELEN C. JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD JOHNSON, M.D., AND HARRY C. HENDERSON, JR., M.D., APPELLEES.

562 N.W.2d 57

Filed April 18, 1997. No. S-95-489.

1. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. ____. 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. ____. 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.
4. **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.
5. **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.
6. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Whether a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
7. **Trial: Expert Witnesses: Physicians and Surgeons.** The testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded for further proceedings.

E. Terry Sibbernsen and Mandy L. Strigenz, of E. Terry Sibbernsen, P.C., for appellant.

John R. Douglas and John R. Klein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Henderson.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and CHEUVRONT, D.J.

CHEUVRONT, D.J.

In this medical malpractice action, the plaintiff, Stephen Vilcinskas, appeals the order of the district court for Douglas County sustaining the motion for summary judgment of the defendant-appellee Harry C. Henderson, Jr., M.D.

ASSIGNMENTS OF ERROR

Vilcinskas contends the district court erred (1) in finding that no genuine issue of material fact existed, (2) in finding that his experts were unqualified, and (3) in finding that Henderson met the applicable medical standard of care.

FACTS

On September 19, 1988, Vilcinskas saw Richard Johnson, M.D., a general practitioner, after suffering severe headaches, high temperature, and disorientation. Johnson contacted Vilcinskas' mother, who said Vilcinskas had been using marijuana and had a history of violence. Believing that Vilcinskas was suffering from acute psychosis and other mental problems, Johnson asked Henderson, a psychiatrist, to consult on the case and to have Vilcinskas admitted to the psychiatric ward intensive care unit at Richard H. Young Memorial Hospital (Richard Young Hospital). Vilcinskas was admitted to Richard Young Hospital at 3:50 p.m. on September 19.

Following Vilcinskas' admission, Henderson was informed by a staff nurse at approximately 7:45 p.m. on September 19 that Vilcinskas had a temperature of 103 degrees. Believing the elevated temperature to be a medical, rather than psychiatric condition, Henderson requested the nurse to immediately contact Johnson for instructions and to inform Henderson of Johnson's orders. Johnson did order a chest x ray and blood cultures, as well as other tests.

Henderson examined Vilcinskas around 10 a.m. on September 20 and ordered that a neurological examination be performed. In his deposition, Henderson testified that Vilcinskas' condition "look[ed] like [it was] an infectious procedure" and that he was worried about Vilcinskas' medical condition at the time he was admitted to Richard Young Hospital.

On September 21, Henderson had Vilcinskas transferred from Richard Young Hospital to the intensive care unit at

Lutheran Medical Center, where he was diagnosed with herpes simplex encephalitis, a rare condition.

On July 27, 1990, Vilcinskas filed suit against Johnson, Henderson, and Richard Young Hospital, contending that each acted negligently in his or its capacity as a medical caregiver. Johnson and Richard Young Hospital have been dismissed as party defendants. Henderson moved for summary judgment, and a hearing on the motion was held on September 23, 1994. In support of his motion, Henderson offered the affidavit of Dr. Bruce Gutnik, a psychiatrist practicing in Omaha, Nebraska, and the depositions of Vilcinskas' experts, Dr. Fred J. Pettid, a board-certified family practitioner in Omaha; Dr. Daniel Kuritzkes, an infectious disease and internal medicine specialist from the University of Colorado; and Dr. Matthew J. Severin, a microbiologist from Omaha. In his affidavit, Gutnik stated that after reviewing the various medical records relating to the case and the deposition of Henderson, he was of the opinion that Henderson met the standard of care required of a psychiatrist in Omaha in regard to Vilcinskas.

In opposition to the motion for summary judgment, Vilcinskas offered the deposition of Henderson; the deposition of Dr. Dennis Daley, a board-certified internal medicine specialist practicing in Omaha; the deposition of Gutnik; and the affidavit of Pettid. In his affidavit and deposition, Pettid stated that Henderson failed to meet the applicable standard of care in treating Vilcinskas for his medical condition. On March 6, 1995, the district court sustained the motion for summary judgment, finding, in effect, that only a psychiatrist is qualified to express an opinion on the applicable standard of care required of a fellow psychiatrist, "even on a purely medical problem." Since the only opinion from a psychiatrist was that Henderson met the standard of care, the motion was sustained. Following the overruling of his motion for a new trial, Vilcinskas appealed to the Nebraska Court of Appeals. The case was removed to this court's docket pursuant to Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

STANDARD OF REVIEW

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judg-

ment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Under 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. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

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. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *State Farm v. D.F. Lanoha Landscape Nursery*, 250 Neb. 901, 553 N.W.2d 736 (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. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

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. *Tess, supra*; *Melick, supra*. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Melick, supra*; *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

In this case, we must therefore determine whether, when viewing the evidence in a light most favorable to Vilcinskas, any real issue of material fact existed concerning whether Henderson met the requisite standard of care in his treatment of Vilcinskas.

ANALYSIS

This court has held that an affidavit of a defendant physician in a malpractice case, which affidavit states that the defendant

did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment. *Boyd, supra*, citing *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). At the time Henderson moved for summary judgment, he offered, and the trial court received into evidence, the affidavit of Gutnik, an Omaha psychiatrist, which stated that it was Gutnik's opinion, with a reasonable degree of medical certainty, that Henderson "met the standard of care required of a psychiatrist in Omaha, Douglas County, Nebraska, in regard to Stephen Vilcinskas." Such evidence was sufficient to present a prima facie case of lack of negligence for summary judgment purposes. See *Boyd, supra*. Thereupon, the burden shifted to Vilcinskas to produce evidence demonstrating an issue of material fact which would prevent judgment as a matter of law for Henderson. The issue in this case is whether the testimony and affidavit of Pettid, an Omaha family practitioner, was sufficient.

This court has held that "[w]hether a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony." *Medley v. Davis*, 247 Neb. 611, 618, 529 N.W.2d 58, 63 (1995). Henderson argues, and the district court found, that because Henderson is a psychiatrist, his duty of care is limited to psychiatric care. Further, Henderson argues that Pettid, a family practice specialist, is not qualified to render an opinion on the standard of care applicable to a psychiatrist. Vilcinskas concedes that Henderson did not act negligently in rendering psychiatric care. Rather, Vilcinskas contends that "[t]he key issue in this case is [Henderson's] actions as a *medical doctor*, not as a psychiatrist." Brief for appellant at 9.

This court has held that the testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993), citing *Harris v. Smith*, 372 F.2d 806 (8th Cir. 1967). Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to

make the expert's formation of a judgment a fact of probative value. *Ashby, supra*, citing *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

Pettid's affidavit stated that he was familiar with the standard of care required of a psychiatrist when such psychiatrist is treating a patient with a medical problem. It is undisputed that Pettid is a qualified medical doctor who could, and did, testify with a reasonable degree of medical certainty as to the standard of care for a *medical* doctor, be it a psychiatrist or any other licensed medical doctor, at the time and place of the events in this case. The fact that Pettid is not a psychiatrist does not automatically disqualify him from rendering an expert medical opinion in this matter. Both parties admitted that Johnson and Henderson were attempting, to some degree, to treat Vilcinskas for a medical problem. Testimony as to the applicable standard of care in such a case, by a qualified medical doctor, is sufficient to demonstrate an issue of material fact.

Accordingly, we conclude that when viewing the evidence in a light most favorable to Vilcinskas, a reasonable inference can be drawn from the testimony of Pettid that Henderson's conduct did not comport with the standard of care for a medical doctor in the treatment of Vilcinskas. Such evidence is sufficient to create a genuine issue of material fact concerning whether Henderson's actions constitute negligence.

In conclusion, the district court erred in granting Henderson's motion for summary judgment. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOHN DUDLEY PATRICK WESTRUP ANDREWS, AS NOMINEE FOR AND ON BEHALF OF CERTAIN UNDERWRITING SYNDICATES AT LLOYD'S, LONDON, APPELLANT AND CROSS-APPELLEE, V. RALPH SCHRAM, APPELLEE AND CROSS-APPELLANT.

JOHN DUDLEY PATRICK WESTRUP ANDREWS, AS NOMINEE FOR AND ON BEHALF OF CERTAIN UNDERWRITING SYNDICATES AT LLOYD'S, LONDON, APPELLANT AND CROSS-APPELLEE, V. THOMAS R. SPAHN, APPELLEE AND CROSS-APPELLANT.

562 N.W.2d 50

Filed April 18, 1997. Nos. S-95-586, S-95-587.

1. **Attachments: Appeal and Error.** An order granting or denying a motion to discharge an attachment based upon conflicting evidence will not be reversed unless clearly wrong.
2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
4. **Attachments: Trial: Proof.** At a hearing on a defendant's motion to quash an attachment, the burden is on the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed.
5. **Principal and Agent: Words and Phrases.** Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control, and the consent of the other to so act.
6. **Principal and Agent.** An agent and a principal are in a fiduciary relationship.
7. **Principal and Agent: Words and Phrases.** A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for a principal, but for whose conduct the agent agrees with the principal to be primarily responsible.
8. **Principal and Agent: Liability.** A subagent stands in a fiduciary relation to a principal and is subject to all the liabilities of an agent to the principal, except liability dependent upon the existence of a contractual relation between them.
9. **Principal and Agent: Fraud.** An agent has an obligation to disclose all facts material to transactions with a principal, and failure to do so constitutes fraud.
10. **Statutes: Attachments: Garnishment: Due Process.** In evaluating whether a statutory scheme for attachment and garnishment comports with due process, a court must balance the following factors: first, consideration of the private interest that will be affected by the prejudgment measure; second, examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

11. **Constitutional Law: Statutes: Attachments: Garnishment: Due Process.** The exigent circumstances requirement in Nebraska attachment and garnishment statutes, in conjunction with the bond, affidavit, and discharge hearing provisions, complies with due process under the 14th Amendment to the U.S. Constitution.

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

Robert C. Evans and Gordon P. Serou, Jr., of Evans & Company, for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ENSZ, D.J., and BLUE, D.J., Retired.

WHITE, C.J.

John Dudley Patrick Westrup Andrews, as nominee for and on behalf of certain underwriting syndicates at Lloyd's, London (Lloyd's), appeals the finding of the district court for Lancaster County that the evidence was insufficient to support a prejudgment attachment against Ralph Schram and Thomas R. Spahn in their individual capacities under Neb. Rev. Stat. § 25-1001 et seq. (Reissue 1995). Spahn and Schram each cross-appeal, arguing that the district court erred in refusing to discharge the attachments and garnishments pending this appeal because § 25-1001 et seq. violates the Due Process Clause of the 14th Amendment to the U.S. Constitution. We reverse.

Schram is the founder and president of Schram Financial Services, Inc. (SFS), and Spahn was the treasurer of SFS at all times relevant to this case. In late 1992, Lloyd's and SFS entered into certain agreements through which Lloyd's authorized SFS to bind insurances and handle premiums and other funds on Lloyd's behalf. The agreements covered the period from November 1992 to October 1993 and provided in pertinent part that the binding of insurances under the agreements was the responsibility of Schram, that SFS had to maintain separate bank accounts to be used exclusively for moneys from insurance transactions on Lloyd's behalf, that SFS was to receive commissions of fixed percentages for the binding of these insur-

ances, and that SFS was liable for all charges and expenses incurred in its operations. The parties entered into agreements identical to these in all relevant provisions in 1994.

On April 4, 1995, Lloyd's filed two separate petitions against Schram and Spahn, alleging that Schram and Spahn as employees and officers of SFS aided and abetted SFS' conversion of insurance premiums due Lloyd's. On this same date, after posting a bond, Lloyd's obtained ex parte orders attaching Schram's and Spahn's real and personal property and garnishing Spahn's bank accounts and the retainer in the form of a $40,000 treasury bill that Schram signed over to his attorney.

Schram and Spahn requested a hearing on the attachments and garnishments pursuant to § 25-1041 to determine whether the affidavits submitted by Lloyd's set forth reasonable cause establishing grounds to attach and garnish their property. The hearing was held on April 18, 1995, at which affidavits and the deposition testimony of Schram and Spahn were submitted.

According to Spahn's deposition testimony, pursuant to the agreements between SFS and Lloyd's, SFS maintained two separate accounts to hold funds on Lloyd's behalf. All funds received by SFS on behalf of Lloyd's were initially routed through one of these two accounts. However, rather than withdrawing solely the amount of SFS' commission as set forth in the agreements, Spahn testified that as treasurer, he wrote checks on Schram's authority in even amounts whenever necessary to pay SFS' operating expenses. Spahn and Schram both testified that the amounts withdrawn directly correlated with the operating expenses of SFS and had no mathematical correlation to the commissions due SFS from Lloyd's. Spahn testified that the transfers from Lloyd's trust accounts to SFS' operating accounts were not reflected in SFS' financial statements. Spahn stated, "We showed just what the true commissions were, not what was transferred." In Spahn's deposition, he admitted that he knew the funds in those accounts belonged to Lloyd's at the time he withdrew funds from those accounts to pay the operating expenses. Both Schram and Spahn testified that they were the only two parties who knew about this method of withdrawing funds and that Schram had not received authority from Lloyd's to transfer the funds in this manner.

The record indicates that SFS operated at a loss of $2,211 in 1991, $154,854 in 1992, and $219,855.53 in 1993. According to Spahn's deposition testimony, some $456,961.84 collected on behalf of Lloyd's was subsequently withdrawn to cover SFS' operating expenses. At the time of the filing of the petitions in this case, the record indicates that SFS had a total of $13,985.35 in all accounts.

On April 27, 1995, the district court vacated the attachments and garnishments. The court stated in its order:

> The affidavits submitted by [Lloyd's] and the deposition testimony of Ralph Schram and Thomas R. Spahn show that funds collected on behalf of [Lloyd's] by SFS were to be held in a trust account and remitted periodically to [Lloyd's] and that such funds were used by SFS, without authority of [Lloyd's], to pay general operating expenses of SFS. Certainly, there is evidence of a fiduciary relationship between SFS and [Lloyd's], that SFS likely has converted the trust funds to its own accounts and that such conversion is strongly indicative of fraud on the part of SFS.
>
> However, the action here is against the individual employee-officers of SFS on a theory of "aiding and abetting." This court finds that the evidence is insufficient to support a prejudgment attachment against these defendants in their individual capacity under [§] 25-1001.

Pursuant to § 25-1047, the district court allowed Lloyd's to appeal its discharge of the attachments and garnishments and ordered that upon the filing of $25,000 bonds in each case, the attachments and garnishments were to remain in effect during this appeal. Lloyd's posted a supersedeas bond in the amount of $25,000 in only Schram's case.

Lloyd's timely filed notices of appeal in both cases. We sustained Schram's and Spahn's petitions to bypass due to the presence of a constitutional question, removed both cases to our docket, and consolidated them for the purposes of oral argument and disposition.

On appeal, Lloyd's alleges that the district court erred in finding insufficient evidence to support the attachments and garnishments against Schram and Spahn in their individual

capacities. Schram and Spahn cross-appeal and argue that (1) § 25-1001 et seq. is facially unconstitutional and violates the Due Process Clause of the 14th Amendment to the U.S. Constitution because the statutes (a) allow the defendant's property to be seized without a prior hearing, (b) permit seizure of property without considering the factors set forth in *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991), and (c) allow seizure without considering the likelihood of the success of the underlying claim; (2) § 25-1001(8) unconstitutionally violates the Due Process Clause of the 14th Amendment because on its face, it allows seizure of property based on an allegation that Schram and Spahn fraudulently contracted or incurred the underlying claim; and (3) § 25-1047 on its face violates the Due Process Clause of the 14th Amendment by continuing the seizure of property pending appeal after a determination was made by a court that the seizure was improper.

An order granting or denying a motion to discharge an attachment based upon conflicting evidence will not be reversed unless clearly wrong. *J. R. Watkins Co. v. Sorenson*, 166 Neb. 364, 88 N.W.2d 902 (1958).

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

In its sole assignment of error on appeal in both cases, Lloyd's argues that the district court erred in finding insufficient evidence to support the attachments and garnishments against Schram and Spahn. We agree.

At a hearing on a defendant's motion to quash an attachment, the burden is on the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. *Ceres Fertilizer, Inc. v. Beekman*, 205 Neb. 768, 290 N.W.2d 199 (1980). An order granting or denying a motion to discharge

an attachment based upon conflicting evidence will not be reversed unless clearly wrong. *J. R. Watkins Co., supra.*

Lloyd's alleges that the attachments and garnishments as to Schram and Spahn were justified under § 25-1001(8), which allows an attachment where the defendant has "fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought." At the hearing to discharge the attachments and garnishments, the district court found that while the evidence was strongly indicative of fraud on SFS' part, the evidence was insufficient to support attachments against Schram and Spahn in their individual capacities. We disagree because we find that Schram and Spahn were subagents of SFS, which was an agent of Lloyd's; that Schram and Spahn as subagents had a fiduciary duty toward Lloyd's; and that the record demonstrates by a preponderance of the evidence that Schram and Spahn fraudulently contracted the debt at issue in the underlying case.

Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control, and the consent of the other to so act. *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 418 N.W.2d 754 (1988). An agent and a principal are in a fiduciary relationship. *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988). A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for a principal, but for whose conduct the agent agrees with the principal to be primarily responsible. Restatement (Second) of Agency § 5 (1958). See *Equilease Corp., supra.* A subagent stands in a fiduciary relation to a principal and is subject to all the liabilities of an agent to a principal, except liability dependent upon the existence of a contractual relation between them. Restatement, *supra*, comment *d.* An agent has an obligation to disclose all facts material to transactions with a principal, and failure to do so constitutes fraud. *Grone, supra.*

The record is clear that in 1992, SFS contracted with Lloyd's to bind insurances and handle premiums and other funds on Lloyd's behalf, agreed that the binding of insurances under the agreements would be the responsibility of Schram, and agreed

that SFS would use its best efforts to legally and properly handle the insurances bound under the contract. Through the contract, Lloyd's manifested its consent that SFS should act on its behalf to bind insurances and handle funds. In the course of contracting, SFS as Lloyd's agent gave Schram primary responsibility as SFS' subagent to bind insurance; SFS also gave Spahn as treasurer primary authority in maintaining the checking accounts, writing the checks, and preparing SFS' financial statements. Thus, the record establishes that Schram and Spahn were subagents of SFS, that SFS was an agent of Lloyd's, and that SFS as an agent of Lloyd's and Schram and Spahn as subagents of SFS had certain fiduciary obligations to Lloyd's.

The evidence presented at the hearing on the motion to discharge the attachments and garnishments also clearly establishes by a preponderance of the evidence that at the time of contracting in 1994, neither Schram nor Spahn disclosed to Lloyd's that SFS through Schram and Spahn was withdrawing funds in excess of the terms for commissions set forth in the contract, that those funds were being placed in SFS' operating accounts, that the money was subsequently used to pay SFS' expenses, that Schram and Spahn knew the funds were being withdrawn in derogation of the contract and in defiance of Lloyd's rights to the funds, that Schram and Spahn had no authority to so appropriate these funds and knew that they lacked this authority, and that both knew that this was an activity in which they had engaged throughout 1992 and 1993 and were engaging at the time of contracting in 1994.

Based on the affidavits submitted at the hearing to discharge the attachments and garnishments in this case, we find that Lloyd's clearly met its burden of proving by a preponderance of the evidence that Schram and Spahn as subagents, and in their individual capacities, fraudulently contracted the debt or incurred the obligation in this matter and that, consequently, the district court's orders discharging the attachments and garnishments were clearly erroneous. Thus, we find meritorious Lloyd's assignment of error.

However, this does not end our discussion in this case. On cross-appeal, Schram and Spahn argue that Nebraska's statutory attachment and garnishment scheme unconstitutionally violates

the Due Process Clause of the 14th Amendment to the U.S. Constitution. Specifically, Schram and Spahn argue that § 25-1001 et seq. violates the Constitution because the statutes allow Schram's and Spahn's property to be seized without a prior hearing, do not consider the factors set forth in *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991), and allow seizure without considering the likelihood of the success of the underlying claim; that § 25-1001(8) is unconstitutional because it allows seizure of property based on the allegation that Schram and Spahn fraudulently contracted or incurred the underlying claim; and that § 25-1047 unconstitutionally continues the seizure of property pending appeal after a determination was made by a court that the seizure was improper. We disagree with each of these arguments.

The U.S. Supreme Court's opinion in *Doehr* is dispositive of all the constitutional claims in this case, and thus these claims will be addressed together in light of the requirements enumerated in *Doehr*. The Court in *Doehr* set forth the relevant inquiry in determining whether a state's prejudgment attachment statutes are violative of due process. The Court stated that in evaluating whether the statutory scheme comports with due process, a court must balance the following factors:

> first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third . . . principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

501 U.S. at 11.

The first element to be evaluated in determining whether Nebraska's statutory attachment and garnishment scheme comports with due process is the private interest that will be affected by the prejudgment measure. The Court in *Doehr* stated that "[w]ithout doubt, state procedures for creating and enforcing attachments . . . 'are subject to the strictures of due process.' "

501 U.S. at 12. Both Lloyd's and Schram and Spahn agree, as do we, that Schram's and Spahn's property interests should be accorded due process both at the preattachment phase and on appeal.

The second element involves an examination of the risk of erroneous deprivation through the procedures under attack. In *Doehr*, the Court struck down Connecticut's attachment scheme because it allowed for the attachment of real estate without prior notice or hearing, a showing of extraordinary circumstances, or the posting of a bond in a case involving the relatively complicated issue of assault and battery. The Court stated, "Unlike determining the existence of a debt or delinquent payments, the issue [in this case] does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.' " 501 U.S. at 14. The Court noted that the absence of a posted bond, a requirement for a showing of extraordinary circumstances, and prior notice or hearing left a dearth of safeguards supplied by the Connecticut statutory scheme so as to reduce the risk of erroneous deprivation.

This case involves a different factual scenario than that presented in *Doehr* and, consequently, a much more minimal risk that Schram and Spahn will be erroneously deprived of their property. First, Lloyd's claims are much more readily susceptible to documentary proof than is an assault and battery case. Second, Nebraska's statutory scheme provides for several of the specific safeguards noted with approval by the Court in *Doehr*: § 25-1001 requires that one of eight specific exigent circumstances exist before property may be attached or garnished, § 25-1002 requires that a judge find reasonable cause exists to attach the property based on fact-specific affidavits submitted at the hearing, § 25-1003 requires that the plaintiff post a bond prior to the issuance of the order of attachment, and §§ 25-1040 and 25-1041 give the defendant the right at any time prior to judgment to move to discharge the attachment and have a hearing on the motion. In fact, the Court in *Doehr* referenced the Nebraska statutory scheme with approval as one that provided appropriate safeguards where the statutes allowed property to be attached without a prior hearing.

Schram's argument that § 25-1047 violates due process because it allows for the continued attachment of his property during the pendency of appeal is similarly unconvincing when examined under this second prong of the *Doehr* test. While § 25-1047 by its specific language allows an appeal of an order of discharge in every case, it allows continued attachment of the property at issue in only those instances in which the plaintiff posts a bond to protect the defendant from any damages suffered in the event that the order of discharge is affirmed on appeal. The defendant is, thus, adequately protected, and his or her risk of erroneous deprivation is minimal.

The third element set forth in *Doehr* involves the principal attention to the interest of the party seeking the prejudgment remedy with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. In *Doehr*, there was no evidence of purportedly heightened threats to the plaintiff's interests (exigent circumstances) to indicate that Doehr was about to transfer or encumber his real estate so as to justify a prehearing attachment. The Court noted that the Connecticut provision, by failing to provide a preattachment hearing without at least a showing of some exigent circumstances, clearly fell short of the demands of due process.

Here, the Nebraska statutory scheme requires that one of the eight exigent circumstances listed in § 25-1001 must be demonstrated prior to attachment, as noted above. Additionally, Schram's and Spahn's alleged fraudulent conversions seriously depleted SFS' assets, and Schram pledged what is apparently his only valuable asset—the $40,000 treasury bond—to his attorney, thus rendering it inaccessible and unprotected absent the garnishment proceedings involved in this case.

As well, Lloyd's interest in continuing the attachment against Schram's property during the pendency of the appeal of the district court's order of discharge is significant. In situations such as this where the appellate court finds that the lower court erroneously issued the order of discharge, a discharge of the attachment during appeal could result in the plaintiff's loss of an asset of significant value. The presence of the required bond protects

Schram from any significant harm in that an affirmance on appeal would not only discharge the attachment as to his assets but would also allow him to receive damages for the wrongful attachment.

While the Court in *Doehr* stated that any given exigency requirement alone would not necessarily protect a statutory attachment scheme from due process challenges, we find that this requirement in our statutes, in conjunction with the bond, affidavit, and discharge hearing provisions, does comply with due process under the 14th Amendment to the U.S. Constitution. Schram's and Spahn's assignments of error in this regard on cross-appeal are without merit.

Because we find that the trial court was clearly wrong in finding insufficient evidence to support the attachments and garnishments under § 25-1001(8) and that the statutory attachment and garnishment scheme does not violate the Due Process Clause of the 14th Amendment to the U.S. Constitution, we reverse the district court's orders of discharge.

REVERSED.

PAPILLION/LAVISTA SCHOOLS PRINCIPALS AND SUPERVISORS ORGANIZATION (PLPSO), APPELLEE, V. PAPILLION/LAVISTA SCHOOL DISTRICT, SCHOOL DISTRICT NO. 27, APPELLANT.

562 N.W.2d 335

Filed April 18, 1997. No. S-95-621.

1. **Statutes: Appeal and Error.** Statutory interpretation presents 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.
2. **Statutes: Legislature: Intent.** In reading 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.
3. ____: ____: ____. Unless the Legislature has plainly indicated a contrary purpose or intention, when a statute specifies the object of its operation, the statute excludes from its operation every object not expressly mentioned therein.
4. **Administrative Law: Commission of Industrial Relations: Jurisdiction.** The Nebraska Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the Nebraska Commission of Industrial Relations. Judgment of Court of Appeals reversed, and cause remanded with direction.

Kelley Baker, Jerry L. Pigsley, and Maren Lynn Chaloupka, of Harding, Shultz & Downs, for appellant.

Robert E. O'Connor, Jr., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The Nebraska Commission of Industrial Relations determined that the petitioner-appellee, Papillion/LaVista Schools Principals and Supervisors Organization, constituted an appropriate bargaining unit; ordered an election; and pursuant to the results thereof, certified the organization as the exclusive collective bargaining agent in its labor negotiations with the respondent-appellant, Papillion/LaVista School District, School District No. 27. The district appealed to the Nebraska Court of Appeals, asserting, in summary, that the commission erred in determining that the organization constituted an appropriate bargaining unit and in its other rulings. The Court of Appeals affirmed the orders of the commission, see *PLPSO v. Papillion/LaVista School Dist.*, 5 Neb. App. 102, 555 N.W.2d 563 (1996), whereupon the district successfully sought further review by this court. We now reverse the judgment of the Court of Appeals and remand the cause with the direction that the petition be dismissed.

The dispositive issue is controlled by statute. Statutory interpretation presents 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. *Metropolitan Utilities Dist. v. Balka, ante* p. 172, 560 N.W.2d 795 (1997).

Neb. Rev. Stat. § 79-102 (Reissue 1996) classifies school districts in six classes, either on the basis of the grade levels main-

tained or on the basis of such levels and the population within the territory encompassed by the school district. *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995). Although the record does not establish the class of school district involved, it does reveal that the organization as the bargaining unit consists of 27 of the district's employees, including 13 principals, 7 assistant principals, a senior high school athletic director, a coordinator of special services, a director of the English as a Second Language program, a library media coordinator, a challenge coordinator, a director of business operations, and a director of special services. The parties stipulated that all 27 employees have varying degrees of supervisory duties.

Principals supervise assistant principals in that all employees in the building are accountable to the principals, who are considered the "bosses" and run the building. Assistant principals report to principals if they are going to be late for work or take a day off from work. Principals also evaluate assistant principals' performances, recommend continued employment, and influence merit pay. Although superintendents, who are not members of the unit, work with and supervise the principals, the principals are ultimately in charge of disciplining employees and are expected to resolve situations in which an assistant principal consistently fails to perform his or her job duties. Finally, principals give advice on the hiring of new assistant principals.

Some principals meet weekly with their assistant principals, while others confer or coordinate daily with their assistant principals, but the assistant principals are considered autonomous as to certain duties, and the assistant superintendents, who are not members of the unit, supervise the principals and assistant principals and regularly deal directly with the assistant principals. The principals do not tell the assistant principals how, when, or where to do their jobs on a daily basis; instead, the principals and assistant principals perform under a team approach. For example, both supervise teachers.

With respect to the other supervisory personnel, the coordinator for special services and the director of the English as a Second Language program report to the director of special services. The senior high school athletic director appears to report

to a senior high school principal. The challenge coordinator, library media coordinator, and director of business operations report to individuals outside the proposed unit.

Neb. Rev. Stat. § 48-816(3) (Reissue 1993) provides:

> (3)(a) Except as provided in subdivisions (b) and (c) of this subsection, a supervisor shall not be included in a single bargaining unit with any other employee who is not a supervisor.
>
> (b) All firefighters and police officers employed in the fire department or police department of any municipal corporation in a position or classification subordinate to the chief of the department and his or her immediate assistant or assistants holding authority subordinate only to the chief shall be presumed to have a community of interest and may be included in a single bargaining unit represented by an employee organization for the purposes of the Industrial Relations Act. Public employers shall be required to recognize an employees bargaining unit composed of firefighters and police officers holding positions or classifications subordinate to the chief of the fire department or police department and his or her immediate assistant or assistants holding authority subordinate only to the chief when such bargaining unit is designated or elected by employees in the unit.
>
> (c) All administrators employed by a Class V school district shall be presumed to have a community of interest and may join a single bargaining unit composed otherwise of teachers and other certificated employees for purposes of the Industrial Relations Act, except that the following administrators shall be exempt: The superintendent, associate superintendent, assistant superintendent, secretary and assistant secretary of the board of education, executive director, administrators in charge of the offices of state and federal relations and research, chief negotiator, and administrators in the immediate office of the superintendent. A Class V school district shall recognize an employees bargaining unit composed of teachers and other certificated employees and administrators, except the exempt administrators, when such bargaining unit is formed by

> the employees as provided in section 48-838 and may recognize such a bargaining unit as provided in subsection (2) of this section. In addition, all administrators employed by a Class V school district, except the exempt administrators, may form a separate bargaining unit represented either by the same bargaining agent for all collective-bargaining purposes as the teachers and other certificated employees or by another collective-bargaining agent of such administrators' choice. If a separate bargaining unit is formed by election as provided in section 48-838, a Class V school district shall recognize the bargaining unit and its agent for all purposes of collective bargaining. Such separate bargaining unit may also be recognized by a Class V school district as provided in subsection (2) of this section.

Neb. Rev. Stat. § 48-801(5) (Reissue 1993) defines employee as used in the Industrial Relations Act as including "any person employed by any employer." Section 48-801(4) defines employer as meaning "the State of Nebraska or any political or governmental subdivision of the State of Nebraska . . . ." Finally, § 48-801(9) defines supervisor as meaning

> any employee having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

In reading 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. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997).

The language of § 48-816(3)(a) unequivocally declares that except as otherwise provided, a supervisor shall not be included in a single bargaining unit with any other employee who is not a supervisor. We have interpreted that language to mean that a

single bargaining unit cannot include supervisors and those whom the supervisors responsibly direct. See, e.g., *IBEW Local 1536 v. Lincoln Elec. Sys.*, 215 Neb. 840, 341 N.W.2d 340 (1983) (crew members and foremen required to responsibly direct them could not be included in same bargaining unit); *Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976) (supervisory personnel could not be part of rank and file bargaining unit or retain same bargaining agent); *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971) (under then version of § 48-816, firefighters could not be in same bargaining unit as captains and lieutenants responsibly directing them). The only exceptions to the general rule expressed in § 48-816(3)(a) are certain firefighters and police officers, as provided in § 48-816(3)(b), and certain administrators employed by Class V school districts, as provided in § 48-816(3)(c). Given that the record is silent as to the district's classification, the record necessarily fails to establish that the district is a Class V school district.

It is true that Neb. Rev. Stat. § 48-838(2) (Reissue 1993) provides, in relevant part: "It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate." It is further true that in *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977), we observed that this statutory presumption evidences a legislative effort to avoid the undue fragmentation of bargaining units. However, the statutory presumption cannot and does not negate specific statutory language providing otherwise. As we wrote in ruling that a county official who had no wage-setting authority could not be a member of a bargaining unit consisting of officials having such authority:

> It is further argued to us that should we find that each elected [county] official is a proper party to speak on behalf of the county with regard to his or her individual employees, great fragmentation will occur. While we have generally said that fragmentation to the extent it can be

> avoided should be avoided, see *American Assn. of University Professors v. Board of Regents*, 203 Neb. 628, 279 N.W.2d 621 (1979), and *Sheldon Station Employees Assn. v. Nebraska P.P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979), we have never held and could not hold that artificial units must be created solely to reduce the number of appropriate units. We are simply not at liberty to disregard the meaning of the statute in order to more efficiently administer labor negotiations. While that may be a desirable end, it is for the Legislature to make that decision, and not for the courts.

Sarpy Co. Pub. Emp. Assn. v. County of Sarpy, 220 Neb. 431, 439-40, 370 N.W.2d 495, 500-01 (1985).

Moreover, contrary to the organization's contention, the enactment of § 48-816(3)(c) exempting certain Class V school district administrators from the operation of § 48-816(3)(a) by permitting them to join a single bargaining unit does not evidence a legislative purpose or intent to permit like administrators in school districts of whatever class to do the same. There is nothing in the unambiguous language limiting the operation of § 48-816(3)(c) to Class V school districts which suggests any such intention. Had the Legislature intended such a result, it could easily have provided that the exemption apply to all school districts. Thus, the resolution of this contention is controlled by the well-known general principle of statutory construction: expressio unius est exclusio alterius; that is, the expression of one thing is the exclusion of another. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992). Stated in other terms, unless the Legislature has plainly indicated a contrary purpose or intention, when a statute specifies the object of its operation, the statute excludes from its operation every object not expressly mentioned therein. See *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 267 N.W.2d 530 (1978). Because in § 48-816(3)(c) the Legislature expressly authorized only certain administrators in Class V school districts to join together, the foregoing rule prevents application of the exemption to any other class of school district.

In the final analysis, it must be remembered that the commission is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission. *Nebraska Pub. Emp. v. City of Omaha*, 235 Neb. 768, 457 N.W.2d 429 (1990); *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). See, also, *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

For the foregoing reasons, the judgment of the Court of Appeals is, as noted in the first paragraph hereof, reversed and the cause remanded with the direction that the petition be dismissed.

REVERSED AND REMANDED WITH DIRECTION.

TERRY GRAMMER, APPELLANT, V. ENDICOTT CLAY PRODUCTS AND COLUMBIA INSURANCE GROUP, APPELLEES.

562 N.W.2d 332

Filed April 18, 1997. No. S-96-161.

1. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
2. **Workers' Compensation: Time.** Where the total amount of compensation due for permanent disability is in dispute, the employer has a duty under the provisions of Neb. Rev. Stat. § 48-125(1) (Reissue 1993) to pay within 30 days of the notice of disability any undisputed compensation; the only legitimate excuse for delay in the payment is the existence of a genuine dispute from a medical or legal standpoint that any liability exists.

Petition for further review from the Nebraska Court of Appeals, SIEVERS and INBODY, Judges, and NORTON, District Judge, Retired, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Rod Rehm and, on brief, Thomas E. Stine, of Rod Rehm, P.C., for appellant.

Dallas D. Jones and Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

In this workers' compensation case, the plaintiff-appellant employee, Terry Grammer, sought a waiting-time penalty from the defendants-appellees, the employer, Endicott Clay Products, and its insurer, Columbia Insurance Group. The Nebraska Workers' Compensation Court denied such penalty; the Nebraska Court of Appeals thereafter reversed the compensation court's decision. See *Grammer v. Endicott Clay Products*, 96 NCA No. 44, case No. A-96-161 (not designated for permanent publication). Endicott and Columbia successfully sought further review by this court; we now affirm the judgment of the Court of Appeals.

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. *Winn v. Geo. A. Hormel & Co., ante* p. 29, 560 N.W.2d 143 (1997). However, as to questions of law, an appellate court is obligated in workers' compensation cases to make its own determinations. *Winn, supra.*

Grammer suffered injuries to his right shoulder and neck as a result of an accident arising out of and in the course of his employment as a laborer for Endicott when he fell from a forklift on January 23, 1992. At the present stage of the litigation, none of the parties contest these facts or the compensation court's ultimate finding that Grammer was entitled to benefits as provided under the Nebraska Workers' Compensation Act. See Neb. Rev. Stat. §§ 48-101 (Reissue 1993) and 48-118 (Cum. Supp. 1996). The only issue in contention is whether Grammer was entitled to a waiting-time penalty as part of his award.

Neb. Rev. Stat. § 48-125(1) (Reissue 1993) provides in part:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability.

Columbia received notice of Grammer's permanent partial disability rating on March 28, 1994. Shortly thereafter, Columbia telephoned Grammer to inquire whether he wished to receive his benefits in a lump sum or in weekly payments. Grammer elected neither. On April 20, Columbia sent Grammer a letter confirming the conversation and once again outlining the alternatives. Grammer did not respond. Thereafter, but before May 2, Columbia again contacted Grammer by telephone, at which time Grammer was still uncertain as to how he wanted to be paid. Because Grammer failed to elect, Columbia computed the amount of weekly disability benefits due to date and paid them on May 2, 5 days after the 30-day period had elapsed.

In seeking to reinstate the judgment of the compensation court, Endicott and Columbia seize upon a portion of the opinion in *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989), quoting from 3 Arthur Larson, The Law of Workmen's Compensation § 83.41(c) (1989), and urge that a waiting-time penalty is not appropriate here, as bona fide settlement negotiations were in process. In *Musil*, the claimant had been paid temporary total disability benefits and had been offered a lump-sum settlement based upon a 22-percent permanent partial disability of the body as a whole. The employer paid no benefits for permanent partial disability, and the compensation court ultimately determined that the claimant was totally disabled. In holding that the evidence supported the award of the compensation court and that the claimant was entitled to a waiting-time penalty, we wrote:

> As we stated in *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989), "As is well known, where there is no reasonable controversy regarding an employee's

entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 1988) authorizes award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent payments." And, as contended by [Musil on cross-appeal], the worker is entitled to recover interest on the payments which have accrued at the time payment is made by the employer. § 48-125(2).

Although there is a controversy in regard to the nature and extent of [Musil]'s permanent disability, there is no evidence to support a contention that [she] has no permanent disability. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In 3 A. Larson, The Law of Workmen's Compensation § 83.41(c) at 15-1433 to 15-1435 (1989), the author states: "If bona fide settlement negotiations accompany the nonpayment of compensation, this may purge the delay or refusal of unreasonableness, but the fact that some settlement offer has been made is not necessarily a defense. A question that has arisen in several jurisdictions is whether a penalty should apply when the employer admits liability for a lesser amount than that claimed, but pays nothing. *It is usually held that the employer should have paid at least the amount for which liability was undisputed, and that a penalty is therefore warranted.*" (Emphasis supplied.)

In *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981), the court held that although the total amount of compensation may be in dispute, the employer's insurer has a duty to promptly pay any undisputed compensation, and that the only legitimate excuse for delay of compensation is the existence of genuine doubt from a medical or legal standpoint that any liability exists. See, also, *Berry v. Workmen's Comp. App. Bd.*, 276 Cal. App. 2d 381, 81 Cal. Rptr. 65 (1969); *Lethermon v. American Insurance Company*, 129 So. 2d 507 (La. App.

1961); *Dufrene v. St. Charles Parish Police Jury*, 371 So. 2d 378 (La. App. 1979); *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977).

233 Neb. at 905-06, 448 N.W.2d at 593-94.

However, in the context of the *Musil* holding, the "bona fide settlement negotiations" language quoted from Larson is obiter dictum, for it does not appear that there was any claim in *Musil* that the insurer's lump-sum settlement offer should toll the 30-day period. It is axiomatic that a case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

Further, the *Musil* court's emphasis demonstrates that the purpose for which it cited Larson's treatise was as authority for the proposition that in order to avoid the waiting-time penalty, an employer must, before the time period expires, pay at least the amount for which liability is undisputed, not for the proposition that settlement negotiations may excuse delinquency.

This is further illustrated by the cases cited in *Musil*. In *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987), the claimant cross-appealed the denial of a waiting-time penalty. Although whether a reasonable controversy exists under § 48-125 is a question of fact, see *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986), we reasoned that there was only speculation and conjecture as to whether any intervening injury caused the claimant's disability, and, thus, a waiting time penalty was appropriate. In so ruling, we wrote that "[a]s construed by this court, § 48-125 authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation." *Mendoza*, 225 Neb. at 783, 408 N.W.2d at 288.

Also significant is our reliance in *Musil* on the opinion of the Montana Supreme Court in *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981). A study of that case reveals that the claimant therein had injured his back while performing a work-related task. He was rated by his physician as having a

5-percent total body impairment, and the employer's insurer was notified. More than 1 year later, after the insurer's own physician gave the claimant a 10-percent impairment rating, the insurer offered to settle on that basis. The claimant refused and made a counteroffer, but did not hear from the insurer until over 4 years later, when he filed a petition for hearing. The compensation court awarded the claimant benefits but refused to impose a penalty for unreasonable delay in payment. On appeal, the Montana Supreme Court quoted the applicable statute, which read, in pertinent part: " 'When payment of compensation has been unreasonably delayed or refused by an insurer . . . the full amount of the compensation benefits due a claimant . . . may be increased by . . . 20%. . . .' " 195 Mont. at 268, 637 P.2d at 13. See Mont. Code Ann. § 39-71-2907 (1995). The Montana Supreme Court noted that the triggering event for the purpose of awarding penalties was the insurer's receipt of medical verification of a compensable injury and held that although the total amount of compensation was in dispute, the employer's insurer had a duty to promptly pay any undisputed compensation, and further, that the only legitimate excuse for delay in payment was the existence of genuine doubt from a medical or legal standpoint that any liability existed. Because the insurer took no action when the claimant rejected its settlement offer but the parties agreed that at least a 10-percent disability claim should be paid, the Montana Supreme Court imposed a penalty for unreasonable delay.

Thus, *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989), sets forth the rule that where the total amount of compensation due for permanent disability is in dispute, the employer has a duty under the provisions of § 48-125(1) to pay within 30 days of the notice of disability any undisputed compensation; the only legitimate excuse for delay in the payment is the existence of a genuine dispute from a medical or legal standpoint that any liability exists.

As no such dispute existed here, it was the obligation of Endicott and Columbia to begin making weekly payments no later than the expiration of 30 days.

The judgment of the Court of Appeals being correct, it is, as noted in the first paragraph hereof, affirmed.

AFFIRMED.

NORTHERN BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. PEFFERONI PIZZA CO., A NEBRASKA CORPORATION, APPELLANT.

562 N.W.2d 374

Filed April 24, 1997. No. S-95-118.

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. **Negotiable Instruments.** Whether a document is a negotiable instrument is a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** For a writing to be a negotiable instrument, it must, among other things, be payable on demand or at a definite time; instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated. Neb. U.C.C. §§ 3-104(1)(c) and 3-108 (Reissue 1980).
5. **Uniform Commercial Code: Negotiable Instruments: Time: Words and Phrases.** An instrument is payable at a definite time if by its terms it is payable (a) on or before a stated date or at a fixed period after a stated date, or (b) at a fixed period after sight, or (c) at a definite time subject to any acceleration, or (d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event. Neb. U.C.C. § 3-109(1) (Reissue 1980).

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge. Judgment of Court of Appeals affirmed.

J. Patrick Green for appellant.

Steven J. Woolley, of Polack, Woolley & Troia, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The plaintiff-appellee, Northern Bank, seeks to recover under a promissory note made by the defendant-appellant, Pefferoni

Pizza Co. By its answer, Pefferoni Pizza challenged the negotiability of the note and pled a variety of defenses. The district court found the note to be negotiable and sustained Northern's motion for summary judgment. Pefferoni Pizza thereupon appealed to the Nebraska Court of Appeals, assigning to the district court four errors, which combine to assert that the district court wrongly found that the note was negotiable and that Northern was the holder in due course thereof. The Court of Appeals ruled that the note was not negotiable and therefore reversed the judgment of the district court. *Northern Bank v. Pefferoni Pizza Co.*, 5 Neb. App. 50, 555 N.W.2d 338 (1996). Northern thereafter successfully petitioned for further review by this court. We now affirm the judgment of the Court of Appeals.

We review this case under 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. *Central Neb. Broadcasting v. Heartland Radio,* 251 Neb. 929, 560 N.W.2d 770 (1997).

On September 30, 1987, Pefferoni Pizza agreed to purchase certain businesses from W. E. Peffer Enterprises, Inc. Pursuant to this agreement, Duane J. Dowd, as president of Pefferoni Pizza, signed a $125,000 promissory note payable to the order of Peffer Enterprises. This note, which will hereafter be referred to as the "collateral note," included the following provision:

> 2. . . . The Maker hereof has certain rights under Purchase Agreement dated September 30, 1987, to negotiate a new loan for [Peffer Enterprises] to replace the Underlying Notes in an amount up to $125,000.00 at a lower rate of interest and for a term extending up to 84 months from and after the closing on the purchase. In the event that the Maker hereof negotiates such a loan, then as of the date that the Underlying Notes are paid in full or reduced with the proceeds of the new loan, the remaining principal balance due and owing under this Note shall be re-amortized over such term and at such rate of interest as

> may be negotiated for [Peffer Enterprises] by the Maker hereof on the new loan. When and if such events occurs [sic], a written amendment evidencing such modification shall be executed by the Maker and Holder hereof.

On January 14, 1988, Northern loaned Walter Peffer, Jr., $35,000, which loan was evidenced by a promissory note hereafter referred to as the "Peffer note." As security for this $35,000 loan, Walter Peffer assigned the September 30, 1987, collateral note to Northern. On July 25, 1988, Northern advised Pefferoni Pizza of the assignment and that all payments on the collateral note were to be made directly to Northern. Pefferoni Pizza made all regular payments on this collateral note directly to Peffer Enterprises up through and including the installment due July 1, 1988, after which no further payments were made. Walter Peffer defaulted on his note. On September 1, 1989, the district court entered a judgment against him on that note in favor of Northern, which Walter Peffer has failed to pay.

Northern's position is that the collateral note is a negotiable instrument and that as it is the holder in due course thereof, it holds the note free of any defenses Walter Peffer may have against Pefferoni Pizza.

Whether a document is a negotiable instrument is a question of law. See *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997).

For a writing to be a negotiable instrument, it must, among other things, be payable on demand or at a definite time. Neb. U.C.C. § 3-104(1)(c) (Reissue 1980). See *P P Inc. v. McGuire*, 509 F. Supp. 1079 (D.N.J. 1981) (failing to make note payable on demand or at definite time precludes negotiability). Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated. Neb. U.C.C. § 3-108 (Reissue 1980). The instant writing is not payable at sight or on presentation; thus, it is not payable on demand.

An instrument is payable at a definite time if by its terms it is payable (a) on or before a stated date or at a fixed period after

a stated date, or (b) at a fixed period after sight, or (c) at a definite time subject to any acceleration, or (d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event. Neb. U.C.C. § 3-109(1) (Reissue 1980). The time for payment is definite if it can be determined from the face of the instrument. § 3-109, comment 2. If an extension is to be at the option of the maker, a definite time limit must be stated or the time of payment remains uncertain and the instrument is not negotiable. § 3-109, comment 5.

The collateral note recites that it was made "in conjunction with a certain Purchase Agreement dated September 30, 1987," and stipulated it be paid in 60 equal monthly installments of $2,748.75 commencing on the first day of November 1987, and on the first of every month thereafter, subject to the extension described in the provision set forth previously. Therefore, if Pefferoni Pizza were to negotiate a new loan for the underlying notes, the repayment schedule of the collateral note would be altered to match the repayment schedule of the renegotiated underlying notes. Although the renegotiation clause in the collateral note declares that the extension cannot exceed 84 months from and after the closing on the purchase, the note does not state the date of closing.

Northern recognizes that in order to be definite, the time for payment must be determinable from the face of the collateral note, and contends that by the references made in the note to other documents, it becomes clear that any extension could not exceed 84 months from and after September 30, 1987. More specifically, Northern argues:

> A promissory note made at the same time and in conjunction with a purchase agreement, secured by a security agreement also made and given at the same time and as part of the same transaction and which specifies that interest accrues from its date and that the first payment of principal and interest will be due one month from its date can only lead to the conclusion that the purchase was closed at the same time and on the same date that the purchase agreement, note and security agreement were

> signed. If the purchase contemplated by the Purchase Agreement was to be closed at some date after the date of the Collateral Note and the Purchase Agreement, then the Collateral Note would not have specified that interest was to accrue from the date of the Collateral Note. Rather, it would have specified that the interest was to accrue only upon the later closing date.

Brief for appellee in support of petition for further review at 8.

Although Northern's argument is a plausible interpretation of the various provisions of the note, it is equally plausible to suggest that if the closing was in fact held on September 30, 1987, contemporaneously with the execution of the collateral note, there would have been no reason for the note to refer to an unspecified closing date; rather, the note would simply have recited that the extension could not be longer than 84 months thereafter, or through September 30, 1994. In short, the inferences to be drawn from the recitations in the note are far too ambiguous to permit us to conclude that the closing of the purchase necessarily took place on September 30, 1987. That being so, we must conclude that the collateral note is not on its face payable at a definite time and that it is therefore not negotiable.

The judgment of the Court of Appeals being correct, it is, as noted in the first paragraph hereof, affirmed.

AFFIRMED.

JOHN Q. BACHMAN, TRUSTEE, APPELLANT, V. EASY PARKING OF AMERICA, INC., A NEBRASKA CORPORATION, APPELLEE.

562 N.W.2d 369

Filed April 24, 1997. No. S-95-178.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Contracts.** A contract is viewed as a whole in order to construe it.
3. ____. Contract language is to be accorded its plain and ordinary meaning as ordinary, average, or reasonable persons would understand it.

4. ____. Generally, the unilateral mistake of one party does not relieve that party from its obligation under a contract absent a showing of fraud, misrepresentation, or other inequitable conduct.
5. **Breach of Contract: Damages.** The proper measure of damages in a contract action is the losses sustained by reason of a breach.
6. **Landlord and Tenant: Damages: Abandonment.** A landlord has a duty to relet the premises in order to mitigate damages when a tenant abandons the premises prior to the expiration of a lease.

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

Michael D. Nelson, of Nelson Law Office, for appellant.

Scott H. Rasmussen, of Brown & Brown, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD JJ., and BUCKLEY, D.J.

BUCKLEY, D.J.

This is an action for the recovery of alleged damages incurred by the appellant-lessor, John Q. Bachman, resulting from the breach of a commercial real estate lease of a surface parking lot by the appellee-lessee, Easy Parking of America, Inc. (Easy Parking).

BACKGROUND

The facts are essentially undisputed. Bachman was at all relevant times the trustee for the owners of real estate described as the south 54 feet of Lot 1, and all of Lot 8, Block 91, City Lots, Original City of Omaha, Douglas County, Nebraska. Easy Parking is a subsidiary of Allright Parking and is a Nebraska corporation with its principal place of business in Omaha.

In March 1991, Bachman and Vincent Smith discussed the possibility of Bachman's leasing the parking lot located at 1102 Dodge Street in Omaha to Easy Parking. Smith was the president of Easy Parking and had been employed for 9 years by Easy Parking's parent company, Allright Parking. Smith's duties included the securing of leases for parking lots.

On or about March 22, 1991, Bachman offered to lease the said surface parking lot for $500 per month to Easy Parking. Easy Parking accepted the offer on or about April 1. The parties

utilized Easy Parking's standard lease form, with Bachman supplying the legal description of the property. The lease was ultimately executed on May 31.

The description of the property leased was "[t]he surface parking lot located on the south 54 feet of Lot 1 and all of Lot 8, Block 91, City [L]ots, Original City of Omaha, Douglas County, Nebraska, commonly known as 1102 Dodge." The term of the lease was from June 1, 1991, through May 31, 1996, unless earlier terminated, for a total rent of $30,000, payable in monthly payments of $500, due on the first day of each month.

Bachman did not indicate that a building was located on any portion of the property; however, a building occupied most of Lot 8. Bachman testified that Lot 8 was included because the north side of the building, which abutted Lot 1, had parking space numbers affixed to it and the gravel parking lot went right up to the north end of the building.

As soon as the lease was executed, Smith mistakenly had flyers placed upon cars in a parking lot located on Lot 7, informing the owners of their new management. Smith was informed on the next day, June 1, that Bachman did not own or have title to the parking lot located on Lot 7 but had the parking lot immediately to the north of the building on Lot 8.

Andrew Travis, Easy Parking's legal counsel, sent a letter to Bachman, antedated May 31, 1991, claiming that the lease agreement was null and void by reason of mistake and failure of mutuality. Bachman responded by letter dated June 3, 1991, stating that he was not mistaken as to the surface lot which was leased and expressing his expectation of receiving rent as per the lease agreement. Bachman sent another letter dated July 22, 1991, regarding Easy Parking's failure to pay the July 1991 rent and to otherwise comply with the terms of the lease agreement. Travis responded with a letter dated July 26, 1991, again restating Easy Parking's refusal to accept possession of the surface parking lot. Easy Parking at no time took possession of any of the property or made any payments under the lease agreement.

Bachman attempted to re-lease the property, resulting in a lease with Campbell Soup Company to commence December 1, 1992. In order to obtain this lease, Bachman had the existing building on Lot 8 torn down and had the entire area resurfaced.

This lease was for an initial rental period of 24 months, at a rate of $1,500 per month, for a total rental of $36,000. This lease was for a period of time that was within the entire term of the original lease between Bachman and Easy Parking.

Bachman filed this action prior to the lease with Campbell Soup Company. Upon the execution of the lease with Campbell Soup Company, Bachman amended his petition to reflect lost rent of $9,000 for the 18 months the surface parking lot had remained vacant at the agreed-upon rate of $500 per month. Until then, Bachman had not relieved Easy Parking of its obligation under the lease agreement. Easy Parking counterclaimed to have a rescission of the written lease agreement on the grounds of mutual mistake of fact and failure of mutuality.

The case was tried to the district court on October 27, 1993. By written order dated January 4, 1995, the district court found that both parties were mistaken as to the lease agreement for different reasons, that Bachman had no damages, and that it would be unconscionable to allow Bachman to recover. Whereupon, the court dismissed both Bachman's petition and Easy Parking's counterclaim. Bachman's motion for new trial was overruled, and this appeal followed. Easy Parking did not appeal the trial court's dismissal of its counterclaim.

We transferred the case to this court's docket pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995), which permits us to regulate the caseloads of the Nebraska Court of Appeals and this court.

ASSIGNMENTS OF ERROR

Bachman assigns as error the court's findings that (1) Bachman was mistaken as to the inclusion of the building as part of the leased parking area, (2) Bachman had no damages, and (3) it would be unconscionable to allow Bachman to recover damages.

STANDARD OF REVIEW

A suit for damages arising from breach of contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995).

ANALYSIS

Bachman first assigns as error the trial court's finding that he was mistaken as to the inclusion of the building as part of the leased surface parking area. In order to determine if this error has merit, it is necessary to examine the contract. We have stated that we view a contract as a whole in order to construe it. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993); *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992); *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49 (1985). Contract language is also to be accorded its plain and ordinary meaning as ordinary, average, or reasonable persons would understand it. *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996); *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994).

When viewed as a whole, it is clear that the parties intended to lease a surface parking lot, not a building. This intent is evidenced by the language throughout the lease identifying the property to be leased as "the surface parking lot." The lease remains silent as to the mention of any building. Similarly, paragraph 4.1 of the lease provides that "premises are leased for use only as a commercial automobile parking facility." Further, common sense dictates that a rental price of $500 per month is not reasonable if the building were to be included as well as the surface lot.

Again, the property leased was "[t]he *surface parking lot* located on the south 54 feet of Lot 1 and all of Lot 8 . . . ." (Emphasis supplied.) There is no comma between "Lot 1" and "and all of Lot 8," which would have lent weight to the claim that the surface parking lot was located only on Lot 1 and not on Lot 8.

Bachman testified that he never intended to include the building on Lot 8 in the lease. In response to the question, "As of May 31, 1991, were there parking lots located on Lot 8 and on the — roughly the south one-half portion of Lot 1," Bachman stated:

> There was a gravel parking lot located on what I would consider the north portion of the parcel. And when I say

> "the parcel," I mean the south 54 feet of Lot 1 and Lot 8. A survey was never done so I could not tell you exactly where the parking lot — gravel parking lot ended. It encompassed all of Lot — the south 54 feet of Lot 1, probably a portion of Lot 8, but we never had it surveyed as far as where the building at that time was located on Lot 8.

The record, therefore, shows that the only mistake that was made was made by Easy Parking. Smith visited the area to see the parking lot to be leased and viewed the wrong parking area, which was Lot 7 and not owned by Bachman but leased for Campbell Soup Company employees. Smith never met with Bachman at the property. He disregarded signs on Lot 7 indicating the lot was for Campbell Soup Company employees. He did not check the location of the described lot, did not check to see who owned the lot, did not know how to read a plat map, and did not have records or documents that the property he thought he was leasing was 1102 Dodge Street. Smith testified as to when he realized his mistake: "In the morning I got a call from Sam Wall from Campbell's and he wanted to know what was going on and I said, well, we leased this property from Mr. Bachman, and he said, well, no, I've got leases with Mr. Esch," whereupon, Smith stated, "I just sunk down in my chair and almost cried."

The only mistake as to what property was included in the lease was the one made by Easy Parking and is therefore a unilateral mistake. Generally, the unilateral mistake of one party does not relieve that party from its obligation under a contract absent a showing of fraud, misrepresentation, or other inequitable conduct. See, *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989); *Jones v. Employers Mut. Cas. Co.*, 230 Neb. 549, 432 N.W.2d 535 (1988); *J.J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). Here, no such showing was made. After determining that there is no mutual mistake of fact, we now consider Bachman's second and third assignments of error, both relating to damages. The proper measure of damages in a contract action is the losses sustained by reason of a breach. See

Lone Cedar Ranches v. Jandebeur, 246 Neb. 769, 523 N.W.2d 364 (1994).

Bachman claims as damages his loss of rent at $500 per month from the inception of the lease until he relet the property to Campbell Soup Company, a period of 18 months, for a total of $9,000.

Easy Parking asserts that Bachman failed in his duty to reasonably mitigate his damages. We have held that a landlord has a duty to relet the premises in order to mitigate damages when a tenant abandons the premises prior to the expiration of a lease. *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993); *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990).

Bachman's testimony, undisputed, was that as soon as he was notified that Easy Parking considered the lease a nullity and would not accept possession of the premises, he knew he needed to attempt to get the property re-leased. Thereupon, he had contacts with Campbell Soup Company and other individuals that had downtown property interests, although he did not formally advertise the property or place a "for rent" sign on the property. He stated that downtown property is hard to lease because there are very few users for downtown property. Eventually, he entered into negotiations with Campbell Soup Company which occurred over a 5- to 6-month period, culminating in the Campbell Soup Company lease executed on October 31, 1992, to begin on December 1. Clearly, Bachman's efforts to relet the property were reasonable, and therefore he met his duty to mitigate his damages.

The trial court found that "it would be unconscionable to allow plaintiff to recover having had the advantage of the Campbell Soup lease and the profits therefrom." This raises the issue as to whether Easy Parking is entitled to credit for the higher rental received by Bachman under the Campbell Soup Company lease. This issue has not heretofore been addressed by this court. Courts in other jurisdictions are divided on this question. See, *Truitt v. Evangel Temple, Inc.*, 486 A.2d 1169 (D.C. 1984); *The Way International v. Ohio Center*, 3 Ohio App. 3d 451, 445 N.E.2d 1158 (1982); *Hermitage Co. v. Levine*, 248

N.Y. 333, 162 N.E. 97 (1928); *Centurian Dev. LTD v Kenford Co.*, 60 A.D.2d 96, 400 N.Y.S.2d 263 (1977); *N.J. Ind. Properties v. Y.C. & V.L., Inc.*, 100 N.J. 432, 495 A.2d 1320 (1985); *Hargis v. Mel-Mad Corporation*, 46 Wash. App. 146, 730 P.2d 76 (1986). However, in those cases, the subsequent leases were for the same or substantially the same amount of rental space.

Here, the subsequent lease to Campbell Soup Company required Bachman to tear down the building which occupied most, if not all, of Lot 8 and to blacktop both Lot 8 and the south 54 feet of Lot 1. The resultant lease to Campbell Soup Company was for more than twice the surface parking area than the original lease with Easy Parking.

While there was no evidence as to the actual cost incurred by Bachman in tearing down the building and surfacing and resurfacing the entire property, we deem such evidence unnecessary in light of our conclusion that whatever actual cost was incurred and the substantial increase in the parking area leased readily account for the significant difference in the monthly rent between the two leases. Accordingly, the subsequent Campbell Soup Company lease is so significantly different that it does not require a determination as to whether Easy Parking should have credit for the higher rent in that lease. Therefore, Bachman is entitled to damages for the unpaid rent.

CONCLUSION

There being only a unilateral mistake on the part of Easy Parking and not a mutual mistake by both parties, we find that Easy Parking breached the lease and that Bachman mitigated his damages by re-leasing to Campbell Soup Company and is entitled to damages for the rent due from the breach of the lease until reletting, in the sum of $9,000. The judgment of the district court is, therefore, reversed, and the cause is remanded with the direction to enter judgment accordingly.

REVERSED AND REMANDED WITH DIRECTION.

MICHAEL BLOSE, APPELLANT, V. J. ALLAN MACTIER, DOING BUSINESS AS PONCA HILLS FARM, APPELLEE.

562 N.W.2d 363

Filed April 24, 1997. No. S-95-418.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **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.
3. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
4. ____. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
5. **Negligence: Animals: Liability.** Ordinarily, the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner of the animal.
6. **Negligence: Animals.** To merit recovery against the owner of a domestic animal, the animal must have demonstrated a propensity to engage in the same behavior which led to the injury at issue.
7. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** In actions accruing prior to *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), a possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized that the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either would not discover or realize the danger or would fail to protect himself against the danger; (4) the defendant failed to use reasonable care to protect the business invitee against the danger; and (5) the condition was a proximate cause of the damage to the plaintiff.
8. **Negligence: Liability: Invitor-Invitee.** It is the superior knowledge the invitor has or should have which is the foundation of the invitor's liability, and absent such superior knowledge, no liability exists.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Washington County, DARVID D. QUIST, Judge. Judgment of Court of Appeals affirmed.

Kevin R. Hopp and Thomas J. Young, of Young & LaPuzza, for appellant.

Bartholomew L. McLeay and Diana J. Vogt, of Kutak Rock, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

Michael Blose appeals the Nebraska Court of Appeals' affirmance of the district court for Washington County's order sustaining J. Allan Mactier's motion for directed verdict and dismissing Blose's petition with prejudice. We affirm.

Blose is a farrier who came on a regular schedule to Ponca Hills Farm. At all times relevant to this case, Mactier owned Ponca Hills Farm, an enterprise which boarded horses, furnished riding lessons, and owned brood mares and hunt horses.

On June 26, 1992, Blose arrived at Ponca Hills Farm to replace three missing shoes on one of Mactier's horses, Saint Nicholas (Saint), an approximately 2,000-pound thoroughbred Clydesdale cross. Although he was generally docile, Saint had a reputation among employees at the farm for bolting or pulling away before the lead rope could be removed when he was turned out to pasture or when employees tried to catch him in the pasture. Blose had been Saint's farrier since at least 1990, and at Blose's request, an employee of the farm would normally hold Saint when Blose worked on him because Saint would not always stand still in the cross-ties.

On the day of the injury, Ponca Hills Farm manager, Judith Csejthey, and Blose drove to the paddock where Saint had been placed when he was brought from the pasture 3 to 5 days earlier. Although Blose shod horses only in a barn setting, Saint had been left in the paddock until Blose's arrival because the veterinarian had ordered that Saint not stand in a stall for prolonged periods. Csejthey took a lead rope and can of grain, entered the paddock by herself, and attempted to catch Saint. As she approached Saint, Saint took a few steps back and began a slow lope around the paddock. Csejthey tried again to catch Saint, and Saint again loped around the paddock.

Although it was not part of Blose's job to assist in catching the horses on which he worked, and although Csejthey did not ask for his assistance, Blose entered the paddock as Saint was loping around after Csejthey's second attempt to catch him. Saint came to a stop in the corner of the paddock, and Csejthey approached from the rear while Blose walked toward Saint from the front in an attempt to keep the horse cornered. As they approached, Saint turned out of the corner and took a step toward Blose; Blose moved toward Saint, extended his left arm, and waved it. Saint took a step back, turned, and jumped over the paddock fence. Saint broke the top board of the fence as he went over, and part of the board came loose and hit Blose in the head, rendering him unconscious. The blow fractured Blose's temporal bone, bruised his brain, and left Blose in a coma for almost 2 weeks. Blose has no memory of the day of the accident.

Blose sued Mactier for damages resulting from this encounter with Saint. In his second amended petition, Blose alleged that Saint had developed dangerous propensities known to Mactier which posed an unreasonable risk of harm to Blose; that the material composition, nature, and type of construction of the paddock fence were inherently dangerous for use in constraining horses; that Blose could not discover, realize, or protect himself from these dangers, and Mactier knew or should have known this; and that Mactier was negligent in failing to protect or warn Blose of these dangers, such that Blose was damaged. At trial, the parties stipulated that Blose's injuries resulted in $80,016.94 in medical bills.

At trial, Ponca Hills Farm employees Csejthey, Nicole Prescott, and Jarrod Ryan testified that Saint had a tendency to bolt or pull away when he was turned out to pasture or an attempt was made to catch him. However, Ryan was uncontradicted in his testimony that Saint had never kicked, bit, threatened, or reared up in Ryan's presence and specifically recalled that, although he had warned Blose about some particularly problematic horses, Saint was not one of them. Csejthey stated that Saint did not have a habit of going through fences prior to the date of the accident. Csejthey testified that Blose had worked on Saint many times before the date of the accident and had particular knowledge about Saint. Csejthey and Prescott

stated that Blose asked that someone hold Saint when Blose worked on him because Saint fidgeted in the cross-ties.

Blose's expert witness, Paul Bast, stated that the fencing in the paddock was adequate to contain Saint and that Saint's flightiness was not an unusual characteristic in horses. However, Bast testified that Saint created an unreasonable risk of harm to Blose. Bast stated that everyone had trouble catching Saint; Saint was a very large animal; Saint was herd bound (by nature he traveled in groups), but was left in the paddock for 3 to 5 days, where he could see his pasture mates; Saint was suffering from chronic lameness and had been standing on a hard surface for several days with three shoes missing; and the heat and flies were irritating on the day of the accident. Bast stated that in his opinion these factors combined to create in Saint an extremely agitated state, such that he did something he had never done before in jumping over the fence. Bast testified that Blose should have been warned about these circumstances.

Bast also stated that Saint's agitation would have been noticeable, manifesting itself in Saint's eyes and in his body language. However, Csejthey testified that when she was in the paddock with Saint on the day of the accident, Saint exhibited no nervous signs—he did not whinny, his ears were not pinned back, he was not rearing up, he did not show the whites of his eyes, and he was not weaving or cribbing. This testimony was uncontradicted.

Bast also stated that in his professional capacity, he worked with Blose on a regular basis. Bast testified that once Blose had seen a horse at Bast's place of employment 15 to 20 times, Bast did not feel that it was necessary to tell Blose specifically about the personality traits or temperament of a horse because Blose would then have been very familiar with the horse.

Following the close of Blose's case at trial, Mactier moved for a directed verdict. The district court granted the motion and dismissed Blose's petition with prejudice. Blose timely filed a motion for new trial, which the district court overruled, and Blose appealed to the Court of Appeals. In a memorandum opinion filed November 14, 1996, the Court of Appeals affirmed the decision of the district court, finding that Blose failed to prove a prima facie case of negligence against Mactier

as either a domestic animal owner or a landowner. We granted Blose's petition for further review.

On petition for further review, Blose alleges that the Court of Appeals erred in (1) determining that the district court was correct when it granted Mactier's motion for directed verdict because there were issues of fact remaining upon which reasonable minds could reach differing conclusions; (2) failing to appropriately apply the standard for reviewing the district court's decision; and (3) determining that the district court correctly denied Blose's motion for new trial.

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996).

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. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996).

In his first assignment of error, Blose alleges that the Court of Appeals erred in determining that the trial court was correct when it granted Mactier's motion for directed verdict because there were issues of fact remaining upon which reasonable minds could reach differing conclusions. We disagree.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Hoover, supra*; *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made,

the case may not be decided as a matter of law. *Hoover, supra*; *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

In his petition, Blose first alleged that Mactier, as the owner of Saint, breached his duty to Blose by failing to warn Blose of Saint's dangerous propensities and by failing to protect Blose from this danger. As did the Court of Appeals, we find that Blose did not establish a prima facie case of negligence against Mactier because Blose did not demonstrate that Mactier breached a duty as the owner of Saint.

The rule in Nebraska concerning the liability of the owner of a domestic animal has long been established. Ordinarily, the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner of the animal. *Lee v. Weaver*, 195 Neb. 194, 237 N.W.2d 149 (1976); *Fritz v. Marten*, 193 Neb. 83, 225 N.W.2d 418 (1975); *Huber v. Timmons*, 184 Neb. 718, 171 N.W.2d 794 (1969); *Durrell v. Johnson*, 31 Neb. 796, 48 N.W. 890 (1891). Additionally, to merit recovery, the animal must have demonstrated a propensity to engage in the same behavior which led to the injury at issue. See, *Durrell, supra* (holding that evidence that horse habitually kicked his stall and once or twice kicked other horses was not sufficient to demonstrate notice on part of owner that horse would kick person and stating that owner is not responsible for any mischief caused by animal if mischief was not kind to be expected of animal); *Lee, supra* (holding that evidence that cat had once previously bitten its owner without any evidence as to circumstances surrounding prior bite was not sufficient to find that cat was vicious or dangerous animal or that owner had notice of its vicious or dangerous nature).

The record in this case is devoid of any evidence of Saint's behavior prior to the date of the accident which would demonstrate that Mactier or his employees had notice that Saint would jump a fence when Blose and Csejthey attempted to catch him. The record indicates that Saint had never before attempted to jump a fence when faced with this type of situation. Likewise, Saint's tendency to bolt when turned out into the pasture and his reputation for being difficult to catch are not sufficiently simi-

lar to his behavior in this situation so as to constitute the notice required to give rise to a duty on the part of Mactier as the owner of Saint. Such knowledge is indispensable to Mactier's liability as the owner of a domestic animal, and Blose failed to present evidence of any such notice.

In his petition, Blose also alleged that Mactier, as the owner of Ponca Hills Farm, breached his duty to Blose by failing to warn Blose of Saint's dangerous propensities and the dangerous condition created by the use of the fencing materials at the paddock, and by failing to protect Blose, as a business invitee, from these dangers. Again, we agree with the Court of Appeals that Blose did not establish a prima facie case of negligence against Mactier as a landowner.

We recognize that this court in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), abrogated the distinction between business invitees and licensees. However, in *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996), we also stated that this abrogation of classifications is prospective only; thus, it is of no effect in the instant case.

According to the pre-*Heins* rule, a possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized that the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either would not discover or realize the danger or would fail to protect himself against the danger; (4) the defendant failed to use reasonable care to protect the business invitee against the danger; and (5) the condition was a proximate cause of the damage to the plaintiff. *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992). We have repeatedly held that it is the superior knowledge the invitor has or should have which is the foundation of the invitor's liability, and absent such superior knowledge, no liability exists. *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d

212 (1995); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988).

Here again, the record is devoid of any evidence demonstrating that Mactier possessed superior knowledge of any dangerous propensities on the part of Saint or any dangerous conditions manifested by the materials used in the construction of the paddock. As noted above, Saint had never before attempted to go through a fence. The information that Mactier had was exactly the same information that Blose possessed—Blose routinely worked with Saint; Blose knew that Saint was flighty; Blose frequently asked that an employee hold Saint when Blose worked on him; Blose knew that it was not part of his job description to help catch horses and that Csejthey did not request his assistance in catching Saint; and Blose knew that Saint was not exhibiting any of the signs of agitation that his expert witness said would be visible if, indeed, Saint was agitated. There is nothing in the record to indicate that Mactier or Mactier's employees possessed any information superior to that possessed by Blose, and the record is clear that Saint had not exhibited this particular behavior before the day of the accident.

Additionally, with regard to the paddock fence, Blose's own expert stated that although the fencing was not adequate to be used as a catch pen, the paddock was adequate for use in containing horses, including Saint. Additionally, the record is devoid of any evidence demonstrating that Mactier or his employees negligently constructed the paddock or that there was any visible or apparent defect in the fence.

Because Blose presented no evidence demonstrating the notice required to give rise to a duty on Mactier's part as a domestic animal owner or as a landowner, we find that the district court properly directed a verdict in Mactier's favor. Blose's first assignment of error is without merit.

In his second assignment of error, Blose alleges that the Court of Appeals failed to appropriately apply the standard for reviewing the district court's decision. Blose argues, essentially, that the Court of Appeals stated the appropriate standard of review but failed to reach the result mandated by that standard. The Court of Appeals did set forth the correct standard of review and, as noted above, correctly affirmed the district

court's directed verdict. Thus, Blose's second assignment of error must also fail.

In his final assignment of error, Blose argues that the Court of Appeals erred in determining that the district court correctly denied Blose's motion for new trial. We disagree.

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). Because we find that the district court correctly directed a verdict in Mactier's favor, we also find that the trial court did not abuse its discretion in refusing to grant Blose a new trial. Blose's last assignment of error is without merit.

Because we find that the Court of Appeals correctly upheld the district court's directed verdict in favor of Mactier and its refusal to grant Blose's motion for new trial, we affirm.

AFFIRMED.

DALE A. RAPP, APPELLEE, V. JOHN W. RAPP, APPELLEE, AND HARRY R. RAPP, TRUSTEE OF THE FLORENCE E. RAPP TRUST, APPELLANT.

562 N.W.2d 359

Filed April 24, 1997. No. S-95-555.

1. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
2. ____: ____. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Attorney Fees: Costs.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee.
4. **Trusts: Attorney Fees: Costs.** Generally, if the fiduciary's defense of his acts is substantially successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his final account and in successfully defending it against objections.
5. **Trusts: Attorney Fees: Costs: Courts: Appeal and Error.** The county court or district court on appeal has discretionary power and authority to order payment of costs

and, in proper cases, to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation.

6. **Trusts: Attorney Fees: Costs.** Attorney fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate.
7. **Trusts: Attorney Fees.** To make a trustee personally responsible for all reasonably incurred attorney fees for the successful defense of his actions as a fiduciary would impose an unconscionable burden on fiduciary service without justification.
8. **Final Orders.** An order in a civil action is final when no further act of the trial court is required to dispose of the cause.

Appeal from the District Court for Kearney County: STEPHEN ILLINGWORTH, Judge. Affirmed in part, and in part reversed and remanded with direction.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Kent E. Person, of Person, Dier, Person, Osborn & Cox, P.C., for appellee Dale A. Rapp.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This is an appeal from the Kearney County District Court decision which approved attorney fees and litigation expenses incurred by the defendant-appellant, Harry R. Rapp, trustee, but found that none of the fees or expenses may be apportioned against the plaintiff-appellee, Dale A. Rapp.

BACKGROUND

On September 9, 1976, Florence E. Rapp created the Florence E. Rapp Trust (Trust), with Florence, Harry, and John W. Rapp as trustees. After the death of Florence, the expenses of settling her affairs and the death taxes associated with her estate were to be paid out of the Trust. The residue was then to be divided into five equal shares, one for each of Florence's children: Dale, John, Roland R. Rapp, Gloria F. Reiner, and Harry. Florence died June 12, 1989.

After Florence's death and prior to the commencement of this action, each of the five beneficiaries of the Trust received the following distribution checks from the Trust: $30,000 on June 16, 1989; $75,000 on November 1; and $6,000 on Decem-

ber 22. Dale alleged that the trustees sent him a $6,000 check which required that if he endorsed the check, the accounting from the Trust would be approved. Dale refused to negotiate and cash his $6,000 check and commenced this action. John died during the pendency of this action. His estate and the three other Trust beneficiaries approved all of the subsequent actions, investments, accounts, and activities of the Trust, and Roland and Gloria were never made parties to the action.

Dale sought to set aside an assignment by the three trustees, Florence, Harry, and John, to Florence and Harry as joint tenants with rights of survivorship of a promissory note from Harry, as trustee; to set aside the sale by Florence to Harry of the interests of Florence in two automobiles which had been owned by Harry and Florence as joint tenants with rights of survivorship; an accounting of income, farm program payments, and other income after June 12, 1989, and to surcharge Harry and John, as trustees, for insufficient rents of non-Trust farmland and pastureland; distribution of $6,000 of Trust cash assets which Harry and John, as trustees, had previously tried to distribute to Dale and distribution of one-fifth of the residue of the Trust assets; and a formal accounting of Trust actions, investments, accounts, and activities.

On January 14, 1993, Harry and John, as trustees, filed a motion for summary judgment on all causes of action. On March 26, the court granted their motion for summary judgment on Dale's third cause of action and overruled the motion as to all other causes of action.

The remaining causes of action were tried on February 23, 1994, and on June 9, the court entered an order denying Dale's first and second causes of action, sustaining Dale's motion for directed verdict with regard to his entitlement to a distribution of $6,000 and one-fifth of the residue of the Trust assets, granting Harry and John's motion as trustees for directed verdict with regard to the accounting because such accounting had previously been provided by them, and assessing costs against Dale.

Harry and John, as trustees, in defending this action incurred attorney fees and other expenses in an amount of $10,497.45.

On August 9, 1994, Dale filed a motion to have Harry, as trustee, held in contempt for withholding the $10,497.45 in

attorney fees and litigation expenses from the $6,000 and the one-fifth Trust residue distributable amount of beneficiary Dale. On December 27, the district court entered a journal entry and order in which the court acknowledged John's death and found Harry in contempt for withholding all of the attorney fees and litigation expenses from Dale's distribution. The court further held that Harry could purge himself of said contempt by paying to the clerk of the district court the $6,000 plus one-fifth of any funds distributed to the other beneficiaries (amounting to $3,964.89) and by providing the court with a written accounting regarding the payment of such amounts. The court further ordered Harry to pay the sum of $750 to Dale as attorney fees for Dale's expense in bringing the contempt action.

Harry purged himself of contempt by paying the necessary sums to the clerk of the district court. Harry then filed a motion for approval, allowance, and apportionment of attorney fees and other litigation expenses. On April 21, 1995, the district court overruled the motion. The court specifically found that Harry should not receive reimbursement fees from Dale's money because (1) Harry, as trustee, attempted to unilaterally circumvent a court order by withholding amounts for attorney fees and expenses of litigation from amounts otherwise distributable to Dale; (2) Harry should have applied to the court to obtain reimbursement for attorney fees and expenses of litigation instead of withholding such amounts otherwise distributable to Dale; and (3) such withholding actions of Harry were previously held by the court to be in bad faith, and to permit Harry to obtain reimbursement from amounts otherwise distributable to Dale would be to condone the prior behavior of Harry, as trustee. Harry then filed a motion for new trial on May 1, 1995. This motion was overruled, but the court clarified its April 21, 1995, journal entry by approving the attorney fees and other litigation expenses as necessary, fair, and reasonable. The court reiterated that none of the attorney fees and litigation expenses approved by the court would be apportioned against Dale.

STANDARD OF REVIEW

On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Shockley*

v. Shockley, 251 Neb. 896, 560 N.W.2d 777 (1997); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993).

When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

ASSIGNMENT OF ERROR

Summarized and restated, Harry, as trustee, assigns as error the district court's failure to apportion attorney fees and other litigation expenses against amounts of Trust assets otherwise distributable to Dale.

ANALYSIS

Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997); *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997); *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996); *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994).

We first look to case law to determine how attorney fees in trust actions are analyzed. Generally, if the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his final account and in successfully defending it against objections. *In re Guardianship of Bremer*, 209 Neb. 267, 307 N.W.2d 504 (1981). We conclude that the standard should be substantially successful and that the fiduciary's defense does not have to be 100 percent successful in order for the fiduciary to be entitled to recover costs including attorney fees. Similarly, the county court or district court on appeal has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation.

Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 (1956). Attorney fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate. *Linn v. Linn*, 146 Neb. 666, 21 N.W.2d 283 (1946).

We have held that to make a trustee personally responsible for all reasonably incurred attorney fees for the successful defense of his actions as a fiduciary would impose an unconscionable burden on fiduciary service without justification. *In re Guardianship of Bremer, supra.* In the present case, Harry, in his capacity as trustee, was successful in defending himself against the action brought by Dale. Therefore, we determine that the trustee in this instance is allowed attorney fees because such fees were incurred for the benefit of the estate. Further, we determine that Harry, as trustee, is not personally liable for the attorney fees incurred in defending the action.

The district court made a specific finding that "the attorneys fee and other litigation expenses, in the amount of $10,495.45 . . . were necessary, fair and reasonable. The Court further finds that the application for the approval and allowance for such attorneys fees and litigation expenses is approved." The granting of such attorney fees is at the discretion of the trial court and will not be overturned absent an abuse of discretion. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). There is no evidence in the record indicating any abuse of discretion; thus, we affirm the trial court's order with regard to the awarding of such fees.

Next, we consider the issue of whether said fees may be apportioned against Dale in whole or in part. The trial court entered an order finding that Harry was to pay Dale $6,000 and that Dale was entitled to his one-fifth share of any additional funds distributed above the $6,000.

An order in a civil action is final when no further act of the trial court is required to dispose of the cause. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997). Here, the $6,000 distribution order was final. No further act of the trial court was required to dispose of the cause. Once the district court entered its order and neither party appealed, that

order became binding on both parties. To challenge this order, Harry must have appealed. Because Harry did not appeal, the judgment is final, and Harry cannot assess any of the attorney fees or litigation expenses against Dale's $6,000 distribution.

We now turn to the issue of whether any of the attorney fees or expenses may be apportioned against Dale's one-fifth share of the Trust. We note that in its final order, the district court found that Dale was entitled to his one-fifth share of any additional funds distributed above the $6,000. These additional funds would necessarily be lessened by the payment out of the Trust of attorney fees and litigation costs. Therefore, we determine that the district court was not correct in refusing to assess any of the attorney fees or litigation expenses against Dale. Once a determination was made as to the reasonableness of said fees, the payment should have been ordered to be paid by Trust funds and apportioned against all of the beneficiaries equally. Therefore, the district court's order disallowing apportionment of attorney fees and litigation expenses against Dale is hereby affirmed in part, and in part reversed and remanded with the direction to enter an order consistent with this opinion.

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

KEVIN ESSMAN, APPELLANT, V. NEBRASKA LAW ENFORCEMENT TRAINING CENTER ET AL., APPELLEES.

562 N.W.2d 355

Filed April 24, 1997. No. S-95-850.

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 decision made by the lower court.
2. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
3. ____: ____: ____. The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the Administrative Procedure Act.

4. ____: ____: ____. The phrase "county where the action is taken" as used in Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994) is defined as the site of the first adjudicated hearing of a disputed claim.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded for further proceedings.

Derek L. Mitchell for appellant.

Don Stenberg, Attorney General, and Timothy J. Texel for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Kevin Essman filed a petition in the district court for Hall County pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994) of the Administrative Procedure Act, seeking judicial review of a final order by the Nebraska Commission on Law Enforcement and Criminal Justice (Commission) denying Essman's application for admission to the Nebraska Law Enforcement Training Center (Training Center). The district court dismissed Essman's petition, finding that the court lacked jurisdiction because the petition was not filed in compliance with § 84-917(2)(a). Essman perfected an appeal to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the Court of Appeals and this court, we removed this case to our docket. We reverse, and remand for further proceedings, based upon our determination that the district court for Hall County has jurisdiction to hear Essman's petition for review.

ASSIGNMENT OF ERROR

Restated, Essman contends that the district court erred in finding that it did not have jurisdiction to review the final order of the Commission denying Essman's application to the Training Center.

STANDARD OF REVIEW

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 deci-

sion made by the lower court. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

FACTS

Essman alleged the following jurisdictional facts in his petition for review filed in the district court: After his 1994 election to the office of sheriff of Thomas County, Nebraska, Essman submitted an application to attend the "Sheriff's Certification Course" at the Training Center, as required by Neb. Rev. Stat. § 23-1701.01 (Cum. Supp. 1996). On February 22, 1995, the application was denied by the director of the Training Center because of alleged violations of regulations governing admission criteria. Essman appealed the director's decision to the Nebraska Police Standards Advisory Council (Advisory Council), which is a standing committee of the Commission with statutory responsibility for overseeing the operation of the Training Center. See Neb. Rev. Stat. § 81-1406 (Reissue 1994). On March 15, the Advisory Council conducted a contested evidentiary hearing in Grand Island, Hall County, Nebraska, and affirmed the director's decision denying Essman admission to the Training Center. Essman appealed the Advisory Council's decision to the Commission. On May 5, the Commission held a hearing in Lincoln and voted to affirm the decision of the Advisory Council.

On June 5, 1995, Essman filed a petition in the district court for Hall County, seeking judicial review of the Commission's final order pursuant to § 84-917(2)(a), naming the Training Center, the Advisory Counsel, and the Commission as appellees. These parties responded by filing a special appearance "objecting to the jurisdiction of the Court over the persons of the Appellees." As specific grounds for this objection, appellees alleged that "service of summons was not accomplished upon the purported Appellees as required by Neb. Rev. Stat. § 25-510.02 (1989) and § 84-917(2)(a) (1994), and that Appellant filed his Petition in an improper jurisdiction to hear this appeal." On July 28, the district court sustained the special

appearance and dismissed Essman's petition "for lack of jurisdiction." Citing the requirement of § 84-917(2)(a) that a petition seeking judicial review of a final order by an administrative agency must be filed " 'in the district court of the county where the action is taken,' " the district court found that because the final order of the Commission was entered in Lancaster County, "[a]ny appeals from that decision should be to the district court of Lancaster County, Nebraska." The district court did not address the alleged insufficiency of service of summons asserted as an alternative basis for the special appearance.

ANALYSIS

Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought "in the mode and manner and within the time provided by statute." *McCorison v. City of Lincoln*, 218 Neb. 827, 828, 359 N.W.2d 775, 776 (1984). See, also, *Nebraska Dept. of Correctional Servs. v. Carroll*, 222 Neb. 307, 383 N.W.2d 740 (1986).

The jurisdictional requirements for obtaining judicial review of a final administrative decision under the Administrative Procedure Act are set forth in § 84-917(2)(a), which provides in pertinent part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

We have held that the filing of the petition and the service of summons pursuant to this section of the Administrative Procedure Act are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency. See *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994).

Although appellees challenged the sufficiency of service of summons in their special appearance, this issue was not addressed by the district court and was neither briefed nor argued on appeal. Our review of the record indicates that sum-

mons were issued and served upon each appellee and the office of the Attorney General within 30 days after the petition was filed in compliance with Neb. Rev. Stat. § 25-510.02 (Reissue 1995) and § 84-917(2)(a). The district court therefore had personal jurisdiction over appellees. See *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995).

The filing of the petition for review is governed by § 84-917(2)(a), which requires that proceedings for judicial review of the final order of an administrative agency in a contested case "shall be instituted by filing a petition in the district court *of the county where the action is taken* . . . ." (Emphasis supplied.) The district court held that because the final order of the Commission was issued at a hearing in Lincoln, the challenged administrative action was taken in Lancaster County and only the district court for Lancaster County had jurisdiction to review that action. We addressed this precise issue in *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996), decided during the pendency of this appeal. In that case, we held that the phrase "county where the action is taken" as used in § 84-917(2)(a) is defined as "the site of the first adjudicated hearing of a disputed claim." 249 Neb. at 341, 543 N.W.2d at 719. See, also, *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982). In this case, Essman alleged in his petition that the first adjudicated hearing was held before the Advisory Council in Hall County, Nebraska, on March 15, 1995. Therefore, under *Metro Renovation*, the petition for review was properly filed in the district court for Hall County, and that court has jurisdiction over the subject matter of this action.

While not disputing the applicability of *Metro Renovation* or the fact that the first adjudicated hearing in this case was held in Hall County, appellees urge us to create an exception to the rule applied in *Metro Renovation* by holding that where the agency conducts a subsequent hearing and has the power to receive additional evidence before issuing its final order, the site of the last hearing should be "the county where the action is taken" for purposes of § 84-917(2)(a). We decline to do so. Our construction of the statute in *Metro Renovation* provides a party with a clear statement of where to file a petition seeking

judicial review of an administrative action. We see no reason to complicate compliance with the rule by grafting unnecessary exceptions upon it. We, therefore, reverse the judgment of dismissal entered by the district court for Hall County and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NORTHERN BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. DUANE J. DOWD, APPELLANT, AND RAY L. GUSTAFSON, APPELLEE.

562 N.W.2d 378

Filed April 24, 1997. No. S-95-1059.

1. **Contracts: Guaranty: Words and Phrases.** A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
2. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.
3. **Guaranty: Principal and Surety: Liability.** The liability of a guarantor for the debt of the principal can be no greater and no less than that of the principal.
4. **Judgments: Appeal and Error.** Generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.

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

J. Patrick Green for appellant.

Steven J. Woolley, of Polack, Woolley & Troia, P.C., for appellee Northern Bank.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The plaintiff-appellee, Northern Bank, seeks to recover under an agreement by which the defendant-appellant, Duane J. Dowd, and the defendant-appellee, Ray L. Gustafson, under-

took to guarantee "payment of any principal and interest due and payable on the [collateral] promissory note" which is the subject of *Northern Bank v. Pefferoni Pizza Co., ante* p. 321, 562 N.W.2d 374 (1997), hereafter referred to as *Northern I*. The district court granted Northern's motion for summary judgment as against both Dowd and Gustafson. Dowd alone thereafter appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in so ruling. We, on our own motion, removed the matter to our docket and now reverse the judgment of the district court and remand the cause for further proceedings.

A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984). Stated otherwise, a guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults. *Murphy v. Stuart Fertilizer Co.*, 221 Neb. 767, 380 N.W.2d 631 (1986).

Some courts draw a distinction between the terms "surety" and "guarantor." See, e.g., *Howell v. Commissioner of Internal Revenue*, 69 F.2d 447 (8th Cir. 1934) (explaining that liability of guarantor is secondary, while liability of surety is original, and that surety is bound by same agreement which binds principal, while guarantor is bound by own independent undertaking), *cert. denied* 292 U.S. 654, 54 S. Ct. 864, 78 L. Ed. 1503. We, however, have used the terms interchangeably. See, e.g., *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992) (applying surety rules in determining liability under guaranty agreement); *Gaspar v. Flott*, 209 Neb. 260, 307 N.W.2d 500 (1981) (describing party who signed guaranty as guarantor or surety); *Midstates Acceptance v. Voss*, 189 Neb. 411, 202 N.W.2d 822 (1972) (describing party guaranteeing payment as surety or guarantor).

We have written that 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 princi-

> pal. *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. It is of the essence of the surety's contract that there be a valid obligation.*" . . .
>
> Inherent in the existence of any surety relationship is the requirement that the principal owe some obligation. The liability of the surety for the debt to the holder of the obligation *is no greater and no less than that of the principal.*

(Emphasis in original.) *Sawyer v. State Surety Co.*, 251 Neb. 440, 444-45, 558 N.W.2d 43, 47 (1997).

Thus, the liability of a guarantor for the debt of the principal can be no greater and no less than that of the principal. Dowd can have no greater obligation under his agreement to guarantee payment of the promissory collateral note to which the agreement refers than does Pefferoni Pizza under the note as the maker thereof.

Inasmuch as *Northern I* reversed the summary judgment in Northern's favor on the note, it necessarily follows that the summary judgment herein in favor of Northern must also be reversed. As observed in *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 610, 521 N.W.2d 906, 907 (1994): "Generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it."

Accordingly, as noted in the first paragraph hereof, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARDEE REUTZEL, APPELLEE, V. RAY REUTZEL, APPELLANT.

562 N.W.2d 351

Filed April 24, 1997. No. S-95-1225.

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. **Divorce: Motions for New Trial: Time.** A motion for new trial in a dissolution action must be filed within 10 days after the decree or judgment is rendered.
3. **Judgments: Records: Time: Words and Phrases.** A rendition of judgment occurs when the court makes an oral pronouncement in open court and accompanies that pronouncement with a notation on the trial docket or, in the alternative, when some written notation of the judgment is filed in the records of the court.
4. **Motions for New Trial: Records.** A motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.
5. **Motions for New Trial: Appeal and Error.** A trial court must rule on a motion for new trial before an appeal can be perfected.
6. **Motions for New Trial: Time.** When a motion for new trial is filed, the timeframe in which to initiate an appeal is controlled by Neb. Rev. Stat. § 25-1912(2) (Reissue 1995).
7. **Motions for New Trial: Appeal and Error.** A notice of appeal filed before a judgment on a motion for new trial is entered has no effect.
8. **Case Overruled.** To the extent that *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979), is inconsistent with Neb. Rev. Stat. § 25-1912(2) (Reissue 1995), it is hereby overruled.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Frontier County, JOHN J. BATTERSHELL, Judge. Judgment of Court of Appeals affirmed.

Blaine T. Gillett, of Ruff, Nisley & Lindemeier, for appellant.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Ray Reutzel appealed a district court determination of his divorce proceeding. The Nebraska Court of Appeals determined it did not have jurisdiction in the matter because appellant's notice of appeal was filed prematurely. The appeal was therefore dismissed on October 17, 1996, pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 1996). We granted appellant's petition for further review and affirm the decision of the Court of Appeals.

BACKGROUND

Appellant and Mardee Reutzel, appellee, were married on June 30, 1979. Appellee filed for divorce, and trial was had on August 10, 1995. Ultimately, the district court awarded custody of the couples' three minor children to appellee in addition to $800 per month child support, nominal alimony, and various property. The district court also awarded appellee attorney and witness fees. Appellant was awarded the couples' trucking business but was required to pay $21,164 to appellee to adjust the difference in the net value of the property divided. This property division was set out in detail in the court's docket on October 6, with the actual decree filed on October 27.

Appellee filed a motion for new trial and order nunc pro tunc on October 13. A telephonic hearing was had on this motion on October 31. Appellant filed a notice of appeal concerning the divorce decree on November 3. The district court ruled on appellee's motion as evidenced by an order filed on November 15. Appellant did not file another notice of appeal after this date.

The Court of Appeals, on its own motion, held that appellant's notice of appeal was filed before the district court entered its judgment on appellee's motion for new trial and order nunc pro tunc and was therefore premature and thus ineffective pursuant to Neb. Rev. Stat. § 25-1912(2) (Reissue 1995). We granted appellant's petition for further review.

ASSIGNMENT OF ERROR

In his petition for further review, appellant's sole assigned error is that the Court of Appeals erred in concluding it did not have jurisdiction over his appeal.

Pursuant to an order from this court, appellant also briefed the merits of this case and contends the district court erred in (1) ordering him to pay child support when he was incarcerated at the time of trial, (2) awarding him less than an equitable share of property, and (3) awarding appellee attorney and witness fees.

STANDARD OF REVIEW

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 Joshua M. et*

al., 251 Neb. 614, 558 N.W.2d 548 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997).

ANALYSIS

The parties have extensively briefed the jurisdictional issue with regard to appellant's filing a notice of appeal in this matter. Because our ultimate determination is one concerning the timeliness of his filing, we begin our jurisdictional analysis with an examination of appellee's filing of a motion for new trial and order nunc pro tunc insofar as it bears directly on the filing requirements for appellant's notice of appeal.

TIMELINESS OF APPELLEE'S MOTION

Following the trial, the district court made a docket entry setting forth its decision in detail on October 6, 1995. Seven days later, on October 13, appellee filed a motion for new trial and an order nunc pro tunc. The actual divorce decree, however, was not filed in the district court until October 27, some 14 days after appellee's motion was filed. Thus, our first inquiry is whether appellee's motion was effective.

A motion for new trial in a dissolution action must be filed within 10 days after the decree or judgment is rendered. Neb. Rev. Stat. § 25-1143 (Reissue 1995); *Smith v. Smith*, 225 Neb. 93, 402 N.W.2d 688 (1987). A rendition of judgment occurs when the court makes an oral pronouncement in open court and accompanies that pronouncement with a notation on the trial docket or, in the alternative, when some written notation of the judgment is filed in the records of the court. Neb. Rev. Stat. § 25-1301 (Reissue 1995); *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). An examination of the bill of exceptions reveals that there was no oral pronouncement of a judgment at the August 10, 1995, trial. That being the case, we conclude that the judgment was rendered on the date the divorce decree was filed, October 27, thereby making appellee's motion for new trial premature. However, a premature filing of a motion for new trial is not necessarily fatal.

A similar situation was addressed in *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979). There, the district court announced its decision on November 28, 1977, but the actual

divorce decree was not signed and filed until December 6. A motion for new trial was filed by the wife on December 5. This court rejected the husband's argument that the motion was a nullity because it was filed prematurely, stating:

> We now hold that a motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.

Id. at 141-42, 277 N.W.2d at 578.

The record in the instant case reflects that a docket entry detailing the trial court's determination was entered on October 6, 1995, with directions that a copy be sent to each party. Appellee's motion for new trial and order nun pro tunc relates specifically to "orders entered by the court in its Decree dated October 6, 1995." As noted above, the decree was subsequently filed on October 27. This decree mirrors the October 6 docket entry in all respects. We conclude that appellee's motion for new trial was "effective" within the dictates of *Pfeiffer*.

Timeliness of Appellant's Notice of Appeal

Having concluded that appellee's motion was effective, we note that a trial court must rule on a motion for new trial before an appeal can be perfected. *Smith v. Smith*, 246 Neb 193, 517 N.W.2d 394 (1994). Moreover, when a motion for new trial is filed, the timeframe in which to initiate an appeal is controlled by § 25-1912(2). See *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). Section 25-1912(2) provides:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial . . . and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) . . . of this subsection. *When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the entry of the order*

> *ruling upon the motion shall have no effect, whether filed before or after the timely filing of the motion. A new notice of appeal shall be filed within the prescribed time from the ruling on the motion.* No additional fees shall be required for such filing.

(Emphasis supplied.)

Was appellant's notice of appeal filed before the entry of the district court's ruling on appellee's motion for new trial? The record in the instant case reveals that a telephonic hearing was had on appellee's motion for new trial on October 31, 1995. There being no written transcript of these proceedings, we cannot determine whether an oral pronouncement of judgment was made at the hearing. Regardless, there exists no docket notation of the decision. That being the case, we must conclude that the ruling on the motion was rendered on the date on which the order was filed. See, *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). As noted above, the court's order ruling on appellee's motion was filed on November 15, 12 days *after* appellant's notice of appeal was filed. Because appellant filed his notice of appeal before appellee's motion for new trial was disposed of, the appeal must be considered premature.

Appellant nevertheless argues that his notice of appeal is valid based upon prior decisions of this court. In *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979), we addressed a situation in which a notice of appeal was filed after the trial court had announced its decision on a motion for new trial but before the judgment was rendered. Similar to our holding in *Pfeiffer*, we held that

> a notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.

Dale Electronics, Inc., 203 Neb. at 137, 277 N.W.2d at 574.

We subsequently expanded this rule into the criminal context in *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). In that case, a defendant filed a notice of appeal before a judgment sentencing him was entered. Applying the rule enunciated in *Dale Electronics, Inc.*, we concluded that this premature appeal became effective upon the rendition of judgment against him.

Subsequent to our decision in *Dale Electronics, Inc.* but before our decision in *McDowell*, the Legislature amended § 25-1912, adding what is currently subsection (2). Set forth above, this subsection explicitly states that whenever a motion for new trial is filed, no appeal can be filed until a judgment on the motion is entered. Indeed, the statute specifically states that any appeal filed before such a ruling "shall have no effect." See, also, *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993) (filing of notice of appeal ineffective under § 25-1912(2) where motion for new trial pending). To the extent that *Dale* has been superseded by § 25-1912(2), it has no effect.

Remaining, however, is the continued validity of *McDowell*. Appellant argues that *McDowell*, decided after the amendment of § 25-1912, requires us to declare his premature filing of appeal valid. We disagree. A close examination of *McDowell* reveals that unlike in the instant case, there was no motion for new trial. As such, there was no need to refer to the requirements set forth in § 25-1912(2) which deal with the filing of an appeal when a motion for new trial has been filed. The difference in the procedural makeup of *McDowell* and the case before us makes *McDowell* inapplicable.

Appellant's notice of appeal was filed before judgment was entered on appellee's motion for new trial. Because § 25-1912(2) states that such premature filings "shall have no effect," the Court of Appeals correctly dismissed this appeal for want of jurisdiction.

AFFIRMED.

ROBERT E. DYER, APPELLANT, V. HASTINGS INDUSTRIES, INC., AND CNA INSURANCE COMPANIES, APPELLEES.

562 N.W.2d 348

Filed April 24, 1997. No. S-96-398.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
2. ____: ____. The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act.
4. **Workers' Compensation: Words and Phrases.** In all workers' compensation cases, an accident shall be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Dallas D. Jones, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIKES, D.J.

LIKES, D.J.

Robert E. Dyer appeals from an order of affirmance on review by a Nebraska Workers' Compensation Court review panel affirming the trial court's dismissal of Dyer's action to recover workers' compensation benefits for mental depression that arose concurrent to his employment with Hastings Industries, Inc. We affirm.

ASSIGNMENT OF ERROR

Restated, Dyer contends that the trial court erred by failing to find he was entitled to workers' compensation benefits for the

mental depression that arose during the course of his employment with Hastings.

STANDARD OF REVIEW

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

FACTS

Dyer began working for Hastings on April 29, 1959. Hastings is insured by CNA Insurance Companies. Dyer held a nonmanagement position in Hastings' shipping, receiving, and warehouse division. His duties included comparing freight invoices to deliveries, shuttling parts from the warehouse to the manufacturing area, and assisting with inventories. Over time, Dyer ascended to the position of group leader.

During 1991, the then 61-year-old Dyer began to experience headaches, loss of sleep, and loss of appetite. Dyer attributed these conditions to job stress.

At about the same time, Hastings hired a new manager, Gordon Flowers. Flowers became Dyer's immediate supervisor. Flowers instituted policy changes in the shipping and receiving division that affected the manner in which Dyer was to perform his work.

After Hastings hired Flowers, Dyer made several recording errors in his receiving ledger. Hastings took note of Dyer's errors and notified him that future errors would not be tolerated. Then, on May 4, 1992, citing Dyer's errors, Hastings demoted Dyer, reducing his pay by 50 cents an hour and removing him from the group leader position.

On May 7, 1992, management asked Dyer to shuttle parts to the floor, assist with United Parcel Service delivery, and begin preparations for an inventory. This was not the first time Dyer

had been asked to perform each of these duties. The record reflects that Hastings' manager, Richard Peck, told Dyer, "You've got to get it done." Dyer, who believed management was intentionally attempting to overwhelm him, responded, "Well, I can't do it all."

Dyer took medical leave from Hastings because of the depression he contends he experienced as a result of the events of May 7, 1992. At that time, Dyer described himself as emotionally upset, unstable, and disgruntled. He testified that he felt worthless and rejected, experienced memory loss, and entertained suicidal and homicidal thoughts.

Dr. Reynaldo de los Angeles examined Dyer shortly thereafter. In his report, Dr. de los Angeles wrote that Dyer's "depression is work-related" and that his "emotional problems were definitely related to the conditions of his place of employment."

Although Hastings had not asked Dyer to leave, he tendered his resignation on May 12, 1993. Thereafter, on June 17, Dyer filed suit in the Workers' Compensation Court, seeking workers' compensation benefits for the depression that arose during the course of his employment with Hastings. In his petition to the trial court, Dyer contended that on or about May 1, 1992, he suffered "personal injuries in an accident arising out of and in the course of his employment with . . . Hastings . . . ." Although the specific nature of the accident is not detailed in Dyer's petition, he contended that

> *the accident resulting in personal injuries occurred when* [*Dyer*] *was exposed to severe harassment* by his supervisors at work. Said harassment was so severe that no reasonable person should be expected to endure it, and it has resulted in severe depression and adjustment disorder with depressed mood, which has manifested itself objectively in the form of loss of appetite, loss of sleep, and homicidal ideation.

(Emphasis supplied.) Dyer also contended that his depression left him unable to work and forced him to seek continuing medical attention.

Hastings answered that any disability Dyer suffered did not result from an accident arising during the course of his employment.

On September 20, 1995, following a hearing, the workers' compensation court found that Dyer "experienced severe transient depression as a result of the circumstances of management scrutiny . . . ." However, the court dismissed Dyer's petition with prejudice because Dyer failed to satisfy his evidentiary burden to establish a compensable claim under Nebraska's workers' compensation laws.

On appeal, a three-judge Workers' Compensation Court review panel affirmed the trial court's decision. Dyer appealed to the Nebraska Court of Appeals, and we removed the appeal to this court pursuant to the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the caseloads of the Court of Appeals and this court.

ANALYSIS

In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act. See Neb. Rev. Stat. § 48-151 (Reissue 1993). See, also, *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). In addition, § 48-151(2) provides, in relevant part, that in all workers' compensation cases, an "accident shall be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Thus, whether Dyer satisfied his burden of proving a compensable workers' compensation claim is at issue before this court.

The trial judge of the Workers' Compensation Court found that Dyer's depression resulted from mental stimulus rather than physical trauma. During cross-examination, Dyer himself admitted that his depression was not the product of an accident but resulted, instead, from management harassment.

It is undisputed that Dyer suffers from the unfortunate consequences of depression. However, after examining all of the evidence, the trial court concluded that Dyer's depression was

the product of "the circumstances of management scrutiny and his termination" from employment rather than the product of an accident or occupational disease arising out of his employment with Hastings. Under our standard of review, there is sufficient evidence to support the trial court's factual conclusion. Therefore, under the record, it cannot be said that the trial court's verdict was clearly wrong.

Accordingly, the decision of the review panel of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. PRICE, APPELLANT.

562 N.W.2d 340

Filed April 24, 1997. No. S-96-510.

1. **Convictions: Appeal and Error.** On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition.
2. **Records: Appeal and Error.** In reviewing the decision of a lower court, an appellate court considers only evidence included within the record.
3. ____: ____. It is incumbent upon the 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.
4. **Trial: Rules of Evidence.** Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
5. **Criminal Law: Juries.** A jury may consider evidence of a person's voluntary flight soon after the occurrence of a crime as evidence of a person's guilt.
6. **Juries: Discrimination: Proof.** In order to establish a prima facie case of a violation of the Sixth Amendment right to a jury pool representing a fair cross section of the community, the defendant must show the following: (1) The group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
7. **Homicide: Lesser-Included Offenses.** In Nebraska, there are no lesser-included offenses to the crime of felony murder.
8. **Homicide: Lesser-Included Offenses: Jury Instructions.** When an information charges a defendant with felony murder, it charges only murder in the first degree; it

is error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or guilty of manslaughter.

9. **Homicide: Intent: Presumptions.** The critical difference between felony murder and first degree murder is that the underlying felony takes the place of the intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Steven J. Lefler, of Lefler & Franklin Law Office, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

WRIGHT, J.

The appellant, James E. Price, was convicted of felony murder and use of a firearm in the commission of a felony in connection with the death of Curtis Patterson. Price was sentenced to life imprisonment for the felony murder and 5 to 10 years' imprisonment for the use of a firearm in the commission of a felony.

SCOPE OF REVIEW

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

FACTS

On July 22, 1995, Patterson and Melvin Walton drove to the home of Jobina Lloyd. Patterson remained in the car while Walton went to the door. As Walton stood on the porch, a van pulled into the driveway behind Walton's car. There were eight men in the van, including Tim Badgett, Matthew Lathan, Daron

Hunter, Vincent Peavy, Demetrius Gibbs, Terril Martin, Kenneth Martin, and Price. Lathan was driving the van, which he parked in such a manner that Walton's car could not be backed out of the driveway.

Walton testified that five men jumped out of the van, each displaying a gun. One of the men forced Patterson out of Walton's car and into the van by placing a gun to his head. One of the men told Patterson that if he "didn't shut up he was going to kill him right there." Witnesses identified Hunter as the man who forced Patterson from the car at gunpoint. After Patterson was forced into the van, two men jumped into Walton's car.

Lloyd testified that one of the men stood in the street in front of her house, holding what looked like a shotgun. This man yelled at the people on the porch to go into the house and shut the door. Other witnesses identified this man as Price and stated that he was carrying an AR-15 rifle. The driver of Walton's car pointed a gun at Walton and told him to get back on the porch. Walton was not able to identify any of the five men because they all had some form of mask covering their faces. Hunter and Terril Martin identified Price as the driver of Walton's car.

Hunter followed Patterson into the van and held a small pistol in his lap. Kenneth Martin sat at the back of the van behind Patterson and also displayed a gun. Gibbs testified that Kenneth Martin pushed and bullied Patterson and told him that he might lose his life.

Evidently, the group decided to take Patterson to a dirt road near 49th and Kansas Streets. Price and Terril Martin followed the van in Walton's car. When the van and the car reached the dirt road, the people in the van jumped out. The group then took boxes, a stereo, and other items from the car.

At that point, Patterson was forced to lie on his stomach between the two vehicles. Price stood over Patterson with his rifle pointed at Patterson. Hunter demanded that Patterson tell him where Hunter's property was and who had stolen the property. Hunter kicked Patterson in the leg and kicked dirt on him. Others, including Price, then began kicking Patterson.

After they finished removing things from Walton's car, the group could not get the van started, and several members began to walk away from the scene. Gibbs stated that he had started to

walk toward Badgett's house when he heard a gunshot. He looked back and saw Price standing 10 to 12 feet from the car and holding a gun. Later, Gibbs saw Price and Terril Martin crossing a field, and he asked Price if they had killed Patterson. Price stated he thought he had killed Patterson, because when he knocked on the trunk, Patterson did not say anything.

Badgett testified that Hunter and Price placed Patterson in the trunk of the car and that Badgett subsequently heard a shot come from Price's gun. When Badgett looked back, he saw Price's gun pointing at the car. According to Badgett, Gibbs arrived at Badgett's house within 5 or 10 minutes and informed him that Patterson was dead. About 10 minutes later, Price and Hunter arrived at Badgett's house. When Hunter asked Price "why he did that," Price responded that he did it because "[h]e thought [Hunter] wanted him dead." Badgett stated that Price then began handing out money and that "he asked us what was wrong with us? Hadn't we ever killed anybody?"

Hunter testified that at the scene of the shooting, Patterson got out of the van, and someone told him to get on the ground. Patterson then lay on the ground while some members of the group kicked him and kicked dirt onto him. Hunter stated that the group was trying to scare Patterson so that he would comply with Hunter's demand to tell him where Hunter's property was located. While this occurred, Price was still displaying the AR-15 rifle. Patterson told the group he would take them to Hunter's property and pled with them not to hurt him. Hunter stated that he believed Patterson would have taken the group to Hunter's property. However, Price told the members of the group that they could not be seen driving through the neighborhood with Patterson and insisted that Patterson be put in the trunk of the car. At that time, Price had the keys to the car. He opened the trunk, and Patterson climbed in.

Hunter testified that after Patterson climbed into the trunk, he got into the driver's seat and began backing the car to turn it around. Terril Martin was in the front passenger's seat, and no one else was near the car. Hunter was talking to Patterson, when he heard a gunshot on his side of the car. He then saw Price standing behind the car with the rifle. After the gunshot, Patterson did not speak again.

After driving the car to his grandmother's house, Hunter found a bullet hole in the trunk. He then drove to a location near a schoolyard, where he found Price. Hunter testified that he confronted Price and told him that Patterson "didn't deserve to die like that. Over some stupid shit." Hunter testified that Price replied, "Fuck it. It's over with." Price then discussed taking the car to Glen Cunningham Lake to get rid of it. Price got into the car with some other members of the group and left. Hunter and Lathan left in Hunter's car, and eventually, Hunter went to another house, where he found the others. At that point, Price told Hunter that he had placed the car behind an apartment complex and that he had set the car on fire.

A jury found Price guilty of felony murder and use of a firearm in the commission of a felony. He was sentenced to life imprisonment for the felony murder and 5 to 10 years' imprisonment for the use of a firearm in the commission of a felony.

ASSIGNMENTS OF ERROR

Price assigns the following errors: (1) The trial court erred when it prevented Price from participating effectively in his own defense by ordering him to remain in a security belt during the trial; (2) the court erred when it answered a question directed at a witness during cross-examination by defense counsel; (3) the court erred when it permitted the prosecution to present evidence that was highly prejudicial and not relevant; (4) the court erred when it impaneled a jury that was less than 5 percent African-American, thereby denying Price a trial by a jury of his peers; (5) the court erred when it did not give jury instructions on second degree murder, manslaughter, kidnapping, or robbery alone; (6) the court erred when it allowed coperpetrators to testify after they had invoked the Fifth Amendment privilege at their depositions, thereby denying Price's Sixth Amendment right to confront witnesses; and (7) the evidence was insufficient to support the convictions.

ANALYSIS

Security Belt

Price alleges that the trial court prevented him from participating effectively in his own defense by ordering him to remain in a security belt during the trial. The security belt allegedly

would produce an electric shock if the judge or a member of the sheriff's department so ordered. Price claims the threat of this shock restricted his ability to participate in his own defense.

We do not address this assignment of error because there is no evidence in the record that Price was required to wear a security belt during the trial. In reviewing the decision of a lower court, an appellate court considers only evidence included within the record. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996). It is incumbent upon the 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. *Id.*

Statement by Trial Court

Price argues that the trial judge erred when he answered a question directed at a witness during cross-examination by defense counsel. During cross-examination, Badgett was asked if he knew whether his testimony would determine what his sentence would be. Badgett responded "no." The judge stated: "I can assure — That question's improper. I can assure you he does not know. Nobody knows. I don't even know."

Price's counsel requested a mistrial, arguing that the judge's response to the question had improperly tainted the jury. The request for a mistrial was overruled. In his brief, Price argues that the judge's comments in the presence of the jury were clearly prejudicial and invaded the province of the jury by interposing an opinion and answering a question directed toward a witness.

In *State v. Rodriguez*, 244 Neb. 707, 709, 509 N.W.2d 1, 3 (1993), this court found prejudicial error when the trial judge, in response to defense counsel's claim that a police officer sitting at the prosecution table was coaching a testifying witness, stated: " 'No, he wasn't. I was watching him.' " We held that an appellate court must examine the particular circumstances of the case to determine whether the judge's behavior was so prejudicial to the substantial rights of the party as to merit a reversal.

In *Rodriguez*, the witness' credibility was crucial. He was the only witness who could connect Rodriguez to the crime. Cross-examination of the witness was essential to discredit him.

During cross-examination, the defense claimed that the police officer was coaching the witness. The judge flatly stated that no coaching had occurred. We found under these circumstances that the judge's comments had prejudiced Rodriguez' case because the comments bolstered the credibility of the prosecution's only witness.

In the present case, however, the judge's statement did nothing to enhance the credibility of Badgett as a witness. Badgett had made a "deal" regarding his sentence in exchange for his testimony. He testified that he did not know whether his testimony would determine what his sentence would be, and the judge concluded that such a question was improper. Further comment by the judge was unnecessary and should not have been made, but under these circumstances, such comments were clearly not prejudicial to Price. The court was merely stating that this was a matter for the court to decide.

Evidence of Flight

Price argues that the trial court erred by allowing evidence that he left Omaha prior to the issuance of a warrant for his arrest. Price claims that the prejudicial effect of this evidence outweighed its probative value and that it should have been excluded pursuant to Neb. Rev. Stat. § 27-403 (Reissue 1995). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). Price argues that the fact that he left Omaha had no probative value because he returned to Omaha voluntarily prior to his arrest.

The record established that Price, Hunter, and Kenneth Martin went to Lincoln shortly after the murder of Patterson and remained there for about a week. The three then traveled to North Carolina. A jury may consider evidence of a person's voluntary flight soon after the occurrence of a crime as evidence of a person's guilt. See *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993). We find this assignment of error to be without merit.

Jury of Peers

Price argues that he was denied a trial by a jury of his peers because the venire panel and the jury included only one African-American. In *State v. Jones*, 246 Neb. 673, 522 N.W.2d

414 (1994), we held that in order to establish a prima facie case of a violation of the Sixth Amendment right to a jury pool representing a fair cross section of the community, the defendant must show the following: (1) The group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Price has failed to establish that the representation of African-Americans in venires from which Douglas County juries are selected is unfair and unreasonable in relation to the number of such persons in the community. Price admits that such selections are made randomly by computer. Cf. *State v. Jones, supra.*

Price claims the State systematically excludes African-Americans from the jury selection process by asking whether a potential juror is so strongly opposed to the death penalty that he or she could not be fair or impartial. As a preliminary matter, Price has not presented any evidence substantiating his claim that African-Americans and non-African-Americans have divergent views on capital punishment. Nonetheless, even if Price had presented such evidence, it would not advance his argument that the venire panel was corrupt under *Jones*. *Jones* prohibits the systematic exclusion of distinctive groups based upon the racial, religious, gender, or ethnic identity of that group relative to the balance of the community. By definition, the exclusion of persons from a venire panel on the basis that they oppose the death penalty in principle is an exclusion which has nothing to do with their racial identity. Accordingly, *Jones* is not implicated.

Moreover, we have consistently held that exclusion of a person from a first degree murder venire panel is permitted on the basis that potential jurors are opposed to the application of the death penalty. See, *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985). This assignment of error is without merit.

INSTRUCTIONS ON LESSER-INCLUDED OFFENSES

Price argues that the trial court erred by not giving jury instructions on second degree murder, manslaughter, kidnapping, or robbery alone, as requested by Price. During the trial, Price's counsel presented evidence which indicated that Price did not plan or intend to kidnap Patterson. Based on this evidence, Price argues that he was entitled to an instruction on second degree murder and manslaughter because these crimes are lesser-included offenses of felony murder.

In Nebraska, there are no lesser-included offenses to the crime of felony murder. See *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). When an information charges a defendant with felony murder, it charges only murder in the first degree; it is error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or guilty of manslaughter. *Id.*

In his supplemental brief, Price relies on *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996). In that case, the Eighth Circuit found that the refusal of Reeves' proposed instructions on second degree murder and manslaughter violated *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

We find that *Reeves* is inapplicable to the case at bar. As noted by the Eighth Circuit in *Reeves*, in Nebraska, the critical difference between felony murder and first degree murder is that the underlying felony takes the place of the intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony. *Reeves* found nothing "necessarily unconstitutional" with the definition of mental culpability required in Nebraska for a felony murder conviction. 102 F.3d at 984. However, the Eighth Circuit concluded that "the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life." *Id.*

In *Reeves*, the court limited its opinion to those felony murder cases where the defendant is subsequently sentenced to death. Since Price was not sentenced to death, *Reeves* clearly

does not apply, and we decline to extend any relief to Price on the basis of *Reeves*.

Testimony by Coperpetrators

Price argues that the trial court erred by allowing his coperpetrators to testify after they had invoked the Fifth Amendment at their depositions. He argues that the witnesses' refusal to testify at their depositions violated his right to confrontation under the Sixth Amendment.

In *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995), two codefendants invoked their Fifth Amendment privilege against self-incrimination at their scheduled depositions prior to Brunzo's trial. Brunzo argued that because the court did not compel the two witnesses to present themselves to be deposed, the court incorrectly permitted such witnesses to testify at trial. We held that under the circumstances, the fact that the witnesses had invoked the privilege against self-incrimination at their scheduled depositions did not mean that the State could not call them as witnesses at trial once they elected to testify.

Here, Price does not effectively articulate how his Sixth Amendment rights were infringed upon under the circumstances. Price does not establish how his right to confront and cross-examine these witnesses was denied him at trial, and Price does not state how prior knowledge of the witnesses' trial testimony would have assisted in the preparation of his defense. Price's counsel knew in advance that the coperpetrators would testify and had received a copy of each individual's taped statement. Price also had a copy of the police officers' narrative reports of their interviews with each of the coperpetrators. Also, when Price learned that the witnesses would testify at trial, he did not move for a continuance in order to depose them. Price does not claim that he was prevented from cross-examining these witnesses at trial or that the witnesses refused to testify during cross-examination. We find this assignment of error to be without merit.

Sufficiency of Evidence

Price argues that the evidence presented was insufficient to support his convictions. On review, a criminal conviction must be sustained if the evidence, viewed and construed most favor-

ably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

Price points to inconsistencies in his coperpetrators' descriptions of what happened. However, the facts, taken in the light most favorable to the State, are sufficient for a finder of fact to conclude beyond a reasonable doubt that Price participated in Patterson's kidnapping and that Patterson was killed during the kidnapping.

Walton testified that as he stood on the porch of Lloyd's house, the van in which Price was riding pulled up behind his car. The van was parked in such a manner that there was no way his car could have been backed out of the driveway. Walton then saw five men jump out of the van. One of the men approached Walton's car and forced Patterson out of the car and into the van while holding a gun to his head. After Patterson was forced into the van, two of the men jumped into Walton's car. The group then drove away with Patterson in the van, and the two men took Walton's car and followed the van. Hunter and Terril Martin testified that Price was the driver of Walton's car.

When the group reached a dirt road near 49th and Kansas Streets, Patterson got out of the van and was instructed to lie on his stomach between the van and Walton's car. Price stood over Patterson with an AR-15 rifle pointed at him while the others in the group kicked Patterson, attempting to scare him. Patterson then submitted to Hunter's demand that he take the group to recover Hunter's property. At that point, Price told the others to put Patterson in the trunk of the car. Whether Patterson voluntarily climbed into the trunk or was forced into it is not determinative. Price, who was armed with a rifle, demanded that Patterson get into the trunk, and Patterson complied.

There is evidence that once Patterson was in the trunk, Price fired a shot into the trunk, and that Price believed Patterson was dead because he did not hear Patterson when he knocked on the trunk. There is also evidence that Price admitted killing

Patterson. After the group determined that Patterson was in fact dead, Price participated in a discussion regarding the need to get rid of the car, and Price set the car on fire.

There is also evidence that Price participated in the robbery which resulted in Patterson's death. While Hunter forcibly removed Patterson from Walton's car, Price stood in front of Lloyd's house armed with an AR-15 rifle and repeatedly instructed Walton to stay on the porch. After Hunter removed Patterson from Walton's car, Price got into the car and took it from the scene. This is sufficient evidence from which a jury could find beyond a reasonable doubt that Price committed robbery against Walton.

From the evidence described above as to the underlying felonies of kidnapping and robbery, there is also sufficient evidence to support Price's conviction for use of a firearm to commit a felony.

CONCLUSION

For the reasons set forth herein, we affirm the judgments of conviction and sentences of the district court.

AFFIRMED.

LAURENCE J. HANIGAN AND ANN HANIGAN, HUSBAND AND WIFE, APPELLEES, V. RAYMOND P. TRUMBLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRY J. BROCKMAN, APPELLEE, AND MARY JANE BROCKMAN, APPELLANT.

562 N.W.2d 526

Filed May 2, 1997. No. S-95-564.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust is an equity action.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. However, where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Trusts: Property: Title: Equity.** A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.

4. ____: ____: ____: ____. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment.
5. **Actions: Trusts: Equity: Proof.** An action to impose a constructive trust is an equity action, and the party seeking the remedy of a constructive trust has the burden to establish a constructive trust by clear and convincing evidence.
6. **Trusts: Property: Equity: Parties.** A court is required to trace the property of a constructive trust, if possible, through whatever mutations and impress a trust thereon in the hands of a third party, unless such third party is in the position of a bona fide purchaser for value without notice, or has changed his or her position thereby so as to give rise to an equitable defense against the plaintiff.
7. **Trusts: Property.** Where money is the asset upon which the trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.
8. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
9. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
10. **Trusts: Property: Fraud.** A fraudulent transfer on its own will not support the imposition of a constructive trust on the transferred property.
11. **Trusts: Property: Fraud: Debtors and Creditors.** As to fraudulent transfers, a court does not impose a constructive trust on the transferred property precisely because the lack of tracing will not justify the exclusive ownership rights that a constructive trust entails. The court instead sets aside the fraudulent transfer and does so only as to such creditors as attack it.

Appeal from the District Court for Douglas County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Charles F. Gotch and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Jerrold L. Strasheim, Timothy V. Haight, and Mary Leiter Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees Laurence J. Hanigan and Ann Hanigan.

WHITE, C.J., WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

WRIGHT, J.

The district court imposed a constructive trust in favor of Laurence J. Hanigan and Ann Hanigan upon a house owned by

Mary Jane Brockman and ordered her to convey to the Hanigans her title and interest in said house. Mary Jane appeals.

SCOPE OF REVIEW

An action to impose a constructive trust is an equity action. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. However, where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

FACTS

This action relates to a series of loans made by the Hanigans to Terry J. Brockman in connection with the construction of the Brockmans' house. The Brockmans acquired title to the lot on which the house in question was built on October 10, 1988, as joint tenants. A warranty deed was filed on October 28 with the register of deeds for Douglas County.

Laurence and Terry had been friends since they met at college in 1973. Laurence became a radiologist and practiced in Carroll, Iowa. Terry became a certified public accountant and lawyer in Omaha, Nebraska, and had his own radio talk show regarding taxes and investments.

Terry was entrusted with the Hanigans' legal, tax, business, and investment matters. Terry gave them advice about investments, pension and profit-sharing plans, and the loans which are the subject of this action. Terry prepared their tax returns, quarterly tax estimates, and wills. He also did their estate tax business and financial planning and performed other miscellaneous services. Terry billed the Hanigans annually for his services.

Although the Hanigans did not know it, the Brockmans' financial situation was not secure. Although from 1982 to 1988, Terry was apparently successful in his work for major accounting firms, at all times during that period, the Brockmans owed

more in debt than their annual income. Much of this debt was charged on credit cards. In March 1989, Terry resigned his position at the accounting firm he worked for in the wake of a professional negligence suit and started his own business. His gross revenue from private practice totaled $9,084 in 1989, $13,738 in 1990, and $33,170 in 1991. The Hanigans' expert witness testified at trial that at all times between 1985 and 1993, Terry's liabilities exceeded his assets.

In the summer of 1988, the Brockmans decided to buy or build a new house in the $300,000 price range. On November 3, 1988, the Brockmans signed a proposal for construction of a house at a price of $289,500, making the total of the lot plus the anticipated cost of construction $349,500. Construction began in January 1989. After the last payment was made to the builder in August 1989, the Brockmans moved into the house.

Laurence testified that on June 27, 1989, Terry asked him what he planned to do with some money Terry knew the Hanigans had to invest. As was his custom, Laurence asked Terry for advice. Terry allegedly advised the Hanigans to make an interim construction loan to him for the house.

Based on this advice, eight loans were made by the Hanigans to Terry. Except for the last note, each of the notes bore an interest rate of 14 percent. In exchange, Terry provided the Hanigans with eight promissory notes, which are described as follows:

Date	Amount	Purpose
6-27-89	$37,000	House Construction
7-21-89	43,000	House Construction
8-23-89	25,000	House Construction
10-11-89	20,000	House
3-23-90	35,000	Not Indicated
1-17-91	28,000	Not Indicated
9-3-91	8,000	Not Indicated
2-16-93	25,000	Not Indicated

The notes were not secured by a mortgage and were not signed by Mary Jane.

It was Laurence's understanding that all of the notes except for the last two were to finance construction. However, the record reflects that only $96,352.43 of the $221,000 loaned to

Terry could actually be traced to the construction of the house and that many of the loans were made after construction was completed. Laurence testified that Terry had represented to him that all of the loans would be repaid as soon as Terry obtained permanent financing for the house.

Laurence did not begin to inquire about repayment of the loans until the last quarter of 1992. At that time, Terry allegedly told Laurence that he was checking around for a good interest rate for the permanent financing. When the loans were not repaid, Laurence continued to inquire about Terry's progress in obtaining permanent financing. Terry explained that the interest rate was too high and that he was waiting for a more favorable time to get the financing. On February 16, 1993, Terry finally agreed when Laurence told him that interest rates were about as good as they were going to get. However, Terry explained that he could not obtain permanent financing until his other bank loans were cleared up. Laurence testified that he then loaned Terry $25,000 because Terry told him that this amount would be enough to pay off Terry's other debts. However, Terry continued to put off acquisition of permanent financing.

Finally, when Laurence told Terry that he absolutely needed to be repaid in order to make a downpayment on the purchase of farmland for his parents and brothers, Terry told Laurence that it would be difficult to repay him at that time because of a recent bad investment. Still, Terry assured Laurence that he would be able to come up with some money through his pension or profit-sharing plan or by borrowing on his life insurance. This never came to fruition, and Terry eventually refused to talk to the Hanigans at all.

On May 14, 1993, the Hanigans commenced an action at law against Terry to recover on the notes. On May 19, Terry committed suicide, and the title to the house passed to Mary Jane. Following Terry's death, Raymond P. Trumble was appointed personal representative of the estate, and he was made a party defendant pursuant to a court order dated June 18. On January 12, 1994, the district court entered summary judgment in that case in favor of the Hanigans and against the personal representative in the amount of $330,010.08, with interest from and after November 30, 1993, at the rate of $79.96 per day.

The Hanigans also commenced this action in equity on May 14, 1993. On March 30, 1995, the district court entered judgment in favor of the Hanigans, finding that they were entitled to a constructive trust upon the residential property and that as beneficiaries of the constructive trust, they were entitled to collect from the property all principal and interest on the eight loans. The district court found that the principal and interest amounts were $357,996.08 as of November 15, 1994, plus additional interest which accrued at the rate of $79.96 per day. The district court further found that the personal representative had no right, title, or interest of any kind in the property and ordered Mary Jane to convey to the Hanigans the title to the property by quitclaim deed.

ASSIGNMENTS OF ERROR

Mary Jane makes the following assignments of error: The district court erred (1) in imposing a constructive trust on the house, (2) in determining that Mary Jane had sufficient knowledge of Terry's alleged wrongful conduct to support the imposition of a constructive trust, (3) in determining that the Hanigans had sufficiently traced their assets into the house to support the imposition of a constructive trust, (4) in imposing a constructive trust upon the full value of the house, (5) in failing to hold that the imposition of a constructive trust was barred by the Hanigans' failure to take reasonable action with regard to their dealings with Terry, and (6) in failing to determine that the Hanigans' claims were barred by the doctrine of laches.

ANALYSIS

Constructive Trust

Mary Jane argues that the district court erred in imposing a constructive trust, because the Hanigans failed to establish the elements necessary to impose a constructive trust. In particular, she asserts that the Hanigans failed to establish wrongdoing on her part and failed to trace sufficient proceeds of the alleged wrongdoing to the house.

A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the prop-

erty. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his acquisition or retention of the property would constitute unjust enrichment. *Id.*

An action to impose a constructive trust is an equity action, and the party seeking the remedy of a constructive trust has the burden to establish a constructive trust by clear and convincing evidence. *Id.* Since this is an appeal of an equity action, we try factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. See *id.*

The record establishes by clear and convincing evidence that Terry fraudulently obtained from the Hanigans $221,000, which is represented by the eight notes. Terry occupied a position of trust with the Hanigans, having performed professional services for them with regard to their legal, tax, business, and investment matters. The Hanigans made the loans to Terry pursuant to his advice to do so and his promise of repayment upon the acquisition of permanent financing, which he represented would be forthcoming. The Hanigans relied on Terry to prepare the promissory notes which he left unsecured and did not have Mary Jane cosign, even though she was a joint tenant of the house.

Loans totaling $188,000 were orally or otherwise represented to be for use as temporary construction financing. However, unbeknownst to the Hanigans, all but two of the loans were made after the construction costs had already been paid in full. Thereafter, an additional $8,000 was loaned for supposed medical expenses, and $25,000 was loaned to enable the Brockmans to obtain permanent financing, although there is no evidence that Terry ever attempted to obtain such financing. Terry also convinced the Hanigans to invest $99,400 in two joint ventures, which evidently never existed. The Hanigans testified that at the time the loans were made, they had no knowledge of the Brockmans' financial difficulties and no reason to believe that Terry would not pay back the loans as promised.

As the Hanigans' financial advisor, accountant, and attorney, Terry had a fiduciary relationship with the Hanigans and, under the circumstances, would not be entitled to hold and enjoy the property so obtained and represented. See *Brtek v. Cihal, supra.* However, the question presented is whether Mary Jane is entitled to hold and enjoy the property so obtained. The court is required to trace the property of a constructive trust, if possible, through whatever mutations and impress a trust thereon in the hands of a third party, unless such third party is in the position of a bona fide purchaser for value without notice, or has changed his or her position thereby so as to give rise to an equitable defense against the plaintiff. See, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *Meier v. Meyer*, 153 Neb. 222, 43 N.W.2d 502 (1950).

Although Mary Jane claims she had no knowledge of Terry's wrongful conduct, she does not argue that she is a bona fide purchaser for value. Whether Mary Jane participated in or had knowledge of the wrongdoing is irrelevant. Mary Jane would be unjustly enriched if permitted to retain the wrongfully taken property of another. See *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978).

Regardless, Mary Jane claims that the district court erred in imposing a constructive trust, because the Hanigans failed to trace the wrongfully taken money to the house. We agree that where money is the asset upon which the trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property. See *Arduin v. McGeorge*, 595 So. 2d 203 (Fla. App. 1992). See, also, *Estate of Russell*, 932 S.W.2d 822 (Mo. App. 1996); *Crestar Bank v. Williams*, 250 Va. 198, 462 S.E.2d 333 (1995); *McFarland v. McFarland*, 470 N.W.2d 849 (S.D. 1991); *Cox v. Waudby*, 433 N.W.2d 716 (Iowa 1988); *Philadelphia v. Mancini*, 431 Pa. 355, 246 A.2d 320 (1968).

The Hanigans admit in their brief that they are able to trace only $96,352.43, which includes $3,422.11 from the two bogus investments, to costs related to the construction of the house.

The district court, however, ordered that Mary Jane convey the entire property, valued at approximately $400,000.

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *D.K. Buskirk & Sons v. State, ante* p. 84, 560 N.W.2d 462 (1997). We conclude that in order to be entitled to the benefit of a constructive trust, the Hanigans' money must be traced into the property which is the subject of the trust. Therefore, we find that the Hanigans have a constructive trust in the property in the amount of $96,352.43 and that the district court erred in imposing a constructive trust in a greater amount.

We next address the Hanigans' argument that Mary Jane is estopped to deny that all the loans were used to finance construction of the house, because the Hanigans relied upon Terry's representations that the loans would be used for that purpose. Estoppel, agency, and privity were not sufficiently raised in the pleadings, and the district court did not pass on such issues. Therefore, we do not consider these issues. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996); *Kropf v. Kropf*, 248 Neb. 614, 538 N.W.2d 496 (1995).

Mary Jane argues that the Hanigans are precluded by principles of equity from taking advantage of the constructive trust because they failed to take measures to protect themselves. We find this argument to be without merit. Inadequacies with regard to the Hanigans' lack of self-protection are not properly a charge against them when the transactions arose in the course of a confidential and fiduciary relationship in which Terry was entrusted to give the Hanigans financial and legal advice.

As to the issue of laches raised by Mary Jane, we find no evidence that she changed her circumstances due to the failure of the Hanigans to pursue their remedies. Therefore, we likewise find no merit to this assertion.

Fraudulent Transfer

The Hanigans argue that even if we decline to uphold the constructive trust, we should affirm the district court's judgment because the transfer of title from Terry to Mary Jane was

in fraud of Terry's creditors. The Hanigans claim that even if tracing is required for the imposition of a constructive trust, tracing is not required for fraud where the fraud is a transfer to place property out of the reach of creditors. The Hanigans assert that one need only identify the fraudulently transferred property. Alternatively, the Hanigans argue that they are entitled to a decree voiding the transfers as fraudulent to the extent necessary to satisfy their claims.

Obviously, had Terry not conveyed the property in joint tenancy, the Hanigans would have been able to reach it pursuant to the judgment entered in the action at law on the eight promissory notes. However, a fraudulent transfer on its own will not support the imposition of a constructive trust on the transferred property. As to fraudulent transfers, the court does not impose a constructive trust on the transferred property precisely because the lack of tracing will not justify the exclusive ownership rights that a constructive trust entails. The court instead sets aside the fraudulent transfer and does so only as to such creditors as attack it. See *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980).

The Hanigans argue that Terry's act of placing title to the property in joint tenancy gratuitously transferred an interest to Mary Jane when he knew or believed that he had or would be incurring debts from the acquisition of the lot and construction of the residence which were or would be beyond his ability to pay. The Hanigans claim that the first fraudulent conveyance was the undivided one-half interest in the lot, which cost $60,000, and that each subsequent increase in the value of the house through payment to the builder constituted a fraudulent transfer to the extent of one-half of each progress payment. They argue that Terry's suicide, by effectuating Mary Jane's right of survivorship, constituted a fraudulent transfer of his remaining one-half interest in the house.

We find that Terry's act of placing the title in joint tenancy was a fraudulent transfer as to the Hanigans. The joint tenancy deed was recorded in October 1988. The Nebraska Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1988), which was in effect at the time of this conveyance, is therefore controlling. Section 36-606 stated:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he or she will incur debts beyond his or her ability to pay as they mature, is fraudulent as to both present and future creditors.

The undisputed testimony establishes that the conveyance to Mary Jane was made without fair consideration. At all times during the years immediately before and after the conveyance, Terry was insolvent in that his assets at fair market value were less than his liabilities. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay the probable liability on his existing debts as they become absolute and matured. § 36-602. The record establishes that at the time of the conveyance, Terry intended to incur debts beyond his ability to pay as they matured.

Section 36-609 provided that "[w]here a conveyance . . . is fraudulent . . . such creditor . . . may . . . (a) [h]ave the conveyance set aside . . . to the extent necessary to satisfy his or her claim . . . ." Thus, the Hanigans are entitled to have the original conveyance of the property set aside. Since this conveyance is set aside, we need not consider subsequent additions to the value of the property or whether Terry's suicide effected a transfer of his interest in the property.

We next address the extent to which the Hanigans may levy execution upon the property. The Uniform Fraudulent Conveyance Act defined an "asset" which may be fraudulently conveyed as "property not exempt from liability for his or her debts." See § 36-601.

Without deciding these issues, we point out that Mary Jane may be entitled to claim a homestead allowance pursuant to Neb. Rev. Stat. § 30-2322 (Reissue 1995) or Neb. Rev. Stat. § 40-101 (Reissue 1993) and an exempt property allowance pursuant to Neb. Rev. Stat. § 30-2323 (Reissue 1995). Mary Jane's children may be entitled to a reasonable allowance for support pursuant to Neb. Rev. Stat. § 30-2324 (Reissue 1995). These issues have not been addressed by the district court, nor were they considered by the court when it found a constructive trust in all of the property. Thus, the property is still subject to Mary

Jane's possible right to assert such exemptions involving the property.

The Hanigans may levy against the property only to the extent that it is nonexempt. Therefore, the district court must consider what exemptions and other allowances have priority over the Hanigans' claims.

CONCLUSION

The judgment of the district court is affirmed in part and in part reversed and remanded with directions to reduce the amount of the constructive trust to $96,352.43 and to allow the Hanigans to levy against the property to the extent that it is not exempt.

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

CAPORALE, J., not participating.

LOUP CITY PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1 OF SHERMAN COUNTY, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE AND STATE TAX COMMISSIONER, M. BERRI BALKA, APPELLEES.

562 N.W.2d 551

Filed May 2, 1997. No. S-95-655.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
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: 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.
5. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.

6. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Administrative Law: Statutes.** Where a statute requires the adoption and promulgation of rules and regulations, the Administrative Procedure Act provides consequences for failure to adopt such rules and regulations.
8. **Schools and School Districts: Due Process.** A school district, as a creature and political subdivision of the state, is neither a natural nor an artificial "person" and, therefore, cannot invoke due process protection against the state.
9. **Administrative Law.** An administrative agency's decision does not conform to the law when its failure to adopt and promulgate statutorily mandated rules and regulations results in a procedure that substantially impairs an entity's ability to meaningfully participate in a hearing process.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

John M. Boehm and Mark L. Eurek, P.C., for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Loup City Public Schools, School District No. 1 of Sherman County (district), appeals the order of the Lancaster County District Court affirming the determination by the Nebraska Department of Revenue (department) of the adjusted valuation for agricultural land in Sherman County and certification of that value to the State Department of Education for use in determining state aid distributions. Because the department had not promulgated rules and regulations to guide the valuation process as required by Neb. Rev. Stat. § 79-3809 (Reissue 1994) (now amended and codified at Neb. Rev. Stat. § 79-1016 (Reissue 1996)), we conclude that the adjusted valuations determined and certified by the department for the district were not adopted in conformity with law. Accordingly, we reverse the order of the district court and remand the cause with directions.

FACTUAL BACKGROUND

In 1990, the Legislature enacted 1990 Neb. Laws, L.B. 1059, commonly referred to as the "Tax Equity and Educational

Opportunities Support Act." In part, the act required the department to calculate the adjusted valuation of each class of property in each county for purposes of determining state aid distribution to Nebraska school districts. Neb. Rev. Stat. § 79-3809 (Cum. Supp. 1990). The purpose of the adjustment mechanism was "to place all schools on an even playing field for purposes of equalization aid, so that no school or school children would be 'unfairly benefitted or penalized by assessment practices which are inconsistent across county lines.' " Bill Summary, L.B. 1290, Committee on Education, 93d Leg., 2d Sess. (Feb. 8, 1994).

In 1991, implementation of the valuation adjustment was delayed until March 1, 1994. Neb. Rev. Stat. § 79-3809 (Supp. 1991). In 1994, the Legislature enacted 1994 Neb. Laws, L.B. 1290, which amended § 79-3809 and required the department to "compute and certify to the State Department of Education the adjusted valuation of each district for each class of property in each such district . . . ." Neb. Rev. Stat. § 79-3809 (Reissue 1994). The adjusted valuation of each class of property was to reflect as nearly as possible the state aid value; for agricultural land, the state aid value was 80 percent of market value. *Id.* For 1994, the Department of Education was to carry out this process on or before July 1. *Id.* Section 79-3809 was also amended to require that the adjusted valuation be accomplished pursuant to "assessment practices established by rule and regulation adopted and promulgated by the Department of Revenue." *Id.* L.B. 1290, amending § 79-3809, was signed by the Governor on April 19, 1994, and became effective on April 20.

Pursuant to the mandate in § 79-3809, the department calculated adjusted valuations for each school district prior to July 1, 1994. These valuations were sent to each school district along with a cover letter, an "Explanation of Process" which outlined the steps taken to determine the adjusted valuations, and a flow chart graphically depicting these steps. The adjusted valuations calculated by the department included an assessment/sales valuation ratio for agricultural land in Sherman County of 50.96 percent.

On July 27, 1994, the district filed written objection to the adjusted valuations and requested a hearing. In a letter to the department dated August 1, 1994, the district requested, in part,

a copy of the rules and regulations used in determining the adjusted valuations and a copy of the rules and regulations related to the format of the hearing. No rules and regulations had been promulgated by the department, and thus, no rules were furnished to the district. A hearing was held before a hearing officer of the Tax Commissioner on August 10.

Dennis Donner, the administrator of the property tax division for the department, testified as to the processes utilized by the department in computing the adjusted valuations. For agricultural land, the department computed the ratio of assessed value to sale price for 1993 by reviewing sales submitted by the county assessors. The base for the prior year was obtained from the 1993 certificate of taxes levied as submitted by each district. The valuation ratio was applied to the base to establish the 80-percent level of value. Finally, the value of reported growth for new property within the district not accounted for in the prior year's certificate was added. Countywide sales information was used because with few exceptions (in which case district information was used), countywide information was the best information available. The department assumed that there was equalization within each county.

The district's experts, Norman L. Anders, a registered real estate appraiser, and Carolyn J. Sekutera, the Sherman County assessor, testified by separate affidavits. Each objected to the four 1993 sales relied on by the department and suggested a number of additional sales that ought to have been included. Each objected to the aggregate assessment/sales ratio calculated by the department because the sales used were 90 percent grassland, while grassland made up only 35 percent of the county's agricultural land and was undervalued relative to the other subclasses of agricultural land. Anders estimated that grassland was assessed at approximately 60 to 65 percent of its selling price, dryland at 65 to 75 percent, and irrigated land at 70 to 85 percent. Sekutera estimated that the ratio for grassland should be 60 to 70 percent, the ratio for dryland should be 65 to 75 percent, and the ratio for irrigated land should be 80 percent.

Sekutera also objected to the department's assessment/sales ratio because the sales utilized by the department spanned only a single year—i.e., 1993 sales. It was Sekutera's opinion that

the valuation process of utilizing only 1 year's sales unfairly skewed the assessment/sales ratio, particularly in a year like 1993 when Sherman County had a limited number of dryland and irrigated land sales and a large number of grassland sales.

The department conceded that it was possible that there was not equalization in agricultural land valuation within Sherman County and requested additional time at the hearing to submit further analysis utilizing a prior year's agricultural sales. On August 16, 1994, the department submitted a letter with further analysis utilizing 1992 agricultural sales. The department analyzed 12 agricultural land sales from 1992: 6 that were predominantly grassland, 5 that were predominantly irrigated land, and 1 that was dryland. The department adjusted each group of sales to 1993 values. This analysis resulted in an assessment/sales ratio of 48.93 percent. The district claimed to have made the same calculations as the department, but it came up with a substantially different assessment/sales ratio: 64.2 percent for the 1992 sales and 60.8 percent for the combined sales for 1992 and 1993.

The Tax Commissioner found that the department used the most current and reliable information available as well as direct information from the county assessors and that the utilization and application of countywide arm's-length sales transactions, by class of real property, to the assessed valuation of that property was an accurate indicator of the level of assessment for that class of property. The Tax Commissioner concluded that the presumption that the department has faithfully performed its duties in making tax assessments will not be overcome by a mere difference of opinion as to the adjusted valuation of the district or as to the methodology used to calculate such adjusted valuations. Accordingly, the Tax Commissioner affirmed the adjusted valuations as originally determined by the department.

The district appealed to the Lancaster County District Court. Finding that the district's evidence constituted a mere difference of opinion from that of the department, the district court concluded that the adjusted values adopted by the department were supported by the evidence and were adopted pursuant to law and affirmed the order of the Tax Commissioner. This appeal followed.

SCOPE OF REVIEW

A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997); *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997).

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. *Metropolitan Utilities Dist. v. Balka, ante* p. 172, 560 N.W.2d 795 (1997).

ASSIGNMENTS OF ERROR

Summarized and restated, the district asserts that the district court erred in (1) determining that the adjusted values were adopted pursuant to law when the department had failed to adopt rules and regulations to govern the valuation process and (2) determining that the adjusted values adopted by the department were properly determined and supported by evidence in the record.

ANALYSIS

The district asserts that the adjusted values were not adopted pursuant to law because the department had failed to adopt rules and regulations to govern the valuation process as required by § 79-3809. The statute provides in relevant part: "Establishment of the adjusted valuation shall be based on assessment practices established by rule and regulation adopted and promulgated by the Department of Revenue." § 79-3809(1). The district contends that such rules and regulations were necessary to set forth the procedures to be used by the department in developing the adjusted valuations. At the time of the hearing on August 10, 1994, the department had not adopted rules and regulations pursuant to § 79-3809.

The department points out that § 79-3809 was not amended to require rules and regulations until April 20, 1994, and that it required the department to certify adjusted valuations to the Department of Education by July 1. The department contends that the Legislature was aware of the time involved in promulgating rules and regulations and must not have intended to require the department to complete this process prior to performing its duties in May and June 1994. The department contends that it would have been absurd to expect it to promulgate rules and regulations in such a short time period.

We must determine whether the department was required to adopt rules and regulations prior to the time of the hearing on August 10, 1994, and, if so, whether the agency decision rendered in the absence of such adopted and promulgated rules and regulations conformed to the law.

We recognize that the timeframes established by the Legislature in which the department was required to both adopt rules and regulations and complete the process of valuation were very difficult, if not impossible, to meet and placed the department and school districts in a precarious position. However, 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. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997).

As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State ex rel. Shepherd v. Neb. Equal. Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). Thus, notwithstanding the limited amount of time the department was given to carry out its responsibilities, the plain language of the statute required the department to adopt and promulgate rules and regulations to regulate the valuation process.

In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *In re Interest of Rondell B.*, 249

Neb. 928, 546 N.W.2d 801 (1996). The Legislature clearly required the department to adopt and promulgate rules and regulations in order to carry out the procedural details of L.B. 1290 and to establish objective and uniform standards by which the adjusted valuation is to be determined. This court will not ignore the Legislature's plain mandate or render it meaningless.

We have held that where a statute requires the adoption and promulgation of rules and regulations, the Administrative Procedure Act provides consequences for failure to adopt such rules and regulations. See, *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994); *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). In *Abbott* and *Gausman*, the Department of Motor Vehicle's rules and regulations governing practice and procedure with regard to administrative license revocations had not been filed with the Secretary of State on the date of the arrests or on the date of the hearings. We held that Neb. Rev. Stat. § 84-906 (Reissue 1987) provided the consequences for failing to adopt rules and regulations: " 'No rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State.' " *Gausman*, 246 Neb. at 683, 522 N.W.2d at 420. We found that the department proceeded against the defendants using rules and regulations that it had failed to file with the Secretary of State. Accordingly, we held that the defendants' due process rights were violated even though they were provided with a detailed outline of how administrative license revocation operated and were given an opportunity to defend against the charges at a revocation hearing.

In the instant case, the district, as a creature and political subdivision of the state, is neither a natural nor an artificial "person" and, therefore, cannot invoke due process protection against the state. See *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990). Nevertheless, the district contends that it did not have notice of what standards, i.e., assessment practices, the department would utilize for purposes of establishing the adjusted valuation prior to the time of the hearing. The district claims that this is not a case where the operative statute sets forth specific standards, i.e., assessment practices, or detailed

procedures for conducting the adjusted valuation process for purposes of school aid distribution. Thus, the district asserts that the lack of established standards to be used by the department in developing the required adjusted valuations substantially impaired the ability of school districts to meaningfully participate in the hearing process. We agree.

Even though the department had constructed procedures and apparently established standards for the calculation of the adjusted valuations for the school districts in the state, the department had not adopted these rules or regulations pursuant to the rulemaking procedures set forth in the Administrative Procedure Act (see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994)), nor had the department filed any rules or regulations governing the adjusted valuation process with the Secretary of State pursuant to § 84-902. Thus, the department had no valid rules or regulations governing the calculation of the adjusted valuations in effect at the time of the hearing.

The types of problems that result from a lack of established standards and procedures are exemplified by the evidence in the instant case. At the August 10, 1994, hearing, the department conceded that it was possible that there was not equalization in agricultural land valuation within Sherman County, and 6 days after the hearing, the department submitted an additional analysis utilizing a prior year's agricultural sales. When analyzing the same agricultural land sales for 1992, the department's analysis resulted in an aggregate assessment/sales ratio of 48.93 percent while the district's analysis resulted in an assessment/sales ratio of 64.2 percent utilizing the same sales.

Because the department had not adopted and promulgated rules and regulations that would govern the process by which property would be valued in each school district, the district could not know with finality what rules the department had followed, nor could the district know with what rules it was required to conform. It naturally follows that a reviewing court is not able to make a determination whether an agency decision "conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable" when there are no valid rules or regulations governing the administrative proceeding. Administrative proceedings under such circum-

stances are, by definition, arbitrary and capricious, and do not comport with the law. We hold that the department's adjusted valuation determination did not conform to the law when its failure to adopt and promulgate statutorily mandated rules and regulations resulted in a procedure that substantially impaired the district's ability to meaningfully participate in the hearing process.

As a result, we conclude that the adjusted valuations determined and certified by the department for the district were not adopted in conformity with law. In light of this holding, we need not and do not consider the district's second assignment of error.

CONCLUSION

Accordingly, we reverse the order of the district court and remand this cause to the district court with directions to reverse the determination of the Tax Commissioner with directions to the Tax Commissioner to conduct further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BRAD J. MOORE, APPELLEE, V.
EGGERS CONSULTING COMPANY, INC., APPELLANT.
562 N.W.2d 534

Filed May 2, 1997. No. S-95-663.

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, correct conclusion irrespective of the determination made by the court below.
3. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
4. **Restrictive Covenants: Employer and Employee.** To determine whether a covenant not to compete is valid, the court must determine whether the restriction is reasonable in the sense that it is not injurious to the public, whether the restriction is

reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest, and whether the restriction is reasonable in the sense that it is not unduly harsh and oppressive on the employee.

5. ____: ____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
6. **Restrictive Covenants: Employer and Employee: Goodwill.** A finding that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete.
7. **Restrictive Covenants: Employer and Employee.** An employer does not ordinarily have a legitimate business interest in the postemployment preclusion of an employee's use of some general skill.
8. ____: ____. A covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.
9. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.
10. **Consumer Protection.** Neb. Rev. Stat. § 59-1602 (Reissue 1993) of the Consumer Protection Act prohibits unfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce.
11. ____. Neb. Rev. Stat. § 59-1607 (Reissue 1993) of the Consumer Protection Act states that the labor of a human being shall not be a commodity or article of commerce.
12. **Employer and Employee: Wages: Words and Phrases.** Neb Rev. Stat. § 48-1229(4) (Reissue 1993) of the Nebraska Wage Payment and Collection Act provides that wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.
13. **Employer and Employee: Wages: Time: Costs: Attorney Fees.** Neb. Rev. Stat. § 48-1231 (Reissue 1993) of the Nebraska Wage Payment and Collection Act provides that an employee having a claim for wages which are not paid within 30 days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney fees assessed by the court, which fees shall not be less than 25 percent of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney fees in such appellate court, which fees shall not be less than 25 percent of the unpaid wages.
14. **Legislature: Employer and Employee: Wages: Costs.** The Legislature has made it clear that employers who unsuccessfully subject employees to litigation to recover wages owed are subject to being taxed fees and costs.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

J Russell Derr, of Erickson & Sederstrom, P.C., for appellant.

Robert E. O'Connor, Jr., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIVINGSTON, D.J.

LIVINGSTON, D.J.

This is an action based upon an employment agreement between employer Eggers Consulting Company, Inc. (Eggers), and employee Brad J. Moore in which Eggers claims the district court erred in finding a covenant not to compete between the parties was unenforceable and in granting summary judgment to Moore under the Nebraska Wage Payment and Collection Act.

FACTS

Moore was employed by Eggers from May 1989 to August 18, 1992. Moore's job title was personnel recruiter, and his duties included solicitation of, consultation with, and placement of employee prospects. In August 1989, Moore was asked to sign an employment agreement, which applied retroactively from May 1989. The employment agreement defined the geographic area and time period in which employees agreed not to compete. The agreement defined the geographic area as the continental United States and the period of time restricted as 1 year. The area restricted was the general industry of data-processing personnel. At the time of this litigation, Moore was the sole proprietor of Regency Group, an executive recruiting firm in North Sioux City, South Dakota. With the Regency Group, Moore continues to place people with companies in the data-processing field.

On September 30, 1992, Moore sued Eggers for unpaid wages due in the amount of $16,343.72. This amount included a $1,500 bonus trip based on performance. Eggers counterclaimed, alleging that Moore had, inter alia, violated the terms of a covenant not to compete between the parties. Moore stated that in the year after he left Eggers, he contacted companies that he had dealt with while he was working for Eggers.

Eggers' counterclaim also included six other causes of action: interference with business relationships, breach of fiduciary duty, unfair competition, unfair and deceptive trade practices, misappropriation of trade secrets, and replevin. As to the first through fifth and the seventh causes of action, Eggers prayed that Moore pay liquidated damages in the amount of $100 per day for each day Moore allegedly had broken and continued to break the provisions of the covenant not to compete.

Eggers' fourth cause of action, unfair and deceptive trade practices, alleged that Moore's actions amounted to unfair or deceptive acts or practices in the conduct of trade or commerce in violation of the Consumer Protection Act. Moore filed a demurrer to this cause of action, claiming that the Consumer Protection Act, specifically Neb. Rev. Stat. § 59-1607 (Reissue 1993), excepts the labor of a human being as a commodity or article of commerce. The court granted Moore's demurrer, finding that the Consumer Protection Act excludes the labor of human beings and, therefore, that Eggers' fourth cause of action did not state a cause of action.

Moore filed a motion for summary judgment as to Eggers' seventh cause of action, alleging breach of the covenant not to compete. The court sustained Moore's motion, finding that the provisions of the employment agreement were overbroad and should not be enforced.

The matter was called for trial on June 6, 1995. At the pretrial conference, counsel stipulated that the lost wage claims, if Moore was entitled to recover, amounted to $16,343.72. The parties then agreed that none of the seven counts of Eggers' counterclaim remained for determination by either a jury or the court. Moore then made an oral motion for summary judgment for "wages" under the Nebraska Wage Payment and Collection Act. Eggers' counsel waived the statutory 10-day notice regarding the summary judgment motion. The court found that the Nebraska Wage Payment and Collection Act voided the employment agreement's definition of wages because the agreement was against public policy. The district court awarded Moore $16,343.72 in unpaid wages and $4,085.93 in attorney fees.

This appeal was originally filed in the Nebraska Court of Appeals. We transferred it to this court's docket pursuant to our

power to regulate the caseloads of the Court of Appeals and this court.

ASSIGNMENTS OF ERROR

Eggers claims the district court erred in (1) granting summary judgment in favor of Moore as to Eggers' cause of action seeking to enforce the covenant not to compete, (2) determining that Eggers did not state a cause of action pursuant to the Consumer Protection Act, (3) determining that the Nebraska Wage Payment and Collection Act was applicable to Moore's claim, and (4) awarding Moore unpaid wages.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997); *Doe v. Golnick*, 251 Neb. 184, 556 N.W.2d 20 (1996); *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996). 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 Muchemore, ante* p. 119, 560 N.W.2d 477 (1997); *Robertson v. School Dist. No. 17, ante* p. 103, 560 N.W.2d 469 (1997); *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997).

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996); *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

COVENANT NOT TO COMPETE

Eggers contends the district court erred in granting Moore's summary judgment motion as to Eggers' seventh cause of action in the counterclaim that alleges Moore violated the employment agreement's covenant not to compete. We disagree.

There are three questions asked to test the validity of a partial restraint on trade, such as a covenant not to compete:

> First, is the restriction reasonable in the sense that it is not injurious to the public? Second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest? Third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee?

Chambers-Dobson, Inc. v. Squier, 238 Neb. 748, 760, 472 N.W.2d 391, 399-400 (1991). Accord, *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). Because there is no evidence that enforcement of the covenant not to compete will be injurious to the public, our inquiry focuses on whether the covenant is no greater than reasonably necessary to protect Eggers in a legitimate interest.

"An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee." *Vlasin v. Len Johnson & Co.*, 235 Neb. at 454, 455 N.W.2d at 776.

> "To distinguish between 'ordinary competition' and 'unfair competition,' courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition."

Id. (quoting *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). Accord *Polly v. Ray D. Hilderman & Co., supra.*

The record reveals that Moore had substantial personal contact with Eggers' accounts, and consequently, he had the opportunity to appropriate customer goodwill. Therefore, Eggers had a legitimate business interest in customer goodwill that it is permitted to protect through the use of a legitimate covenant not to compete. See, *Vlasin v. Len Johnson & Co., supra*; *Polly v. Ray D. Hilderman & Co., supra.*

A finding that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete. See *Vlasin v. Len Johnson & Co., supra.* An employer does not ordinarily have a legitimate business interest in the postemployment preclusion of an employee's use of some general skill. *Chambers-Dobson, Inc. v. Squier, supra.* In the present case, Moore stated that Eggers did not provide a lot of materials for him and that his client information was obtained through his own diligence by reading business directories and telephone books in the library. Eggers does not have a legitimate business interest in precluding Moore's use of such general skills.

Having determined that Eggers has a legitimate interest in protecting customer goodwill, it remains necessary for us to determine if the covenant not to compete is no greater than reasonably necessary to protect this interest.

In the present case, the covenant not to compete contains the following restrictions:

> Employee covenants and agrees that he shall not directly or indirectly at any time for one year after termination of his employment for any reason:
>
> . . . .
>
> (b) Solicit or accept any business opportunity with any client of the employer with whom the employee worked or called upon or *has knowledge of* because of his employment by the employer during the last three (3) years of employment with the employer, where such business opportunity would be in any way competitive with the employer.

> (c) Solicit or accept any business opportunity or arrange any placement in the area of executive and employee recruiting in the specific business area specified in Exhibit B.

(Emphasis supplied.) Exhibit B defines the business area as the continental United States.

A covenant not to compete may be valid only if " 'it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.' " *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455, 455 N.W.2d 772, 776 (1990) (quoting *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987)). In the present case, the covenant not to compete seeks to restrict Moore from soliciting or working for any client of Eggers that Moore had knowledge of, including those that Moore did not personally work with and had never met. The covenant also seeks to protect Eggers against any type of competition from Moore, protection to which Eggers is not entitled. While we acknowledge that Eggers is protected against Moore's competition by improper and unfair means, it is not entitled to protection against ordinary competition. See *Vlasin v. Len Johnson & Co., supra.*

Further, the covenant not to compete prohibited Moore from working in employee recruitment anywhere in the continental United States. While employed with Eggers, Moore focused on placements in the Midwest. Eggers has proposed no rationale for such a broad geographical restriction. Without any explanation for the reason that the geographical restriction should include the continental United States, it is clear that preventing Moore from working anywhere in the continental United States is greater than is reasonably necessary to protect Eggers' legitimate business interest.

Because the covenant in this case attempts to prohibit Moore from entering into business with anyone he had knowledge of, rather than just Eggers' clients with whom Moore did business and had personal contact, and from working in employment recruitment anywhere in the continental United States, we find that the scope of the covenant is greater than is reasonably necessary to protect Eggers' legitimate interest and is, therefore, unreasonable and unenforceable.

Eggers contends that the employment agreement is a collection of severable provisions and, therefore, argues that even if the court finds some of the provisions of the employment contract unenforceable, it should sever the unenforceable provisions and enforce the remainder of the agreement. A review of the employment agreement reveals that it is not a compilation of severable provisions and that, in essence, Eggers is requesting we reform the employment agreement in order that it comply to the law. We decline to do so. It is " 'not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.' " *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 339, 518 N.W.2d 652, 656 (1994) (quoting *Vlasin v. Len Johnson & Co., supra*). See, also, *Polly v. Ray D. Hilderman & Co., supra.*

Consumer Protection Act

Eggers next assigns as error the district court's finding that Eggers failed to state a cause of action pursuant to the Consumer Protection Act (Act), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1993). Eggers claims that Moore was engaging in unfair practices in the conduct of his employment recruiting business in violation of the Act. Section 59-1602 of the Act prohibits unfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce. The district court sustained Moore's demurrer to this cause of action, finding that the Act specifically excepts the labor of a human being as a commodity or article of commerce.

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. *Memorial Hosp. of Dodge Cty. v. Porter*, 251 Neb. 327, 557 N.W.2d 21 (1996); *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). Section 59-1607 of the Act states that "[t]he labor of a human being shall not be a commodity or article of commerce." No interpretation is necessary to ascertain the meaning of this plain, direct, and unambiguous statute. Therefore, we agree with the district court and find that because

the Act excepts the labor of a human being, Eggers failed to state a cause of action in alleging that Moore violated the Act by engaging in his employment recruiting business.

NEBRASKA WAGE PAYMENT AND COLLECTION ACT

Eggers also claims as error the district court's determination that the Nebraska Wage Payment and Collection Act (Wage Act), Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1993), was applicable to Moore's claim. Moore's petition alleged that Eggers failed and refused to pay him and that Eggers owed him a total of $16,343.72—$14,843.72 in total commissions and $1,500 for a bonus trip. These sums were not paid to Moore within 30 days after the regular payday, as agreed to between the parties. Before the district court, Moore made an oral motion for summary judgment as to his wage claim, and the parties agreed that if Moore was entitled to recover any wages, the amount would be $16,343.72. The employee agreement states in part that the

> Employee shall be entitled only to those commissions which are due and payable on the final day of employment. A commission is due and payable upon collection of the fee from the client. No commission shall be paid to the Employee until such time as the client pays the commission and the Candidate begins employment. In the event of termination for any reason, the Employee shall not be entitled to any bonus, award, prize or other incentive payment which may be payable at any time after termination.

The Wage Act provides in part as follows:

> Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.

§ 48-1229(4).

The statute clearly states that wages include commissions on all orders on file with the employer at the time of termination.

In contrast, the employment agreement states that employees receive commissions only after such time as the client pays the commission and the candidate begins employment.

The language of the statute is clear; wages include commission on orders on file with the employer at the time of termination of employment. Eggers cannot circumvent the statutory definition of wages through its employment agreement. If an act is prohibited by statute, an agreement in violation of the statute is void. See *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959).

In the present case, Moore made placements during the months of July and August before leaving Eggers on August 18, 1992. The statute plainly defines the commission on these accounts as wages due to Moore. Because these commissions were on file with the employer on the date of August 18, 1992, the statute plainly defines them as wages due to Moore. We, therefore, agree with the district court and find that Moore is entitled to wages in the stipulated amount of $16,343.72.

Pursuant to § 48-1231, the district court awarded Moore 25 percent of his unpaid wages, the minimum attorney fees statutorily prescribed. Section 48-1231 provides in part as follows:

> An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

In accordance with the statute, we uphold the trial court's award of attorney fees and costs and determine that costs in this action are to be paid by Eggers. A fee in excess of the statutory

minimum is warranted in this case. This appeal involves a clearly unreasonable covenant not to compete, as well as the defense of multiple counterclaims. Eggers' argument that the covenant not to compete was reasonable borders on meritless, and Eggers' request that the court reform the covenant not to compete is in direct conflict with established precedent of this court. The Legislature has made it clear that employers who unsuccessfully subject employees to litigation to recover wages owed are subject to being taxed fees and costs. Moore's attorney fees in the appellate court in the sum of $5,448, which is 33⅓ percent of the unpaid wages as previously determined by the trial court, are assessed against Eggers.

AFFIRMED.

JOAN KIME, APPELLANT, V. WILLIAM A. HOBBS, APPELLEE.
562 N.W.2d 705

Filed May 2, 1997. No. S-95-843.

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. **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.
4. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
5. ____: ____: ____. By stating "where the inference is clear," the Nebraska Supreme Court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.
6. **Employer and Employee: Independent Contractor.** In determining whether or not a worker is an employee, as distinguished from an independent contractor, there is no single test by which the determination may be made. Such a determination must be made from all the facts in the case.

7. **Agency: Parties.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
8. **Employer and Employee: Independent Contractor.** There are 10 factors which are considered in determining whether a person is an employee or an independent contractor: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
9. ____: ____. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
10. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
11. **Employer and Employee: Independent Contractor: Contracts.** Even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms.
12. **Negligence: Liability: Independent Contractor.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
13. ____: ____: ____. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
14. ____: ____: ____. One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.
15. ____: ____: ____. To impose liability on the employer of an independent contractor, the employer must have (1) supervised the work that caused the injury; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (3) had the opportunity to prevent the injury, but negligently failed to prevent the injury.
16. **Negligence: Liability: Independent Contractor: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
17. **Negligence: Independent Contractor.** The duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or

dangers, including work that is inherently dangerous in the absence of special precautions, is a nondelegable duty.

18. **Negligence: Employer and Employee: Independent Contractor: Livestock.** The transportation of cattle in a tractor-trailer under normal conditions is not an inherently dangerous activity such that it imposes a nondelegable duty on the employer of an independent contractor to ensure that the cattle are transported in a nonnegligent manner.
19. **Negligence: Liability: Employer and Employee: Independent Contractor.** An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care in selecting an employee, even if such employee is an independent contractor.
20. **Summary Judgment: Proof.** After the party moving for summary judgment has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

Appeal from the District Court for Cherry County: WILLIAM CASSEL, Judge. Affirmed.

M.J. Bruckner, of The Bruckner/Ballew Law Firm, P.C., and Bill Quigley, of Quigley, Dill & Quigley, for appellant.

C.J. Gatz, of Jewell, Gatz, Collins, Fitzgerald & DeLay, and Richard L. Spittler for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Plaintiff-appellant, Joan Kime, was seriously injured in a collision between the vehicle in which she was a passenger and a tractor-livestock trailer unit driven by Edward F. Yelli. Yelli owned the truck-tractor, and defendant-appellee, William A. Hobbs, a Holt County farmer-rancher, owned the livestock trailer. At the time of the accident, Yelli was hauling cattle for Hobbs. The district court entered summary judgment in favor of Hobbs, finding that there were no questions of material fact at issue, that Yelli was an independent contractor and not an agent of Hobbs, that Yelli was not engaged in an inherently dangerous activity such as to impose strict liability on Hobbs, and that Hobbs had not been negligent in hiring Yelli. Kime timely appealed the judgment of the district court, and we granted Kime's petition to bypass review by the Nebraska Court of Appeals.

I. FACTUAL BACKGROUND

On October 22, 1990, Kime was a passenger in a vehicle which was stopped facing south on U.S. Highway 83 north of Valentine, Nebraska. The driver of the vehicle, Betty Sullivan, was preparing to turn left into a farm driveway when her vehicle was struck from the rear by a tractor-livestock trailer unit being driven by Yelli. The collision killed Sullivan and produced injuries that resulted in permanent paralysis below the waist for Kime.

Yelli owned the tractor; the livestock trailer was owned by Hobbs. At the time of the accident, Yelli was hauling a load of cattle belonging to Hobbs from Hobbs' ranch near Valentine to Hobbs' feedlot east of O'Neill, Nebraska.

Hobbs was a large-scale farmer, rancher, cattle feeder, and cattle order buyer in north central and northeast Nebraska. The nature of Hobbs' business necessitated the use of a number of trucks and drivers to transport cattle. Hobbs owned approximately eight livestock trailers; however, Hobbs did not own any tractors with which to pull the trailer units. Therefore, he relied on a number of truckers in the Ewing, Nebraska, area to pull the trailers on an as-needed basis. Hobbs' son-in-law, Randy Hawk, served as the dispatcher for the trucking part of the business.

Hawk was responsible for dispatching trucks to haul Hobbs' cattle and cattle that Hobbs had order bought for other feedlots. When Hobbs needed trucks, he would call Hawk and let him know the number of loads of cattle. Hawk would find out what trucks were available by calling the drivers on a list he maintained. Once he found an available truckdriver, Hawk would advise the driver where and when to pick up the load.

Yelli started hauling for Hobbs in February 1990. Yelli owned a single truck-tractor, which he hired out for profit. He supplied the oil, gas, grease, maintenance, and repairs for his own truck. There was no written agreement between Hobbs and Yelli defining their relationship; however, both Hobbs and Yelli claimed in separate affidavits that it was their intention to establish an independent contractor relationship.

Hawk provided the drivers with a form on which to record their mileage. In October 1990, the drivers were paid approximately $1.40 per loaded mile for the most direct route between

the picking up and unloading points. Yelli testified that he took the route he wanted to take and that there was not a special route a driver was required to take. If a detour was necessary because a road was blocked or if the trucker drove around a weigh scale, the trucker was paid for the additional miles. Hobbs reimbursed the truckers for overweight tickets unless the ticket was the driver's fault. In addition, Hobbs reimbursed Yelli for weight tickets Yelli paid when he weighed loads of cattle, for work done on the trailers, and for washing out the trailers.

The drivers were paid twice each month. Yelli was paid nonemployee compensation during 1990, and Hobbs filed a Form 1099 with the Internal Revenue Service. Hobbs did not deduct Social Security, federal income tax, state income tax, or other payroll taxes from these payments. Yelli provided liability insurance on his truck; Hobbs provided collision coverage and licensing for his trailers.

Yelli had no authority to use Hobbs' livestock trailer other than to load Hobbs' cattle, take them to their destination, and unhook the trailer. However, Hawk and the driver could arrange to use the trailer to haul another rancher's cattle if the trailer was not being used or if they were waiting at a sale and a short haul was available. When a driver was unavailable to drive his or her own tractor, he or she could hire another driver to drive the tractor on hauls for Hobbs without requesting permission to do so.

A number of the other drivers on Hawk's list pulled cattle for Hobbs on a more regular basis than did Yelli. In October 1990, Yelli was driving for other people in addition to Hobbs. Yelli owned his own grain trailer and his own refrigeration trailer and, prior to the job at issue, had been hauling corn for another rancher. Yelli testified that he never turned down a grain-hauling job to wait for Hawk to call him to haul cattle for Hobbs. Yelli stated that it was more advantageous financially to use his own trailer to haul corn than to pull Hobbs' trailer to haul cattle. Between October 1 and 22, Yelli made four trips that were dispatched by Hawk.

Kime's second amended petition set forth three theories of liability: (1) that Yelli was the agent, employee, and servant of Hobbs; (2) that the transportation of a shifting load of cattle in

a loaded livestock trailer being pulled by a tractor is an ultrahazardous and dangerous activity, imposing on Hobbs a nondelegable duty to see that his trailer and cattle were transported in a nonnegligent manner; and (3) that Hobbs was negligent in hiring Yelli.

On September 26, 1994, Hobbs filed a motion for summary judgment. Following two evidentiary hearings, the district court found that there was no genuine issue as to any material fact, that Yelli was an independent contractor, that transportation of cattle in a livestock trailer being pulled by a tractor was not an inherently dangerous activity, and that there was no evidence Hobbs was negligent in hiring Yelli. Accordingly, the district court granted Hobbs' motion for summary judgment and dismissed Kime's second amended petition with prejudice. This appeal followed.

II. SCOPE 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. *Mapes Indus. v. United States F. & G. Co., ante* p. 154, 560 N.W.2d 814 (1997); *Robertson v. School Dist. No. 17, ante* p. 103, 560 N.W.2d 469 (1997). 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. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997).

III. ASSIGNMENTS OF ERROR

Kime assigns that the district court erred in (1) granting summary judgment in favor of Hobbs on the issue of whether Yelli was an agent of Hobbs, (2) granting summary judgment in favor of Hobbs on the issue of whether there was a nondelegable duty because Hobbs was engaged in an inherently dangerous activity, and (3) granting summary judgment in favor of Hobbs on the issue of whether Hobbs was negligent in hiring Yelli.

IV. ANALYSIS

1. Independent Contractor

Kime first assigns that the district court erred in finding that Yelli was an independent contractor as a matter of law and, therefore, erred in granting summary judgment in favor of Hobbs. Kime asserts that questions of fact remained as to Yelli's status as either an independent contractor or an agent of Hobbs, that the district court failed to view the evidence in the light most favorable to Kime, and consequently, that the district court should not have granted Hobbs' motion for summary judgment.

The issue we must decide is whether, based on the facts before us, Yelli is an independent contractor as a matter of law and, accordingly, whether the district court properly entered summary judgment in favor of Hobbs.

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. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *State Farm v. D.F. Lanoha Landscape Nursery*, 250 Neb. 901, 553 N.W.2d 736 (1996). Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. See, *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996); *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995). By stating "where the inference is clear," this court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom. *Pettit v. State, supra.* Thus, if neither the facts nor the inferences to be drawn from those facts are in dispute, the determination of Yelli's status should be made as a matter of law.

In determining whether or not a truckdriver such as Yelli is an employee, as distinguished from an independent contractor, there is no single test by which the determination may be made. Such a determination must be made from all the facts in the case. See *Larson v. Hometown Communications, Inc., supra.* Whether an agency exists depends on the facts underlying the

relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship. *Id.* Thus, while Yelli and Hobbs submitted affidavits that averred in conclusory terms their intention to create an independent contractor relationship, it is the underlying facts that we examine in order to determine the true nature of the relationship.

There are 10 factors which are considered in determining whether a person is an employee or an independent contractor: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Pettit v. State, supra.*

The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Id.* In examining the extent of the employer's control over the worker in this context, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed. An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done *only as to the result of the work and not as to the methods or means used.* *Id.* Even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms. *Larson v. Hometown Communications, Inc., supra.*

While Hobbs did exercise some control over the transportation of the cattle, this control was to ensure the provision of the end product that was contracted for: the conveyance of the cattle from the ranch to the feedlot for an agreed-upon price. Thus, the fact that Hobbs determined the time and place that the cattle were to be picked up and delivered and that he agreed to pay a set amount per mile for the shortest route between the two points, does not evidence control over the means and methods used in performing the work. Hobbs did not exercise control over the manner in which Yelli operated the tractor-trailer unit, did not control the route actually taken, and did not control who would actually drive the tractor, Yelli or someone hired by Yelli. Thus, the methods used to perform the work were not subject to the control of Hobbs.

The remaining factors also clearly indicate that Yelli was an independent contractor rather than an employee. Yelli was engaged in a distinct occupation or business. He owned his own tractor, a grain trailer, and a refrigeration trailer which he hired out for profit. Yelli supplied the instrumentality of the work, the tractor, and he provided the gas, grease, oil, maintenance, repairs, licensing, and insurance for the tractor. Accordingly, Yelli made decisions about what to haul for whom based on which jobs would yield the best return and did not haul solely for Hobbs. In addition, Yelli was paid for the jobs he completed, and Hobbs did not withhold taxes from these payments.

Therefore, even when viewing the evidence in a light most favorable to Kime, we conclude that the district court did not err in finding, as a matter of law, that Yelli was an independent contractor. Accordingly, this assignment of error is without merit.

2. Hobbs' Duties

Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994). There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's

work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Id.*

(a) Retention of Control

While Hobbs did not retain sufficient control over Yelli's work to subject him to liability for the acts of Yelli as an agent or employee, we must determine whether Hobbs retained some control over the relevant work and whether he is therefore liable for a failure to exercise reasonable care in the use of that control. Restatement (Second) of Torts § 414 at 387 (1965) provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

See, also, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

To impose liability on the employer of an independent contractor, the employer must have (1) supervised the work that caused the injury; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (3) had the opportunity to prevent the injury, but negligently failed to prevent the injury. See *id.* Kime clearly fails to meet the above criteria in the instant case. Having the right to control and supervise the work in this context implies having the ability to oversee and direct the manner in which the work which caused the injury is carried out. As we have already concluded, Hobbs had no control over the manner in which Yelli operated his vehicle. While Hobbs may have retained control over particular aspects of the transportation process, such as the time and place of pickup and delivery and the rate of payment, this supervisory control did not extend to the operation of the tractor-livestock trailer unit itself. Consequently, Hobbs did not supervise the relevant work and had no opportunity to prevent the conduct that led to the damages alleged in this case.

Accordingly, we conclude that Hobbs did not retain the type of control over the activities that led to the accident sufficient to subject him to liability.

(b) Inherently Dangerous Activity

Kime next asserts that the district court erred in determining as a matter of law that the transportation of cattle is not an inherently dangerous activity which would impose on Hobbs a nondelegable duty to see that his trailer and cattle were transported in a nonnegligent manner. Kime contends that even if Yelli is an independent contractor, Hobbs may not escape liability for Yelli's negligence because he was engaged in inherently dangerous work.

We must determine whether or not the transportation of cattle in a tractor-livestock trailer unit is an inherently dangerous activity such that it imposes a nondelegable duty on the employer of an independent contractor.

A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. *Parrish v. Omaha Pub. Power Dist., supra.* One such nondelegable duty is the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is inherently dangerous in the absence of special precautions. See, *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *Parrish v. Omaha Pub. Power Dist., supra*; the Restatement, *supra*, §§ 416 and 427. A special or peculiar risk is one that "differ[s] from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions." *Id.*, § 416, comment *d.* at 397. See, also, *Parrish v. Omaha Pub. Power Dist., supra.*

We have generally held that a motor vehicle is not an inherently dangerous instrumentality. *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976); *Christensen v. Rogers*, 172 Neb. 31, 108 N.W.2d 389 (1961); *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956). However, we have not specifically addressed whether the operation of a loaded tractor-livestock trailer unit presents a peculiar risk of danger.

Other jurisdictions have considered whether a loaded truck presents a peculiar risk so as to impose a nondelegable duty on

the employer of an independent contractor and have concluded that the risk that there will be a mechanical malfunction, that the truck will be overloaded, or that the independent contractor will exceed the speed limit are "ordinary" risks that arise in the normal course of the work and which require only "ordinary" precautions. See, *Ek v. Herrington*, 939 F.2d 839 (9th Cir. 1991) (holding that transportation of logs did not generally pose peculiar risk of harm); *Williams v. Tenn. River Pulp & Paper*, 442 So. 2d 20 (Ala. 1983) (holding that hauling of pulp timber does not constitute peculiar risk of harm). See, also, Restatement (Second) of Torts § 416, comment *d.* (1965). However, when a commodity such as several tons of logs is to be transported, the employer of an independent contractor may be subject to liability for failure to take special precautions to anchor it securely. *Ek v. Herrington, supra.* See, also, the Restatement, *supra* at comment *d.*

Kime makes no allegation that the cattle were improperly secured in the trailer. Rather, she alleges that Yelli was negligent in his operation of the unit in failing to keep a proper lookout, failing to have his vehicle under reasonable control, and operating his vehicle at an excessive rate of speed. These risks attendant to the operation of the vehicle are precisely the risks that the employer of an independent contractor is justified in presuming that the contractor will act to avoid. We hold that the transportation of cattle in a tractor-trailer under normal conditions is not an inherently dangerous activity such that it imposes a nondelegable duty on the employer of an independent contractor to ensure that the cattle are transported in a nonnegligent manner.

Accordingly, we determine that the district court did not err in finding that Hobbs was not engaged in an inherently dangerous activity which presented peculiar risks and that Hobbs, therefore, had no nondelegable duty to ensure that the cattle were transported in a nonnegligent manner.

(c) Negligent Hiring

Kime's third theory of liability is that Hobbs was negligent in hiring Yelli. Kime relies on our holding in *Greening v. School*

Dist. of Millard, 223 Neb. 729, 393 N.W.2d 51 (1986), that an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care in selecting an employee, even if such employee is an independent contractor. Kime contends that Yelli had a driving record which evidenced disregard for the safety of others on the highway, that Yelli's tractor had defective brakes, and that Yelli was classified as a high risk by the insurance industry.

Regarding the latter two allegations, the district court correctly determined that there was *no* evidence in the record to support Kime's contentions. The district court received into evidence Yelli's affidavit that affirmatively averred that his truck-tractor did not have defective brakes at the time of the accident. Yelli further averred in the affidavit that he had never been classified as a high-risk driver by the insurance industry and that he was insured by a standard liability insurance policy.

With reference to Kime's allegation that Yelli had a driving record which evidenced disregard for the safety of others on the highway, Kime points to Hobbs' deposition testimony that he had not checked the driving record of any of his "employees" prior to the accident. The district court had received into evidence Yelli's affidavit and driving abstract that showed Yelli had received five citations for speeding, one citation for violating a stop sign, and one citation for overloading his vehicle between the years 1987 and 1990. In his affidavit, Yelli averred that he had never been issued a citation for a serious traffic offense. In *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997), we stated that after the party moving for summary judgment has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

In the instant case, when viewing the evidence in a light most favorable to Kime, the district court correctly determined that Yelli's driving record did not evidence disregard for the safety of others and that no other facts demonstrated that Hobbs was negligent in hiring Yelli. Accordingly, this last assignment of error is without merit.

V. CONCLUSION

In accordance with the foregoing analysis, we conclude that the district court was correct in granting Hobbs' motion for summary judgment on all theories of recovery.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICK STUBBS, APPELLANT.
562 N.W.2d 547

Filed May 2 , 1997. No. 95-940.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Criminal Law: Crime Victims.** The initial step when determining whether Neb. Rev. Stat. § 28-386 (Reissue 1995) has been violated is to determine whether the victim was a vulnerable adult.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lincoln County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals affirmed.

Blaine T. Gillett, of Lincoln County Public Defender's Office, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

WHITE, C.J.

In the winter of 1992, Dale Edmisten was involved in an automobile accident while driving to Colorado to visit his niece, Janie Knickerbocker, for the holidays. During his visit, it appeared as though Edmisten was confused and experienced trouble walking. After staying with his niece, Edmisten was driven back home to his farmhouse, which was located 7 miles

from Sutherland, Nebraska. Edmisten had lived at that residence since 1918.

During the spring of 1993, Rick Stubbs, appellant, visited Edmisten on numerous occasions and would offer to purchase various items from Edmisten. There is evidence that Edmisten sold items to Stubbs on more than one occasion.

Edmisten testified that after a visit from Stubbs, Edmisten would notice that items such as tools would be missing from his home. Edmisten, however, could not identify which items were missing and did not see Stubbs actually take any of his property.

In March 1993, Knickerbocker visited Edmisten. While visiting her uncle, she observed that he could recall what had occurred in the past but had some difficulty with understanding what was occurring in the present. She noticed that Edmisten shuffled when he walked and that he had some difficulty moving. During that visit, Knickerbocker also noted items present in her uncle's home.

On March 26, 1993, Knickerbocker obtained power of attorney for both Edmisten's health and financial affairs. She testified that it appeared that Edmisten understood what he was signing.

While Knickerbocker at that time felt that Edmisten could not live by himself, she decided to postpone plans to put him into a nursing home until the end of May, and she returned to Colorado. Edmisten continued living by himself, cooking his own meals, dressing himself, and picking up his mail.

Knickerbocker returned to her uncle's home in May 1993. She noticed that several items which she had seen in March were now gone: an anvil, an oxbow, an Indian war ax, an antique dresser set, two trunks, a .22-caliber rifle, and a John Deere tractor. She then notified the county sheriff's office, reporting the items that were missing. Officer Mike Dye of the Lincoln County sheriff's office investigated the matter. Dye spoke to Stubbs, who allegedly said that he had spoken to Edmisten, that he had been to his house, and that he had purchased some items.

Stubbs was later charged by information on March 2, 1994. Specifically, Stubbs was charged with the knowing and intentional abuse of a vulnerable adult by exploitation. He was arraigned on April 11, and trial was held on March 21, 1995.

At trial, several witnesses testified as to the physical and mental health of Edmisten. Knickerbocker testified that Edmisten appeared confused after the accident in 1992, that he shuffled when he walked, that such movement was difficult, that he needed assistance in getting groceries, and that he had a poor diet, consisting mainly of milk.

Sandra Bay, a neighbor of Edmisten's, testified that Edmisten would drive his truck to his mailbox. According to Bay, Edmisten would sometimes misjudge the distance to the mailbox and veer slightly off the roadway. She also testified that Edmisten's physical health was deteriorating, that is, he was having a difficult time walking and moving very well.

Kimberly Eckhoff and Melvin Eckhoff, longtime family friends, often brought Edmisten food because it appeared that he was not eating very well. Kimberly Eckhoff cleaned Edmisten's house on one occasion. She noted that the house was a mess on that occasion and testified that Edmisten would shuffle as he walked. Melvin Eckhoff took Edmisten to the grocery store at least once a week after learning that store employees were worried that Edmisten was having a difficult time maneuvering through their store. Melvin Eckhoff would also take Edmisten to the bank.

Ray Seifer, another neighbor, testified that he saw Edmisten once or twice a week. He described Edmisten as not being very mobile and noticed that because of his age, Edmisten was having problems remembering things.

Dr. George Cooper, a family practitioner in North Platte since 1962, was called by the State as an expert witness. In July 1993, Dr. Cooper examined Edmisten. Dr. Cooper found that Edmisten's lungs were clear, that he had normal arterial and venous circulation, that he did not have a deficit such as paralysis, and that his blood pressure was normal. Dr. Cooper diagnosed Edmisten as being mildly senile and having vertigo and proprioception deficit, which is the loss of a sense of balance. He reported that Edmisten was both physically and mentally active without full awareness of the consequences. He also concluded that it was very likely that Edmisten could be considered a vulnerable adult.

When Edmisten was asked whether he lived independently, he testified that he did not live with anyone, cooked his own meals, dressed himself, watched television, took care of his bills, bathed himself, and did not have any medical problems for which he was taking medicine. When asked whether he was in pretty good health, Edmisten answered, "I thought so." Edmisten testified that he would know where he was and what he was doing.

Evidence was also submitted to demonstrate Stubbs' alleged exploitation of Edmisten. Knickerbocker stated at trial that a lot of her uncle's property had disappeared: an oxbow, an anvil, an Indian war ax, a dresser set, two trunks, quilts, and the John Deere 4630 tractor. Bay testified that she observed a red and white pickup being driven past Edmisten's house and onto his driveway several times one day when Edmisten was gone. In addition, Bay testified that she noticed that a considerable number of items had disappeared from Edmisten's workshop. Kimberly Eckhoff and her husband, Randy, also observed a red pickup being driven past Edmisten's home one day. Melvin Eckhoff mentioned that he noticed items missing from Edmisten's workshop.

Edmisten stated at trial that he thought items which he owned had been taken by Stubbs. He could not, however, list specifically what had been taken. Finally, Edmisten, as well as Knickerbocker and Bay, testified that they had never actually seen Stubbs wrongfully take property from Edmisten.

Evidence was introduced to the effect that the John Deere tractor was in a general state of disrepair. Several individuals testified as to the value of the tractor. The witnesses concluded that the value was somewhere between $5,500 and $11,000.

Edmisten testified that he did not remember offering to sell the tractor to Stubbs. To the contrary, Stubbs' mother testified that Edmisten told her that he wanted $3,500 for the tractor and would not accept anything less. It appears as though Stubbs' mother submitted a check to Edmisten for $3,500 in April 1993 on Stubbs' behalf.

At the close of the evidence, the court held that there was sufficient evidence to sustain a verdict on the "substantial . . . functional impairment" portion of the vulnerable adult statute. Later

on appeal, the State stipulated that the only issue was whether Edmisten suffered a "substantial functional impairment."

The jury found Stubbs guilty of abuse of a vulnerable adult, and he was subsequently sentenced. Stubbs appealed his conviction.

On appeal, the Nebraska Court of Appeals held that while the evidence supported a finding that Edmisten was physically and mentally aging, it did not support a finding that he suffered a substantial functional impairment which left him incapable of caring for himself or living independently. *State v. Stubbs*, 5 Neb. App. 38, 555 N.W.2d 55 (1996). The court also held that the evidence did not show that Stubbs took Edmisten's property by means of undue influence, breach of a fiduciary relationship, deception, or extortion. Finally, the court held that the State failed to show a nexus between Edmisten's impairment and the alleged exploitation. The court reversed the trial court's judgment and vacated Stubbs' conviction and sentence. The State then petitioned this court for further review.

The State contends that the Court of Appeals erred in (1) finding that the evidence presented at trial was insufficient to prove that Stubbs exploited Edmisten; (2) finding that the evidence presented at trial was insufficient to prove that Edmisten was a "vulnerable adult" as defined by Neb. Rev. Stat. § 28-371 (Reissue 1995); and (3) holding that the State must show a nexus between a vulnerable adult's impairment and the exploitation of a vulnerable adult when this showing is not required by the statute.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996).

The State argues that the Court of Appeals erred in holding that there was insufficient evidence to demonstrate that Edmisten was a vulnerable adult as defined by § 28-371. We disagree and affirm the Court of Appeal's decision with regard to this issue.

Stubbs was convicted under Neb. Rev. Stat. § 28-386(1) (Reissue 1995), which states that a "person commits knowing and intentional abuse of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be . . . (d) Exploited."

The initial step when determining whether such statute has been violated is to determine whether the victim was a vulnerable adult. A vulnerable adult is "any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian has been appointed under the Nebraska Probate Code." § 28-371. In the instant case, assessment of whether Edmisten could be considered a vulnerable adult is limited to a finding of whether he had suffered a substantial functional impairment as stipulated to by the State. Pursuant to Neb. Rev. Stat. § 28-368 (Reissue 1995), substantial functional impairment means a "substantial incapability, because of physical limitations, of living independently or providing self-care as determined through observation, diagnosis, investigation, or evaluation."

In this case, there is insufficient evidence to establish that Edmisten was incapable of living independently or providing self-care. Edmisten testified himself that he was living independently, cooking his own meals, bathing and dressing himself, paying his bills, and eating solid foods such as steak and pizza, and that he was in good health, experiencing no medical problems. Knickerbocker testified that she did not feel that it was necessary to move Edmisten into a nursing home until the end of May 1993. Dr. Cooper testified that Edmisten experienced no respiratory, circulatory, or heart problems and reported that his blood pressure was normal.

There is evidence that Edmisten was naturally aging. Such a process took a toll on Edmisten's body and mind. However, moving slowly and forgetting some things are not sufficient to support a finding that an individual is unable to live independently. Therefore, the State has failed to meet its burden of establishing that Edmisten suffered from a "substantial functional impairment." As a result, the State failed to adequately demonstrate that Stubbs violated § 28-386. For these reasons, the Court of Appeals was correct in vacating Stubbs' conviction

and sentence. Since the preceding analysis is dispositive of the instant case, the State's remaining assignments of error need not be addressed.

AFFIRMED.

CONNOLLY and GERRARD, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. WESLEY MASSEY, APPELLANT.
562 N.W.2d 542

Filed May 2, 1997. No. S-96-912.

1. **Postconviction: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
2. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
3. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Michael F. Maloney for appellant.

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

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

Wesley Massey appeals the district court's denial of his amended motion to vacate judgment and sentence, seeking postconviction relief from his 1983 convictions for felony murder and kidnapping. Massey was charged in two separate informations with felony murder and kidnapping. The matters were

consolidated for trial, and on May 6, 1983, a jury returned guilty verdicts on both counts. Massey was subsequently sentenced to life imprisonment for the murder and a concurrent term of 50 years' imprisonment for the kidnapping. On direct appeal, we affirmed the convictions and sentences. See *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984). Massey timely perfected this appeal from the denial of his request for postconviction relief.

SCOPE OF REVIEW

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996).

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996).

FACTS

At some point prior to the commission of the crimes involved in the instant case, Massey escaped from the Colorado State Penitentiary, where he was serving a sentence of life imprisonment plus 40 years. On the evening of May 23, 1977, Massey and Mary Larson were staying at the Ramada Inn located near 71st and Grover Streets in Omaha, Nebraska. Larson testified at trial that on the evening in question, she and Massey were short of cash. They devised a plan whereby Larson would make contact with a customer of the hotel and lure the customer into one of the rooms, where Massey would rob the customer.

Gary Damron was in the hotel lounge that evening. Larson approached him, and they shared a few drinks. When Damron left the lounge for a brief period, Larson met Massey in the hall and told him that she had found someone. Thereafter, Larson

and Damron went to the room where Larson and Massey were staying. Once Larson and Damron were in the room, Massey hit Damron over the head with a liquor bottle, which stunned Damron. Massey then pulled out a revolver and demanded money. When Damron resisted, Massey struck him in the head with the gun and Damron lost consciousness. Massey then took a $5 bill from Damron's pocket and a bracelet from his wrist.

When Damron regained consciousness, he was bleeding profusely. Massey ordered Damron to take off his clothes. Damron then took off his suit jacket, vest, and shoes. These items of clothing were recovered from the scene by police and identified by Larson at trial.

Larson stated that after Damron had removed his clothing, he insisted that he did not have any more money. As a result, a fight broke out between Massey and Damron. The struggle continued into the hallway, while Larson remained in the room. Larson stated that when Massey returned, he told her to get their belongings together. Massey remained in the room for a few minutes, complaining about the amount of blood on his clothing, and then left the room. As Larson left the room, she saw Massey and Damron struggling again in front of the elevator.

Keith Bjerk, a business acquaintance of Damron's, testified that he saw Damron stumble out of the elevator "looking like somebody had poured a can of red paint on his head." Damron shouted, "'Help me, Keith. This guy's trying to kill me.'" Damron attempted to get away from Massey, but was unsuccessful. Bjerk approached Massey, touched his shoulder, and said, "'Come on, man, this guy's had enough.'" Massey then hit Damron again, stuck the gun into Damron's side, and shot him. Bjerk fled into the hotel lounge, and as he went back into the lobby, he saw Massey leave the hotel. At trial, Bjerk identified Massey as the man who shot Damron.

Massey was not located for 1 or 2 days following the murder. At some point during that time, Massey convinced Richard Gilliam to give him a ride to where Massey's car was supposedly stalled. As the two were driving, however, Massey pulled a gun out from under his sweatshirt and forced Gilliam to drive him out of the state. Gilliam testified that Massey told him that he had shot the man at the Ramada Inn and told Gilliam the

details of what happened once Larson lured Damron into the room. Gilliam testified that Massey told him that once Damron bolted from the room, Massey chased him down the hall and into the elevator. When Massey saw people in the lobby, he figured he would get caught, so he shot Damron.

The pathologist who performed the autopsy testified that the primary cause of Damron's death was a gunshot wound to his chest. This type of wound was produced by a gun placed directly against the body before firing.

At trial, Massey admitted that he robbed and shot Damron. He also testified that he had previous convictions for several felonies. During direct examination by his counsel, Massey stated that he was currently serving a life sentence plus 40 years in the Colorado State Penitentiary.

A jury found Massey guilty of felony murder and kidnapping. He was sentenced to life imprisonment and a concurrent term of 50 years' imprisonment. On direct appeal, we upheld the convictions and sentences. Massey did not assign as error on direct appeal the conviction for kidnapping, and it is not addressed by Massey in his request for postconviction relief.

ASSIGNMENTS OF ERROR

Massey assigns two errors to the district court: (1) the court's finding that Massey's trial counsel was not ineffective for eliciting testimony prejudicial to Massey and (2) the court's finding that Massey's appellate counsel was not ineffective for failing to assign trial counsel's ineffectiveness as an error in Massey's direct appeal to this court.

ANALYSIS

In his first assignment of error, Massey alleges that his trial counsel's performance was deficient because during the course of Massey's direct examination, trial counsel elicited testimony from Massey that he had been convicted of four or five previous felonies and that he was currently serving a sentence of life plus 40 years in the Colorado State Penitentiary. Massey argues that a lawyer with ordinary training and skill in criminal law would not have elicited such prejudicial testimony from his own client, especially since the State would not have been permitted to elicit the same or similar testimony.

Massey contends that this testimony caused the jury to be less likely to believe him after hearing that he had been convicted of four or five felonies and was currently serving a sentence of life plus 40 years in Colorado. At trial, Massey's defense was that he committed two separate and unrelated offenses: robbery and manslaughter, not felony murder. Massey argues that in order for him to prevail at trial, the jury had to believe that Massey did not pursue Damron after he fled the hotel room and that Massey intended to leave the hotel room as soon as possible. Massey claims that the robbery was over once Damron left the hotel room and that the second altercation between Massey and Damron was a separate and distinct incident. Massey claims that his credibility was destroyed by trial counsel's deficient performance and that but for his counsel's deficient performance, the jury would have given greater weight to his testimony. Massey argues that if his testimony had been given its proper weight, there was a reasonable probability that the jury would have acquitted him of the felony murder charge.

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996).

We first address whether there is a reasonable probability that but for trial counsel's deficient performance, the result of the proceeding would have been different. When Massey committed robbery against Damron, the crime of robbery was defined as follows: "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery . . . ." See Neb. Rev. Stat. § 28-414 (Reissue 1975).

Massey admitted to the robbery and killing of Damron. His theory at trial was that the robbery had been completed before

the murder occurred. Massey now argues that because the robbery and the murder occurred in two separate episodes, he should not have been convicted of felony murder. We disagree.

In *State v. Bell*, 194 Neb. 554, 233 N.W.2d 920 (1975), Bell entered a gas station, and while the attendant was opening a garage bay more than 50 feet away, he picked up the station's cash register, put it in a companion's car, and then got into the car. The attendant saw Bell leaving with the cash register and pursued him, but did not catch Bell until after he and the cash register were already in the car. The attendant tried to get the cash register back by leaning into the car window, and he was struck and pushed by Bell.

On appeal, we considered when the taking of the cash register ended for purposes of determining whether Bell had used force in order to take the cash register. We noted that although Bell had already removed the cash register from the station, the robbery was not yet complete because an escape with the stolen property was an integral part of the robbery. We cited *People v. Anderson*, 64 Cal. 2d 633, 414 P.2d 366, 51 Cal. Rptr. 238 (1966), with approval:

> "In this state, it is settled that a robbery is not completed at the moment the robber obtains possession of the stolen property and that the crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . .
>
> "Accordingly, if one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, as defendant did here, the crime of robbery has been committed."

Bell, 194 Neb. at 556, 233 N.W.2d at 922.

In the case at bar, the robbery was still in progress while Massey was struggling with Damron in the hallway and on the elevator. We note that Damron yelled to Bjerk that Massey was trying to kill him. Gilliam testified that Massey told him that Massey had chased Damron into the elevator and subsequently shot him. At this point, Massey had not yet escaped, and the robbery was ongoing.

A reasonable inference regarding what occurred in the elevator is that Massey was attempting to escape from the hotel with Damron's property during the struggle. A jury could certainly find beyond a reasonable doubt that Massey killed Damron in an attempt to escape with Damron's property and that Massey was attempting to escape while in possession of Damron's property when he shot Damron.

Thus, because Massey's distinction between the robbery and the murder of Damron is unsuccessful, Massey cannot demonstrate a reasonable probability that but for counsel's deficient performance in soliciting Massey's testimony about the sentence he was serving in Colorado, the result of the proceeding would have been different. See *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996). Massey's killing of Damron was committed during the ongoing commission of a robbery. Even if the information regarding Massey's Colorado sentence had not been solicited, Massey has not shown a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Thus, Massey's first assignment of error is without merit.

In his second assignment of error, Massey argues that his appellate counsel was ineffective for failing to raise the issue discussed in his first assignment of error during his direct appeal. On direct appeal, Massey's appellate counsel assigned two errors: the improper admission into evidence of the revolver allegedly used in the killing and the court's failure to give lesser-included offense instructions for second degree murder or manslaughter. Appellate counsel did not allege that trial counsel was ineffective in eliciting testimony from Massey that he was then serving a sentence of life plus 40 years in the Colorado State Penitentiary.

For the reasons stated above, Massey's allegation that his trial counsel was ineffective is without merit. Thus, even if Massey's appellate counsel had raised this issue on direct appeal, there is no reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings

of the district court will not be disturbed unless clearly erroneous. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). Massey has not established a basis for postconviction relief. Therefore, we affirm the judgment of the district court which denied Massey's amended motion to vacate the judgment and sentence.

AFFIRMED.

IN RE COMPLAINT AGAINST PAUL D. EMPSON, DISTRICT JUDGE OF THE 12TH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. PAUL D. EMPSON, RESPONDENT.

562 N.W.2d 817

Filed May 9, 1997. No. S-35-960001.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** The standard of review for a judicial discipline proceeding is de novo upon the record before the master.
2. ____: ____: ____. In reviewing matters of judicial discipline, the Nebraska Supreme Court must first determine, upon its own independent inquiry, whether the charges against the respondent are supported by clear and convincing evidence; next, the court must determine which, if any, canons of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1995) may have been violated; and finally, the court must determine what discipline, if any, is appropriate under the circumstances.
3. **Judges: Disciplinary Proceedings.** A clear violation of the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1995).
4. **Judges.** The Nebraska Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers and other persons in society.
5. **Judges: Intent.** A judge, like any other individual, is free to hold personal religious beliefs. However, it is inappropriate for a judge, as an authority figure, to disseminate religious materials in the courthouse with the intent of impressing his or her beliefs on the recipients.
6. **Judges: Disciplinary Proceedings: Witnesses.** A judge's contact with persons scheduled to testify against that judge in a disciplinary proceeding creates an appearance of impropriety.
7. **Judges: Disciplinary Proceedings.** The goal of disciplining a judge in response to inappropriate conduct is twofold: to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated.
8. ____: ____. Judicial discipline imposed must be designed to announce publicly the Nebraska Supreme Court's recognition that there has been misconduct, the discipline

must be sufficient to deter the respondent from again engaging in such conduct, and it must discourage others from engaging in similar conduct in the future.

9. ____: ____. A judge is disciplined not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society, to reassure the public that judicial misconduct is neither permitted nor condoned, and to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.
10. ____: ____. Examination of a judge's conduct depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.
11. **Judges: Disciplinary Proceedings: Proof.** Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which, taken together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary.

Original action. Judgment of suspension without pay.

Thomas F. Hoarty, Jr., of McGowan & Hoarty, for relator.

Terrance O. Waite and Keith A. Harvat, of Murphy, Pederson, Waite, Williams & McWha, for respondent.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This original proceeding comes before us upon a complaint filed by the Nebraska Commission on Judicial Qualifications on February 14, 1996, charging respondent, Paul D. Empson, a district court judge of the 12th Judicial District, with five counts of misconduct. The complaint was subsequently amended to add an additional charge.

A hearing on the complaint was conducted on August 12, 13, and 14, 1996. In accordance with Neb. Const. art. V, § 30, and Neb. Rev. Stat. § 24-721 (Reissue 1995), this court appointed the Honorable John T. Grant, a retired member of this court, to serve as special master presiding over the hearing for the purposes of taking evidence and making recommended findings of fact and conclusions of law.

The master found that the charges set forth in counts 1 through 3, 5, and 6 were supported by clear and convincing evi-

dence and that respondent's conduct was therefore in violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1995) and various canons within the Nebraska Code of Judicial Conduct. No findings of fact or conclusions of law were issued regarding count 4 of the complaint in that it involves respondent's conduct in the case *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998), which was pending before this court when the instant case was filed. As such, the master correctly stayed any proceedings concerning count 4.

The commission adopted the findings and conclusions of the master in their totality and recommended that respondent be suspended from his judicial office for a period of 6 months without pay. Respondent filed a petition in error with this court on December 16, 1996, asking that the commission's recommendation be rejected, modified, or vacated.

I. STANDARD OF REVIEW

No evidence in addition to that heard by the master has been received by this court. As such, the standard of review in this court is de novo upon the record made before the master. *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992); *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987).

As set forth in *In re Complaint Against Staley*, 241 Neb. at 155, 486 N.W.2d at 889:

> This court must first determine, upon its own independent inquiry, whether the charges against the respondent are supported by clear and convincing evidence; next, we must determine which, if any, canons of the Code of Judicial Conduct and subsections of § 24-722 may have been violated; and finally, we must determine what discipline, if any, is appropriate under the circumstances.

II. APPLICABLE STATUTORY AND JUDICIAL CODE OF CONDUCT PROVISIONS

The complaint filed against respondent relies on § 24-722, which provides:

> A Justice or judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time

> not to exceed six months, or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . .

A clear violation of the Code of Judicial Conduct constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Staley, supra*; *In re Complaint Against Kelly, supra.*

The relevant canons of the Code of Judicial Conduct in question in this matter are the following:

> CANON 1
>
> A Judge Shall Uphold the Integrity and Independence of the Judiciary
>
> A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. . . .
>
> CANON 2
>
> A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. . . .
>
> CANON 3
>
> A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently
>
> . . . .
>
> B. ADJUDICATIVE RESPONSIBILITIES.
>
> . . . .
>
> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom

the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society. *In re Miera*, 426 N.W.2d 850 (Minn. 1988).

III. DISCUSSION

1. COUNT 1

Set forth in its entirety, count 1 of the complaint alleges, "Beginning in or about 1986 and continuing until 1995, Judge Empson engaged in offensive and unwelcome conduct toward various female court personnel, citizens having business in the courts, and student interns, which amounted to sexual harassment."

The master found several episodes in which respondent engaged in offensive and unwelcome conduct. With respect to these findings, respondent asserts that he was placed at a disadvantage in that count 1 of the complaint concerns actions "which amounted to sexual harassment" and that he therefore prepared his case to refute only allegations of sexual harassment and not all conduct he engaged in that "amounted to something less than sexual harassment." Brief for respondent at 10. As such, respondent contends that the special prosecutor was required to prove, by clear and convincing evidence, that respondent was responsible for sexually harassing persons in the workplace, as defined by case law. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (defining sexual harassment as conduct of sexual nature which has purpose or effect of unreasonably interfering with

individual's work performance or creating intimidating, hostile, or offensive working environment).

Respondent's contention overlooks the obvious: Count 1 expressly states that respondent "engaged in offensive and unwelcome conduct." In light of such wording, it was appropriate for the master to examine respondent's inappropriate conduct despite the possibility that it might not rise to the level of sexual harassment. We note that regardless of whether respondent's actions amount to sexual harassment, the issue before us is the ethical responsibilities of respondent as a judge. See *In re Miera, supra.* We must therefore examine each instance in which respondent is alleged to have engaged in offensive and unwelcome conduct, that may or may not be considered sexual harassment, and determine whether such conduct violated the Code of Judicial Conduct and § 24-722.

(a) Lori Everts

Everts is a court reporter in Alliance, Nebraska, for Judge Brian Silverman, a district court judge for the 12th Judicial District. Prior to working for Judge Silverman, Everts would occasionally work with respondent when he was in Alliance to handle court matters. Everts worked exclusively for respondent for a short period of time before working for Judge Silverman.

Sometime in 1995, Everts filed a complaint against respondent with the commission. This complaint listed six specific events involving respondent which Everts considered inappropriate.

(i) Handholding Incident

Respondent and Everts traveled to Gering, Nebraska, on June 2, 1992, for a trial. Due to the length of the trial, they were required to stay overnight in a local motel. After the first day of trial, Everts and respondent ate dinner together at a restaurant in Gering. Before eating, respondent asked Everts if she was going to pray. Everts responded that she would and folded her hands and put her head down. At that point, respondent, without saying anything, placed his hand on the table, and Everts placed her hand on his. Although Everts said nothing to respondent at the time, she stated that holding his hand embarrassed her. Respondent admits the incident occurred but asserts that the

incident was simply a prayer before a meal and that his family usually prays in that manner.

Respondent's regular court reporter at the time was Yvonne (Bonnie) Frye. Frye testified that although she was able to travel with respondent for the trial in Gering, he chose to take Everts. Upon his return, respondent told Frye, " 'Oh, by the way, I got to hold Lori's [Everts'] hand.' " Frye testified that she had prayed with respondent before approximately 30 meals but that she never held his hand.

The master found that the handholding incident occurred and amounted to sexual harassment in violation of Canons 2 and 3B(4) of the Code of Judicial Conduct and § 24-722(6).

(ii) Stand Up and Turn Around Comment

Sometime in early fall of 1992, the Judicial Resources Commission met in Gering. On that day, Everts wore a sweater and jeans to work in the Alliance courthouse. Respondent noticed this and asked Everts to stand up from her desk, to which she complied. Once Everts was standing, respondent said, " 'Well, turn around.' " According to Everts, she became "embarrassed" and uncomfortable.

Respondent does not remember making these comments but adds that if he had to guess, he was concerned that Everts was not dressed appropriately for work. Aside from this "educated guess" about what happened, respondent did not dispute Everts' account of the incident.

The master found that the incident occurred and that such conduct violated Canons 2 and 3B(4) of the Code of Judicial Conduct and § 24-722(6).

(iii) Shower Comment

Everts testified that sometime during the summer of 1993, respondent, the clerk of the court, and Everts were in the courtroom waiting for a legal proceeding to begin. While on the bench, respondent asked Everts how her shower was that morning, to which Everts responded, " 'Well, why, did it rain this morning.' " Respondent replied, " 'No, how was your shower,' " adding, " 'I bet you wonder why I'm asking you that.' " Everts testified these comments embarrassed and confused her.

Respondent's recollection of the event is that he thought Everts had taken a hurried shower that morning and still had wet hair upon her arrival in the courtroom. According to respondent, the clerk told him " 'That's hair style, that's the style' "; he then said, " 'Oh, sorry,' " and that was the end of the matter.

The master found that this exchange took place and that respondent's conduct violated Canons 2 and 3B(4) and (5) of the Code of Judicial Conduct and § 24-722(6).

(iv) Comments Regarding Premarital Sex

Respondent questioned Everts regarding her view of premarital sex on at least two occasions. The first occurred when respondent was in Alliance presiding over legal matters. During a conversation in the clerk's office, respondent informed Everts that the county attorney wanted to have a baby without being married. Respondent asked Everts if she agreed with this, and she responded no. Respondent then asked Everts if she was making her boyfriend wait. Everts testified that respondent was referring to having sex with her boyfriend prior to their marriage. This comment embarrassed Everts. Respondent does not recall the conversation but does not deny that it took place, noting that he had talked to Everts about remaining chaste and pure.

The second incident occurred at the courthouse in Chadron, Nebraska, on March 9, 1994. Everts, working for Judge Silverman at that time, traveled to Chadron to report a legal proceeding. After the case was concluded, Everts, Judge Silverman, and Frye were having a discussion just outside the courtroom. During this discussion, respondent asked Everts if she was making her fiance wait until they were married. Everts interpreted respondent's remark as inquiring whether she was engaging in premarital sex with her boyfriend. Everts testified she did not respond to the question and was humiliated because respondent made the comment in front of others.

Judge Silverman testified that he was present that day and overheard respondent ask Everts if she was keeping herself for her boyfriend until they were married. Judge Silverman interpreted this question as one dealing with premarital sex between Everts and her boyfriend. According to Judge Silverman,

Everts' eyes were filled with tears on the drive back to Alliance and she asked why he did not do anything when respondent made the comment. When asked what his reaction to respondent's comment was, Judge Silverman answered, "I couldn't believe that he said that and I reached down and picked up my briefcase and I said, 'Let's go.' I just — I literally could not believe that in a group of people somebody would ask that question."

Frye was also present during the comment and testified that respondent said something like, " 'I hope you're making him wait until marriage for sex.' " According to Frye, respondent went on to tell Everts that if she did not make her boyfriend wait, he would not cherish or respect her. At a later date, respondent asked Frye if she could imagine Everts "doing it," referring to sexual intercourse.

When asked whether he remembers the conversation and making the comments to Everts, respondent offered the following testimony:

> A. Not specifically, but I don't doubt that it happened. I like Ms. Everts' own explanation of what was said better than probably what was said by others.
>
> Q. What do you recall about her explanation?
>
> A. Somewhere in there she said I said remember to keep yourself pure.
>
> Q. You might have said something like that?
>
> A. Probably. At that time I believe I knew that she'd made wedding plans.
>
> Q. Knowing now what you know then about her resentment of that type of conversation, would you make that comment to her?
>
> A. Not at all, not under any circumstances.

The master found, by clear and convincing evidence, that respondent inquired about Everts' sexual activity with her boyfriend on both occasions in violation of Canons 2 and 3(B)(4) and (5) of the Code of Judicial Conduct and § 24-722(6).

(v) Note to Everts

The remaining complaint made by Everts concerns a note respondent wrote to her on May 7, 1993, concerning some

grammatical errors in her reporting services. After specifically noting five examples of incorrect grammar and spelling mistakes in a particular transcript, respondent concluded the note with, "I love you — enough to risk your displeasure — in the right way," followed by his initials.

Everts testified she became embarrassed when reading the note and did not want anyone to see her reading it. According to respondent, he added the "love you" phrase in order to "soften the blow" of his critique of her work. Furthermore, respondent contends that he did not intend to convey a sexual innuendo with the note and that he was referring to "Christian love" and not a romantic or sexual type of love.

In his report, the master wrote, "I find that the note was written by Respondent, and that the word love, for the purposes of this Report, means 'love' as that word appeared to, and meant to, the recipient of the note." The master went on to conclude that respondent's conduct in writing the note violated Canons 2, 3B(4) and (5) of the Code of Judicial Conduct and § 24-722(6).

(b) Bonnie Frye

Frye was respondent's court reporter from April or May 1991 until July 1995. Sometime during her first year of employment, Frye attempted to introduce her 70-year-old friend to respondent. Respondent refused, stating that he did not have time. At a later time when Frye asked respondent about his conduct, respondent told her that in his experience, friends could be many things and then asked her if she was "screwing" him. Frye testified that this statement made her furious. Respondent denies asking Frye if she was "screwing" her friend, because he does not use that type of language. Upon further questioning about the incident, respondent stated:

> Now, I met the old fella, I don't know his name, it could have been [Frye's friend], I remember him being from Alliance, I don't believe that I snubbed the man or treated him bad in any way. I didn't spend a lot of time standing around talking with him because I had things to do, but there was no follow-up conversation to that. He was not the kind of man who you would accuse anyone of having sex with, except his wife if he had one, and I didn't say that and I don't like being accused of it and it's wrong.

Respondent also attempted to discredit Frye's credibility by questioning the circumstances under which she left the employment of respondent. Briefly, evidence was adduced that Frye had filed claims with the county for reporting services before she actually filed the transcripts with the court. Upon being made aware of this, respondent reportedly gave Frye the option of quitting or being terminated. However, at no time did respondent report Frye's alleged activities to the county attorney for criminal prosecution. Nonetheless, respondent contends that Frye's testimony is suspect at best, in that she ultimately lost her employment as a court reporter with respondent.

The master, having witnessed and heard the testimony of Frye, determined her testimony concerning the comment made about Frye's friend was truthful. Finding that such a statement was made, the master concluded that respondent subjected Frye to sexual harassment. However, the master did not specifically state which canon or statute respondent violated in making the comment.

(c) Dee Heineman

Heineman worked as respondent's court reporter from 1981 to 1991. Heineman testified that sometime during 1986 or 1987, she was in the courthouse in Chadron when she overheard a discussion between respondent and Marge Daniels Doerr, the clerk of the district court at the time. Heineman specifically heard respondent tell Doerr, "'Every time I think of Dee [Heineman] and Marvin [Heineman's husband] having sex, I think of a fat glob oozing all over the top of Marvin.'" Doerr corroborated Heineman's testimony. Heineman testified that she was shocked and angry and wondered why respondent was thinking of her having sex with her husband. The statement also left Doerr uncomfortable and embarrassed.

When asked whether he made such a statement to Doerr, respondent answered with the following:

> No. Well, I have no recollection of saying such a thing, I didn't think that. You saw Dee up here, Dee looks pretty much today as she did all the time she was my court reporter, she's never been a person anybody would describe as a blob, I never, ever thought anything like that about her and her husband. What she said about her

> impression of the thing is exactly mine, I didn't think about her and her husband in that kind of context at all, I would not have said so if I did, and I certainly wouldn't have used those terms and there was no call for it that anybody's able to say. So it's something that has no beginning and no end and it's just stuck there and I don't believe I said it.

The master found, by clear and convincing evidence, that respondent made the "fat glob" remark to Doerr in violation of Canons 2 and 3B(4) of the Code of Judicial Conduct and § 24-722(6). In reaching this conclusion, the master noted that "[t]o hold otherwise means that both Ms. Heineman and Ms. Doerr concocted the whole story to the utter embarrassment of both Ms. Heineman and her deceased husband."

(d) Misty Fowler

Fowler attended Chadron State College from August 1992 to May 1996. In furtherance of her studies, Fowler worked as an intern in the Dawes County courthouse during the summer of 1995. As a part of her internship, Fowler would sit in on trials before respondent. During a recess in a felony trial, Fowler had a discussion with respondent in the clerk's office. In this discussion, respondent told Fowler that she should not go to bed angry. When Fowler responded that she understood what the Old Testament says about anger, respondent said, " 'That's not what I mean. I meant don't ever deny your husband sex when you're angry.' " This comment about sex shocked and offended Fowler, in addition to making her feel embarrassed and humiliated.

Respondent admits that this exchange took place but that he did not intend to harass Fowler. Instead, respondent states he was "probably being too cute." Respondent also contends that he did not believe his comments bothered her, noting that Fowler continued to have discussions with respondent during breaks throughout the remaining 3 days of trial.

The master found respondent made the foregoing comments to Fowler in violation of Canons 1, 2, 2A, and 3B(4) of the Code of Judicial Conduct and § 24-722(6). In so concluding, the master added, "I find it particularly disturbing that a judge during a felony trial, can find time, during the trial, to have

uninvited, insensitive public conversations with a 'cute' girl watching the trial, concerning a deeply personal matter."

(e) Janice Sanford

Sanford is an abstractor and title agent in Chadron. Sometime during the spring of 1995, she and respondent had a discussion in the office of the clerk of the district court. Upon discovery that Sanford was dating an individual, respondent asked her if she was "being good." Sanford replied that as an abstractor, her job depended on her being good and that she was being careful. According to Sanford, respondent told her,

> "I'm not telling you to be careful, I'm telling you to be chaste. That's a decision that you have to make ahead of time, you have to decide to do that ahead of time because if you wait until the heat of the moment it will — you'll make the wrong decision."

This comment made Sanford uncomfortable and she said so, to which respondent replied that he was not trying to embarrass her, he just wanted her to know that the Lord loves her but hates fornication. David Motsick, clerk of the district court for Dawes County, testified that he was also present during this exchange. According to him, Sanford and others were engaged in a conversation in the clerk's office when respondent entered and told Sanford, " 'I hope you're being chaste.' " Kim Frazel, former clerk of the district court in Chadron, was also present and testified that she heard respondent ask Sanford if she was being good, meaning, was she having premarital sex. Approximately 2 weeks later, respondent encountered Sanford in the courthouse in Rushville, Nebraska, and asked her, " 'Are you still being good?' " Not denying he made the comments, respondent testified that he regrets it terribly if he hurt Sanford's feelings.

The master found that respondent made the foregoing comments to Sanford in violation of Canons 1, 2, 2A, and 3B(4) of the Code of Judicial Conduct and § 24-722(6).

(f) Cindy Brandt

Brandt is a free-lance court reporter and has worked and traveled with respondent. While at the courthouse in Rushville, respondent discovered that Brandt was living with a man she intended to marry. According to Brandt, respondent said, " 'Oh,

that's too bad,' " and " 'Well, that's too bad because that makes you a used woman and a tramp and nobody will ever want to marry you.' " This comment embarrassed Brandt, who testified that she does not think a judge should say such things to an employee.

Respondent testified that he believes his discussion with Brandt occurred in a car and admits that an exchange about her living arrangement did take place. According to respondent, upon discovering that Brandt was living with a man, he said, " 'I'm sorry to hear that,' " and proceeded to tell her that statistics show that premarital cohabitation reduces the chances for a long-lasting marriage. Although he regrets hurting Brandt, respondent denies that he called her a tramp or a used woman.

The master found that this incident occurred as told by Brandt and was in violation of Canons 2 and 3B(4) of the Code of Judicial Conduct and § 24-722. However, rather than treat this incident as falling under count 1 of the complaint, the master considered it as falling under count 2 of the complaint. Our review of the record and pleadings in this matter leads us to conclude that this event should be treated as falling under count 1 of the complaint.

(g) Rhonda Flower

Flower, an attorney in Scottsbluff, Nebraska, called respondent sometime between 1991 and 1993 to inform him of a settlement agreement between parties in a civil matter docketed in his court. Flower recalled that the first thing respondent said to her on the telephone was, " 'Rhonda, just tell me one thing, at the end of this conversation, will I love you any more than I already do.' " Although Flower was initially embarrassed and uncomfortable with this comment, she eventually considered the statement to be a joke. Respondent remembers making a comment similar to the one Flower recalls but asserts he assumed that the telephone call was concerning bad news or that she was going to ask for a continuance.

The master concluded that the incident occurred as reported by Flower and that respondent's comments violated Canons 1, 2, 2A, and 3(B)(4) of the Code of Judicial Conduct and § 24-722(6).

(h) De Novo Review of Count 1

From our de novo review of the record concerning count 1, we find that the handholding incident involving respondent and Everts does not rise to the level of an ethical violation. On cross-examination, Everts specifically testified that respondent first put his hand on the table and that she then placed hers on top. This testimony clearly establishes that the handholding occurred as a result of Everts' own volition. We also find that the shower comment does not entail a violation of a judicial canon insofar as respondent was merely commenting on what appeared to be Everts' wet hair. Respondent's intentions in making the comment were corroborated by the testimony of the court reporter that the appearance of wet hair is the new "style." Once respondent was made aware of this, the discussion ended. In a similar fashion, we conclude that respondent violated no canon in asking Everts to stand up and turn around. The testimony concerning the circumstances surrounding this statement established that Everts was dressed rather casually when respondent made the comment. That being the case, we find respondent's testimony that he made the statement because he was concerned that Everts was dressed inappropriately to be credible. Finally, the note written to Everts does not constitute an ethical violation because the purpose of the letter was obvious: to inform Everts of grammatical problems with her reporting. We believe that the fact that the letter was signed with the phrase "I love you" conforms to respondent's desire to "soften the blow" of criticizing Everts' work and was not offensive conduct.

Regarding Frye's contention that respondent asked her if she was "screwing" her friend, we find that this allegation involves a "he said/she said" scenario, especially in light of respondent's vehemently denying he made such a statement. Considering the fact that Frye was possibly a disgruntled employee, we cannot conclude, by clear and convincing evidence, that respondent made the statement.

Concerning the telephone discussion between respondent and Flower, we find that respondent made the "will I love you more than I already do" statement but that it is innocuous and does not amount to an ethical violation. In making this deter-

mination, we once again examine the statement in the context in which it was made. During her testimony, Flower stated that she eventually took the telephone conversation as a joke. In addition, the testimony of respondent reveals that he made the comment thinking Flower was calling with a request for a continuance. In light of this testimony, we cannot say that respondent's statement amounted to offensive conduct in violation of the canons.

With the exception of these incidents, we find, as did the special master, that the remaining incidents discussed above occurred in violation of various canons of the Code of Judicial Conduct. As such, we conclude that count 1 of the complaint is supported by clear and convincing evidence. Indeed, as the preceding discussion details, respondent has clearly engaged in offensive and unwelcome conduct toward women in violation of Canons 2, 2A, and 3B(4) and (5) of the Code of Judicial Conduct and § 24-722(6) on no fewer than eight occasions. We fail to see any purpose whatsoever in respondent's repeated sexual inquiries into the private and personal lives of the persons around him. Such conduct cannot be condoned whatever respondent's motives.

2. Count 2

The second count of the complaint alleges the following:

> Judge Empson has informed a court reporter who previously was employed by him that, in performing his judicial duties, he considers women who are living with men outside of marriage to be more responsible for such conduct than the men because, in his view, it is women who lead men astray.

The court reporter in question, in regard to count 2, is Frye. Concerning this allegation, Frye testified as follows:

> Q. What was it that you asked Judge Empson?
>
> A. I just asked him why he was so much tougher on women than he was on men.
>
> Q. In what respect?
>
> A. Well, he had asked [the wife in a divorce case] so many questions about affairs and how many times and who and where and he hadn't — it didn't seem to me like he had said much to [the husband].

Q. Was that something that in your opinion you had observed before?

A. In my opinion, yes.

Q. And by that, I mean a difference between the way the Judge questioned women and men?

A. I felt that way.

Q. And so you asked the Judge about that?

A. Yes.

Q. And what did he say?

A. He said that women were basically more responsible for situations like that than the men were.

Q. When you say situations like that, what do you mean?

A. Well, I was talking about like out of marriage affairs and living with people when you weren't married to them, that was sort of what the case was about in that area of the case.

Respondent testified that Frye misunderstood his comment in that he was simply telling her what a Bible verse in the Old Testament states. Moreover, respondent asserted that he does not subscribe to that belief in making judicial decisions. In support of this contention, several witnesses who are regularly present in respondent's courtroom testified that respondent questions male and female litigants the same and only inquires into a litigant's personal affairs if child custody is in issue.

The master made no specific finding as to whether respondent made and adheres to the foregoing statement. From our de novo review of the record, we are unable to conclude, by clear and convincing evidence, that respondent did, in fact, make this statement to Frye with the meaning she attached to it. Frye testified on cross-examination that she and respondent would often discuss religion. As such, respondent's contention that he was simply discussing a Bible passage appears to conform with the past conversations between the two individuals. Moreover, we find it difficult to believe that respondent would adhere to such a statement in his judicial decisionmaking in light of the numerous witnesses who testified that respondent does not treat women litigants differently from men litigants. We therefore conclude that count 2 of the complaint has not been proved by clear and convincing evidence.

3. COUNT 3

The third count in the complaint alleges the following:

> At the conclusion of a criminal case in 1995 (State v. Hunt) after a verdict had been reached, Judge Empson, during a post-trial discussion with the jurors, distributed religious materials to the jurors in the courthouse. Judge Empson has also, in the courthouse, given a copy of the Bible to a litigant who had appeared before him in a domestic relations case seeking a protective order.

(a) State v. Hunt Jury

The Hunt trial took place in Chadron in 1995 and involved a felony criminal charge. After the jury had returned its verdict, the jurors were invited to stay and ask any questions they had regarding the trial. All jurors remained, and a question and answer session began with the jurors seated in the jury box and respondent in front of the box.

Dorothy Hunter was a juror and former client of respondent when he was a practicing attorney. Hunter noted, during the question and answer session, that respondent had changed since the last time they had met. According to respondent, he told the jurors they did not want to talk about his "change," but they said they wanted to know the reason. At that point, respondent went back to his chambers and returned with 3- by 5-inch pamphlets, containing 21 chapters of the New Testament Book of John. Mary Willnerd, another juror, testified that respondent handed the pamphlets to the first person in the jury box, and the pamphlets were passed down the line. Some jurors, including Willnerd, did not take a pamphlet. Once the pamphlets were distributed, respondent proceeded to tell the jury how he had become a Christian. Both Hunter and Willnerd agreed that the jurors were free to leave at any time and that no one was rebuked for failing to take a pamphlet. Hunter testified that she was not offended by respondent's remarks, while Willnerd stated that she was uncomfortable when respondent handed out the pamphlets.

Sometime after this exchange took place, respondent told Motsick about his distributing religious materials to the Hunt jury and that he had a chance to "witness" to two of the jurors.

An attorney and close friend of respondent who belongs to the same church affiliation as respondent testified that the term "witness" means telling others what you think the Bible teaches and why you believe it and entails an invitation to "come and get a better understanding of what the [B]ible does say." Frye also testified that respondent told her that he "had got to minister to the jury."

Respondent agrees the incident took place but argues that he was not attempting to force his religious beliefs on any juror and that he was simply answering a question asked of him.

The master found the incident took place in violation of Canons 1, 2, and 2A of the Code of Judicial Conduct and § 24-722(6), concluding that "a judge in authority in his courtroom should not present specific forms of religious beliefs" and that "[r]espondent's actions were an effort to proselytize Dorothy Hunter and the other jurors."

(b) Giving Bible to Litigant

The second incident under this charge concerns a woman named Valerie Brenner. Brenner appeared before respondent seeking a protection order. After granting the order, respondent observed Brenner sitting in the hall outside the courtroom looking distraught. Brenner conveyed to respondent that she and her son were having difficulty reading and understanding their Bible. When Brenner stated she could not afford to purchase a different version, respondent loaned his "New International Version" paperback Bible to her. Respondent testified that he has seen neither Brenner nor his Bible since that day.

Respondent admits the incident occurred but argues that it was not improper because it occurred outside of court and that there was no possibility that Brenner would appear before him again because a protective order violation matter goes before the county court. The master, finding the incident occurred as set forth by both Brenner and respondent, concluded otherwise, stating the discussion and loaning of the Bible was improper because should Brenner appear before respondent again, there could exist questions of impartiality. As such, the master concluded the incident was violative of Canons 1, 2, 2A, and 3B(5) of the Code of Judicial Conduct and § 24-722(6).

(c) De Novo Review of Count 3

We find, by clear and convincing evidence, that the two incidents alleged in count 3 occurred, but we discuss the appropriateness of each separately.

As a general matter, we find it inappropriate for a judge, as an authority figure, to disseminate religious materials in the courthouse with the intent of impressing his or her beliefs on the recipients. Despite the fact that the Hunt trial was over and the jurors had been excused, the question and answer session in which the religious pamphlets were dispersed proceeded with the jurors remaining in the jury box. More troubling are respondent's remarks that he got to "witness" and "minister" to the jurors. The fact that respondent had completed his judicial "duties" at the time of the discussion is immaterial in determining whether his conduct was appropriate. See *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984). While respondent is free to practice his religion as he chooses, his attempts to express his personal views on persons within the confines of the courthouse are violative of Canons 1 and 2 of the Code of Judicial Conduct and § 24-722(6).

In contrast is respondent's exchange with Brenner. The circumstances surrounding this incident requires us to view respondent's conduct in a different light. At the time respondent approached Brenner, she was emotionally distraught. Although we cannot discern from the record whether it was respondent or Brenner that initiated the discussion of the Bible, we can conclude that they both voluntarily engaged in the conversation. Unlike the situation involving the Hunt jury, Brenner actually sought out assistance from respondent. In light of these circumstances, we cannot conclude that respondent's offering of spiritual advice to a distraught woman willing to accept it constitutes an ethical violation.

4. Count 5

Count 5 of the complaint alleges the following: "During the trial of the Bunnell case, outside of the presence of the jurors Judge Empson stated to one of the trial attorneys: '_____, you don't want to piss me off.' "

The case of Bunnell v. Burlington Northern Railroad was tried before rèspondent in March 1993. Robert Mullin was one

of the attorneys involved in the case. According to Mullin, he and two other attorneys were sitting at a table during a recess when respondent entered and spoke. Mullin cannot remember the precise comment he replied with but remembers respondent stating, "'You don't want to piss me off, Mullin.'" Respondent does not remember making the comment but noted that it could have happened. Both respondent and Mullin testified that the trial had run longer than anticipated and that no complaint was ever filed concerning the alleged statement. The master found respondent made the foregoing statement to Mullin in violation of Canons 2 and 3B(4) of the Code of Judicial Conduct.

We agree that the evidence clearly and convincingly supports the allegation that respondent made the statement to Mullin. Although the statement was not judicious, it was apparently made in the middle of a trial that had taken a different path than expected, thereby creating tension. We agree with the master's statement that "Nebraska lawyers are a hardy lot" and that respondent's comment did not strike "any degree of terror into Mr. Mullin's heart." As such, we conclude that respondent's statement does not constitute a violation of any judicial canon.

5. Count 6

Count 6 was added pursuant to an amended complaint allowed, over objection, by the master. This count alleges the following:

> In or about the summer of 1996 Judge Empson contacted witnesses Dee Heineman and Rhonda Flower for the purpose of interfering with and/or influencing their testimony in this proceeding, in violation of Canons 1, 1A, 2, 2A, 2B, 4 and 4A(3) of the Code of Judicial Conduct, and Neb. Rev. Stat. §§ 24-722(6) and 28-919.

(a) Contact with Dee Heineman

On July 15, 1996, Heineman was Judge Hippe's court reporter in Gering. Respondent went to Heineman's office that day with a copy of supplemental interrogatory answers in the disciplinary proceeding in which it was stated that both Heineman and Doerr were going to testify about the "fat glob" remark. Heineman testified that respondent came within a foot of her and began yelling and saying he did not want her to get

hurt. Respondent denied that he had made the statement. Marilyn Lynch, Judge Robert O. Hippe's bailiff, testified that she heard respondent yelling from a distance of approximately 60 feet although she could not make out the words. Heineman stated she felt threatened. Respondent acknowledges that he went to Heineman's office that day but contends he went to tell her, in person, that he did not make the "fat glob" statement nor did he threaten her in any way.

The master, noting his previous finding that the "fat glob" statement was, in fact, made, found that respondent's conduct in contacting Heineman was in violation of Canons 1, 1A, 2, and 2A of the Code of Judicial Conduct and § 24-722(6) and Neb. Rev. Stat. § 28-919 (Reissue 1995).

(b) Contact with Rhonda Flower

The second witness respondent contacted was Flower. During a recess in a court proceeding in July 1996, respondent invited Flower into his chambers and told her that he had no intention of treating her differently in light of her testifying against him. Respondent then gave Flower several compliments on her legal abilities. Flower did not feel that respondent was trying to threaten or coerce her to change her testimony but that she did get the impression that respondent was trying to ingratiate himself with her. In addition, Flower stated that respondent had never given her compliments before. Respondent agrees with Flower's recollection of their meeting in the above manner but asserts he made the comments to Flower to put her at ease considering she was going to testify against him.

The master found that respondent's contact with Flower was in violation of Canons 1, 1A, 2, and 2A of the Code of Judicial Conduct, and § 24-722(6) and Neb. Rev. Stat. § 28-919 (Reissue 1995).

(c) De Novo Review of Count 6

We find, by clear and convincing evidence, that respondent contacted both Heineman and Flower prior to their testifying at the hearing before the master. We disagree with the master, however, that these contacts constituted a violation of § 28-919. The only provisions of this statute that are remotely applicable are subsections (1)(a) and (b), in which an offender must

attempt to induce a witness to testify falsely or to withhold any testimony or evidence. This did not occur here as evidenced by the testimony of both Heineman and Flower that respondent did not attempt to get them to change or alter their testimony in any way.

Nevertheless, we are still troubled by respondent's contacting individuals about a future proceeding of which he is the subject, especially when respondent was aware that those persons were going to testify against him at the proceeding. Adding to our concern is Heineman's testimony that she felt threatened by respondent's contact and Flower's testimony that she thought respondent was trying to ingratiate himself with her. While respondent's actions in contacting these women do not sustain a violation of § 28-919, they do bring into question respondent's judgment and judicial temperament, and create an appearance of impropriety. Thus, we find, by clear and convincing evidence, that respondent's contacting Heineman and Flower occurred in violation of Canons 1, 1A, and 2A of the Code of Judicial Conduct and § 24-722(6).

IV. DISCIPLINE

Having concluded that respondent has violated canons of the Code of Judicial Conduct and § 24-722(6) on numerous occasions, we must address the appropriate discipline to be imposed. The commission, in adopting the findings of the master, recommended that respondent be suspended from his judicial office for a period of 6 months without pay. While this recommendation is entitled to be given weight, it is incumbent upon this court to independently fashion an appropriate penalty. Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1995); *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984).

The goal of disciplining a judge in response to inappropriate conduct is twofold: to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. These principles were first enunciated in *In re Complaint Against Kneifl*, 217 Neb. at 485-86, 351 N.W.2d at 700, wherein we stated:

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judi-

> ciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.

With these principles in mind, we make particular note of the fact that respondent's conduct and statements have violated both the Judicial Code of Conduct and § 24-722(6). Of particular concern are respondent's contacts with witnesses scheduled to testify against him and his apparent pattern of engaging in offensive and unwelcome conduct toward women. This conduct, in and of itself, warrants discipline. See *In re McAllister*, 646 So. 2d 173 (Fla. 1994) (making sexual remarks to employee in addition to incidents of ex parte communication and intentional verbal abuse of attorney warrant order of removal); *Matter of Ackel*, 155 Ariz. 34, 745 P.2d 92 (1987) (using profanity or sexual innuendo per se brings judicial office into disrepute).

In addition, respondent's discussion of his religious beliefs with persons inside the courthouse, his contacting witnesses scheduled to testify against him, and his inappropriate comments to attorneys appearing before him were injudicious and reflect a lack of judgment and judicial temperament. Because these incidents bring respondent's judicial office into disrepute, discipline is required.

Respondent candidly admitted that his conduct was inappropriate at certain times but not to the extent that severe discipline is warranted. While some incidents we have discussed are obviously more bothersome than others, we examine the totality of

the evidence in the record before us to determine the proper discipline. As we have previously stated, examination of a judge's conduct "depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Complaint Against Kneifl*, 217 Neb. at 475, 351 N.W.2d at 696, citing *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). We also agree with the sentiments made by the Florida Supreme Court in its removal of a judge from office for a pattern of misconduct:

> "Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which, [taken] together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary."

In re Crowell, 379 So. 2d 107, 110 (Fla. 1979). Even if we were to assume that any of the incidents in question, if isolated, would not be worthy of discipline, the accumulation of repeated misconduct by respondent warrants discipline.

The proper imposition of discipline in this matter must be sufficient to deter respondent from engaging in such conduct and to deter others from engaging in similar conduct in the future. *In re Complaint Against Kneifl, supra.* In light of respondent's repeated violations of the Code of Judicial Conduct and § 24-722(6), we suspend respondent immediately from his judicial office for a period of 6 months without pay. This suspension and loss in compensation of approximately $44,000 should convey the clear message that conduct such as that engaged in by respondent has no place in the judiciary and will not be tolerated.

JUDGMENT OF SUSPENSION WITHOUT PAY.

WHITE, C.J., not participating.

BOWLING ASSOCIATES, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLANTS, V. J. ROBERT KERREY AND DEAN RASMUSSEN, APPELLEES.

562 N.W.2d 714

Filed May 9, 1997. No. S-95-317.

1. **Summary Judgment: Appeal and Error.** 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. 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. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.

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

James A. Eske, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellants.

Carl J. Sjulin, of Rembolt Ludtke & Berger, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and COADY, D.J.

PER CURIAM.

In 1977, J. Robert Kerrey and Dean Rasmussen, appellees, planned to create a partnership which would be composed of both general and limited partners. In compliance with the partnership laws, they circulated an offering circular on May 12, 1977. The circular invited individuals to invest, as limited partners, in the general partners' effort to develop, own, and operate a bowling facility known as Sun Valley Lanes in Lincoln, Nebraska. Among the projected expenses set forth in this circular was an expense of $25,000 for a liquor license.

In July 1977, 24 limited partners and appellees, in their capacity as general partners, executed an agreement creating the partnership of Bowling Associates, Ltd. The limited partners

consisted of several businesspersons and corporations who represented themselves to be sophisticated investors of substantial means with sufficient knowledge and experience in business matters. The agreement contained, in part, a provision with regard to the compensation that the general partners would be entitled to receive. More specifically, section 5.3 of the agreement provided:

> Compensation. The General Partners in the aggregate will be paid a salary of $600 per month plus a management fee equal to seven percent (7%) of the Cash Flow of the Partnership as determined immediately prior to the payment of such management fee, herein referred to as the "Management Fee" (to be paid to the General Partners in such proportion as they may agree or in the absence of such agreement as the Managing Partner shall determine in the reasonable exercise of his discretion. Except as may otherwise be provided in this Agreement or as may be decided by the Managing Partner in his absolute discretion, reasonably applied, no Partner shall receive any salary, fees or payments from the Partnership other than distributions of Cash Flow to which such Partner may be entitled.

On February 8, 1978, a liquor license, restricting the sale of alcoholic beverages to the lounge area of the bowling alley, was issued to appellees individually. All fees associated with the purchase of such license were paid by Bowling Associates. In October 1981, the designated licensee was changed to K-R Enterprises, a Nebraska partnership owned by appellees. As anticipated by Kerrey, an ordinance was passed in 1981 legalizing the service of alcoholic beverages in the bowlers' area. Accordingly, the liquor license which was held by K-R Enterprises was extended to include the bowling lanes as well as the lounge.

On December 2, 1982, Rasmussen informed the limited partners that Kerrey and he would like to transfer the license held by K-R Enterprises to Bowling Associates. The limited partners were informed in February 1983 that the transfer of the liquor license had been approved by the city council.

In January 1983, K-R Enterprises and Bowling Associates entered into an agreement whereby K-R Enterprises agreed to

sell to Bowling Associates leasehold improvements, inventory, and equipment located at Sun Valley Lanes. K-R Enterprises was to receive $25,000 for such sale.

The annual meeting for the business year 1983 was held in March 1984. A printed balance sheet for 1983 was prepared, indicating as a new asset a deferred charge of $25,000 for a liquor license. The partnership's "Statement of Changes in Financial Position" for that same year indicated that $25,000 had been paid out for a liquor license. All limited partners were given copies of the financial statements.

In 1987, appellees transferred their general partnership interest in Bowling Associates to Kerrey Holdings. Kerrey Holdings is a Nebraska general partnership in which Kerrey and Rasmussen are the sole partners.

On November 4, 1993, Bowling Associates and 17 limited partners, appellants, filed a derivative action in the district court for Lancaster County, Nebraska. The second amended petition contained two causes of action, the second of which is at issue on appeal: Appellees unlawfully received a $25,000 payment from Bowling Associates in 1983.

In October 1994, appellees filed a motion for summary judgment as to the second cause of action. A hearing was held in December 1994. On January 31, 1995, the district court entered an order, ruling on objections made by the parties during the hearing. The court overruled appellants' objections to portions of exhibit 1, an affidavit by Rasmussen. The court also excluded appellants' exhibit 7, which was an affidavit by plaintiff Roger Downs verifying the truthfulness of the allegations contained in the second amended petition. The court then granted appellees' motion for summary judgment and dismissed the second cause of action, which was barred by the statute of limitations.

Appellants filed a motion for new trial, which was overruled. Appellants timely filed an appeal on March 27, 1995. Pursuant to our power to regulate the caseloads of the Nebraska Court of Appeals and this court, on our own motion we removed this case to our docket.

Appellants assign three errors: (1) The district court erred in granting appellees' motion for summary judgment, (2) the district court erred in overruling appellants' objections to exhibit 1, and (3) the district court erred in excluding exhibit 7.

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. 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. *Mahlin v. Goc, ante* p. 238, 561 N.W.2d 220 (1997).

Pursuant to Neb. Rev. Stat. § 25-207(4) (Reissue 1995), an action for relief on the ground of fraud can only be brought within 4 years. Such action does not accrue, however, until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). While appellants contend in their petition that appellees violated the limited partnership agreement by receiving the payment of $25,000 in 1983, they also contend that such cause of action could not reasonably have been discovered prior to March 1992. We disagree.

Appellants received copies of the 1983 financial statements in 1984. Such statements included a "Statement of Changes in Financial Position." Such statement clearly indicated that a payment of $25,000 had been made in 1983 for a liquor license. Furthermore, appellants allege in their petition that the fees necessary for purchasing a license in 1978 had already been paid by Bowling Associates. An additional output of $25,000 for a liquor license in 1983 would have put a person of ordinary intelligence and prudence on inquiry notice which, if pursued, would lead to discovery of a potential cause of action.

This court also finds particularly interesting that appellants offer no explanation for why they were not capable of discovering the alleged wrongdoings until 1992. A review of the record indicates that appellants received no new information with regard to the payment since receiving the financial statements for 1983. Appellants have failed to demonstrate why what was sufficient to put them on notice in 1992 was insufficient to put them on notice in 1984.

There is uncontroverted evidence that appellants received copies of the financial statements which provided that funds were expended for a liquor license in 1983. We therefore conclude as a matter of law that appellants were on notice when they received the financial statements in 1984 and affirm the district court's decision to grant appellees' motion for summary judgment as to appellants' second cause of action.

AFFIRMED.

MARJORIE KENT, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY L. KENT, DECEASED, APPELLANT, V. LOUIS L. CROCKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSALIE CROCKER, DECEASED, APPELLEE.

562 N.W.2d 833

Filed May 9, 1997. No. S-95-657.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Verdicts: Juries: Appeal and Error.** When reviewing a jury verdict, an appellate court considers the evidence and resolves evidential conflicts in favor of the successful party.
3. **Verdicts: Appeal and Error.** 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.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Jury Instructions: Appeal and Error.** It is not error for a court to refuse to give a requested instruction if the substance of the requested instruction is contained in those instructions actually given.
6. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
7. **Negligence.** In cases where the plaintiff's negligence is equal to or greater than the negligence of the defendant, the plaintiff is barred from recovery.

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

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

Donald D. Schneider, of Schneider & Hartmann, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

In a wrongful death case arising from a car-pedestrian accident, the jury found that Roy L. Kent and Rosalie Crocker were equally negligent. Marjorie Kent appeals.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

When reviewing a jury verdict, an appellate court considers the evidence and resolves evidential conflicts in favor of the successful party. *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995).

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. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

FACTS

In Fremont, Nebraska, Lincoln Avenue is a paved two-lane street running north and south. Linden Avenue is a paved two-lane street running east and west. Stop signs require the east-west vehicle traffic on Linden Avenue to stop at the intersection of Lincoln Avenue.

On August 22, 1992, at approximately 11 a.m., Rosalie Crocker was driving north on Lincoln Avenue. It was sunny, and visibility was clear. At the same time, Roy Kent was walking east along Linden Avenue near the intersection of Lincoln and Linden Avenues. When Roy Kent reached Lincoln Avenue, he began to cross the street. As he was entering the northbound lane of Lincoln Avenue, Rosalie Crocker's vehicle struck him. Roy Kent died from the injuries caused by the accident.

A police investigation disclosed that Rosalie Crocker's vehicle had left no skid marks. Rosalie Crocker died prior to trial due to causes unrelated to the accident. However, when she was interviewed by a police officer at the scene of the accident, she stated: "I was driving north on Lincoln. The minute I saw him I put on the brake, but I wasn't fast enough. He was right beside me." On the day after the accident, the same officer interviewed Rosalie Crocker at her home. She then stated that "she did not see the gentleman until the last minute."

There were no eyewitnesses to the accident. However, Don Paseka was driving approximately one block behind Rosalie Crocker's vehicle at the time of the accident. Paseka estimated the vehicle's speed to be around 30 m.p.h. Paseka did not see Roy Kent before he was struck by Rosalie Crocker's vehicle. Paseka testified that he saw Rosalie Crocker's brake lights come on after Roy Kent was hit by the vehicle and that the vehicle did not turn, swerve, or take any sort of evasive maneuver to avoid the accident.

The defendant's expert, Ted Sokol, an engineer and professor in the college of engineering and technology at the University of Nebraska, performed an accident reconstruction and analysis of the accident. Sokol opined, with a reasonable degree of engineering certainty, that Roy Kent was not in the crosswalk at the time Rosalie Crocker's vehicle struck him. In Sokol's opinion, Roy Kent was between 4.4 and 8 feet south of the south edge of the crosswalk at the time of the accident.

Sokol further testified that when Roy Kent stepped beyond the west curb line, he was 20 feet from the point of impact and Rosalie Crocker's vehicle was approximately 300 feet south of the point of impact. When Roy Kent was 15 feet from the point of impact, the vehicle was 225 feet south of the point of impact. When Roy Kent was 10 feet from the point of impact, the vehicle was 150 feet south of the point of impact. When Roy Kent was 5 feet from the point of impact, the vehicle was 75 feet south of the point of impact. When Roy Kent was 2 feet from the point of impact, the vehicle was 30 feet south of the point of impact.

The plaintiff's expert, Ralph Ekstrom, a professor emeritus of engineering mechanics at the University of Nebraska, testi-

fied that Roy Kent had a clear view of Rosalie Crocker's vehicle as he crossed Lincoln Avenue and that he should have been able to see the vehicle when it was at least 200 feet south of the intersection. Ekstrom gave the opinion that Roy Kent would have had the time and opportunity to avoid the accident had he noticed the oncoming vehicle at any time before he crossed over the centerline of Lincoln Avenue. Ekstrom concluded that Roy Kent was facing east as he crossed the street and that he did not observe the vehicle prior to impact.

At trial, Rosalie Crocker's husband, Louis L. Crocker, and her treating ophthalmologist, Dr. Gregory Haskins, both testified that her vision was adequate to see Roy Kent on the day of the accident. Louis Crocker testified that Rosalie Crocker appeared to be able to drive adequately when she drove him places in August 1992 and that on the occasions when she drove after the accident, she appeared to be able to see adequately. Louis Crocker stated that it was not until November 1992, when Rosalie was hospitalized with general systemic failure and was near death, that her left eye failed her and that she then stopped driving pursuant to her doctor's instructions.

Haskins examined Rosalie Crocker on August 7, 1992, 15 days before the accident. He noticed that she had decreased vision in her right eye. However, he stated that when he saw her on August 7, he was satisfied that she could qualify to drive. Haskins testified that based on his examination of August 7 and his experience as an ophthalmologist, it was his opinion that on August 7, Rosalie Crocker could probably have seen a pedestrian 100 to 150 feet away. Haskins also opined based on reasonable medical probability that there was a high probability that Rosalie Crocker's vision would not have significantly changed during the 15 days between the August 7 examination and August 22, the date the accident occurred.

Following trial, the jury returned a verdict indicating that Rosalie Crocker's negligence was 50 percent of the cause of the accident and that Roy Kent's negligence was 50 percent of the cause of the accident. Accordingly, the district court entered a defense verdict, and Marjorie Kent timely appealed to the Nebraska Court of Appeals. Subsequently, we removed the appeal to our docket.

ASSIGNMENTS OF ERROR

In summary, Marjorie Kent argues that the district court erred in failing to properly instruct the jury on her theory of the case because the court rejected her requested jury instructions Nos. 1, 2, 3, and 4.

ANALYSIS

The fundamental issue on appeal is whether the district court erroneously failed to give Marjorie Kent's requested jury instructions. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996).

Requested Instruction No. 1

Marjorie Kent argues that the district court erred in failing to give her requested jury instruction No. 1, which stated as follows: "An automobile driver who knows or in the exercise of due care should know that because of the failing condition of their eyesight they pose a threat to the safety of themselves and others by operating a motor vehicle must bear responsibility for their own actions."

The district court refused to give this instruction and, instead, gave other instructions that addressed a person's duty of care. Instruction No. 8 given by the court stated: "Negligence is doing something that a reasonably careful person would not do under similar circumstances or failing to do something that a reasonably careful person would do under similar circumstances." In addition, instruction No. 10 stated:

> Drivers are negligent if they do something a reasonably careful driver in the same situation would not have done or fail to do something a reasonably careful driver in the same situation would have done.
>
> For example, drivers are negligent if they fail to see or hear those things that would have been seen or heard by a reasonably careful driver in the same situation. They are

> also negligent if they fail to keep their vehicles under such control as a reasonably careful driver would have, in the same situation.
>
> Reasonably careful drivers take into consideration such facts as their own speed, the condition of their vehicle, the condition of the road, the presence of fog, the presence of other vehicles, pedestrians, or objects, and any other factors that affect driving conditions.
>
> Drivers must use reasonable care even when they have the right-of-way.

Instruction No. 2 stated that "[t]he Defendant admits that Rosalie Crocker failed to maintain a proper lookout . . . ."

It was Marjorie Kent's theory of the case that Rosalie Crocker was negligent in driving with impaired and failing vision. Marjorie Kent argues that Rosalie Crocker did not take adequate care given her failing eyesight and that, therefore, requested instruction No. 1 was required in order to clarify this duty. Marjorie Kent asserts that the district court's instructions did not inform the jury as to the duty of care that a person with poor eyesight must use and that, therefore, the court's general instructions without clarification may have misled the jury into thinking that the law required only that Rosalie Crocker meet the standard of care that the average reasonably careful person would have taken. Marjorie Kent claims that the court's instructions did not clearly indicate that a person must account for the condition of his or her eyesight when determining what is the proper standard of care.

Whether a disabled person has breached his or her duty is based upon how a reasonably careful person with such a disability would have acted. We recently addressed this issue in *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996). In *Traphagan*, we stated that the following instruction, in relevant part, was a correct statement of the duty that one who has a disabling condition owes to others:

> "Negligence is doing something that a reasonably careful person with physical abilities identical to those of the person accused of negligence would not do under similar circumstances, or failing to do something that a reasonably careful person with physical abilities identical to

> those of the person accused of negligence would do under similar circumstances."

251 Neb. at 155, 555 N.W.2d at 787.

In order to establish reversible error from the refusal to give a requested instruction, an appellant must first show that the tendered instruction is a correct statement of the law. See *Traphagan v. Mid-America Traffic Marking, supra.* Under the facts in the instant case, the district court could not instruct the jury that Rosalie Crocker's driving with failed vision was the proximate cause of the accident. There was no evidence to establish that she was negligent as a matter of law because she drove with her quality of vision. Evidence was presented at trial to the effect that Rosalie Crocker's vision was adequate for her to drive on the date of the accident and that she could see a pedestrian. Requested instruction No. 1 did not correctly state the law. Therefore, the court did not err in refusing to give it.

Requested Instruction No. 2

Marjorie Kent argues that the district court erred by not giving requested instruction No. 2, which stated:

> The fact of a valid operator's license does not relieve an automobile driver from responsibility for their failure to exercise due care for their own safety and the safety of others by refraining from driving an automobile when they know or should know they are incapable of doing so in a reasonably safe manner.

In effect, this instruction states that Rosalie Crocker should not have driven her car. We find that the district court did not err in refusing to give requested instruction No. 2.

Requested Instruction No. 3

Marjorie Kent asserts that the district court should have given requested instruction No. 3, which stated: "Nebraska law provides that every driver keep a proper lookout and exercise due care to avoid colliding with any pedestrian upon any roadway, give an audible signal when necessary and exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway."

The substance of this instruction was included in two instructions given by the court—instructions Nos. 10 and 11. Instruc-

tion No. 10 stated in part: "[D]rivers are negligent if they fail to see or hear those things that would have been seen or heard by a reasonably careful driver in the same situation." This adequately instructed the jury as to the legal requirement of drivers to maintain a proper lookout. See, *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985); *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 306 N.W.2d 902 (1981).

Instruction No. 11 stated in pertinent part: "Nebraska statutes provide that, notwithstanding any other provisions of Nebraska law, all drivers shall avoid negligently hitting any pedestrian upon any street, shall give an audible signal when necessary, and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a street." This instruction addressed all portions of the law related to pedestrian right-of-way and the requirement that a driver give a signal to a pedestrian.

It is not error for a court to refuse to give a requested instruction if the substance of the requested instruction is contained in those instructions actually given. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997). Instructions Nos. 10 and 11, when read together, adequately instructed the jury on the issues contained in the requested instruction, and therefore, it was not error for the district court to refuse to give requested instruction No. 3.

Requested Instruction No. 4

Marjorie Kent argues that it was error for the district court to refuse to give requested instruction No. 4, which stated:

> If, from the evidence, you find that Rosalie Crocker knew or should have known that because of the condition of her eyesight, her operation of an automobile posed a threat to the safety of herself and others and that at the time of this accident, she failed to see Roy Kent because of the condition of her eyesight, then from the preceding

> three instructions she failed to exercise that degree of due care owed a pedestrian and your finding will be for the plaintiff.

This requested instruction does not correctly state the law because it ignores the element of causation in a negligence action. The jury was not required to find for Marjorie Kent, as the requested instruction requires. Rather, if the jury found that Rosalie Crocker was negligent, the jury was required to compare her negligence to the negligence of Roy Kent.

In cases where the plaintiff's negligence is equal to or greater than the negligence of the defendant, the plaintiff is barred from recovery. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). Therefore, even if the jury found that Rosalie Crocker was negligent, the jury was not required to return a verdict for Marjorie Kent. This requested instruction was not a correct statement of the law, and therefore, it was not error for the district court to refuse to give it.

CONCLUSION

The district court properly instructed the jury on the issues of negligence raised by the evidence. Roy Kent walked directly in front of an oncoming vehicle driven by Rosalie Crocker. Apparently, he never saw the oncoming vehicle, even though he had an opportunity to do so. The evidence presented at trial established that Rosalie Crocker's vision was adequate on the day of the accident to see a pedestrian. Under the facts of this case, there was no basis for instructing the jury that it had to find in favor of Marjorie Kent because Rosalie Crocker knew or should have known that her physically impaired operation of a motor vehicle posed a threat to others.

Finding no merit in any of Marjorie Kent's assignments of error, we affirm the judgment of the district court.

AFFIRMED.