Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
09/09/2026 01:30 PM CDT

REPORTS OF CASES

DECIDED BETWEEN

APRIL 6, 1990 and AUGUST 2, 1990

IN THE

Supreme Court of Nebraska

VOLUME CCXXXV

STEVEN R. SCHROEDER

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1991

Copyright A. D. 1991

By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

WILLIAM C. HASTINGS, Chief Justice
LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice

STEVEN R. SCHROEDER ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Tecumseh
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John P. Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	John P. Murphy Donald E. Rowlands II	North Platte North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Jack H. Hendrix	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Edward E. Hannon	O'Neill
Sixteenth	Box Butte, Dawes, Grant, Morrill, Sheridan, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Gage and Jefferson	William B. Rist	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, Garden, and Kimball	John D. Knapp	Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Ronald D. Olberding	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	John C. Whitehead John M. Brower	Columbus Fullerton

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Joseph S. Troia	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn Philip R. Riley Richard W. Krepela	Neligh Creighton Madison
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
Eleventh	Hall and Howard	Richard E. Weaver David A. Bush	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Gerald R. Jorgensen	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	August F. Schuman Alan L. Brodbeck	Ainsworth O'Neill
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	James L. Macken G. Glenn Camerer	Gering Gering
Eighteenth	Gage and Jefferson	Steven Bruce Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas H. Dorwart C. G. Wallace	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith J. Kovanda Robert E. Wheeler	Burwell Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gerald E. Rouse Gary F. Hatfield Lyle Winkle	Columbus Central City Columbus

ATTORNEYS

Admitted Since the Publication of Volume 234

ROBERT L. ARCHAMBAULT
DOUGLAS E. BAKER
JAMES G. BITZES
TIMOTHY E. BROGAN
PATRICK E. BROOKHOUSER, JR.
RICHARD H. BURDICK
KEVIN P. CASSIDY
DAVID ALAN CHRISTENSEN
WENDELL F. COWAN, JR.
MICHELE CRAYCROFT
DONALD BOZEMAN DA PARMA
GRANT KEITH DUGDALE
BILL EBERHARDT
JAY C. ELLIOTT
BRIAN DOUGLAS ESCOBEDO
PETER J. GAROFALO
HELINE GRUNKIN
MATTHEW F. HEFFRON
STEPHEN HENNING
DANIEL M. HESSE
ERIN COLLEEN HOGAN
TAD HOPPE
JOE HURD
ANN E. HURST
JERRY J. HYNES
CHARLES B. JAKSICH
KIMMARIE L. KAEO
MORGAN P. KELLY
MICHAEL W. KENNEDY
ROBERT W. KORTUS
JONATHAN G. LEONG
MARK A. LUDWIG
DAVID ALAN MANN
ARTHUR MCELROY
EUNICE A. MILLER
JORY ESAR MILLER
LOUISE F. MILLER
VERLYN R. OBERING
TIMOTHY K. OLSON
MARTIN P. PELSTER
THOMAS DAVID PENFIELD
PATRICIA E. PIERMAN
KENNETH REITZ
SANDRA M. ROSSITER
LLOYD RHYNEHART SCHNEIDER
ROBERT F. SCHOPP
CATHERINE A. SIMMONS
LARRY H. SKEEN
ANDREW SOBOTKA
JONATHAN STICK
CONSIGLIA A. TERENZIO
RODNEY WETOVICK
LAWRENCE G. WHELAN
RANDALL M. WILLARD
THOMAS E. ZIMMERMAN

TABLE OF CASES REPORTED

A.M., C.M., and L.M., In re Interest of 506
Adams Bank & Trust v. Empire Fire & Marine Ins. Co. 464
Airport Transportation Co.; Knowlton v. 96
Amen; Weimer v. 287
Anderson v. Gunter 560
Andrews, In re Change of Name of 170
Ayars v. Ayars 361

B.A.G., In re Interest of 730
Badami; State v. 118
Bank of Stapleton; Gottsch v. 816
Beermann; State ex rel. Spire v. 384
Beins; State v. 648
Bindrum v. Foote & Davies 903
Blue Cross; Fuglsang v. 552
Blue River Bank; Wurst v. 197
Bray v. Kate, Inc. 315
Brennan v. School Dist. No. 21 948
Brewington v. Rickard 843
Broussard; State v. 809
Brown; State v. 10
Brown; State v. 374
Burlington Northern RR. Co.; Trackwell v. 224
Butler, County of; Millman v. 915

C.A., In re Interest of 893
C.D.C., In re Interest of 496
C.P., In re Interest of 276
Capaldi v. Capaldi 892
Carlon v. Carlon 95
Central States Health & Life v. Miracle Hills Ltd. 592
Change of Name of Andrews, In re 170
City of Omaha; Nebraska Pub. Emp. v. 768
City of Omaha; Thompson v. 346
City of Wahoo; Houska v. 635
Clark Bros. Sanitation; Fenster v. 336
Cornhusker Cas. Co.; Hughes v. 656
Costanzo; State v. 126
County of Butler; Millman v. 915
County of Dakota v. Mallett 82

D.D.P., In re Interest of 864
Dakota, County of v. Mallett 82
David; Martin v. 599
Denesia v. St. Elizabeth Comm. Health Ctr. 151
Dineen; State ex rel. NSBA v. 363
Dinsmore; Rosnick v. 738
Dittoe; Muckey v. 250
Dowling v. Dowling 183

Eary; State v. 254
Ebert; State v. 330
Edgerton v. Lawry 100
Elson v. Pool 469
Emme v. Emme 505
Empire Fire & Marine Ins. Co.; Adams Bank & Trust v. 464
Estate of Krueger, In re 518
Estate of McFayden, In re 214
Estate of Novak, In re 939
Estate of Widger, In re 179
Evans; State v. 575

Fenster v. Clark Bros. Sanitation 336
Foote & Davies; Bindrum v. 903
Freezer Servs., Inc., State ex rel. v. Mullen 981
Fuglsang v. Blue Cross 552

Garcia; State v. 53
Garvey; State ex rel. NSBA v. 737
Giessinger; State v. 140
Gooch Milling & Elevator Co.; Sherwood v. 26
Gottsch v. Bank of Stapleton 816
Grantzinger; State v. 974
Guardianship of Potter, In re 149
Guardianship of T.C.W., In re 716
Gunter; Anderson v. 560

Hammel v. Transit Auth. of City of Omaha 702
Harp v. Ruprecht 346
Hensman v. Parsons 872
Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc. 207
Houska v. City of Wahoo 635
Howells Elevator v. Stanco Farm Supply Co. 456
Hughes v. Cornhusker Cas. Co. 656

IBP, inc.; Snyder v. 319
In re Change of Name of Andrews 170
In re Estate of Krueger 518
In re Estate of McFayden 214

In re Estate of Novak 939
In re Estate of Widger 179
In re Guardianship of Potter 149
In re Guardianship of T.C.W. 716
In re Interest of A.M., C.M., and L.M. 506
In re Interest of B.A.G. 730
In re Interest of C.A. 893
In re Interest of C.D.C. 496
In re Interest of C.P. 276
In re Interest of D.D.P. 864
In re Interest of J.B. and A.P. 74
In re Interest of J.B. et al. 530
In re Interest of L.B., A.B., and A.T. 134
In re Interest of L.C., J.C., and E.C. 703
In re Interest of L.K.Y. and A.L.Y. 545
In re Interest of M. 61
In re Interest of Murray 430
In re Interest of T.E., S.E., and R.E. 420
In re Interest of V.M. 724

J.B. and A.P., In re Interest of 74
J.B. et al., In re Interest of 530
Johnsen; Shipp v. 559
Jones; State v. 1
Joubert; State v. 230
Jurgens; State v. 103

Kate, Inc.; Bray v. 315
Kelly; State v. 997
Kincaid; State v. 89
Knowlton v. Airport Transportation Co. 96
Krueger, In re Estate of 518
Kubik; State v. 612
Kuskie v. Kuskie 148

L.B., A.B., and A.T., In re Interest of 134
L.C., J.C., and E.C., In re Interest of 703
L.K.Y. and A.L.Y., In re Interest of 545
Lawry; Edgerton v. 100
Len Johnson & Co.; Vlasin v. 450
Lowe v. Lowe 354
Luehring v. Tibbs Constr. Co. 883

M., In re Interest of 61
Madison's, Inc.; Stoco, Inc. v. 305
Mallett; County of Dakota v. 82
Martin v. David 599
Martinez v. Nebraska Dupaco 720

McCune v. Neitzel 754
McFayden, In re Estate of 214
McPherson; State v. 107
Mellor v. Mellor 361
Middagh v. Stanal Sound Ltd. 433
Millman v. County of Butler 915
Miracle Hills Ltd.; Central States Health & Life v. 592
Moore; State v. 955
Muckey v. Dittoe 250
Mullen; State ex rel. Freezer Servs., Inc. v. 981
Murray, In re Interest of 430

NSBA, State ex rel. v. Dineen 363
NSBA, State ex rel. v. Garvey 737
Nebraska Dupaco; Martinez v. 720
Nebraska Pub. Emp. v. City of Omaha 768
Neitzel; McCune v. 754
Nelson; State v. 15
Nevels; State v. 39
Novak, In re Estate of 939
Nuss; State v. 107

Oliver; Professional Recruiters v. 508
Omaha, City of; Nebraska Pub. Emp. v. 768
Omaha, City of; Thompson v. 346
Omer v. Tagg 527

Parsons; Hensman v. 872
Perez; State v. 796
Phelps; State v. 569
Phinney; State v. 486
Pillard; State v. 642
Pool; Elson v. 469
Porter; State v. 476
Potter, In re Guardianship of 149
Prahin; State v. 409
Professional Recruiters v. Oliver 508

Qualley v. Qualley 841

Reed v. Reed 96
Rehbein; State v. 536
Reynolds; State v. 662
Rickard; Brewington v. 843
Rock Cty. v. Spire 434
Rosnick v. Dinsmore 738
Ruprecht; Harp v. 346

Saltzman; State v. 964

Sanders; State v. 183
Schaneman; State v. 655
Schneckloth; State v. 853
School Dist. No. 21; Brennan v. 948
Schwab; State v. 972
Shepherd; State v. 426
Sherwood v. Gooch Milling & Elevator Co. 26
Shipp v. Johnsen 559
Skalak v. Walker 551
Snyder v. IBP, inc. 319
Spire; Rock Cty. v. 434
Spire, State ex rel. v. Beermann 384
St. Elizabeth Comm. Health Ctr.; Denesia v. 151
Stanal Sound Ltd.; Middagh v. 433
Stanco Farm Supply Co.; Howells Elevator v. 456
State ex rel. Freezer Servs., Inc. v. Mullen 981
State ex rel. NSBA v. Dineen 363
State ex rel. NSBA v. Garvey 737
State ex rel. Spire v. Beermann 384
State ex rel. Storz v. Storz 368
State Farm Fire & Cas. Co. v. van Gorder 355
State v. Badami 118
State v. Beins 648
State v. Broussard 809
State v. Brown 10
State v. Brown 374
State v. Costanzo 126
State v. Eary 254
State v. Ebert 330
State v. Evans 575
State v. Garcia 53
State v. Giessinger 140
State v. Grantzinger 974
State v. Jones 1
State v. Joubert 230
State v. Jurgens 103
State v. Kelly 997
State v. Kincaid 89
State v. Kubik 612
State v. McPherson 107
State v. Moore 955
State v. Nelson 15
State v. Nevels 39
State v. Nuss 107
State v. Perez 796
State v. Phelps 569

State v. Phinney 486
State v. Pillard 642
State v. Porter 476
State v. Prahin 409
State v. Rehbein 536
State v. Reynolds 662
State v. Saltzman 964
State v. Sanders 183
State v. Schaneman 655
State v. Schneckloth 853
State v. Schwab 972
State v. Shepherd 426
State v. Thayer 70
State v. Trackwell 845
State v. Vanderkuur 566
State v. Victor 770
State v. Walker 85
State v. Williamson 960
State v. Wright 564
State v. Yost 325
State v. Zaritz 599
Stoco, Inc. v. Madison's, Inc. 305
Storz; State ex rel. Storz v. 368
Stroh v. Stroh 475

T.C.W., In re Guardianship of 716
T.E., S.E., and R.E., In re Interest of 420
Tagg; Omer v. 527
Thayer; State v. 70
Thomas v. Thomas 129
Thompson v. City of Omaha 346
Tibbs Constr. Co.; Luehring v. 883
Trackwell; State v. 845
Trackwell v. Burlington Northern RR. Co. 224
Transit Auth. of City of Omaha; Hammel v. 702
Tri-County Agri-Supply, Inc.; Hiway 20 Terminal, Inc. v. 207

V.M., In re Interest of 724
van Gorder; State Farm Fire & Cas. Co. v. 355
Vanderkuur; State v. 566
Victor; State v. 770
Vlasin v. Len Johnson & Co. 450
Von Tersch v. Von Tersch 263

W & K Farms v. Walter 952
Wahoo, City of; Houska v. 635
Walker; Skalak v. 551
Walker; State v. 85

Walter; W & K Farms v. 952
Weimer v. Amen 287
Widger, In re Estate of 179
Williamson; State v. 960
Wright; State v. 564
Wurst v. Blue River Bank 197
Wyman v. Wyman 287

Yonker v. Yonker 842
Yost; State v. 325

Zaritz; State v. 599

APPELLATE DIVISION OF THE DISTRICT COURT CASES

Upon consideration by the Supreme Court of Nebraska of the records, briefs, and recommendations of the Appellate Division of the District Court, the judgments in the following cases were affirmed.

No. 87-1090, filed May 18, 1990: **Lantis v. City of Omaha.** Appeal from the District Court for Douglas County: J. Patrick Mullen, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-126, filed June 22, 1990: **Mason v. Douglas Cty. Sheriff's Merit Comm.** Appeal from the District Court for Douglas County: Paul J. Hickman, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

Nos. 88-153, 88-332, filed April 20, 1990: **Stonestreet v. Land.** Appeal from the District Court for Hamilton County: William H. Norton, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-245, filed April 20, 1990: **Trump v. Homestead Trucking, Inc.** Appeal from the District Court for Gage County: William B. Rist, Judge. Heard before Reagan, Endacott, and Olberding, District Judges.

No. 88-344, filed April 26, 1990: **In re Estate of Walker.** Appeal from the District Court for Harlan County: Bernard Sprague, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-399, filed May 18, 1990: **Daedalus Constr. Co. v. Wiekhorst Bros. Excavating & Equip. Co.** Appeal from the District Court for Douglas County: Theodore L. Carlson, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 88-410, filed April 26, 1990: **Sukraw v. McDonald State Bank.** Appeal from the District Court for Lincoln County: John P. Murphy, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-412, filed June 22, 1990: **Mitchell v. Douglas Cty. Sheriff's Merit Comm.** Appeal from the District Court for Douglas County: Lawrence J. Corrigan, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-420, filed May 18, 1990: **Saalfeld v. Saalfeld.** Appeal from the District Court for Saline County: Orville L. Coady, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 88-466, filed May 18, 1990: **Petersen v. Stinger-Albertsen Co.** Appeal from the District Court for Dakota County: Robert E. Otte, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-519, filed May 18, 1990: **Childs v. Laramy, Inc.** Appeal from the District Court for Douglas County: Donald J. Hamilton, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 88-564, filed June 22, 1990: **Animal Clinic of McCook v. Otto.** Appeal from the District Court for Red Willow County: Jack H. Hendrix, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-567, filed June 15, 1990: **Lemke v. Kotera.** Appeal from the District Court for Saunders County: William H. Norton, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 88-594, filed July 20, 1990: **Woods v. Woods.** Appeal from the District Court for Douglas County: Jerry M. Gitnick, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-649, filed July 20, 1990: **Clark v. Union Pacific RR.** Appeal from the District Court for Douglas County: James M. Murphy, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-684, filed June 22, 1990: **Benitez v. Chief Indus.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-760, filed May 4, 1990: **Lehl v. Panhandle Enterprises, Inc.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-831, filed July 6, 1990: **Hammel v. Transit Auth. of City of Omaha.** Appeal from the District Court for Douglas County: Donald J. Hamilton, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-849, filed June 8, 1990: **Seger v. Federal Intermediate Credit Bank.** Appeal from the District Court for Holt County: Ronald D. Olberding, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 88-857, filed July 20, 1990: **Northwestern Steel & Supply Co. v. Peony Park.** Appeal from the District Court for Douglas County: Theodore L. Carlson, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-975, filed April 20, 1990: **State v. Aldana.** Appeal from the District Court for Johnson County: Robert T. Finn, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-1058, filed May 25, 1990: **State v. Guy.** Appeal from the District Court for Dawson County: Donald E. Rowlands II, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 89-093, filed April 20, 1990: **State v. Pope.** Appeal from the District Court for Douglas County: John E. Clark, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 89-219, filed April 6, 1990: **State v. Leviston.** Appeal from the District Court for Dodge County: Mark J. Fuhrman, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 89-327, filed May 25, 1990: **State v. Coleman.** Appeal from the District Court for Douglas County: James A. Buckley, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 89-345, filed April 20, 1990: **State v. LynCook.** Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Rist, Bartu, and Garden, District Judges.

No. 89-437, filed July 20, 1990: **State v. Lynch.** Appeal from the District Court for Douglas County: James A. Buckley, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 89-479, filed July 20, 1990: **State v. Chasing Hawk.** Appeal from the District Court for Sheridan County: Paul D.

Empson, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 89-758, filed June 8, 1990: **State v. Wallace.** Appeal from the District Court for Dodge County: Mark J. Fuhrman, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 89-777, filed June 8, 1990: **State v. Hudson.** Appeal from the District Court for Buffalo County: Dewayne Wolf, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 89-804, filed June 8, 1990: **State v. Yates.** Appeal from the District Court for Lincoln County: Donald E. Rowlands II, Judge. Heard before Warren, Coady, and Riley, District Judges.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 88-660: **K N Energy, Inc. v. City of Atkinson.** Stipulation allowed; appeal dismissed.

No. 88-661: **K N Energy, Inc. v. City of Hartington.** Stipulation allowed; appeal dismissed.

No. 88-662: **K N Energy, Inc. v. City of Hartington.** Stipulation allowed; appeal dismissed.

No. 88-671: **K N Energy, Inc. v. City of Bassett.** Stipulation allowed; appeal dismissed.

No. 88-699: **T.A.S. Truck Lines, Inc. v. Yueill.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-818: **In re Freeholder Petition of Engstrom Farms, Inc.** Stipulation allowed; appeal dismissed.

No. 88-819: **In re Freeholder Petition of Isaacs.** Stipulation allowed; appeal dismissed.

No. 88-820: **In re Freeholder Petition of Baack.** Stipulation allowed; appeal dismissed.

No. 88-909: **Ehrlich v. Woita.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-1060: **Oakview Townhomes Assn. v. Pelton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-024: **Koch v. Koch.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-724: **Panowicz v. Panowicz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-728: **State v. Staska.** Affirmed. See Rule 7A(1).

No. 89-747: **State v. Barajas.** Affirmed. See Rule 7A(1).

No. 89-817: **State v. Johnson.** Cause having not been shown, judgment vacated and cause remanded to district court.

No. 89-878: **Coble v. Lyman Investment, Inc.** Stipulation

allowed; appeal dismissed.

No. 89-889: **State v. Bihlmaier.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1151: **State v. McFall.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1172: **State v. Huffman.** Stipulation allowed; appeal dismissed.

No. 89-1173: **State v. Wilhelm.** Stipulation allowed; appeal dismissed.

No. 89-1192: **State v. Garrison.** By order of the court, appeal dismissed. See Rule 7A(2).

No. 89-1199: **State v. Potter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1215: **State v. Brothers.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1227: **State v. Marion.** Affirmed. See Rule 7A(1).

No. 89-1235: **State v. Livingston.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1241: **Watkins v. Clarke.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1258: **Aschenbrenner v. United Telephone Co.** Stipulation allowed; appeal dismissed.

No. 89-1267: **State v. Smith.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1268: **Immele v. Nebraska Pub. Power Dist.** Stipulation allowed; appeal dismissed.

No. 89-1275: **State v. Munn.** Affirmed. See Rule 7A(1).

No. 89-1287: **State v. Parker.** Affirmed. See Rule 7A(1).

No. 89-1290: **Erickson v. Federal Land Bank of Omaha.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1303: **State v. Taylor.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1305: **State v. San Juan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1308: **State v. Hood.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1315: **In re Estate of Shubert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1322: **State v. Curiel.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1335: **State v. Coates.** Affirmed. See Rule 7A(1).

No. 89-1349: **State v. Dice.** Cause having been shown, it is ordered that sentence imposed by trial court be modified to provide that sentence to treatment at Lincoln Regional Center not exceed maximum length of sentence to Department of Correctional Services. As so modified, sentence imposed by trial court is affirmed.

No. 89-1353: **Kitt v. City of Omaha.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1356: **State v. Valades.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1361: **Childs v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1367: **Vilas v. Department of Roads.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1370: **State v. Uthurusamy.** By order of the court, appeal dismissed for lack of jurisdiction. See Rule 7A(2).

No. 89-1371: **State v. Arneson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1378: **In re Interest of Hastings.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1382: **State v. Hall.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1388: **Kroeger v. Kroeger.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1393: **State v. Lehr.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1394: **In re Application of Mills v. Old Market**

Limousine Serv., Inc. Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1397: **State v. Sabatka.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1401: **State v. Carter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1402: **State v. Laird.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1403: **Sorenson v. Harden.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1406: **State v. Likely.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1410: **State v. Venus.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1415: **State v. Branch.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1421: **State v. Wyatt.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1422: **State v. Leaming.** Stipulation allowed; appeal dismissed.

No. 89-1423: **State v. Fleischmann.** Stipulation allowed; appeal dismissed.

No. 89-1430: **Otoe County Nat. Bank v. Lewis.** Stipulation allowed; appeal dismissed.

No. 89-1431: **Sandhills Beef, Inc. v. Sierra Pacific Meat Co., Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 89-1435: **State v. Gross.** Stipulation allowed; appeal dismissed.

No. 89-1436: **State v. Starks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1437: **State v. Bratton.** Motion of appellee for

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1441: **State v. Roesch.** Affirmed. See Rule 7A(1).

No. 89-1445: **State v. Leaming.** Stipulation allowed; remanded for resentencing.

No. 89-1447: **State v. Fleischmann.** Stipulation allowed; remanded for resentencing.

No. 89-1461: **State v. Davis.** Affirmed. See Rule 7A(1).

No. 89-1463: **Millard Volunteer Fire Dept., Inc. v. Millard Suburban Fire Protection.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1465: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1467: **State v. Fish.** Affirmed. See Rule 7A(1).

No. 89-1470: **State v. Holder.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1471: **In re Interest of Tweedy.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1472: **State v. Hauser.** Stipulation allowed; appeal dismissed.

No. 89-1477: **State v. Johnston.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1478: **In re Interest of Sopcich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1482: **State v. Houston.** Affirmed. See Rule 7A(1).

No. 89-1483: **State v. Falls.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1486: **Stanley v. Stanley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1489: **Board of Mental Health v. Gienau.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1491: **State v. Drugsvold.** Affirmed. See Rule 7A(1).

No. 89-1497: **Citibank, N.A. v. Apple Creek Associates.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-1498: **State v. McCraney.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1499: **State v. LaChapelle.** Affirmed. See Rule 7A(1).

No. 89-1501: **State v. Rodriquez.** Affirmed. See Rule 7A(1).

No. 89-1503: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-003: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-004: **In re Adoption of Nappolini.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-014: **Schrader v. Pegler-Sysco Food Serv.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-015: **State ex rel. Rhodes v. Wheeler.** Motion of appellee to dismiss appeal for mootness sustained; request for attorney fees denied.

No. 90-016: **E.V. Lutheran Good Samaritan Soc. v. C & R Engineering, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-023: **State v. Caneco.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-024: **State v. Caneco.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-032: **State v. Bloxton.** Affirmed. See Rule 7A(1).

No. 90-033: **Frerichs v. Frerichs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-035: **State v. Christiansen.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-037: **Jacobsen v. Alexander.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-046: **State v. Davis.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-047: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-049: **State v. Perry.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-056: **State v. Carter.** Affirmed. See Rule 7A(1).

No. 90-059: **McFadden v. McFadden.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-061: **State v. Rose.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2). Trial court directed to correct its order nunc pro tunc to give defendant credit on his sentence for 117 days rather than 100 days as set forth in the judgment and sentence order.

No. 90-062: **State v. Buckner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-063: **State v. Coleman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-068: **Springer v. Higgins.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-071: **State v. Toney.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-073: **State v. Chromy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-077: **State v. Morton.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-078: **State v. Martinez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-085: **Bieda v. Northwestern Mutual Life Ins. Co.** Stipulation allowed; appeal dismissed.

No. 90-086: **Anderson v. Copple.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-087: **State v. Gregory.** Stipulation allowed; appeal dismissed.

No. 90-090: **State v. Pickel.** Affirmed. See Rule 7A(1).

No. 90-095: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-098: **Commonwealth Savings Co. v. Soukup.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-099: **Commonwealth Savings Co. v. Buresh.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-100: **Commonwealth Savings Co. v. Wegrzyn.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-101: **Commonwealth Savings Co. v. Rech.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-102: **Commonwealth Savings Co. v. Kadavy.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-103: **Commonwealth Savings Co. v. Wagner.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-106: **State v. Allgood.** Affirmed. See Rule 7A(1).

No. 90-108: **Kantor v. Bremers.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 90-109: **State v. Castor.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-113: **State v. Mueller.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-119: **In re Lnenicka Trust.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-125: **In re Applications A-15974 through A-15985.** Motions of appellees Upper Big Blue N.R.D. and City of Fremont for summary dismissal sustained; see Rule 7B(1).

No. 90-126: **In re Appropriations A-14137 et al.** Motions of appellees Upper Big Blue N.R.D. and City of Fremont for summary dismissal sustained; see Rule 7B(1).

No. 90-129: **Roemen v. Tussing.** Stipulation allowed; appeal dismissed.

No. 90-136: **Anderson v. Cotton.** Stipulation allowed; appeal dismissed.

No. 90-137: **Anderson v. Cotton.** Stipulation allowed; appeal dismissed.

No. 90-151: **State v. Thompson.** Affirmed. See Rule 7A(1).

No. 90-153: **State v. Coran.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-156: **State v. Mayer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-159: **Gas 'N Shop, Inc. v. Nebraska Liquor Control**

Comm. Stipulation allowed; appeal dismissed.

No. 90-163: **State v. Clinchers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-166: **In re Conservatorship of Spence.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-170: **State v. Benish.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-174: **State v. Sabatka.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-179: **State v. Cave.** Affirmed. See Rule 7A(1).

No. 90-180: **State v. Thurman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-183: **State v. Summage.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-184: **State v. Soule.** Affirmed. See Rule 7A(1).

No. 90-185: **State v. Gallion.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 90-189: **Nolte v. Adams County Bank of Kenesaw.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 90-192: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-201: **Jaramillo v. State of Nebraska.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-202: **Jaramillo v. State of Nebraska.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-203: **Jaramillo v. State of Nebraska.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-207: **Bogatz v. Bogatz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-212: **State v. Oellerich.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-215: **Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-218: **Wolfe v. Wolfe.** Stipulation allowed; appeal

dismissed with prejudice.

No. 90-221: **State v. Bentley.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-224: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-225: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-229: **Village of Nora v. Department of Environmental Control.** Stipulation allowed; appeal dismissed.

No. 90-230: **Wilcox v. Hartman.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-233: **Kenney v. Kenney.** Stipulation allowed; appeal dismissed.

No. 90-234: **First Security Bank of Holdrege v. Pearson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-239: **Farm Credit Bank of Omaha v. Dikeman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-243: **State v. Jones.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-246: **In re Interest of Dennis.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-247: **In re Interest of Dennis.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-248: **Bockmann v. Bockmann.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-254: **State v. Barnett.** Affirmed. See Rule 7A(1).

No. 90-255: **ConAgra Fertilizer Co. v. Marxsen.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-262: **State ex rel. Cash v. Hernandez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-263: **Anderson v. Copple.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-264: **Mitera v. Mitera.** Affirmed. See Rule 7A(1).

No. 90-268: **State v. Partee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-270: **Hampton v. State.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-280: **Marler v. Marler.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-285: **State v. Sikora.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-300: **Cossyleon v. Cossyleon.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-335: **Massie v. The Lutheran Home.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-344: **State v. High.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-345: **State v. High.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-348: **Nebraska Pub. Power Dist. v. Nebraska Accountability and Disclosure Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-349: **Davis v. Davis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-353: **State v. Birth.** Appeal dismissed. See Rule 7A(2).

No. 90-360: **Hruska v. Hruska.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-364: **Wolf v. Schultz.** Stipulation allowed; appeal dismissed.

No. 90-366: **Little v. Hoover Group, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-375: **State v. Britt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-376: **State v. Britt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-377: **State v. Britt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-380: **Tri-County Bank & Trust v. Haught.** Stipulation allowed; appeal dismissed.

No. 90-383: **Harders v. Nebraska Real Estate Commission.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-419: **State v. Prunty.** Motion sustained; appeal

dismissed.

No. 90-441: **State v. Moten.** Appeal dismissed. See Rule 7A(2).

No. 90-466: **Twyman v. Amisub Saint Joseph Hospital, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 90-469: **DeLong v. Andrews.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-470: **Rodenbaugh v. Rodenbaugh.** Stipulation allowed; appeal dismissed.

No. 90-497: **Heironymus v. Heironymus.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-509: **State v. Hurlbert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-545: **State ex rel. Nelson v. Beermann.** By order of the court, relator's petition dismissed at cost of relator.

No. 90-595: **State v. Richardson.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. LONNIE C. JONES, APPELLANT.

453 N.W. 2d 447

Filed April 6, 1990. No. 88-908.

1. **Verdicts: Evidence: Appeal and Error.** On appeal, the Nebraska Supreme Court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
3. **Appeal and Error.** On a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
4. **Constitutional Law: 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 or 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 defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record that shows counsel's deficient performance in representing the defendant.
6. **Effectiveness of Counsel.** A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance.
7. **Securities Regulation: Convictions: Intent: Proof.** Proof of specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a conviction under the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1987).
8. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a

particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffective assistance of counsel.

9. **Appeal and Error.** Error assigned but not discussed will not be considered by this court on appeal.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

Lonnie C. Jones, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers; and, on brief, Neal P. Nelson for appellee.

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

FAHRNBRUCH, J.

Lonnie C. Jones appeals two cases consolidated for trial wherein he was convicted by a jury of 21 violations of the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1987). The defendant received sentences totaling 3 to 9 years' imprisonment. We affirm.

Jones was found guilty in the district court for Dawson County on three counts of offering or selling unregistered securities, in violation of § 8-1104; eight counts of aiding and abetting the sale of unregistered securities; two counts of transacting business as a broker-dealer, issuer, or agent while not registered as a broker-dealer, issuer, or agent, in violation of § 8-1103; and eight counts of offering a security by employment of a scheme to defraud or by making untrue statements or engaging in a course of business which operated as a fraud upon the purchaser, in violation of § 8-1102.

On appeal, the defendant claims that his convictions should be reversed because (1) the evidence was insufficient to support his convictions; (2) he was denied effective assistance of counsel; and (3) the trial court abused its discretion in imposing an excessive sentence.

Jones, having discharged his court-appointed counsel at the time of sentencing, appears in this court pro se. Failure of any court to appoint counsel for this appeal is not an assigned error in this proceeding.

We first consider Jones' contention that the evidence was insufficient to support his convictions.

On appeal, the Nebraska Supreme Court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. *State v. Wyatt*, 234 Neb. 349, 451 N.W.2d 84 (1990).

In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *Id.*; *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

Taking the view most favorable to the State, the record reflects that Jones' convictions stem from the selling of "charter memberships" in his business, Cash Explosion Promotions, by the defendant and an employee, Lowell Rose. Cash Explosion was to be financed by the sale of 100 $1,500 "charter memberships" that entitled the membership owner to receive 16 percent interest on each $1,500 investment for 2 years. Additionally, the membership owner was to share equally in 25 percent of the net profits of the business. Each membership was evidenced by a written document given to the investor.

Investors testified that they understood they were not required to do anything other than make their initial investment in order to receive the 16-percent interest and the profit sharing. Two investors stated they bought "shares" of stock in Cash Explosion. There was no indication on the memberships that any affirmative acts were required of the purchasers.

Rose testified he worked for Jones and that he made representations to the investors under defendant's direction. Jones testified that he hired Rose and authorized Rose to make the representations on the membership agreements. Defendant personally, and through Rose, represented to the investors that their funds would be safe, that the investments were low risk, and that they were secured up to 125 percent by

income-producing properties, mortgages, and corporate bonds. One investor stated she did not believe she was taking a chance on losing her investment. At the time of trial, the investments had never been secured by any form of collateral. Jones admitted at trial that he had no collateral by way of property, first mortgages, or corporate bonds securing the charter memberships.

On February 13, 1986, Jones met with an attorney for the Nebraska Department of Banking and Finance regarding the Cash Explosion program. Defendant was told that his program constituted the offering of a security, that the security was required to be registered with the Department of Banking, and that he was required to be registered with the department to sell such a security. Jones was also told that any future offerings or sales should not occur until registration had been accomplished. The defendant was advised to seek legal counsel knowledgeable in securities law. Jones stated he saw an attorney and learned that registration would be costly. Defendant concluded that with internal bookkeeping changes, he could avoid registration. Jones continued to market the Cash Explosion program without registration. Although Jones represented that only 100 memberships would be sold, 121 were sold.

It is a well-established rule that on a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990).

In support of his claim that the evidence was insufficient to support his convictions, Jones argues only that his Cash Explosion venture activities did not amount to the selling or offering of securities because the "membership program" did not meet the definition of an "investment contract." Brief for appellant at 10. An investment contract is a security under § 8-1101(12). In interpreting the Securities Act of Nebraska, § 8-1122 encourages reference to federal law and the law of other states that have adopted the Uniform Securities Act. In *S. E. C. v. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946), the U.S. Supreme Court found that an investment contract is a security if it evidences (1) an investment (2) in a

common enterprise (3) with a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others. See, also, *Reves v. Ernst & Young*, ____ U.S. ____, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990).

In Jones' case, he offered to and did sell "non-merchant charter memberships" to purchasers for $1,500 each. The written membership agreements provided that the owner would receive interest at the rate of 16 percent per year for the first 2 years of the membership "PLUS: Equal share in 25% of net profit of Cash Explosion along with the retail charter members until the year 2000 A.D. First 100 charter members to share equally." Charter members were encouraged to purchase more than one membership. It is self-evident from the membership sale agreement that each member's $1,500 was an investment and that there was a common enterprise involving at least 100 people. In his first "Newsletter For Charter Members Of Cash Explosion Promotions" Jones said, "[W]e are dealing with a ONE HUNDRED MILLION DOLLAR a year business!!!" In his second newsletter, in which he referred to an advertising campaign, Jones declared, "All this means is that your Charter Memberships will convert to stock in the company. This will *not change your agreements*, you will still receive 16% interest the first two years (paid monthly) *PLUS you will still share in 25% of the net profits of the company . . .*." (Emphasis supplied.) In subsequent newsletters, Jones spoke glowingly of prospects for a successful venture which would become nationwide. Under the terms of the contract and representations by Jones, a jury could find beyond a reasonable doubt that a purchaser bought a charter membership for $1,500 with the reasonable expectation of profits. There is substantial evidence from which it could be determined that the profits would be derived from the entrepreneurial or managerial efforts of others and that the investor need do nothing more than put up his or her money. The written investment contract did not require the purchaser to do anything more than invest funds.

In several counts of the informations involving unregistered securities, Jones is charged with willfully offering or selling an unregistered security, "to-wit: shares in Cash Explosion." The agreement uses the word "share" in describing a member's

portion of 25 percent of net profit of Cash Explosion by the first 100 charter members. "Share" means

> [a] part or definite portion of a thing owned by a number of persons in common and contemplates something owned in common by two or more persons and has reference to that part of the undivided interest which belongs to some one of them. A unit of stock representing ownership in a corporation.

Black's Law Dictionary 1233 (5th ed. 1979). See, also, Webster's Third New International Dictionary Unabridged (1981).

Throughout his testimony, Jones claimed that the sale of membership agreement only gives a member the option to purchase stock after 2 years. In view of the written agreement, not only is that contention untenable, but if his contention was correct, Jones' conduct would still violate Nebraska's securities act. Section 8-1101(12) defines a "security," in part, as "any note, stock . . . certificate of interest or participation in any profit-sharing agreement . . . investment contract . . . or, in general, any interest or instrument commonly known as a security . . . *or right to subscribe to or purchase . . . any of the foregoing*." (Emphasis supplied.)

The security offered by the defendant does not fall within any of the securities exempt from registration in § 8-1110 or transactions exempt from registration under § 8-1111.

Under the foregoing facts, there was sufficient evidence for a jury to find beyond a reasonable doubt that the defendant was guilty of the crimes charged. There is no merit to Jones' contention that there was insufficient evidence for a jury to find beyond a reasonable doubt that a security was offered or sold in his Cash Explosion venture.

We next consider Jones' claim that he was denied effective assistance of counsel.

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or 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 defense, that is, a demonstration of reasonable probability that but for counsel's

deficient performance, the result of the proceeding would have been different. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record that shows counsel's deficient performance in representing the defendant. *State v. Whiteley,* 234 Neb. 693, 452 N.W.2d 290 (1990).

As noted in *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), and again in *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989): " '[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance.' "

In contending that his trial counsel was ineffective, defendant first asserts that had trial counsel shown the court exhibit 9 and explained that "the [16-percent] interest [paid to members] was *not* designed to be paid by the Cash Explosion Venture," brief for appellant at 11, the jury would have concluded that the offering did not constitute an investment contract or security, as there would be no expectation of profit from a common enterprise. Exhibit 9 was a bulletin making numerous claims about Cash Explosion and contained information that was given to members as part of their investment.

Exhibit 9 was offered and received into evidence, and it merely states that income from various properties was being pledged to a trust account in sufficient amounts to guarantee 16 percent per annum simple interest for a period of 2 years. The exhibit does not indicate that interest would not be paid by the Cash Explosion venture. Jones fails to demonstrate how counsel's performance with regard to exhibit 9 prejudiced his defense. Nor does the defendant demonstrate how the results of the trial would have been different had his counsel performed as the defendant would have had him perform.

Jones also contends that trial counsel was ineffective in failing to obtain an affidavit from an attorney who purportedly gave defendant legal advice with regard to the Cash Explosion

venture. Jones contends that had such affidavit been procured, the jury would have realized that he did not purposely break the law. Proof of specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a conviction under the Securities Act of Nebraska. *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983). Moreover, even if such an affidavit had been obtained, it would be inadmissible at trial as hearsay. See, Neb. Rev. Stat. §§ 27-801(3) and 27-802 (Reissue 1989).

In his reply brief, defendant asserts that trial counsel should have subpoenaed the attorney he claims to have consulted, as well as other witnesses. Nothing in the evidence by way of affidavit or testimony from the attorney supports Jones' allegations as to what the attorney would have testified to had he been called as a witness. Likewise, what other witnesses would have testified to had they been called is not reflected in the record by affidavits or testimony. Assertions stated in a brief but not supported by the record do not support an ineffective assistance of counsel claim. See *State v. Whiteley, supra*. Furthermore, the decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffective assistance of counsel. *Id.* Jones' contention is meritless.

Defendant lists the following documents that he contends effective counsel would have introduced in his defense:

> 1) The Cash Explosion business records, which would have proven:
>
> a. How much money Lowell Rose stole, besides the $7,000 which was known about, during the months of September and October, 1986. In other words, how much did he steal during the months of December 1985 through September 1986?
>
> b. That Mr. Rose was an independent agent, not an employee.
>
> 2) An original letter, dated December 1986, from Mrs. Lowell Rose, addressed to the Defendant, where she apologized for Lowell Rosses [sic] dishonest actions, which caused the failure of Region One, even before it became a reality.

> 3) A letter from Charles Boren, a charter member, stating his belief that the Defendant was a man of honesty and integrity and would not intentionally be involved in any illegal activity.
>
> 4) A 1 1/4 hour long video tape, narrated by the Defendant, which carefully explained the Cash Explosion Venture and [h]ad been approved by the Prosecution.

Reply brief for appellant at 4.

The above documents with regard to Lowell Rose are irrelevant to the crimes charged. The defendant has failed to prove how he was prejudiced by his counsel's failure to offer such evidence at trial or that the result of the trial would have been different had the evidence been received. The letter from Boren was hearsay and not admissible. Defendant fails to show how his counsel's failure to offer a videotape in evidence prejudiced his defense or that the results of the trial would have been different had the tape been before the jury.

Jones also contends that his trial counsel should have emphasized that the wording used in the membership agreements was originated by Rose. This complaint is without merit. Jones testified he was aware of the language in the agreements and authorized Rose to make the representations contained in the agreements.

The defendant also claims that a plea in abatement filed by his counsel was "so deficient" that it did not enlighten the trial court that "security interests of the complaining parties had not attached and hence [the security laws] did not apply [and that] but for counsel's deficient performance the charges would have been quashed." Brief for appellant at 14. In arguing that the security interests had not attached, defendant directs this court to article 9 of the Nebraska Uniform Commercial Code, specifically, Neb. U.C.C. §§ 9-302 et seq. (Reissue 1980). Article 9 of the Uniform Commercial Code is not relevant in this case, notwithstanding defendant's assertion to the contrary. Jones' assignment of error that he was denied effective assistance of counsel is meritless.

The defendant contends that "[u]nder the facts in this case, (specifically the presentence investigation report) the District court abused its discretion, by imposing an excessive sentence

against the appellant." Brief for appellant at 3. The defendant does not discuss this assignment of error in either his initial brief, reply brief, "Oral Argumant [sic], Submitted In Writing," or "Written Rebuttal to Oral Argument." It is a well-established rule of this court that error assigned but not discussed will not be considered. *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989); *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NANCY KAY BROWN, APPELLANT.

453 N.W.2d 576

Filed April 6, 1990. Nos. 89-116, 89-117.

1. **Criminal Law: Double Jeopardy.** The rule that a person cannot twice be put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act.
2. **Search Warrants: Affidavits.** The totality of the circumstances test states that if the circumstances set forth in the affidavit for search warrant, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.
3. **Trial: Evidence: Waiver: Appeal and Error.** In order to preserve a claimed error in the admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. If a party does not make a timely objection to the evidence, the party waives the right to assert prejudicial error concerning the evidence received without objection.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Randy S. Hisey, of Uhlir, Baker & Hisey, for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

WHITE, J.

In this case, defendant appeals her convictions in the Dakota County District Court for possession with intent to deliver a controlled substance and possession with intent to manufacture a controlled substance. The appeals were consolidated in this court. We affirm.

On Saturday, May 21, 1988, a confidential informant contacted Nebraska State Patrol Investigator Johnson with detailed information regarding a marijuana manufacturing operation being conducted in defendant's home. In sum, the informant detailed seeing marijuana being cultivated and manufactured in defendant's home. On May 23, Investigator Johnson filed in the Dakota County Court an affidavit for a search warrant recounting what had been learned through the confidential informant, and implicating one Steven Ristau. Steve Cortis is defendant's boyfriend. The affidavit contained the conclusory statement that "the confidential informant is trustworthy . . . ." The court issued a no-knock warrant to search defendant's house.

A search of the home revealed large quantities of marijuana in various stages of growth and equipment used to manufacture marijuana for sale. Defendant was arrested, and informations were later filed in the Dakota County District Court. In separate informations, defendant was charged with possession with intent to distribute a controlled substance and possession with intent to manufacture a controlled substance. Defendant pled not guilty.

Defendant moved to quash the informations, alleging that both informations constitute the same crime and therefore violate double jeopardy principles. She also moved to suppress all evidence obtained as a result of the search of the house, alleging that the confidential informant was not shown to be reliable. She further moved to compel disclosure of the confidential informant's identity. The State resisted each of these motions, and they were overruled.

With regard to the hearing on the motion to suppress, the only evidence presented was the bill of exceptions from the county court preliminary hearing, which was offered by the defendant. There is no evidence in that bill of exceptions to

indicate the basis upon which Investigator Johnson concluded the informant was trustworthy.

The case was tried to the court on December 6 and 7, 1988. Defendant was found guilty on both counts and was subsequently sentenced. On December 12, defendant filed a motion for new trial, which was apparently overruled.

On June 8, 1989, defendant filed a motion for a new trial or a new hearing on the motion to suppress, pursuant to Neb. Rev. Stat. § 29-2101 (Reissue 1989). This motion alleged that on March 14, 1989, in the related case of *State v. Cortis*, docket No. 45-20, the confidential informant's identity was revealed after the trial court sustained a motion to compel disclosure. The informant's name was Colleen Barker, and she was deposed by Cortis' attorney. Selected portions of the deposition were filed with the motion. Defendant alleged that information learned through the deposition was newly discovered evidence which would have materially affected the search warrant probable cause determination, and which was not discoverable with reasonable diligence because the State resisted, and the trial court overruled, her motion to compel disclosure of the confidential informant's identity. This motion was also overruled. Defendant appeals to this court, assigning several errors.

Defendant first argues that she was denied her constitutional protection against double jeopardy in that the elements of the information in case No. 45-24 were identical to the elements of the information in case No. 45-22. The information in case No. 45-22 reads in pertinent part: "[O]n or about the 23rd day of May A.D. 1988 [defendant did] knowingly or intentionally manufacture, distribute, deliver, dispensed [sic] or possessed [sic] with intent to manufacture, district [sic], deliver, or dispense a controlled substance, to-wit: marijuana as defined by Neb. Rev. Stat. 28-405 Schedule 1(c)(10)." Case No. 45-24 states that "on or about the 23rd day of May A.D. 1988 [defendant did] possess with the intent to manufacture a controlled substance, to-wit: marijuana as defined by Neb. Rev. Stat. 28-405 Schedule 1(c)(10)."

This court has stated that the rule that a person cannot twice be put in jeopardy for the same offense has no application

where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984).

In the present case any confusion which may have existed in the wording of the informations was cured by the findings of the trial court, which stated:

> It will be the finding and order of the Court in Case No. 45-22, that the Court finds the defendant guilty of possession with intent to deliver a controlled substance. While there was no direct evidence of intent to deliver, the necessary intent can be established by circumstantial evidence, and such circumstantial evidence in this case established intent beyond a reasonable doubt. The possession of 17 point 5 pounds of marijuana in sellable form is a sufficient quantity of the controlled substance to support the factual finding of the defendant's intent to deliver. That quantity, according to the evidence, is sufficient to manufacture from 22,400 to 29,000 marijuana cigarettes, and completely excludes any reasonable contention that the controlled substance was for the defendant's private use. . . . In Case No. 45-25, the Court finds the defendant guilty of possession with intent to manufacture marijuana. The presence of 12 growing plants, paraphernalia to populate and raise those plants, I feel, can lead to no other conclusion.

"Deliver" and "manufacture" are defined separately under Neb. Rev. Stat. § 28-401 (Reissue 1985). It is clear from the trial court's statements that defendant was convicted of two separate and distinct offenses arising out of the same act or transaction. There was no error.

Defendant next argues that the trial court erred in overruling her motion to suppress and her June 8, 1989, motion for a new trial and a new suppression hearing. In essence, she asks this court to determine if the affidavit for the search warrant, when read in light of the informant's deposition taken after the trial, states sufficient probable cause under a "totality of the circumstances" test, as adopted by this court in *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983). This test states

that if the circumstances set forth in the affidavit for search warrant, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.

Defendant contends that the deposition testimony shows the confidential informant, Colleen Barker, was never used as an informant prior to this case, that Barker has a felony check forgery conviction and a felony check writing conviction, that Barker may have been under the influence of drugs when she made observations of defendant's home, and that the testimony reveals confusion in the affidavit as to Steven Ristau and Steve Cortis, who are different individuals. This evidence, according to defendant, draws into question Barker's veracity and basis of knowledge for her observations. It also calls into question whether Investigator Johnson acted with reckless disregard for the truth when he made the statement in the affidavit that the confidential informant was trustworthy.

We do not reach the merits of defendant's argument. At trial, the State's first witness was Eric Reed, a Dakota County deputy sheriff. He testified that he was familiar with marijuana through his training and experience. He further testified that on May 23, 1988, he accompanied other law enforcement personnel to defendant's home to execute a search warrant. While at the house he videotaped the entire contents of the home. By stipulation of both parties, both videotapes were received into evidence, and Reed then narrated one of the videotapes, indicating to the court that the green plant material was marijuana. The videotapes documented the entire contents of the home, including marijuana in various stages of manufacture. The evidence which was presented after the introduction of the videotapes was merely cumulative. Defendant never objected to the introduction of the videotapes. It was only after the State put on its next witness and began to introduce evidence of the witness' observations of the home's contents that defendant entered a continuing objection. This court has stated that in order to preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered

evidence. If a party does not make a timely objection to the evidence, the party waives the right to assert prejudicial error concerning the evidence received without objection. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989); *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223 (1989). Defendant has waived consideration of this assignment of error.

Defendant next argues that the trial court erred in not sentencing her to probation. It did not. Defendant was on probation for an earlier offense when she was arrested for the offenses under consideration in this appeal. Defendant was convicted of two Class III felonies, which carry a 20-year maximum term and a 1-year minimum term of incarceration. She received 2 to 5 years' imprisonment on both convictions, the sentences to run concurrently. This court has often stated that "[a] sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). The trial court did not abuse its discretion. There is no error.

Accordingly, defendant's convictions and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH L. NELSON, APPELLANT.
453 N.W.2d 454

Filed April 6, 1990. No. 89-214.

1. **Trial: Pleadings: Evidence: Appeal and Error.** When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when it was offered.
2. **Pleadings: Appeal and Error.** The denial of a motion in limine does not in itself constitute reversible error.
3. **Trial: Mental Competency.** The granting of a request for a psychiatric evaluation of the victim falls within the discretionary power of the trial court.
4. **Sexual Assault: Mental Competency: Witnesses.** The purpose of a psychiatric

examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness.

5. **Trial: Evidence: Appeal and Error.** Generally, it is within the trial court's discretion to admit or exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion.
6. **Sentences: Appeal and Error.** A sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
7. **Sentences.** As a general rule, it is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively.
8. _____. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count.
9. _____. In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social or cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence in the commission of the crime.
10. _____. The seriousness of the offense is an important factor in the setting of a sentence, and evidence as to a defendant's life, character, or previous conduct is highly relevant to the determination of a proper sentence.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

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

Robert M. Spire, Attorney General, Jill Gradwohl Schroeder, and, on brief, Susan M. Ugai for appellee.

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

HASTINGS, C.J.

Following a jury trial in the district court, the defendant was found guilty of first degree sexual assault and kidnapping. After the trial court determined that he was not a mentally disordered sex offender, defendant was sentenced to imprisonment for 15 to 25 years for the sexual assault and to a consecutive term of 15 to 25 years for the kidnapping. Both of these crimes are Class II felonies, providing for sentences of 1 to 50 years.

The defendant assigns as error (1) the admission of evidence

concerning a prior bad act of the defendant, (2) the denial of defendant's request for a psychiatric examination of the victim, (3) the exclusion of evidence of a specific instance of the victim's past sexual behavior, and (4) the excessiveness of the sentences. We affirm.

On March 6, 1988, defendant and several of his friends went to Max Magruder's, a restaurant and bar located in the Conestoga Mall in Grand Island. The defendant testified that two women customers, for whom he ordered several drinks throughout the evening, joined them at their table. He himself had approximately six drinks during the course of the evening. Later in the evening, he and one of the two women, who he said was definitely intoxicated, went for a walk in the mall area. When he came back to the table, he noticed that his keys were missing. A short time later, he and this same woman went to the restroom. He said he had his arm around her and then asked her if she had his keys. He said he grabbed her by the arm and said he would like to have his keys back. She started to cry, so, he said, he let her go. He denied that he ever took her into the men's restroom.

A short time later, the defendant saw the victim, who was a waitress at Magruder's, walk out the door. According to his testimony, he followed her out and was going to ask her for a ride. The defendant claims that he got into her car on the passenger's side, that they started kissing and petting, and that she told him she knew a place in the country where they could park. His testimony indicates that the two of them engaged in sexual relations which were voluntary on the part of both of them and that the victim then drove the defendant back to town. Shortly thereafter, he was confronted by a police officer.

According to the victim, as she was getting into her car she saw the defendant running toward her car. She got in the car, and eventually the defendant forced his way into the driver's side of her automobile and commenced to drive off. She tried to escape once by opening the passenger door, but the defendant reached over and pulled her back. He forcibly held onto her with one hand. During the time that they were driving, the defendant forced the victim to perform several sexual acts. He did this by threatening to "bash in [her] brains."

The victim testified that when they arrived at a spot in the country where there was a driveway, the defendant proceeded to assault her with his fingers, his mouth, and his penis. The defendant then told the victim to put her clothes back on, and he drove them back to town, he got out of her car, and the victim drove home.

Both of the victim's parents testified that she told them she had been raped. The police were called, and the victim's mother went with her to the hospital.

The woman for whom the defendant had been buying drinks earlier in the evening, and with whom the defendant said he walked around the mall and later toward the restrooms, testified. She told how during the course of this evening on which the alleged assault took place, she was followed to the restroom by the defendant. According to her, the defendant grabbed her hand, took her into the men's restroom, and held her while he used the toilet. He then unzipped her jeans, but when she continued crying he let her go.

The physician director of the St. Francis Medical Center emergency department testified. He related the history given him by the victim, which agreed generally with her testimony. As a result of his examination, he found scratches on the back of her left calf and on her back and an abraded area on the perineum from which serum was seeping. He was unable to find any evidence of sperm in the vagina.

The victim's personal physician examined her on March 7, 1988. He testified over objection that the victim told him that she "had been raped the night before." The physician's examination revealed a tender bruised area on the left shoulder near the neck and a bruised area over the right perineal region, the right side of the crotch. He continued to testify that other than the fact that she was somewhat upset, other findings were negative, although she complained of a sore tailbone. The doctor testified that he could not tell when the trauma occurred that caused the bruising, but did say that his impression was that it was not more than 2 days earlier.

The basis for defendant's request for a psychiatric examination of the victim, which was denied, was an affidavit that a coworker of the victim's would testify that within a week

after the alleged assault the victim had told her that following the incident, the victim was left out in the country and her car was found in town. Defendant's counsel argued that this is inconsistent with prior statements of the victim to law enforcement officials and her deposition and preliminary hearing testimony and that based on these inconsistent stories, he believes the victim has emotional problems and disorders and that she had fabricated her entire story.

The issue as to the victim's prior sexual activity arose as the result of a deposition of one of the victim's examining physicians. During that examination, she admitted having had sexual intercourse 3 days prior to the alleged assault. Because neither of the examining physicians could determine exactly when the victim's injuries occurred, it is defendant's position that the injuries could have resulted from the admitted sexual intercourse and that the assault did not happen.

Prior to trial, the defendant filed a motion pursuant to Neb. Rev. Stat. § 28-321 (Reissue 1989) to introduce evidence of this past sexual behavior. This motion was denied. During the course of the trial, defendant requested permission to make an offer of proof with regard to his earlier motion concerning the relevancy of the prior sexual acts of the alleged victim. The offer of proof was denied.

Defendant's complaints concerning the admission of evidence of a prior bad act by him related to his experience with the woman in or near the restrooms when, she testified, he unzipped her jeans. However, we do not reach that assignment of error because of the failure of the defendant's counsel to interpose an objection when the evidence was offered.

When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when it was offered. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). As stated by this court in *State v. Tomrdle*, 214 Neb. 580, 585, 335 N.W.2d 279, 283 (1983):

> A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. . . . "[I]t is not

> the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." . . . "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."

(Citations omitted.)

The denial of a motion in limine does not in itself constitute reversible error. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988). When such a motion is denied, the moving party must also object at trial and base his or her complaints on the trial record. *State v. Clark, supra.*

When the witness was called who was the victim of the alleged zipper incident, but before she gave any testimony, defense counsel stated to the court, out of the jury's presence: "Your honor, I would renew my objection and my motion in limine, which was filed previously with this Court with regard to this testimony as being irrelevant, highly prejudicial. And this is alleged uncharged misconduct, which is inadmissible in evidence under the Nebraska statutes, Your Honor."

The motion was again overruled, and the witness eventually testified, without objection being made, to the zipper incident. Defendant, having failed properly to preserve the error by objecting to the introduction of the evidence at the appropriate time, cannot now be heard to complain about the introduction of the evidence.

Addressing defendant's second assignment of error, the granting of a request for a psychiatric evaluation of the victim falls within the discretionary power of the trial court. In *State v. Maestas*, 190 Neb. 312, 207 N.W.2d 699 (1973), this court discussed the power of the trial court to require such an examination, but did not clearly hold that the trial court has

such power. The court stated: "We hold that *if* the court has inherent power to require the complaining witness in a prosecution for a sex crime to submit to psychiatric examination, nonetheless it did not under the showing here abuse its discretion in denying the examination." (Emphasis supplied.) *Id.* at 314, 207 N.W.2d at 700. One of the factors considered by the *Maestas* court in determining that there was no abuse of discretion was that the testimony of the prosecutrix did not bear any obvious indications of unreliability or mental aberration.

Courts in other jurisdictions have held that a trial court does have discretionary power to compel a psychiatric evaluation, but only for compelling reasons. See, *State v. Lederer*, 99 Wis. 2d 430, 299 N.W.2d 457 (1980), *questioned on other grounds*, *State v. Feela*, 101 Wis. 2d 249, 304 N.W.2d 152 (1981); *State v. Buckley*, 325 N.W.2d 169 (N.D. 1982); *State v. Klueber*, 81 S.D. 223, 132 N.W.2d 847 (1965) (the court is permitted to compel a psychiatric evaluation upon a substantial showing of need and justification).

The purpose of a psychiatric examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness. *State v. Reiman*, 284 N.W.2d 860 (S.D. 1979). However, as stated by the North Dakota Supreme Court:

> In actions involving sex crimes, the complainant is not the person being tried. The proceedings should not put the complaining witness on trial to shift the attention away from the accused. Neither should the trial be conducted to unnecessarily subject the complaining witness to additional trauma. However, we must also recognize the right of one accused of a sex offense to have a fair trial. We believe these competing principles require that we follow what appears to be the majority rule that the trial court has discretion to order a psychiatric examination of a complaining witness based upon compelling reasons established on the record, but not for a mere fishing expedition.

State v. Buckley, supra at 171.

Defendant's basis for requesting such an examination of the complaining witness in this case relates to the apparent inconsistency in her recitation of the events of the alleged assault to the police and upon the witness stand, as compared to the description which her coworker claims the victim gave to her. Defendant argues in his brief:

> Perhaps the inconsistency has a logical explanation. Perhaps the inconsistency is a symptom of some medical disease or mental illness. One does not know. However a mental examination would help in determining the source of the inconsistency. Consequently, the Court abused its discretion in not permitting the examination.

Brief for appellant at 15-16.

Such a rule would justify a mental examination every time a witness appeared to have given conflicting stories. Defendant failed to make any showing casting doubt about the victim's mental capacity as a witness. The real question was one of credibility and weight for the jury to decide. See *State v. Lederer, supra* at 463.

Section 28-321(2) provides:

> 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 . . . .

It is defendant's contention that because the victim had admitted during the taking of her history by the emergency room physician that she had engaged in sexual intercourse 3 days before this alleged assault, such evidence was relevant to the issue of whether defendant was the source of the victim's physical injuries, i.e., the bruising about the left shoulder and the perineum and the scratches on the leg and back.

In *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), this court had its first opportunity to examine § 28-321. In the course of its opinion, the court said:

> Patterned on federal Rule 412, § 28-321(2) excludes evidence of a victim's past sexual behavior unless evidence

> "offered by the defendant" at an in camera hearing shows that (1) the victim's past sexual behavior with anyone other than the defendant has some bearing on the question whether the defendant is the source of physical evidence in the prosecution for sexual assault . . . .

State v. Hopkins, supra at 375, 377 N.W.2d at 116. The purpose of the statute 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 *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

The record does not contain a transcript of the testimony taken during the in camera hearing held on defendant's motion. The journal entry in which the trial court held that the evidence was inadmissible notes that an in camera hearing was held and that exhibits 2 and 3 were received. These two exhibits were the depositions of the emergency room physician and the victim's personal physician.

The personal physician testified in his deposition that he did not feel that the bruises which previously have been referred to were caused by trauma occurring 3 to 4 days prior to his examination, but, rather, that they occurred not more than a day before. The emergency room physician noted that the victim had a sore rectal area, and he observed scratches on her back and left calf and serum seeping from her rectal area, which was abraded or injured. In his opinion, the scratches looked fresh, like they could have occurred in the last several hours of that evening.

The record discloses no other evidence relevant to the inquiry as to whether the injuries could have occurred as the result of a prior sexual encounter as distinguished from a sexual assault by the defendant. The evidence presented to the trial court failed to support any inference that the victim's injuries were the result of the prior sexual intercourse. The relevance of the evidence sought to be offered by the defendant not having been established, it cannot be said that the trial court abused its discretion in excluding the evidence of the earlier sexual encounter.

Generally, it is within the trial court's discretion to admit or

exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987).

Finally, the defendant contends that imposition of consecutive sentences of 15 to 25 years is an abuse of discretion. It is well established that a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Von Busch*, 234 Neb. 119, 449 N.W.2d 237 (1989).

The fact that the sentences are consecutive rather than concurrent does not constitute an abuse of discretion. It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989). The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the other offenses. *State v. Lewchuk*, 232 Neb. 229, 440 N.W.2d 229 (1989). Since additional evidence is required to prove the offense of kidnapping besides that necessary to prove the offense of sexual assault, consecutive sentences may be imposed. See, Neb. Rev. Stat. § 28-319 (Reissue 1989); Neb. Rev. Stat. §§ 28-312 and 28-313 (Reissue 1989).

As to the length of the sentences, it is well established that

> "[i]n imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social or cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime."

State v. Maeder, 229 Neb. 568, 574, 428 N.W.2d 180, 184

(1988). Furthermore, " '[t]he seriousness of the offense is an important factor in the setting of a sentence,' and '[e]vidence as to a defendant's life, character, or previous conduct is highly relevant to the determination of a proper sentence.' " *Id.*

Defendant was 39 years old at the time of the crimes. He obtained a GED at the age of 22. By his own report, he was arrested for assault and battery at the ages of 17 and 19. He has a history of speeding violations, and his prior convictions include destruction of city property (amended from third degree assault on an officer and resisting arrest), driving while intoxicated, four counts of issuing bad checks, and third degree assault by mutual consent (amended from third degree assault). Defendant has been an alcoholic since he was a teenager.

Sexual assault is a crime of violence. Defendant repeatedly terrorized the victim with threats that he would bash her head in if she did not do what he instructed, and he forced her to perform several humiliating sexual acts with him. Although she did not suffer permanent physical injury, the victim did suffer psychological trauma. She is afraid to go out alone, especially at night, is afraid of anyone whom she does not know being close to her, is extremely afraid of anyone with a similar look or build to defendant, quit her job because she was uncomfortable with crowds and people who were drinking, and sought the assistance of counseling. Her parents had to buy her another car as she could not bring herself to drive or be in the one in which she was sexually assaulted.

Considering the nature of defendant's acts, his past record, and the statutory limits for the punishment of the offenses, it cannot be said that the sentences imposed by the trial court were an abuse of discretion. Although it is impossible to "color-match" cases, this case is not unlike *State v. Maeder, supra*, where the same sentences were imposed for the same crimes.

The judgment of the district court is affirmed.

AFFIRMED.

DAVID J. SHERWOOD, APPELLEE, V. GOOCH MILLING AND ELEVATOR CO., A DIVISION OF ADM MILLING CO., A MINNESOTA CORPORATION, ET AL., APPELLANTS.

453 N.W.2d 461

Filed April 6, 1990. No. 89-681.

1. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
2. **Trial.** Determination of causation is ordinarily a matter for the trier of fact.
3. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
5. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it.
6. **Workers' Compensation: Words and Phrases.** Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, for which the employee was trained or accustomed to perform, or any other kind of work which a person of the employee's mentality and attainments could do.
7. **Workers' Compensation.** Whether a worker is totally disabled is a question for the finder of fact.
8. _____. An injured worker's right to vocational rehabilitation services depends upon his inability to perform work for which the worker has previous training and experience.
9. _____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
10. _____. Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988) allows the Workers' Compensation Court to award rehabilitation services when a total or partial disability is or is likely to be permanent if there is a reasonable probability that such services will enable a disabled worker to become gainfully employed or increase his or her earning capacity.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

Scott A. Burcham, of Baylor, Evnen, Curtiss, Grimit, & Witt, for appellants.

Mark D. Petersen, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellee.

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

CAPORALE, J.

The defendant-appellant employer, Gooch Milling and Elevator Co., a division of ADM Milling Co., and its insurance carrier, defendant-appellant Old Republic Insurance Company, challenge the award of workers' compensation benefits to the employee, plaintiff-appellee David J. Sherwood. Defendants assign as error the Workers' Compensation Court's (1) finding that Sherwood suffers from an occupational disease arising out of and in the course of his employment, (2) finding that Sherwood is temporarily totally disabled, (3) awarding Sherwood vocational rehabilitation services, and (4) awarding Sherwood certain fees and assessing certain costs against the defendants. We affirm as modified.

Sherwood began his employment with Gooch Milling on February 12, 1968, performing various tasks of physical labor. Gooch Milling's brief states that Sherwood "has a substantial history of respiratory problems dating back to the early 1970's . . . ." Brief for appellants at 7. This assertion is apparently based upon an excerpt from a report by the National Jewish Center for Immunology and Respiratory Medicine, which states:

> Mr. Sherwood was hospitalized for one week in the early 1970s, for respiratory symptoms, after the feed mill [apparently the same Gooch feed mill as the one in which he worked prior to becoming disabled] was fumigated and he was cleaning out dust. The fumigation was "phos toxin" which were pellets that led to a gas. He felt that the gas exposure, probably phosgene, was responsible for his respiratory symptoms, although he recalls that a doctor felt that perhaps he was allergic to mildew in the dust.

However, this earlier hospitalization seems to be only an isolated incident in that the record indicates that Sherwood was

generally very healthy from 1968 through 1985.

Beginning in 1982, after working at various other positions at Gooch Milling, Sherwood began working as a fat coater in Gooch Milling's dogfood processing facility. As a fat coater, Sherwood operated and monitored machinery which sprayed tallow and a product named "BioDigest" onto the dogfood being processed. The air in the area where Sherwood worked as a fat coater was hot and humid and apparently contained suspended vapors from the heated liquids which were sprayed onto the dogfood.

The record indicates that when Gooch Milling began spraying BioDigest onto dogfood sometime between 1983 and 1985, the BioDigest had a strong acidic odor which irritated the throats and lungs of Gooch Milling's employees.

After Gooch Milling began using BioDigest, Sherwood began experiencing respiratory problems, including shortness of breath and coughing which frequently became so severe that it induced vomiting. On July 29, 1986, Sherwood was hospitalized as a result of severe coughing and vomiting which seemed to be induced by his on-the-job exposure to BioDigest. Sherwood was released to return to work on August 11, 1986.

Sherwood's physician, Dr. Anup K. Chakraborty, again restricted Sherwood from his occupational duties, for a 12-week period beginning in March 1987, and recommended that he not be exposed to BioDigest fumes when he returned to work in June 1987. Sherwood's duties were changed after he returned to work in June 1987, and at that time he became an "extruder operator" at Gooch Milling, a position which he had held prior to working as a fat coater. His health remained in an improved state until he was again exposed to BioDigest fumes later in August or September 1987, when Sherwood once more experienced headaches, coughing, vomiting, and shortness of breath in association with his exposure to the fumes.

On October 26, 1987, Chakraborty advised Sherwood to totally avoid exposure to BioDigest fumes. Contrary to his doctor's advice, and at the urging of his superiors at Gooch Milling, Sherwood did return to work on October 26. He also worked the next day, October 27, and on that date suffered headaches and coughing spells which resulted in vomiting.

Sherwood testified that he had told his superiors at Gooch Milling that his doctor had advised him not to work on October 26. But since his superiors nevertheless told him to go to work, Sherwood did work from October 26 through October 28, because he feared the prospect of losing his employment with Gooch Milling in the event he refused to work on those dates. On October 28, before his shift had ended, Sherwood, along with his fellow employees, was escorted off the Gooch Milling premises because of an impending labor strike.

Gooch Milling paid Sherwood temporary total disability benefits in connection with his absences from work prior to October 28, 1987 (e.g., in July 1986 and from March 11, 1987, through June 7, 1987); however, Gooch Milling paid no such benefits to Sherwood after October 28, and he has not worked since that date. The labor strike which began on October 28, 1987, ended on or about January 26, 1988.

Sherwood made inquiries regarding his temporary total disability benefits and was told by Gooch Milling representative Harold Kennedy that he could not receive such benefits because he was on strike. He was also told that he could not return to work without a medical release.

In a continuing effort to alleviate Sherwood's symptoms, Chakraborty referred Sherwood to the National Jewish Center for Immunology and Respiratory Medicine in Denver, Colorado. The report by Dr. Kathleen Kreiss, director of the occupational medicine program at the center, refers to clinic visits on August 30 and 31, 1988, and September 1, 1988, and states in part:

> We have seen many patients, who after noxious exposures in their work situations develop persistent respiratory complaints, including "supersensitivity" to many irritants and odors. When we do not find an organic basis for such complaints, we usually think of these symptoms as representing post traumatic stress disorder. Mr. Sherwood clearly has a physical reason for his cough, in that he wakes frequently at night from coughing. This nocturnal cough is not compatible with a psychogenic origin to his cough. Nevertheless, his impairment seems to be out of proportion to any objective tests of airways or

parenchymal function. Mr. Sherwood acknowledges that he often does not vomit when it is socially unacceptable and that he feels that his coughing, headaches, and vomiting are worse in situations when he is stressed. Thus, although he has some physical reason for his cough, I think that his symptoms have been magnified, probably as a result of a post traumatic stress disorder.

There are at least two possible reasons for his persistent coughing. He describes sputum production, and often feels that his coughing is relieved for an hour or so when he is able to bring up phlegm. He describes this phlegm as extremely sticky and difficult to bring up. This is compatible with chronic bronchitis caused by occupational exposure to acid irritants. In addition, he describes stuffy nose, which is probably accompanied by postnasal drip, another common cause of cough. It is clear that Mr. Sherwood has an extremely reactive posterior pharynx. This may be due to the inflammation that he sustained in the two years that he worked with Biodigest. In any case, he seems to be unable to tolerate stimulation of his pharynx by postnasal drip, which might be un-perceived by other people. . . .

. . . .

. . . In conclusion, Mr. Sherwood's symptom of chronic cough is most compatible with chronic bronchitis, with a possible contribution of postnasal drip. These symptoms arose in temporal relation to his exposure to an extreme irritant, which even the Material Safety Data Sheet, says should be used with adequate ventilation and respiratory protection. There is no other plausible explanation for the etiology of his chronic cough. However, his cough is probably exacerbated by anxiety over the meaning of his symptoms and their progression to severe headache and vomiting on a frequent basis. His extreme reaction to many irritants may partly represent a post traumatic stress disorder, again a work-related condition, related to his exposure to spills that precipitated many medical consultations.

At Gooch Milling's request, Sherwood was seen by Dr.

Richard Osterholm of Omaha, Nebraska. A December 12, 1988, letter sent to Gooch Milling's attorney by Osterholm and his colleagues, Drs. Frank LaMarte and Marlin Stahl, details numerous tests which Sherwood had undergone, and in part states the following:

> Our impression is one of bronchitis which is associated with cough. The laboratory and clinical parameters identified support no impairment of functional respiratory capacity.
>
> Except for a bronchial biopsy finding consistent with minimal chronic non-specific bronchitis and a slightly depressed PO2 of 67, this individual's entire current work-up is normal. . . .
>
> . . . .
>
> . . . Mr. Sherwood is a lifelong non-smoker who reports being in normal health prior to his reported work-related exposure to BioDigest. According to the patient's history there appears to be a temporal relationship between the time of exposure and the onset of his symptoms. . . . We would agree . . . that the information currently available does not allow for a definitive diagnosis for a "work-related event". The exposure described was temporally associated with development of bronchitis. However, at this time there is little evidence if any of impairment of functional respiratory capacity. . . . It is concievable [sic] that his cough which is reportedly exaggerated by inhaling irritants could affect his work performance in a variety of different jobs. However, we do feel he is employable. We recommend he avoid exposure to BioDigest.

Sherwood had been seen earlier by Dr. Stephen Rennard of the University of Nebraska Medical Center in Omaha. A May 1, 1987, letter from Rennard to Sherwood's attorney states in part:

> [W]hile the information currently available does not allow a definitive diagnosis for a "work related" event, as noted above, the history is certainly suggestive. We have recommended that Mr. Sherwood continue to restrict his exposure to "Bio-Digest". This final recommendation is

made empirically and seems "common sense" but is not based on a definitive diagnosis of a work related event.

I would repeat that while I'm unfamiliar with the specific product Bio-Digest this product is a mixture of enzymes. Enzymes are organic compounds and allergic reactions to this type of substance have been well reported in the literature.

Although Sherwood is a lifelong nonsmoker and apparently has not been exposed to BioDigest fumes since October 28, 1987, the testimony of his wife, Stephanie Sherwood, indicates that Sherwood's symptoms persist as of the date of the rehearing, December 5, 1988. Sherwood testified that he was physically unable to do the tasks required of him at his previous jobs.

In addition to the foregoing, a December 16, 1988, letter from Chakraborty to Sherwood's attorney states in part:

> In short, we have a gentleman who is now 45 years of age, has never smoked in his life and since being exposed to the extremely irritant, toxic fumes since 1985 has had a cough, dyspnea, headache and has come to a stage where he has severe coughing spells with minimal exertion or even with no exertion, such as at nighttime, which leads to vomiting. The only objective findings that we have is that the patient goes into coughing paroxysms with any attempted deep breathing, but has otherwise normal lung functions, bronchoscopic examinations, etc. All the physicians involved in his care agree that this patient is not faking his symptoms. Various medications have been tried on him and he has possibly had some improvement with the medications so far. The physician's group in Omaha did not think that a definitive diagnosis for a "work-related event" could be made, but they come out also with the recommendation that this patient should not go back to his previous work environment where he is exposed to these toxic fumes.
>
> I had the opportunity to see Mr. Sherwood over the last 2 1/2 years on various occasions in the office and remain quite convinced that his symptoms are genuine. I remain quite concerned about his symptoms and his suffering and

> I am frustrated to see that the medications only offer very minimal relief of his symptoms. Without any history of previous smoking, without any other apparent predisposing factors such as immunoglobulin deficiency, bronchial asthma, cystic fibrosis, bronchiectasis, etc., I do not have any way of thinking of any other cause for his chronic, severe bronchitis but the occupational exposure to those irritant fumes. I realize that this patient had a house plastering job at a young age and also has been a woodcutter, involved in farming, cattle raising, hog breeding and has also been a volunteer rural firefighter, but I cannot imagine any of those could have led him to the present disability but for the exposure to the toxic fumes. . . .
>
> . . . .
>
> In conclusion, I can put it with reasonable medical certainty that there was a direct causation of this extremely irritant toxic fume exposure to this patient's bronchitis, that the patient is still having continued symptoms, that it is not possible to predict when he is going to recover, either partially or completely and that he should under no circumstances be exposed to the same environment again. He should remain under continued medical supervision and followup and undergo investigation as necessary.

The compensation court found that while Sherwood was employed at Gooch Milling, he "contracted industrial, bronchial asthma, an occupational disease, as a result of repeated exposure to toxic chemical fumes in the course and scope of his employment." The court further found that Sherwood, as a result of such exposure, remained temporarily totally disabled on December 5, 1988, and that he would remain so for an indefinite future period of time. The court therefore ordered the defendants to pay temporary total disability benefits to Sherwood as long as he remained so disabled and left the issue of a possible residual disability to be determined after Sherwood reaches maximum medical improvement. In addition, the court ordered the defendants to pay for reasonably necessary medical and hospital care resulting from

Sherwood's job-induced injury.

The compensation court also held that Sherwood was entitled to an evaluation for rehabilitation services, as provided in Neb. Rev. Stat. § 48-162.01 (Reissue 1988). The compensation court stated:

> There is a reasonable probability that with appropriate training, rehabilitation or education, the plaintiff may be rehabilitated to the extent that he can significantly increase his earning capacity; if the plaintiff desires to be evaluated as to his suitability for rehabilitation services, including job placement, he should contact the Rehabilitation Specialist of the Nebraska Workers' Compensation Court . . . within 30 days after the date of this Award; a report of any such evaluation shall be filed promptly with this Court, and copies thereof promptly furnished to all parties hereto, whereupon the Court, after affording the parties an opportunity to be heard, may take such action as is further provided in Section 48-162.01 . . . .

Defendants first contend that the compensation court erred in finding Sherwood's current condition to be causally related to his employment. In making this claim, defendants assert that Sherwood's condition is not "characteristic and peculiar" to his employment. It is true that unless the character of an injury is plainly apparent, an injury is a subjective condition, and an expert opinion is required to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury. *McMichael v. Lancaster Cty. Sch. Dist. 001*, 233 Neb. 603, 447 N.W.2d 35 (1989); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Rodgers v. Sparks*, 228 Neb. 191, 421 N.W.2d 785 (1988). However, " '[d]etermination of causation is, ordinarily, a matter for the trier of fact.' " *Fees, supra* at 621, 423 N.W.2d at 486, quoting *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989).

In the present case, other than the temporal relationship between Sherwood's exposure to BioDigest and his respiratory affliction, there is no tangible, objective evidence linking

Sherwood's condition to his employment at Gooch Milling. However, Sherwood did undergo extensive testing to determine the cause of his condition. After such testing, Chakraborty concluded that Sherwood's condition was caused by his exposure to irritant fumes while working at Gooch Milling. Thus, Sherwood did present evidence that in the opinion of at least two treating physicians, his condition was caused by his employment.

The findings of fact made by the Workers' Compensation Court have the same force and effect as a verdict in a civil case and will not be set aside unless clearly wrong. *Carter v. Weyerhaeuser Co.,* 234 Neb. 558, 452 N.W.2d 32 (1990); *Mutual of Omaha v. Broussard, supra*; *Spangler v. State,* 233 Neb. 790, 448 N.W.2d 145 (1989).

In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Carter v. Weyerhaeuser Co., supra*; *Mutual of Omaha v. Broussard, supra*; *Spangler v. State, supra.*

Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it. *Carter v. Weyerhaeuser Co., supra*; *Mutual of Omaha v. Broussard, supra.*

In view of the evidence presented by Sherwood, it cannot be said the compensation court was clearly wrong in determining that Sherwood's respiratory affliction was caused by his employment at Gooch Milling.

Defendants' second assignment of error claims that the compensation court erred in finding that Sherwood remained temporarily totally disabled on December 5, 1988. Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, for which the employee was trained or accustomed to perform, or any other kind of work which a person of the employee's mentality and attainments

could do. *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). See, also, *Kleiva v. Paradise Landscapes*, 230 Neb. 234, 430 N.W.2d 550 (1988); *McDonald v. Lincoln U-Cart Concrete Co.*, 232 Neb. 960, 442 N.W.2d 892 (1989).

Whether a worker is totally disabled is a question for the finder of fact. See *Kleiva, supra*.

Sherwood has a ninth-grade education and has very limited vocational training. His job experience prior to his work at Gooch Milling consists basically of physical labor and selling brushes. Sherwood's work at Gooch Milling has also required substantial physical labor.

Sherwood testified that he was physically unable to do the tasks required of him at his previous jobs, and the testimony of his wife confirms that Sherwood's symptoms persist. Chakraborty expressed the views that Sherwood was not "disabled for work, but he has serious problems when exposed to the toxic fumes at the plant," and that he would be unable to and should not be "advised to return to his pre-injury work responsibilities as an extruder operator." A fair summary of those opinions is that although Sherwood is not disqualified from all employment, he cannot now do what he was last doing. That opinion, coupled with Sherwood's testimony that he is physically unable to perform the tasks required of him by his previous jobs and his wife's testimony that his symptoms continue, supports the compensation court's factual finding that Sherwood is presently temporarily totally disabled. See, *Kleiva v. Paradise Landscapes, supra*; *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988); *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986).

Defendants' third assignment of error asserts the compensation court erred in finding that Sherwood was entitled to vocational rehabilitation services as awarded on rehearing.

While defendants claim the compensation court awarded Sherwood rehabilitation services, the court, although not as clearly as it might have, ordered only that an evaluation be conducted if desired by Sherwood. In any event, an injured worker's right to vocational rehabilitation services depends upon his inability to perform work for which the worker has

previous training and experience. *Hernandez v. Farmland Foods*, 227 Neb. 629, 418 N.W.2d 765 (1988); *Smith v. Hastings Irr. Pipe Co., supra.* Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court. *Hernandez v. Farmland Foods, supra*; *Smith v. Hastings Irr. Pipe Co., supra.*

As shown by the analysis of defendants' second assignment of error, the evidence is sufficient to uphold the compensation court's determination that Sherwood is not able to perform work for which he has previous training and experience.

Section 48-162.01(6) allows the compensation court to award rehabilitation services when a total or partial disability is or is likely to be permanent if there is a reasonable probability that such services will enable a disabled worker to become gainfully employed or increase his or her earning capacity. The compensation court could conclude from Chakraborty's December 16, 1988, letter to Sherwood's attorney that Sherwood's condition was likely to be permanent. Consequently, the compensation court's finding that Sherwood is disabled being supported in the evidence, that court cannot be said to have been clearly wrong in allowing Sherwood to be evaluated in order to determine his suitability for rehabilitation services.

Defendants' fourth assignment of error alleges that certain expert witness fees and transcript costs should not have been assessed against them.

With respect to expert witness fees, Neb. Rev. Stat. § 48-172 (Reissue 1988) is applicable. That section states in applicable part:

> When a reasonable attorney's fee is allowed the employee against the employer as provided in section 48-125, the compensation court shall further assess against the employer as costs of the employee . . . the fees and mileage for necessary witnesses attending the proceedings at the instance of the employee. Both the necessity for the witness and the reasonableness of the fees shall be approved by the compensation court.

On rehearing, the award of the compensation court included $400 for an expert witness fee. The record indicates that the fee

was incurred to Wedgewood Medical Center, the medical group with which Chakraborty is associated, in connection with a billing dated April 12, 1988. However, the record in this case does not include any expert testimony relating to the $400 billing which is dated April 12, 1988, so apparently this testimony was only used, if at all, in the initial hearing on June 2, 1988. At that hearing, the compensation court ruled that a reasonable controversy existed and did not award attorney fees. Therefore, § 48-172 does not authorize the compensation court's awarding of the witness fee in question.

Regarding the alleged error with respect to the awarding of transcript costs, Neb. Rev. Stat. § 48-182 (Reissue 1988) is applicable. That section states in part:

> In case either party at interest refuses to accept any final order of the Nebraska Workers' Compensation Court after rehearing, such party may, within thirty days thereafter, file with the compensation court a notice of intention to appeal and within thirty days from the date of such final order file with the compensation court a praecipe for a bill of exceptions. Within two months from the date of the filing of the praecipe, the court reporter or transcriber shall deliver to the clerk of the Nebraska Workers' Compensation Court a bill of exceptions which shall include a transcribed copy of the testimony and the evidence taken before the compensation court, which transcript when certified to by the person who made or transcribed the record shall constitute the bill of exceptions. *The transcript and bill of exceptions shall be paid for by the party ordering the same* . . . .

(Emphasis supplied.)

The compensation court thus acted correctly in requiring defendants to pay the charges associated with the rehearing transcript.

For the foregoing reasons, the judgment of the compensation court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN F. NEVELS, APPELLANT.

453 N.W.2d 579

Filed April 6, 1990. No. 89-698.

1. **Courts: Juvenile Courts: Jurisdiction.** There is no arithmetical computation or formula required in a district court's consideration of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988) for determining whether to transfer proceedings to juvenile court. For retention of the proceedings as a prosecution of a criminal offense, the district court need not resolve every factor against the juvenile; there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute.
2. **Juvenile Courts: Jurisdiction.** The statutory criteria or factors of Neb. Rev. Stat. § 43-276 (Reissue 1988) disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile.
3. _____: _____. Rehabilitation has traditionally played a key role in the treatment of young offenders; however, the concept of deterrence and the need to balance individual justice with the needs of society, a balancing process that is basic and fundamental to the general scheme of the criminal law, also have a place in the juvenile justice system.
4. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A district court's denial of a motion to transfer to juvenile court is reviewed on appeal for abuse of discretion.
5. **Trial: Expert Witnesses.** A trier of fact is not required to take the opinions of experts as binding upon it.
6. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge.
7. **Sentences.** In imposing a sentence, a sentencing judge should consider, among other things, the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
8. _____. It is the minimum portion of an indeterminate sentence which measures its severity.
9. _____. In determining a sentence, a sentencing judge is obliged to consider protection for the public and deterrence of both the defendant and others similarly inclined.

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

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

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

CAPORALE, J.

In accordance with his pleas, defendant-appellant, Benjamin F. Nevels, who was 15 years of age at the time of the crimes, was adjudged guilty of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1989), robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 1989), and the use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was thereafter sentenced to imprisonment for a period of from 6 2/3 to 20 years for manslaughter, to a period of from 4 to 8 years for robbery, to be served concurrently with the manslaughter sentence, and to a period of from 5 1/3 to 12 years for the use of a weapon, to be served consecutively to the other sentences. Nevels' assignments of error claim the district court erred in (1) failing to transfer his case to the juvenile court and (2) imposing excessive sentences with respect to the manslaughter and use of a weapon convictions. We affirm.

Nevels was born on July 17, 1973, to Fred and Paulette Nevels, who have since divorced. Nevels lives in Lincoln with his mother; his father lives in Alexandria, Virginia.

The divorce and her subsequent relationships with men were an emotional drain for Nevels' mother, who consequently was unable to provide a stable home environment for Nevels. Nevels witnessed the physical abuse of his mother during one of her relationships and was himself physically abused on at least two occasions. His mother changed residences frequently while Nevels was a child in order, according to her, to escape racial prejudice which arose as the result of her being white and Nevels' father being black.

Nevels had regular visits with his father prior to the time his father moved to Virginia, but after his father moved in 1981, the visits became less frequent. The unstable, unstructured, permissive environment created by Nevels' mother provided a confusing contrast to the more structured, regimented

environment provided by his father. In 1981, Nevels' mother married John Joseph, an inmate at the Nebraska State Penitentiary. Nevels often accompanied his mother on visits to the penitentiary to visit Joseph. According to one mental health expert, Nevels regards Joseph, rather than his natural father, as his true father.

Nevels began using alcohol and drugs at age 10 or 11 and has used them regularly since that time. He has also had difficulty in school, using disruptive behavior in order to get attention.

In addition, Nevels has a rather extensive history of adjudications in juvenile court, including adjudications for trespassing, resisting arrest, intentionally or recklessly causing damage to property, shoplifting, third degree assault, and receiving stolen property. He was placed on probation for all the adjudications except for the most recent incident involving property damage and receiving stolen property, for which he was committed to the custody of the Department of Correctional Services for placement in the Youth Development Center at Kearney, Nebraska. He violated the terms of his probations on a number of occasions.

Prior to Nevels' commitment to the Kearney center, Nevels' mother placed him in the Rivendell Center for Children and Youth, a privately operated psychiatric treatment facility at Seward, Nebraska, because of a suicide attempt made by Nevels. After 5 weeks at Rivendell, Nevels ran away. He was then placed in the Kearney center, from which he was eventually paroled. Nevels was not provided after his parole with any followup to the treatment he received at Kearney and committed the crimes which are the subject of the present action while on parole.

During the night of August 19, 1988, Nevels had been drinking alcohol and using drugs. Eventually, he encountered the victim, Eugene Nnakwe, and offered to help Nnakwe locate some marijuana. Nevels entered Nnakwe's vehicle, and the two contacted 17-year-old Jason Daniels, who also agreed to help Nnakwe find some marijuana and entered Nnakwe's vehicle. The three drove around Lincoln, searching for marijuana, and at some point while Nnakwe was out of hearing, Nevels and Daniels agreed that if they could not find Nnakwe any

marijuana, they would "beat him out of his money." According to Daniels, this expression refers to a nonviolent "con" whereby the two would tell Nnakwe they would use his money to buy marijuana, take his money under that pretext, and then not return with either the money or the marijuana.

Ultimately, at around 12:30 a.m. on August 20, the three arrived at a Lincoln, Nebraska, park so that Daniels could try to locate some marijuana at a nearby house. Nnakwe parked his vehicle on the street adjacent to the park. According to Nevels' testimony at the sentencing hearing, while Daniels was away from the vehicle, Nnakwe made sexual overtures toward Nevels, saying, "[Y]ou know what I want." When Daniels returned to the park, he heard Nevels say to Nnakwe, "You can't do that. Don't do that." According to Daniels, Nnakwe and Nevels were physically struggling with each other. Eventually, Nnakwe fell to the ground. When Daniels tried to break the two apart, Nnakwe grabbed him, whereupon Daniels struck Nnakwe on the chest.

Nnakwe then got up from the ground and ran toward the parked vehicle. When Daniels next saw Nnakwe and Nevels, they were again struggling. Nnakwe was on his knees, and Nevels was striking Nnakwe with his hands. Nnakwe fell onto his back, and Nevels began to kick Nnakwe's chest and head, using what Daniels described as "swoop kicks" and "stomp kicks." Even after Nnakwe became unconscious, Nevels continued to kick Nnakwe. According to Daniels, Nevels appeared "[u]pset and out of control, mad at something." Daniels dragged Nnakwe out from under Nevels' kicks, and the two dragged Nnakwe 35 or 40 feet to a tree further into the park.

Daniels urged Nevels, "Let's go, let's go," but Nevels remained in the park and began to strike Nnakwe in the chest and face with a metal tire iron, which, according to Nevels' testimony at the sentencing hearing, Nnakwe had earlier introduced into the altercation and had dropped. Daniels saw Nevels hit Nnakwe more than four times with the tire iron. According to Daniels, Nevels just kept repeating to Nnakwe angrily that "he couldn't do that. . . . [H]e couldn't do that." When Daniels told Nevels, "You are going to kill him," Nevels

stated, "I want to kill him. He can't do that." At Daniels' request, Nevels put the tire iron down, but then pulled a pine branch from a tree and began to strike Nnakwe with that.

After Nevels stopped beating Nnakwe, he went through Nnakwe's pockets and got the keys to his vehicle. He and Daniels then left the park in Nnakwe's vehicle, with Daniels driving. Nevels said to Daniels, "Did you know that guy was gay?" Daniels drove about half a block when Nevels told Daniels he wanted to return to the park to retrieve the tire iron. After retrieving the tire iron, Nevels returned to the vehicle and told Daniels that he had placed a picnic table on Nnakwe so he could not get away.

At the time they left the park, both Nevels and Daniels thought Nnakwe was "just knocked out" and were concerned he might get up and call the police about his stolen vehicle. They returned to the park to determine whether Nnakwe was still there. Daniels testified that he remained at the vehicle while Nevels went to check Nnakwe. Daniels stated he could hear Nnakwe making "a snoring sound" and heard Nnakwe "grunt." Nevels returned to the vehicle and told Daniels that Nnakwe was asleep.

The next morning, Nnakwe's body was discovered in the park. The physician who performed the autopsy stated that Nnakwe did not die from the blunt force trauma to his face and head but, instead, from asphyxiation over a period of 2 to 3 hours after the beating as a result of the aspiration and ingestion into his lungs of blood flowing from the wounds caused by the beating. This physician stated that at least six blows had been delivered to Nnakwe's head and neck.

After his arrest for the subject crimes, Nevels was placed in the Lancaster County juvenile detention center. On one occasion, Nevels was restricted to his room because of his involvement in a fight between two other residents of the center. As a result, Nevels became upset, agitated, and angry and attacked an employee of the center, hitting him 10 to 20 times. On at least two different occasions, Nevels threatened members of the staff. However, Nevels also received a letter of commendation for good behavior from several members of the staff.

Nevels was later admitted to Dominion Hospital, a psychiatric facility located in Virginia, for 4 weeks and then transferred to Springwood Psychiatric Institute, also in Virginia, an institution which deals specifically with substance abuse problems.

Several mental health experts testified on Nevels' behalf. Dr. Joseph Palombi, a child and adolescent psychiatrist, treated Nevels during his stay at Dominion Hospital. He opined that Nevels suffers from several disorders and disabilities, including a mixed developmental disorder involving several speech- and language-based learning disabilities; minimal cerebral dysfunction which interferes with Nevels' learning, cognition, motivation, interaction with other people, and memory; a "conduct disorder socialized aggressive," which means Nevels is aggressive during periods of anxiety and has difficulty in conforming his behavior to the norms of society; a major depressive disorder involving periods of depression and thoughts of suicide; a mixed substance abuse disorder involving the use of drugs to deal with sadness, depression, and low self-esteem; and an adolescent identity disorder which means Nevels is "still . . . in the process of forming his own identity, [is] very immature, presents with a very pseudo-mature, very macho, very self-confident image, [although] nothing could be further from the truth." Palombi estimated Nevels' level of maturity as that of an average 11- to 13-year-old juvenile. Palombi also testified that Nevels tries to act like an adult in order to create an identity for himself, but in reality does not take responsibility for his actions, is "very insecure . . . anxious . . . childlike," masks his emotions in order to protect himself, is "often . . . overwhelmed by anxiety," and will become assaultive if he feels threatened. According to Palombi, Nevels killed Nnakwe because he felt

> threatened by [Nnakwe], both physically and psychologically . . . the fact that a homosexual advance was made toward him and that physically an altercation occurred, [Nevels] clearly expressed his outrage and his fear that he was going to be both physically and sexually assaulted. . . . [T]he threat provoked a clear anxiety attack. . . . He lost control.

According to Palombi, Nevels responded favorably to the treatment he received in the Virginia institutions; developed a capacity to look at himself and express emotions about himself; began to feel good about academic accomplishments; had begun to think about his relationships with his mother, father, and stepfather; and was "beginning to feel some remorse" concerning Nnakwe's death. Palombi opined that Nevels' disorders are treatable as evidenced by his favorable response to treatment, that such treatment "could very definitely be" successful before Nevels reaches his 19th birthday and, in other words, that it was "well within the realm of our prognostic discussions . . . that [Nevels] could be treated within a three years plus time frame," and that the treatment Nevels requires could be provided by a long-term residential treatment facility having "controls and very rigid structure" with individualized programs. However, Palombi also acknowledged that neither he nor any other mental health professional could predict an individual's future dangerousness.

Palombi suggested placement of Nevels in The Pines treatment center, a partly secure private institution in Virginia. Palombi stated that while at Springwood, Nevels did better in a closed unit, one that is locked and provides a more strict, structured behavioral program, rather than an open unit. Palombi warned that mainstreaming Nevels into an adult prison population "would probably be [devastating]."

Another psychiatrist, Dr. Rosalyn Inniss, who interviewed Nevels for 7 1/2 hours and reviewed a multitude of records relating to Nevels, testified similarly to Palombi that Nevels has identity problems because of being biracial, suffers from depression, is relatively unattached to people, is immature, tries to get attention through negative behavior, and does not know what social behaviors are acceptable. According to Inniss, Nevels' identity problem is in part the result of his parents' differing lifestyles and in part the result of the fact that his mother has not required him to be or feel responsible for his behavior. Inniss viewed Nevels' participation in the attempt to trick Nnakwe out of his money as an effort by Nevels to become a full member of his peer group, and stated that Nevels perceived Nnakwe's sexual overtures as an attack upon his

masculinity, which devastated him.

Because Nevels seeks acceptance and nurturing, still perceives that there are alternatives to identifying with a group which displays negative conduct, and, in Inniss' view, showed progress while at Kearney and Rivendell, and because Nevels' judgment and abstract reasoning are still in the process of forming, Inniss was of the opinion that Nevels can be treated in "a highly structured treatment program" within the 3 1/2 years until his 19th birthday. Inniss warned that sending Nevels to prison "would guarantee which way [Nevels would] go."

Dr. James Cole, a clinical psychologist, provided testimony similar to that given by Palombi and Inniss. Cole stated that Nevels' personality problems revolved around Nevels' lack of identity in that Nevels engages in negative behavior which makes him feel more secure about his black, male identity and which secures acceptance in his peer group. Cole also stated that because of the unstable, permissive home environment provided by his mother, Nevels is insecure and "less mature than a 15 year old." According to Cole, Nevels perceived Nnakwe's overtures as an immediate and sudden threat to his masculine identity, "which was his primary vulnerability," and as a result, "considerable anger was aroused against [Nnakwe], and then following anger would be aggression."

Cole was of the opinion that Nevels is treatable because he does not yet have a fixed personality, does not have the characteristics of the antisocial personality possessed by psychopaths and sociopaths, has a strong need for acceptance and to feel worthwhile, has the ability to feel affection for others, is responsive to attempts to establish a rapport with him, and has been amenable to treatment in the past. Cole expressed the view that "there's a very good chance" treatment in a healthy environment would be successful within the 3 1/2 years until Nevels' 19th birthday. In his psychological assessment of Nevels, Cole recommended institutionalization for a minimum of 3 years. According to Cole, the failure to treat Nevels would result in his "becoming much more of a hardened, antisocial type." While Cole opined that Nevels could be treated in the high-risk offenders program of the Lincoln Regional Center, he also testified the center informed

him that because Nevels requires treatment for at least 3 years, it could not admit him because of lack of bed space.

During cross-examination by the State, Cole acknowledged that if Nevels were placed in the juvenile system, there would be a risk that he would believe he had manipulated the system. In his psychological assessment of Nevels, Cole recommended that "[w]hatever judicial, legal, or court proceedings occur, one core principle is critical: [Nevels] must be made to understand that he is responsible for his behavior. In a reasonable, age appropriate manner, he must bear the consequences of his actions. This must be clearly and unambiguously communicated to him."

The three mental health professionals who testified for Nevels were of the opinion that in treatment Nevels would benefit from interaction with his father, and Dr. Inniss further stated Nevels' mother should not be involved in such treatment. Just prior to the hearing on the motion to transfer, legal custody of Nevels was placed with his father, who expressed a willingness to participate in Nevels' treatment and to pay whatever expenses for treatment that were not covered by his insurance. He further testified that space for Nevels had already been reserved at the Dominion Hospital in Virginia. He did, however, acknowledge that Nevels would be in the facility on a voluntary basis.

Nevels also produced testimony concerning the treatment of juveniles placed with the Department of Correctional Services. Larry Tewes, the assistant director of the department, testified that no special programs are available to juveniles placed with the department. After the age of 16, juveniles are placed in the general adult population of the prison. Tewes testified that juveniles are vulnerable to the adult residents and that while a protective custody unit is available to residents, the protective unit does not eliminate the danger to juveniles. Tewes stated that the department provides voluntary inpatient treatment for social and mental impairments, mental illness, and substance abuse and employs three clinical psychologists who oversee the programs and provide direct treatment.

Nevels also produced the testimony of Dearle Alexander, a current resident of the Nebraska State Penitentiary who was

placed with the Department of Correctional Services at the age of 16. Alexander testified that drugs were readily available in prison and that he was regularly assaulted both sexually and physically. However, Alexander also stated that while in prison, he had passed a high school equivalency test, had gone to trade school, and had participated in Alcoholics Anonymous.

Several witnesses for the State, including Nevels' probation officer; Nevels' parole officer at the Kearney center; the Lancaster County Attorney, who investigated Nnakwe's death; and a psychologist for the Nebraska Department of Correctional Services, who had not worked with Nevels on an individual basis but had reviewed certain records concerning Nevels, opined that Nevels' case should not be transferred to juvenile court. These witnesses provided a variety of reasons for their opinions, including the violence and gravity of the offense committed, the lack of Nevels' success while in the juvenile court system, the inability of the juvenile court system to deal with a juvenile who has committed homicide, and the fact that dealing with Nevels in the juvenile court system might diminish the seriousness of the offense. The psychologist further expressed his view that mental health professionals cannot be certain that a juvenile who has been released is fully rehabilitated. Nevels' probation officer was of the opinion that Nevels required both punishment and rehabilitation in a very secure, long-term facility such as an adult correctional facility.

The State also produced several witnesses who testified concerning the inadequacy of the dispositions available to the juvenile court. Roy Nifoussi, Nevels' probation officer, testified that the possible dispositions of a juvenile through the juvenile court system included probation with the parent; probation in a foster home, group home, or some type of community correctional program; or placement at the Youth Development Center-Kearney. According to the Lancaster County Attorney, the Kearney center has no programs or methods available to deal with juveniles who have committed homicide.

Dr. Brad Bigelow, a psychologist for the Nebraska Department of Correctional Services, concurred that the Kearney center provided no specific programs for juveniles

who have committed homicide. Bigelow stated that juveniles may be released from the Kearney center at any time such dismissal is approved by the staff; the juvenile court has no control over when a juvenile is released. Bigelow also disclosed that "[n]umbers dictate [the] length of stay in our institution. And the more kids that we have coming in, obviously, the more kids we have to have going out." While Bigelow testified that he would not release a juvenile who had not fully benefited from the treatment program or would transfer the juvenile to a different program, he also stated that it was possible that a juvenile who had committed homicide could be released after 4 months if the juvenile displayed outstanding behavior. Bigelow described the Kearney center as an open campus, having no fence, guards, or guard dogs. "It's readily accessible to the community and vice-versa."

Nevels first asserts that the district court erred in concluding that there was a sound basis for retaining jurisdiction over him and thus erred in refusing to transfer his case to the juvenile court.

Neb. Rev. Stat. § 29-1816 (Reissue 1989) provides in relevant part that upon proper motion, the district court shall consider whether it should waive jurisdiction of one who was less than 18 years of age at the time the alleged crimes were committed and transfer the case to the juvenile court for proceedings under the Nebraska Juvenile Code.

In deciding whether to grant a requested waiver of jurisdiction and transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988). *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); § 29-1816. Section 29-1816 provides that the district court shall transfer the case unless a sound basis exists for retaining it.

Section 43-276 requires consideration of the following criteria:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the

> alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as [are deemed] relevant . . . .

In *State v. Alexander*, 215 Neb. 478, 486-87, 339 N.W.2d 297, 301-02 (1983), we stated:

> There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. For retention of the proceedings as a prosecution of a criminal offense, the court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of [§ 43-276] disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] "Rehabilitation has traditionally played a key

> role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system." *State in the Interest of C.A.H. & B.A.R.*, [89 N.J. 326, 336, 446 A.2d 93, 98 (1982)]. As a result of such balancing, some youths will be held accountable through proceedings in the adult criminal justice system for effective deterrence of future antisocial misconduct.
>
> . . . The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention, that is, in the juvenile justice system or criminal justice system. [Citations omitted.]

Abuse of discretion is the standard of review applicable to an appeal from a district court's denial of a motion to transfer to juvenile court. *State v. Thieszen, supra.* While, as Nevels argues, there is testimony from three mental health professionals that he could be treated during the time the juvenile court would have jurisdiction over him (the juvenile court's jurisdiction over a juvenile lasts only until the juvenile attains the age of majority, age 19, or the court otherwise discharges the juvenile from its jurisdiction, see Neb. Rev. Stat. §§ 43-247 (Reissue 1988) and 43-245(6) and 43-289 (Cum. Supp. 1989)), there is also testimony that mental health professionals cannot be certain that a juvenile who has been released is fully rehabilitated. The district court was apparently not convinced that Nevels could be rehabilitated within the time the juvenile court would retain jurisdiction over him. As the trier of fact, the district court was not required to take the opinions of experts as binding upon it. See *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989).

The reality of the present case is that Nevels has repeatedly violated the law and performed other antisocial acts, culminating in the very violent and cruel beating which is involved in the present case. He has been subject to treatment, although limited, in the past and has as yet failed to reform. In

addition, there is evidence that if Nevels' case were to have been transferred to the juvenile court, he might have viewed the transfer as his manipulation of the system and not take responsibility for the crime. There is also evidence that the adult correctional facilities provide some rehabilitation programs if Nevels is willing to participate. The record supports the district court's findings that Nevels' rehabilitation needs will extend beyond the time the juvenile court has jurisdiction and that the facilities available to the juvenile court would not provide enough protection for the public.

The district court's conclusion that a sound basis exists for retaining jurisdiction over Nevels' case as a criminal prosecution is supported by appropriate evidence. Thus, in applying the balancing test of § 43-276, it cannot be said the district court abused its discretion in refusing to transfer Nevels' case to the juvenile court.

In view of the foregoing determination, we need not, and therefore do not, consider whether, in any event, Nevels' pleas of guilty to the charges waived any right he may have otherwise had to object to the district court's retention of jurisdiction over his case.

Nevels next asserts that the sentences imposed by the district court for manslaughter and use of a deadly weapon to commit a felony are excessive.

Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that the penalty for manslaughter, a Class III felony, is a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. Like manslaughter, the crime of use of a deadly weapon to commit a felony is a Class III felony and commands the same penalty as manslaughter.

As frequently stated, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge. *State v. Nelson, ante* p. 15, 453 N.W.2d 454 (1990); *State v. Boppre,* 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Tyrrell,* 234 Neb. 901, 453 N.W.2d 104 (1990). In imposing a sentence, a sentencing judge should consider, among other things, the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or

law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988). Moreover, it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987).

Nevels asks us to consider, in determining whether the district court abused its discretion in imposing its sentences, Nevels' age, social history, learning disabilities, juvenile record, progress made in treatment and, according to the experts, the fact that he is salvageable, and that he complied with various treatment programs subsequent to committing the crimes here involved. While it is true that the district court is required to consider these factors, we have said that in addition to considering the defendant's age, we "are obliged to consider protection for the public and deterrence" of both the defendant and others similarly inclined. *State v. Alexander*, 215 Neb. 478, 487, 339 N.W.2d 297, 302 (1983). Considering the amount of violence involved in the beating of Nnakwe and Nevels' general antisocial personality, there was no abuse of discretion in the sentences imposed by the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFERY GARCIA, APPELLANT.
453 N.W.2d 469

Filed April 6, 1990. No. 89-725.

1. **Appeal and Error.** The Supreme Court will consider only those errors which are assigned and discussed in an appellant's brief.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions.
3. **Criminal Law: Identification Procedures: Witnesses: Words and Phrases.** A

showup is usually defined as a one-on-one confrontation where the witness views only the suspect, and it is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect and while the incident is still fresh in the witness' mind.

4. **Criminal Law: Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
5. **Criminal Law: Identification Procedures.** The initial inquiry is whether an identification procedure was suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances. If an identification procedure is suggestive, then it must be determined whether the in-court identification was nonetheless reliable based on the totality of the circumstances.
6. **Trial: Identification Procedures.** In determining reliability, the factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
7. **Criminal Law: Identification Procedures.** A police officer's comment that a lineup or photographic array contains a suspect or a suspect's picture does not render the identification procedure unduly suggestive inasmuch as a witness would assume that to be the case.
8. **Trial: Evidence: Appeal and Error.** The admission of character evidence is largely left to the discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
9. **Criminal Law: Testimony.** On direct examination, a defendant's testimony that he or she has never been convicted of a crime is inadmissible.

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

Jerry J. Milner, of Milner Law Office, P.C., for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

FAHRNBRUCH, J.

Objecting to police identification procedures and the exclusion of good character evidence, the defendant, Jeffery Garcia, appeals his Hall County District Court jury conviction for robbery. We affirm.

At 12:30 a.m. on July 24, 1988, Velma Mosley, now known as Velma Watkins, left her place of employment in Grand Island and began walking home. When Watkins noticed three young men in a parking lot, she crossed the street. As Watkins continued walking, she sensed that the men were following her. One of the men approached Watkins from her left side and the two faced one another at an arm's-length distance. Watkins testified that the man was of Mexican descent, was wearing white slacks, and was shirtless. At this time, Watkins and the man noticed two other men, later determined to be Jay Otto and Michael McClaren. The man near Watkins returned to his companions. Otto and McClaren remained seated on the sidewalk by a funeral home and continued talking to two women in a parked car. The area was illuminated by signs around the funeral home and by a corner streetlight.

After facing the Hispanic man, Watkins began walking down the middle of the street. As she passed Otto and McClaren, they asked Watkins if she wanted a ride. She declined and assured them that she was all right. As the three men following Watkins approached Otto and McClaren, they told the pair to get off the sidewalk. When the men walked by Otto and McClaren, the last of the trio patted McClaren on the head.

Approximately one-half block later, the man in white pants grabbed the strap of Watkins' purse. Watkins made eye contact with her assailant. The strap broke away from the purse, and Watkins' assailants began to run. Realizing that they did not have the purse, the men returned, knocked Watkins to the ground, stepped on her neck, and wrestled the purse from her. Watkins went to a nearby bar, where she reported the robbery.

As Sgt. Kerry Cole of the Grand Island Police Department was leaving the police station parking lot shortly before 2 a.m. on July 24, he observed four males running down the middle of Division Street, near its intersection with Walnut Street. Watkins' stolen purse was later found behind a house located on the southeast corner of Division and Walnut. Cole gave chase and was finally able to detain one of the men. Sergeant Cole described the man as a shirtless Hispanic male with a mustache, wearing light-colored jeans. The detainee was identified as Jeffery Garcia, the defendant. After briefly

questioning him, Cole released Garcia.

At approximately 2:01 a.m., Michael Tremain, a Grand Island police officer, was dispatched to the bar to speak with Watkins. Upon his arrival at the bar, Watkins informed Officer Tremain of the robbery and gave a description of her assailants. Tremain conveyed this information by radio to other officers.

When he received the information that three Hispanic males had perpetrated a robbery and that one was shirtless and wearing white jeans, Sergeant Cole began searching for Garcia. Cole located Garcia in the company of Victor Deras at the intersection of Sycamore and Charles Streets, and had them come to his cruiser. Upon receipt of Sergeant Cole's radio dispatch that he had located suspects, Officer Tremain drove Watkins to the intersection of Sycamore and Charles, where the two men were being detained by Sergeant Cole. From Officer Tremain's cruiser, which was parked across the street from the two suspects, Watkins identified both men as being involved in the robbery. Thereupon, Garcia and Deras were placed under arrest for the crime of robbery.

On July 27, two six-man photographic arrays were shown to Otto. The array containing Garcia's photo consisted of separate photos of the upper torsos and faces of six individuals. Otto identified Garcia in one array and Deras in the other array as two of the men who were following Watkins on the morning of July 24. Neither Garcia nor Deras was pictured in both photographic arrays.

Although he did not testify at the defendant's trial, McClaren's deposition which was introduced at the suppression hearing reflects that McClaren, when shown the two photographic arrays, also identified Garcia and Deras as two of the men who were following Watkins just before she was robbed. McClaren made his identification on July 26. When Grand Island Police Det. Michael Salak showed the photographic arrays to Otto and McClaren, he cautioned each of them not to make an identification unless they were absolutely certain. Salak did, however, advise both witnesses that each array contained a photo of a suspect in the Watkins robbery. As will be discussed later, this comment is not fatal to a reliable identification.

After an evidentiary hearing, Garcia's motion to suppress identification of the defendant by the testimony of Watkins, Otto, and McClaren was denied. At trial, the court overruled Garcia's renewed motions to suppress in-court identifications of the defendant by Watkins and Otto. Both Watkins and Otto made in-court identifications of Garcia.

During the defendant's trial, defense counsel asked Garcia if he had ever been convicted of a felony, and his reply that he had not been was stricken upon the State's objection.

The jury found Garcia guilty of violating Neb. Rev. Stat. § 28-324(1) (Reissue 1989), which provides: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." The district court sentenced Garcia to a term of imprisonment of not less than 15 nor more than 30 months, with credit for time served.

While Garcia alleges four assignments of error, the only claimed errors discussed in his brief are (1) the trial court's failure to suppress identification testimony and (2) the exclusion of evidence of Garcia's good character. The Supreme Court will consider only those errors which are assigned and discussed in Garcia's brief. See, *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988).

It is Garcia's position that the showup conducted at the intersection of Sycamore and Charles violated his due process rights and that, therefore, Watkins' in-court identification should have been suppressed.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions. *Id.*

A showup is usually defined as a one-on-one confrontation where the witness views only the suspect, and it is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect and while the incident is still fresh in the witness' mind. *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988). An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989). The initial inquiry is whether an identification procedure was suggestive. See, *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), *overruled on other grounds*, *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987); *State v. Tramble*, 187 Neb. 488, 191 N.W.2d 822 (1971); *Salam v. Lockhart*, 874 F.2d 525 (8th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 252, 107 L. Ed. 2d 202; *State v. Collette*, 199 Conn. 308, 507 A.2d 99 (1986); *State v. Vaughn*, 101 Wash. 2d 604, 682 P.2d 878 (1984); 1 W. LaFave & J. Israel, Criminal Procedure § 7.4 (West 1984). A determination of impermissible suggestiveness is based on the totality of the circumstances. *Swoopes, supra*. If an identification procedure is suggestive, then it must be determined whether the in-court identification was nonetheless reliable based on the totality of the circumstances. *Richard, supra*; *Vaughn, supra*; *Collette, supra*. In determining reliability, the factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989).

Standing alone, Watkins' viewing of Garcia in a showup shortly after the occurrence of the crime does not violate due process. See, *Robinson, supra*; *Wickline, supra*; *State v. Johnson*, 214 Neb. 869, 336 N.W.2d 581 (1983); *Johnson v. Dugger*, 817 F.2d 726 (11th Cir. 1987); *Collette, supra*. Based upon the totality of the circumstances, the record establishes that Watkins' in-court identification of Garcia as the robber was reliable. On the morning the robbery occurred, Watkins

came face-to-face with Garcia on two occasions. Although it was night, lighting was provided by a streetlight and a business establishment's lighted signs. Watkins' degree of attention was high in view of the fact that she was alone and aware of being followed by three men in the early morning hours. Watkins' description substantially described Garcia, who was without a shirt and wearing light-colored pants. Although Watkins failed to notice that Garcia had a mustache on the morning in question, that is not significant in light of all the circumstances. See *State v. Johnson, supra* (determining that although there were some discrepancies between the witness' initial description and the defendant's actual appearance, the record still established an adequate basis for identification by the witness). While Watkins testified that it was possible that she did not have a clear view of Garcia at the showup, at the time of the showup Watkins asserted in unequivocal terms that both Deras and Garcia were involved in robbing her. The time lapse between the robbery and the showup was relatively short. The trial court's finding that Watkins' in-court identification of Garcia as one of the robbers was reliable is not clearly erroneous. The showup was not so unnecessarily suggestive and conducive to an irreparably mistaken identification that Garcia was denied due process of law.

Garcia next contends that the manner in which the photographic arrays were shown to Otto violated the defendant's due process rights. Consequently, Garcia asserts that the district court should have suppressed Otto's in-court identification of Garcia as one of the men he observed following Watkins on the morning of July 24. The previously discussed rules regarding showups apply with equal force to the showing of photographic arrays. See, e.g., *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). Garcia has not directed our attention to the manner in which the array was allegedly suggestive. An examination of the photographs reflects that the array was not suggestive. Though Detective Salak advised Otto that a suspect was pictured in the photographic array, a police officer's comment that a lineup or photographic array contains a suspect or a suspect's picture does not render the identification procedure unduly suggestive inasmuch as a witness would

assume that to be the case. *State v. Swoopes,* 223 Neb. 914, 395 N.W.2d 500 (1986); *State v. Joseph,* 202 Neb. 268, 274 N.W.2d 880 (1979); *State v. Bolden,* 196 Neb. 388, 243 N.W.2d 162 (1976). The district court's finding that the photographic array was not so unnecessarily suggestive and conducive to an irreparably mistaken identification that Garcia was denied due process of law is not clearly erroneous. Thus, Garcia's argument that Otto's in-court identification should have been suppressed is meritless.

On direct examination by his counsel, Garcia testified that he had never been convicted of a felony. Upon the State's objection, Garcia's answer was stricken. The defendant contends that the trial court committed reversible error by striking this testimony.

The admission of character evidence is largely left to the discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion. *State v. Nesbitt,* 226 Neb. 32, 409 N.W.2d 314 (1987). Garcia's testimony that he had no prior felony convictions was an attempt to introduce evidence of general character or reputation. On direct examination, a defendant's testimony that he or she has never been convicted of a crime is inadmissible. See, *Hendricks v. State,* 281 Ala. 376, 202 So. 2d 738 (1967); *Wrobel v. State,* 410 So. 2d 950 (Fla. App. 1982), *review denied* 419 So. 2d 1201; *State v. Bedker,* 149 Wis. 2d 257, 440 N.W.2d 802 (1989), *review denied* 149 Wis. 2d lvi, 443 N.W.2d 312. Since Garcia's testimony that he had never been convicted of a felony was evidence of his general character or reputation, the district court did not abuse its discretion in striking this testimony.

The defendant's conviction and sentence are affirmed.

AFFIRMED.

IN RE INTEREST OF M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.D., APPELLANT.

453 N.W.2d 589

Filed April 6, 1990. No. 89-774.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual issues de novo on the record, but where the evidence is in conflict, this court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should be issued only when there is no reasonable alternative.
3. _____. Participation in certain elements of a court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Joseph Lopez Wilson for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

GRANT, J.

This is an appeal by L.D. from an order of the separate juvenile court of Douglas County terminating L.D.'s parental rights with respect to her daughter M.

Appellant contends that the juvenile court erred (1) in finding that M. was a child within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1988) and (2) in finding that termination of the mother's parental rights was in M.'s best interests. We affirm.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual issues de novo on the record, but, where the evidence is in conflict, this court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990). An

order terminating parental rights must be supported by clear and convincing evidence and should be issued only when there is no reasonable alternative. *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

The record shows the following. M. was born to R.D. and L.D. out of wedlock on March 9, 1979. On July 28, 1986, Child Protective Services was informed that the child "was spanked every day. There were pinch marks that the child had had as being caused by pliers and there were statements that her father had been touching her in her private areas." Child Protective Services investigated the claims. On September 18, 1986, the Douglas County Attorney's office filed a petition in four counts in the separate juvenile court of Douglas County, alleging (1) that the child was born on March 9, 1979; (2) that the child was a juvenile within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), in that she had been sexually molested by her father, and not protected from such molestation by her mother; (3) that her mother neglected the child as defined under § 43-292(2); and (4) that her father adversely affected the child as defined under § 43-292(4). The petition requested the juvenile court to make such orders as it deemed appropriate for the care and custody of the child and to terminate the parents' rights with respect to the child.

At a detention hearing October 20, 1986, the juvenile court placed the child in a foster home.

An adjudication hearing was held on July 6, 1987. Pursuant to an agreement between the parents, represented by counsel, and the State, the petition was amended to allege, in part:

> COUNT II
>
> [M.] comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-247 (3a), Reissue of 1981 [sic], being under the age of eighteen years, and having natural parents, [L.D.] and [R.D.], natural parents of said child, who place said child in a situation which is dangerous to her life or limb, or injurious to the health or morals of said child, in that:
>
> A. Said child has been subjected to sexual molestation by [R.D., her father].

> B. [R.D.] was accused of sexually molesting [T.A.] in 1984 of which [L.D.] was fully cognizant; [L.D.] being aware of the sexual molestation allegations against [R.D.] failed to take adequate precautions to protect [M.] from [R.D.].

The parents, represented by counsel, entered a no contest plea to the petition as amended, after the court specifically advised them that such a plea would be an admission of the facts alleged against them in count II. The juvenile court found count II to be true and, at the request of the State pursuant to the agreement, dismissed counts III and IV and the prayer requesting termination of L.D.'s and R.D.'s parental rights with respect to M. The court ordered the child to remain in the temporary custody of the Nebraska Department of Social Services for foster home placement pursuant to a previous order.

At a dispositional hearing on August 28, 1987, the juvenile court ordered the parents to comply with a plan designed to correct the conditions leading to the court's previous finding that M. came within the definition of § 43-247(3)(a). The plan included the following: (1) that the child continue therapy, which would include the parents when deemed appropriate by the child's therapist; (2) that both the parents would attend weekly meetings of Parents United, a support group dealing with incest; (3) that the parents would obtain and maintain steady employment; (4) that the parents would cooperate with the caseworkers, including notifying the court within 48 hours of a change of employment or residence; (5) that the mother was granted reasonable rights of visitation as arranged by Child Protective Services; and (6) that the father would be granted reasonable rights of visitation when approved by the child's therapist.

At a review hearing on March 10, 1988, evidence was submitted concerning the parents' progress under the rehabilitation plan. From the time of the disposition hearing, the child attended therapy regularly with a therapist but was switched to a different therapist in late January 1988. The parents attended only a few therapy sessions with the first therapist during this time due to scheduling difficulties and the "need to deal more with [the child] on her personal issues." It

was noted at the hearing that the father's failure to admit he ever molested the child, or had any problems in that regard, was considered a barrier to the success of the plan. The father was told he would not be allowed to continue participating in Parents United if he persisted in his denial. The undisputed evidence indicated that the father's denial prevented him from being successfully treated, and the child could not be returned to the home of an untreated perpetrator.

The father's denial of any molestation of his child continued in spite of the father's admission of the alleged molestation in his formal plea before the juvenile court. The record does not disclose any request by either parent to withdraw their plea.

With reference to the mother, reports in evidence show that on January 7, 1988, the first therapist conducted a joint session with the child and her mother. At this session the child told her mother what the child's father had done to her, and the mother responded that she believed her and that she supported her.

As a result of the March 10 review hearing, the juvenile court renewed its prior order finding it was in the child's best interests to remain in foster care and ordered the continuation of the plan stated in the past order, except that therapy was to be conducted by the new therapist.

A second review hearing was held September 14, 1988. At this hearing it was reported that Parents United had barred the father from Parents United meetings beginning February 16, 1988. The initial reason for the exclusion was the father's failure to obtain a psychological evaluation, which was required by Parents United to determine whether he was treatable and whether he had psychotic tendencies. Upon receiving the psychological evaluation on February 29, 1988, the father was not allowed to participate in the meetings because he was diagnosed as an antisocial personality, which was interpreted to mean that he was not treatable. Parents United determined that the meetings would not benefit the father until he admitted to being a perpetrator.

The mother voluntarily ceased attending the meetings from February 23 to May 3, 1988, but then with encouragement resumed attendance. It was reported that the mother attended the meetings and made some progress by beginning to question

whether the child's father was telling the truth. However, on August 2, 1988, at a "Permanency Planning Review," the mother stated that she still did not believe that R.D. molested the child. The mother's position at this time was the opposite of the facts she had admitted in open court.

The father was informed on March 18, 1988, by the child's therapist that therapy was useless to him and would not be provided to him until he admitted he had a problem. With reference to the mother during the time period between the review hearings, the therapist reported that the mother did not consistently attend therapy, did not work on the issues, and did not totally believe that the father abused the child.

The reports by the Juvenile Probation Office and Child Protective Services concluded that the rehabilitation plan had failed because no progress had been made due to the father's denial of the molestation and the mother's dereliction in not believing her child. The therapist reported that the mother continued to question the child about the molestation, and the mother asked the child if it was not really someone other than her father who had molested her. The child remained consistent throughout her therapy in the allegation that her father had molested her.

At the conclusion of the September 14, 1988, hearing, the juvenile court continued the previous order, except the court specifically required the parents to attend therapy and amended the order to attend Parents United meetings to include the mother only.

On September 21, 1988, the State moved to terminate the mother's and father's parental rights with respect to the child. The motion stated, in part, that the child had been found to be a child within the meaning of § 43-247(3)(a) as far as her natural parents were concerned and that

> [M.] comes within the meaning of Nebraska Revised Statutes, 1943, Section 43-292 (6), because reasonable efforts, under the direction of the Court have failed to correct the conditions leading to the aforementioned determination, to wit:
>
> . . . .
>
> B. After approximately two years of court involvement

> and therapy, [the father] continues to deny that he molested said child, thereby stalemating any hopes of reuniting this family.
>
> C. After approximately two years of court involvement and therapy, [the mother] continues to vacillate as to whether or not she believes that [the father] assaulted said child, thereby stalemating any hopes of reuniting this family.

The hearing on the motion was held on June 7, 1989. In December 1988, during the time between the filing of the petition to terminate and the hearing, the father moved to Florida, apparently to allow the mother to reunite with the child. Although the mother testified at the June 7 hearing that she had totally separated from the father, she admitted that she talked to the father at times and spoke with him the day before the June 7 hearing.

In January 1989, the mother expressed to the therapist that she believed the child's accusations and was prepared to tell the child that she believed her and would support her. The therapist brought the child and her mother together in a joint therapy session for this purpose. The therapist testified that the session failed because instead of showing support for the child, the mother became angry when the child stated that the father "simply had his fingers crossed when he told the Judge that he would move and that if she came home then Mom and Dad would get back together again and they would move to Florida and she was afraid of her dad." The mother did not respond to prompting by the therapist to support the child but, instead, stated that the child was being selfish and wanted to know the real reason the child did not want to come home. The therapist did not schedule any more joint sessions because she did not believe the mother was ready to take responsibility and not blame the child.

At the June 7, 1989, hearing, the therapist testified that in her expert opinion, "based upon two-and-a-half years and two therapists," the mother was not likely to ever have the capability of protecting the child from molestation by her father or others. The therapist testified that all models of incest rehabilitation require the nonoffending parent to believe that

the incest occurred. The therapist explained:

> [T]he very basis again is building a trusting relationship. The parent, in order to protect, must believe that first of all the child had been molested or had been hurt. Second of all, to offer that belief that they must believe there were certain signs and symptoms. Third, they must have a relationship - a trusting relationship with the child so if they don't read the signs of that there is a risk for remolestation and the child says that Daddy is molesting me again then she believes the child and then act to protect the child, none of which I believe [L.D.] has accomplished up to this time and it's been two-and-a-half years.

The therapist stated that this analysis also applies to the ability of the mother to protect the child from being molested by others, because the child would not feel comfortable enough to tell her mother about the abuse, would not believe that her mother would protect her from the abuser, and, in fact, the mother probably would not act to protect the child if she did tell her mother about the abuse.

The mother testified that she has believed that the father molested her daughter ever since January 1989, and stated that she wished to continue therapy, but with a different therapist. She had no specific complaint about the therapist but thought that "there ha[d] to be better therapists in Omaha than her."

In an order filed June 14, 1989, the juvenile court found that the allegations in the motion to terminate were true, that the child was a child within the meaning of § 43-292(6), and that it was in the child's best interests that the parental rights of L.D. and R.D. with respect to M. be terminated. Only the mother appeals from this order.

In her first assignment of error, the mother contends that the court incorrectly found that the child was a child within § 43-292(6). The mother contends that the State failed to prove by clear and convincing evidence that (1) the mother willfully failed to comply with reasonable provisions material to the rehabilitative objective, and (2) as a result of noncompliance, termination of parental rights is in the best interests of the child. The mother cites *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987), as requiring willful

noncompliance before parental rights may be terminated.

The mother's interpretation of the rule in that case is too broad. *In re Interest of J.S., A.C., and C.S., supra*, required proof of willful noncompliance only when termination resulted from "parental noncompliance with a court-ordered rehabilitative plan." *Id.* at 267, 417 N.W.2d at 158.

The condition of § 43-292(6) is satisfied if, "[f]ollowing a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." We have interpreted the statute in the following manner:

> [T]he fact of participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.

In re Interest of R.A., 226 Neb. 160, 170, 410 N.W.2d 110, 117 (1987). "Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay." *Id.* at 167, 410 N.W.2d at 115.

In this case, the evidence shows that the mother has never sincerely believed that the child was molested by the father and is not, therefore, able to protect the child from further abuse. The petition alleging abuse by the father was filed in September 1986. By pleading no contest, with their attorney present and after inquiry by the court, each of the parents admitted the allegations within the petition that the father had assaulted the child and that the mother was aware since 1984 of allegations that the father had sexually abused another child. More than a full year after the petition was filed, the mother expressed to her first therapist that she believed the child, and participated in a joint session where she told the child she believed her. Shortly thereafter, the mother apparently changed her mind. The mother continued to question the child about whether she was really molested by someone else. On May 3, 1988, following an

unsupervised visit to the mother's home, the child displayed behaviors indicating molestation, and although the child would not talk about it, she indicated that she had physical contact with a man during the visit. In January 1989, the mother told the second therapist that she believed the child, but then her participation in the joint session indicated otherwise. In subsequent therapy sessions, the mother was unable to convince the therapist that she truly believed that the father had molested the child. At the June 7, 1989, hearing, the therapist testified that she did not believe the mother would be capable of protecting the child for the foreseeable future.

In view of the above circumstances, we must agree that after over 2 1/2 years it is unlikely that the mother will ever come to sincerely believe that the child was molested by her father. The evidence is clear and convincing that the mother is not capable of protecting the child from her father or others. The rehabilitation plan failed in this instance because the mother was not amenable to treatment, not because the plan was not complied with or was unreasonable.

The child was found by the juvenile court to be within the meaning of § 43-247(3)(a) because her parents placed her "in a situation which is dangerous to her life or limb, or injurious to the health or morals of said child." As of June 14, 1989, the only progress made toward correcting this situation was that the father moved to Florida in December 1988. The evidence does not show us that the separation is permanent. We have determined that we cannot rely on such a separation to continue into the future. See, *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982); *In re Interest of Cook*, 208 Neb. 549, 304 N.W.2d 390 (1981). In our de novo review, we find that reasonable efforts have failed to correct the circumstances leading to the adjudication that the child is a child within the meaning of § 43-247(3)(a), and therefore the condition stated in § 43-292(6) exists.

Next, the mother contends that the juvenile court erred in finding that it was in the child's best interests to terminate her parental rights. With regard to this contention, she argues that she is treatable if given time and another therapist. She argues that there is no showing that the child's best interests require

termination without delay, and reminds us that termination is a last resort.

As discussed above, the evidence indicated that the mother has disregarded allegations of the father's child molestation since 1984. It is unlikely that the mother will ever sincerely believe the father molested the child, after vacillating for over $2^1/_2$ years. We are convinced that it is not the therapist, but the mother that is the source of the failure of the rehabilitation plan. Termination is appropriate in this case because there does not appear to be a rehabilitation plan that will relieve the problems in the foreseeable future. " 'We will not gamble with the child's future; she cannot be made to await uncertain parental maturity.' " *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979) (quoting *Long v. Long*, 255 N.W.2d 140 (Iowa 1977)). We find that it is in the child's best interests that her mother's parental rights be terminated. The judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KAY ANNETTE THAYER, APPELLANT.

453 N.W.2d 474

Filed April 6, 1990. No. 89-782.

1. **Courts: Judicial Notice: Legislature.** It is the duty of the courts to take judicial notice of the laws enacted by the Legislature.
2. **Courts: Judicial Notice.** All courts must take judicial notice of the public law prevailing within the forum.
3. **Judicial Notice: Evidence: Words and Phrases.** That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who ordinarily should have done so.
4. **Convictions: Appeal and Error.** The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it.
5. **Probation and Parole: Sentences: Appeal and Error.** A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, and Robert L. Wolf for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

BOSLAUGH, J.

After trial to a jury, the defendant, Kay Annette Thayer, was convicted of possession of methamphetamine, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), a Class IV felony. She was sentenced to a term of 2 years' probation.

The defendant has appealed, contending the district court erred (1) in failing to grant her motion for a directed verdict and (2) in imposing an excessive sentence.

The record shows that during the early morning hours of January 10, 1989, the defendant was arrested near McGrew, Nebraska, pursuant to a warrant. After her vehicle had been stopped and the defendant had been identified as the driver, she was searched, and a cigarette case was taken from her clothing. The cigarette case contained two small straw vials with crimped ends. A laboratory analysis disclosed that one of the straws contained methamphetamine. The defendant did not testify at trial.

The defendant does not challenge the information and does not contend that the court's instructions to the jury were improper. In her first assignment of error, she argues only that the State failed to prove all of the elements of the offense beyond a reasonable doubt because the State failed to prove the statutory law that specifically prohibits the possession of methamphetamine. In other words, the State "in failing to prove the indicated portions of the criminal code [§ 28-416(3) and Neb. Rev. Stat. § 28-405(c)(3), [Schedule II] (Reissue 1989)] has failed to prove an essential element of its case." Brief for appellant at 7-8.

In *State v. Frank*, 61 Neb. 679, 85 N.W. 956 (1901), we held

that it is the duty of the courts to take judicial notice of the laws enacted by the Legislature.

In *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 64 N.W.2d 105 (1954), we held that all courts must take judicial notice of the public law prevailing within the forum. The rule is applicable to all general statutes. See, also, *Campbell v. Campbell*, 168 Neb. 533, 96 N.W.2d 417 (1959); *Pallas v. Dailey*, 169 Neb. 277, 99 N.W.2d 6 (1959); *Powell v. Van Donselaar*, 160 Neb. 21, 68 N.W.2d 894 (1955).

That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who ordinarily should have done so. *Board of Educational Lands & Funds v. Gillett, supra.*

The defendant's argument is similar to that advanced in *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979). In *Russell*, the defendant was convicted of illegal possession of marijuana. He argued on appeal that the trial court erred by (1) giving an instruction which included the sentence "The Indiana Uniform Controlled Substances Act defines marijuana as a controlled substance," (2) giving an instruction which did not list as an element of the offense which the State had to prove the fact that marijuana was a controlled substance, and (3) overruling his motion for judgment on the evidence based on his contention that the State failed to prove that marijuana was a controlled substance. The Indiana court observed, "All these allegations of error stem from defendant's contention that whether marijuana was a controlled substance when the offense occurred is a question of fact upon which the State must introduce evidence and persuade the jury beyond a reasonable doubt. This contention is wholly erroneous." *Id.* at 401, 395 N.E.2d at 800.

The *Russell* court then stated that marijuana was a controlled substance as a matter of law at the time the offense occurred, and held, "It is elementary that the court must take judicial notice of statutes . . . and has a duty to instruct the jury as to what is the law." (Citations omitted.) *Id.* at 401, 395 N.E.2d at 800-01.

In this case, the defendant was charged with knowingly or intentionally possessing "a controlled substance other than

marijuana, to wit: Methamphetamine, Schedule II (c) (3) of section 28-405 R.S. Supp. 1988." Section 28-416 provides that a person knowingly or intentionally possessing a controlled substance other than marijuana, unless authorized by statute, is guilty of a Class IV felony. A controlled substance is "a drug, substance, or immediate precursor in Schedules I to V of § 28-405." Neb. Rev. Stat. § 28-401(4) (Reissue 1989). Section 28-405(c)(3) [Schedule II] refers to the controlled substances "methamphetamine, its salts, isomers, and salts of its isomers." The trial court properly took judicial notice of the statutes and instructed the jury accordingly.

In her brief, the defendant acknowledges that the evidence was uncontroverted that she was in possession of methamphetamine "in the form of a powdery substance found in a crimped straw" found in the cigarette case taken from her. Brief for appellant at 7. The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Carter*, 234 Neb. 378, 451 N.W.2d 271 (1990). The defendant's first assignment of error is without merit.

In her second assignment of error, the defendant claims the district court erred in imposing an excessive sentence. The offense of which the defendant was convicted is a Class IV felony, with a maximum penalty of 5 years' imprisonment, a $10,000 fine, or both. She was sentenced to a term of 2 years' probation. As conditions of probation, the defendant was ordered to provide urine samples on a random basis at the request of the probation officer for the purpose of analyzing the sample for the presence of alcohol and controlled substances. The district court further ordered that the defendant serve the last 30 days of the probationary period in the county jail unless waived by the court. The defendant objects to the 2-year term of probation and claims that the district court abused its discretion in imposing these particular conditions of probation.

In sentencing the defendant, the trial court noted that the defendant's attitude was "not good" and that she showed no remorse for her actions. The trial court stated that the defendant was sentenced to probation only because

imprisonment would cause excessive hardship to her three minor children.

A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. *State v. Grell*, 233 Neb. 314, 444 N.W.2d 911 (1989). The conditions of probation complained of are authorized by Neb. Rev. Stat. § 29-2262(2)(b), (n), and (p) (Cum. Supp. 1988). The sentence imposed was not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF J.B. AND A.P., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. G.P., APPELLANT.

453 N.W.2d 477

Filed April 6, 1990. No. 89-794.

1. **Juvenile Courts: Jurisdiction.** The juvenile court has jurisdiction of any juvenile who is in a situation dangerous to life or limb or injurious to the health or morals of such juvenile.
2. **Juvenile Courts: Parental Rights.** The juvenile court may terminate all parental rights between the parents and a juvenile when the court finds such action to be in the best interests of the juvenile and the parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.
3. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the court to reach a conclusion independent of the trial court. When the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
4. **Parental Rights: Proof: Evidence: Words and Phrases.** An order terminating parental rights must be based on clear and convincing evidence. Clear and convincing means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
5. **Parental Rights.** A parent's failure to take proper measures to protect children from abuse by another furnishes sufficient cause to terminate parental rights.
6. _____. It is not necessary that the court wait until the child shows permanent

physical scars before the court can act to terminate parental rights.

7. _____. There is no requirement that a court must implement a rehabilitation plan before parental rights may be terminated.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Donald W. Kleine, of Kleine Law Office, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

FAHRNBRUCH, J.

G.P.'s parental rights to her two surviving children, J.B. and A.P., were terminated because she substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection. G.P. appeals. We affirm.

The evidence before the Douglas County Separate Juvenile Court reflects that T.P., a male with whom G.P. was living, repeatedly, over a period of time, had brutally attacked G.P.'s two sons, 18-month-old C.B. and 4-year-old J.B. C.B. died due to head injuries as a result of T.P.'s last attack. J.B. repeatedly suffered severe injuries inflicted by T.P. No medical attention had been provided for either child until C.B. became comatose. Even then, J.B. received no medical attention for his injuries until police officers intervened.

The record reflects that after C.B. was hospitalized, both T.P. and G.P. were arrested because of their conduct in regard to one or more of G.P.'s children. The record also reflects that at the time of the juvenile court hearing, nearly a year after C.B. died, G.P. was serving a sentence in the Nebraska Center for Women at York. She expected to be discharged in September 1989.

The trial court's order of June 21, 1989, terminated G.P.'s parental rights in J.B. It also terminated T.P.'s and G.P.'s parental rights in A.P., the couple's then 13-month-old daughter. The natural father of J.B. was not before the court. T.P. did not appeal the termination order as it applied to him.

Therefore, only the termination of parental rights of the natural mother, G.P., in J.B. and A.P. will be considered.

In her single assignment of error, G.P. alleges that the juvenile court erred in finding that there was clear and convincing evidence that it was in her children's best interests to terminate their mother's parental rights. G.P. has never challenged the juvenile court's adjudication that it had jurisdiction of J.B. and A.P. under Neb. Rev. Stat. § 43-247 (Reissue 1988), which provides: "The juvenile court in each county as herein provided shall have jurisdiction of . . . (3) Any juvenile (a) . . . who is in a situation . . . dangerous to life or limb or injurious to the health or morals of such juvenile . . . ."

The petition in this case charged, and the juvenile judge found by clear and convincing evidence, that G.P.'s parental rights in J.B. and A.P. should be terminated under Neb. Rev. Stat. § 43-292(2) (Reissue 1988) because G.P. substantially and continuously or repeatedly neglected J.B. and A.P. and refused to give said children necessary parental care and protection. Section 43-292 provides:

> The [juvenile] court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection . . . .

In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the court to reach a conclusion independent of the trial court. *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990). However, when the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *Id.*

An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988). " '[C]lear and

convincing means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.' " *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 157 (1987). The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of the child. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). A parent's natural right to the custody of his or her own child must yield when the two requirements of § 43-292 have been met. *In re Interest of J.S., A.C., and C.S., supra.* First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. *In re Interest of J.S., A.C., and C.S., supra.* "It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parents that is required." *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 766, 386 N.W.2d 877, 883 (1986).

A parent's failure to take proper measures to protect children from abuse by another furnishes sufficient cause to terminate parental rights under the statutory subsection at issue. See, *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982); *In re Interest of Cook*, 208 Neb. 549, 304 N.W.2d 390 (1981).

With the foregoing legal principles as guidelines, we review the record de novo to determine if the evidence is clear and convincing to justify terminating G.P.'s parental rights to her two surviving children.

The evidence is in conflict as to whether G.P. and T.P. were married on December 12, 1987, as reported to a police officer. There is an indication that a marriage license was issued for G.P. and T.P. to marry. There is also some evidence that the marriage license was used and a marriage ceremony performed. However, G.P. maintains that she was not present at any marriage ceremony and, therefore, T.P. and she are not husband and wife. Nevertheless, G.P. lived with T.P. and used his surname.

Residing in the home with T.P. and G.P., as of late May 1988, were T.P.'s 4-year-old daughter, C.P.; J.B.; C.B.; and A.P., who was about 3 weeks old. C.P. was born out of wedlock to T.P. and a woman with whom he had lived some time prior to April 1987. J.B. and C.B. were fathered by men other than T.P.

In May 1988, T.P. and G.P. took 18-month-old C.B., in a comatose and unresponsive condition, to the Bergan Mercy Hospital emergency room in Omaha. C.B. was then transferred to Childrens Memorial Hospital's pediatric intensive care unit. The youngster was bleeding inside the skull, which created pressure on the brain; he had a number of fractures, some of which were old and in the process of healing while others were of more recent origin, and a number of bruises, several of which were older. The boy's condition was considered life threatening and critical. His injuries occurred the day before he was taken to Bergan Mercy. Approximately 2 weeks later, C.B. died from his head injuries.

After C.B. was taken to the hospital and examined, a police investigation ensued. Police, after first being misdirected by G.P. and T.P., later found J.B.; J.B.'s 3-week-old half sister, A.P.; and T.P.'s 4-year-old daughter, C.P., in their home. The three children were discovered fully clothed, sleeping near a soiled diaper on an unmade bed. T.P., fully clothed, was hiding in the shower. A babysitter was also found in the home. The home was extremely filthy, smelled of urine, and was littered with clothing, debris, cat feces, and discarded food. The condition of the home was unwholesome and unsafe for the children. The children were taken to University Hospital in Omaha for examination.

The extent of J.B.'s injuries is not contested. He had numerous bruises and excoriated areas which were tender to the touch; swelling about the head; inflamed eardrums; a fracture of the jaw in two places, which prevented him from opening his mouth beyond 13 millimeters; a fracture of the right middle finger; a 2-week-old fracture of the tibia, the largest bone in the lower leg, that prevented J.B. from putting any weight on his left foot; a shattered left distal phalanx, a bone in the big toe; a fractured collarbone; three rib fractures, which are unusual in children because of their resilient skeletal systems; and a

vertebral body compression fracture of the eighth thoracic vertebra.

The evidence is clear and convincing that many of the injuries to J.B. and C.B. were inflicted by T.P.'s hitting, kicking, and choking the boys. During the last episode of injuries, in the presence of G.P., T.P. hit and kicked both boys. He also choked C.B. and threw him at J.B. C.B. "didn't wake up," 4-year-old C.P. told an examining physician. She told a police sergeant that she had seen T.P. choke C.B. and throw him onto the floor underneath the baby crib. C.B., after he was thrown, kept vomiting, went to sleep, and was very sick, according to C.P.

The evidence of T.P.'s child abuse was not confined to G.P.'s children. Although no trauma was visible when C.P., the 4-year-old daughter of T.P., was examined at University Hospital, she told the police sergeant that her daddy "beat my ass." G.P. testified that T.P. had beaten C.P. with a belt when she wet her pants.

The evidence is clear and convincing that G.P. never took meaningful steps to protect the children in her household from T.P.'s abuse. As a matter of fact, she lied to protect T.P. when she told a police sergeant that C.B. was injured when he fell from a couch and hit his head on the floor, when she knew that T.P. had thrown the child at J.B. G.P. testified that she had "[a]ll the time" seen T.P. strike J.B. and C.B. and that T.P. had kicked them while he was wearing boots. G.P. told the police sergeant that she had seen T.P. hit the boys in the stomach with a closed fist and pick the children up by the neck and choke them. Despite her belief that J.B.'s leg was broken, G.P. did not seek medical attention for the child because she did not wish to go against T.P.'s wishes. Due to T.P.'s abuse to her sons, G.P. left T.P. sometime between October and early December 1987. Because he promised he would stop beating the children, G.P. returned and allegedly married T.P. on December 12, 1987. The beatings did not stop. There is clear and convincing evidence that some of the beatings the boys received were inflicted after December 12, 1987, but at a time well before C.B. was fatally attacked in May 1988. G.P. told the police sergeant that she could have prevented the abuse of her children by just picking up and leaving her husband. Even after C.B. was fatally

injured, G.P. had no interest in leaving T.P. because she loved him.

It is undisputed that on May 23, 1988, a pediatric examination of 3-week-old A.P. revealed that she was suffering from ear infections in both ears; congestion in the nose and throat; and thrush, a yeast infection on her tongue and lips. A.P. had had thrush for some period of time. It is readily observable, since the infection manifests itself in white spots. While these conditions may be considered somewhat minor, there was medical testimony that ear infections should be treated promptly. It is clear G.P. had provided A.P. no medical treatment for her maladies. It can be inferred from G.P.'s failure to obtain prompt medical attention for her children that had it not been for intervention by the police, A.P. would not have received medical attention. Fortunately, A.P.'s medical examination showed that she had suffered no traumatic injuries.

While A.P. had not suffered physical abuse at the hands of her father, it is not necessary that the court wait until the child shows permanent physical scars before the court can act to terminate parental rights. See *In re Interest of J.D.M.*, 230 Neb. 273, 430 N.W.2d 689 (1988). In this instance, the evidence is clear and convincing that G.P. failed to provide necessary care and protection for A.P. She did not provide prompt medical care for the child, nor did she remove the child from the hostile environment where children were beaten.

That G.P.'s conduct falls within § 43-292(2) is proven by clear and convincing evidence.

The evidence having clearly and convincingly established that G.P. substantially and continuously or repeatedly neglected her children and refused to give said children necessary parental care and protection, we now consider the best interests of G.P.'s two surviving children.

By her own admission, G.P. was present during the assaults on her children. Significantly, G.P. believed that J.B.'s leg was broken, but did not seek medical treatment for the child. See *In re Interest of A.L.G.*, 230 Neb. 732, 432 N.W.2d 852 (1988) (citing in support of its decision to uphold termination the mother's failure to seek medical treatment for 2 to 4 weeks after

her child suffered several fractures). Our decision is influenced not only by the severity of the abuse, but also by its duration. The record reflects that G.P. was aware of the abuse long before the late fall of 1987, when she and her children went to live in her parents' home. By returning to an abusive environment, she chose to satisfy her own desires despite the obvious endangerment to her children. There is some evidence that G.P. is mildly retarded and was abused by, and fearful of, her husband. She claims this prevented her from protecting her children or leaving with them. However, by her own admission, G.P. could have prevented the tragedy by picking up and leaving with the children. Even as her 18-month-old child lay comatose at the hospital, G.P. stated she would not leave her husband because she loved him.

G.P. contends that parental rights should not be terminated unless the parent is first provided the opportunity to rehabilitate himself or herself. There is no requirement that a court must implement a rehabilitation plan before parental rights may be terminated. *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

The clear and convincing evidence of G.P.'s neglect to obtain prompt medical attention for C.B., J.B., and A.P.; G.P.'s failure to protect C.B. and J.B. from T.P.'s brutal assaults; and G.P.'s failure to remove A.P. from a hostile environment leads to only one conclusion—that it is in the best interests of G.P.'s two surviving children that the natural mother's parental rights be terminated.

AFFIRMED.

COUNTY OF DAKOTA, NEBRASKA, APPELLEE, V. JOHN H. MALLETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HOWARD MALLETT, DECEASED, APPELLANT, HAROLD G. WRIGHT, CO., ET AL., APPELLEES.

453 N.W.2d 594

Filed April 6, 1990. No. 89-1161.

1. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned.
2. **Judicial Sales: Foreclosure: Property.** As a general rule, property which is susceptible of being sold at a foreclosure sale in separate tracts should, if practicable, be sold in parcels, rather than as an entirety.
3. **Judicial Sales: Foreclosure: Property: Appeal and Error.** It is within the discretion of the trial court to provide in a decree of foreclosure for the sale of property en masse, and such a sale will be sustained absent a showing of prejudice.
4. _____: _____: _____: _____. Where the record does not show that the judgment debtor requested that the land be sold in separate tracts, he is not entitled as a matter of right to have the sale set aside because the land was sold en masse.
5. **Judicial Sales: Appeal and Error.** When there is no evidence that others are willing to pay more, a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court.
6. _____: _____. The district court must determine by unrestricted means whether at the sheriff's sale the price bid is adequate or whether at a subsequent sale more would be realized, and this court will not overturn its determination absent an abuse of discretion.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Norris G. Leamer, of Leamer & Hurley, for appellant.

Kurt A. Hohenstein, Dakota County Attorney, for appellee County.

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

BOSLAUGH, J.

This is an appeal from an order confirming a sheriff's sale of part of Lot 9 and all of Lots 10 and 11 of South Soo Acres addition to South Sioux City, Nebraska. The appellant, John H. Mallett, personal representative of the estate of Howard

Mallett, contends the trial court erred in confirming the sale, because the price was inadequate.

The plaintiff, County of Dakota, commenced this action on June 20, 1988, under the provisions of Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1986 & Cum. Supp. 1988), to foreclose tax sale certificates on various tracts of real estate. The petition alleged that the county owned and held tax sale certificates for delinquent taxes for the years 1982 and 1983 and that the appellant was an owner of or had an interest in the property. The petition prayed for an accounting, foreclosure of the liens, and sale of the premises. The affidavit of the county attorney stated that taxes for the years 1982 to and including 1987 in the aggregate sum of $6,282.59 plus interest of $2,452.46 were delinquent.

On December 13, 1988, the trial court found that the defendants were in default, and on December 28, 1988, a decree of foreclosure was entered.

The trial court found that general taxes, interest, and costs in an amount of nearly $9,000 were delinquent and were a first lien on the property and that delinquent special assessments in the amount of nearly $8,000 were a second lien on the property, and ordered the property sold to satisfy the liens against it.

After proper notice, a sheriff's sale was held on February 8, 1989; however, no bids for the property were received.

On April 11, 1989, the trial court ordered the property to be resold. After proper notice, the property was resold on May 24, 1989, to Community Redevelopment Agency for $100. On June 19, 1989, the plaintiff filed a motion for confirmation. The appellant filed a motion to set aside the sale and objected to confirmation of the sale.

On July 11, 1989, the trial court found that the sale was regularly conducted in conformity with the law, the property sold for fair value under the circumstances and conditions, and the property would not bring a greater price at a resale, and ordered the sale confirmed. Mallett has appealed from the order confirming the sale.

The appellant contends that the sale price was so inadequate as to shock the conscience of the court and that the property should have been divided and sold in separate tracts in order to

realize a greater price.

The appellant claims that he had moved for an order directing the sheriff to sell the property in separate tracts in order to realize a higher price, but that the motion was never ruled on. There is nothing in the record concerning such a motion. "It is incumbent on the party appealing to present a record which supports the errors assigned . . . ." *GFH Financial Serv. Corp. v. Kirk,* 231 Neb. 557, 561, 437 N.W.2d 453, 456 (1989). See, also, *Howard v. Howard,* 234 Neb. 661, 452 N.W.2d 283 (1990); *Chalupa v. Chalupa,* 220 Neb. 704, 371 N.W.2d 706 (1985).

At the confirmation hearing the sheriff testified that he did not believe that a subsequent sale would achieve any better results than the price obtained at the second sale of the property and that he had no opinion as to whether the property would bring more than $100 if it were divided into three different tracts.

In the decree of foreclosure, the court directed the sheriff to sell the property in one tract. Although the general rule is that "where property which is susceptible of being sold in separate tracts is the subject of a foreclosure sale, it should, if practicable, be sold in parcels, rather than as an entirety," *First Nat. Bank v. Hunt,* 101 Neb. 743, 746, 165 N.W. 139, 140 (1917), it is within the discretion of the trial court to provide in a decree of foreclosure for the sale of property en masse, and such a sale will be sustained absent a showing of prejudice. *First Nat. Bank v. Hunt, supra.*

> Where the record does not show that the judgment debtor took steps to procure the direction of the court that the land be sold in separate tracts, or requested that the officer sell in such manner, he is not entitled as a matter of right to have the sale set aside because the land was sold *en masse.*

(Syllabus of the court.) *Id.*

In this case, there is nothing in the record to show that the appellant requested that the property be sold in parcels until after the sale on May 24, 1989. Furthermore, the appellant failed to show how he was prejudiced by the sale of the property as a unit because there was no evidence that the property would have brought a higher price if it had been offered as separate

tracts.

There is no evidence in this case as to the value of the property or what it could be sold for if a third sale was held. When there is no evidence that others are willing to pay more, " 'a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court. . . .' " *County of Nance v. Thomas*, 146 Neb. 640, 645, 20 N.W.2d 925, 928 (1945); *State, ex rel. Sorensen, v. Denton State Bank*, 126 Neb. 486, 253 N.W. 670 (1934). The district court must determine by unrestricted means whether at the sheriff's sale the price bid is adequate or whether at a subsequent sale more would be realized, and this court will not overturn its determination absent an abuse of discretion. *Ehlers v. Campbell*, 147 Neb. 572, 23 N.W.2d 727 (1946).

There is no evidence in this case which would support a finding that the sale price was grossly inadequate. The judgment must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAULETTE WALKER, APPELLANT.
453 N.W.2d 482

Filed April 6, 1990. No. 89-1362.

Pleas. Prior to the acceptance of a guilty or no contest plea, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing.

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court reversed.

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

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

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

PER CURIAM.

This is an appeal from a judgment and sentence of the county court for Douglas County, Nebraska, which was affirmed on appeal to the district court for Douglas County. The offenses are described as "fraud" and "receiving stolen property" and as in violation of ordinances of the city of Omaha. As we are not favored in the record with a copy of the offended ordinances, nor of the complaint in which the essential elements of the crime are set forth, those elements may never be known, since the proceedings at the arraignment and sentence do not contain in the dialogue with the county court a clue as to the specifics of the acts of which this appellant pled guilty, without counsel. The appellant was sentenced to a single term of 40 days in jail.

Two errors are assigned: (1) The guilty plea is invalid, since the trial court failed to advise the defendant of the nature of the charges, nor did the court ascertain if the appellant understood the charges, and (2) the sentence is excessive.

Appellant failed to raise specific errors in the district court and thus, according to appellee, ought to be prohibited from raising any errors in this court. We considered this contention and rejected it in *State v. Erlewine,* 234 Neb. 855, 452 N.W.2d 764 (1990). At the same time, we announced a rule of practice of this court governing review of county court appeals to the district court after the filing date of *State v. Erlewine.*

The dialogue between the court and the appellant is as follows:

> MR. WINCHESTER: Paulette Walker. State against Paulette Walker, M89-1326. Charged with fraud and receiving stolen property on January 9th, 1989.
>
> THE COURT: Good morning. Are you Paulette

Walker?

MS. WALKER: Yes.

THE COURT: Ms. Walker, you have a right to be represented by an attorney. If you're indigent and cannot afford to hire an attorney, you're entitled to have a public defender appointed to represent you. Would you like to consult with or have an attorney present before you're required to plead to this charge?

MS. WALKER: No.

THE COURT: How do you wish to plead?

MS. WALKER: Guilty.

THE COURT: The maximum sentence is six months in jail, a $500 fine, or both. There is no minimum sentence so you could be fined as small as $1. Do you understand that?

MS. WALKER: Yes.

THE COURT: You have a right to have a trial. If you plead guilty there'll be absolutely no reason for a trial, and you'll be found guilty without a trial. Do you understand that?

MS. WALKER: Yes.

THE COURT: If there were a trial the State would call their witnesses before the Court. They'd testify under oath. You or your lawyer would have the right to cross-examine the witnesses. You'd have the right to remain silent. You cannot be compelled to testify against yourself or make any admissions concerning the matter. You have the right to the compulsory attendance of any witnesses that assist you in your defense. As I said, you're presumed to be innocent. You don't have to prove anything. The State has the burden of proving your guilt beyond a reasonable doubt. Now there'll be no trial if you plead guilty. Do you understand that?

MS. WALKER: Yes.

THE COURT: Has anybody threatened you to get you to plead guilty?

MS. WALKER: No.

THE COURT: You're doing so voluntarily?

MS. WALKER: Yes.

> THE COURT: I'll receive into evidence the police report concerning the matter.
>
> . . . .
>
> THE COURT: I'm reviewing RB number 12123C.
>
> . . . .
>
> THE COURT: I find then the basis for the complaint to be valid — the complaints to be valid, and that the pleas are voluntarily and intelligently tendered. They will be accepted, and you will be found guilty.

In *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), with reference to the acceptance of a guilty or no contest plea, we said:

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.
>
> We conclude that the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested.

Id. at 820, 394 N.W.2d at 883.

Facts gleaned from the police report and the presentence report indicate the charges arose out of an arrest at a local department store. The appellant was observed removing a clothing item from a rack and presenting it to an employee to claim a refund. An item found in a shopping bag was returned to another store. The item was assumed to be stolen, though neither the presentence nor the police report establishes that fact.

The specific command of *Irish* was not so much misapplied

in this proceeding as ignored.

Since we are dealing in criminal cases with human liberty, shortcuts from the *Irish* requirements will not be tolerated. The appellant was entitled to be informed of the nature of the charges and to a court determination that she understood them. She was not accorded that right. Therefore, the convictions must be reversed.

The second error will not be considered, as it is unnecessary to be decided.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY J. KINCAID, APPELLANT.

453 N.W.2d 738

Filed April 13, 1990. No. 89-730.

1. **Evidence: Motor Vehicles: Proof.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.
2. **Evidence: Motor Vehicles.** Evidence that radar equipment was tested within a few hours of its use by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly is sufficient evidence of the accuracy of the radar equipment.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of District Court affirmed as modified.

Timothy J. Kincaid, pro se.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

WHITE, J.

This is an appeal from an order of the Douglas County District Court affirming defendant's conviction and sentence for speeding. We affirm the conviction, but reduce the fine to $50.

On October 2, 1988, at approximately 3:35 p.m., Omaha Police Division Officer Brian Haskell was positioned at 110th and West Dodge Road in Omaha, conducting stationary radar checks from his marked police cruiser. He was observing traffic eastbound on Dodge when his radar sounded. Haskell observed a red Mercedes-Benz traveling at high speed in the center lane of West Dodge Road, pursued the Mercedes, and stopped it at approximately 96th and West Dodge Road. Defendant was cited for traveling 75 m.p.h. in a 45-m.p.h. zone.

Defendant pled not guilty, and the case was tried to the court without a jury. Evidence of the car's speed, as measured by the radar unit, was admitted over defendant's objection. At the close of defendant's case, the trial court found defendant guilty, fined him $100, and ordered him to pay costs. He has appealed to this court, assigning several errors.

Defendant first contends, in sum, that the trial court erred in admitting into evidence the radar readout, when the foundational evidence was inadequate to establish that the radar unit was functioning properly and adequately, as required by Neb. Rev. Stat. § 39-664(1) (Reissue 1988).

Section 39-664(1) provides in pertinent part:

> Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The measuring device was in proper working order at the time of conducting the measurement;
>
> . . . .
>
> (d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

In *State v. Kudlacek,* 229 Neb. 297, 298, 426 N.W.2d 289,

291 (1988), we stated that

> "[e]vidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation." . . . "Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required."

In *Kudlacek*, the State presented evidence showing that a light test, an internal calibration test, and a tuning fork test were used to test the accuracy of the radar unit. We held this evidence was sufficient for the trial judge to conclude the radar unit was functioning properly.

In *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), the defendant's speed was measured by a radar unit which was tested several hours earlier using a calibrated tuning fork and a speedometer check with another patrol car. The defendant argued on appeal to this court that in the absence of proof that the patrol car's speedometer was accurate and proof that the calibrated tuning fork was also accurate, there was insufficient proof that the radar equipment was accurate and working properly. We stated that "[i]n effect, the defendant's argument is that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves be proved accurate and functioning properly. We cannot agree. Such a chain of evidence might have to proceed ad infinitum." *Id.* at 466, 168 N.W.2d at 531. We held that evidence of either test was sufficient to constitute adequate proof that the radar equipment was working properly.

> Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

Id. at 467, 168 N.W.2d at 532.

In the present case, Officer Haskell testified that prior to using the radar unit he performed an LED light segment test, an

internal circuitry test, and a tuning fork test, and concluded the radar was operating properly. He further testified that after issuing the citation, but prior to leaving the location, he performed the same tests and again concluded the radar unit was functioning properly. With regard to the tuning fork test, Haskell testified there were two forks, one stamped with a 35-m.p.h. marking and the other an 80-m.p.h. marking. The tuning forks were supplied by the manufacturer and were tested at the factory. He testified he struck each tuning fork, held it approximately 1 inch in front of the radar antenna, and received a digital readout which correlated to the marking stamped on the fork. The radar unit was not calibrated using a test car. We conclude that this evidence, in light of *Kudlacek* and *Snyder*, was sufficient foundation to establish that the radar unit was operating properly.

Defendant next assigns as error the trial court's failure to dismiss the case when the State failed to prove that the arresting officer met the requirements of § 39-664(2) in apprehending him. This section provides:

> The driver of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:
>
> (a) If the apprehending officer has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device;
>
> (b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed; and
>
> (c) If the apprehending officer is in uniform or displays his or her badge of authority.

Defendant contends that because the conjunctive word "and" separates subparts (b) and (c), all three subparts are required before a speeder can be validly apprehended. In the present case, then, he could not have been validly apprehended because the arrest was effectuated by only one officer, where the statute requires at least two officers acting in accordance

with the statute for a valid arrest.

We reject appellant's contention. This court has often stated that while a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. See, *In re Interest of Richter,* 226 Neb. 874, 415 N.W.2d 476 (1987); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Hicks*, 225 Neb. 322, 404 N.W.2d 923 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985); *State v. Farr*, 209 Neb. 163, 306 N.W.2d 854 (1981). Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980); *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979). This court has also stated in numerous criminal cases that in construing a statute this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results, *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Farr, supra*; and *State v. Maez*, 204 Neb. 129, 281 N.W.2d 531 (1979), and that a sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *State v. Farr, supra; State v. Maez, supra.*

In the present case, interpreting § 39-664(2) to require two officers who are using radar to act jointly when issuing a citation for speeding is absurd. Under this interpretation of the statute, a single officer, who determined by speed radar that a vehicle was traveling in excess of the speed limit, could not validly issue a speeding citation to the driver of that vehicle, but that same officer, who had probable cause and who was acting alone, could validly arrest a suspect on the most serious felony offenses. This interpretation does not effectuate the object of the legislation, and the result of such an interpretation is absurd, especially since the scientific principles underlying

speed radar devices are widely recognized and accepted in the legal community.

We believe a more reasonable construction of § 39-664(2) would require showing subparts (a) and (c), or showing subparts (b) and (c). Therefore, the statute should be construed as reading:

> The driver of any motor vehicle measured by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:
>
> (a) If the apprehending officer, who is in uniform or displays his or her badge of authority, has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device; *OR*
>
> (b) If the apprehending officer, who is in uniform or displays his or her badge of authority, has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was recorded, and (ii) gives a description of the vehicle and its recorded speed.

We believe that this construction, allowing officers using speed radar to act alone or in groups of two or more, best achieves the purpose of the statute. Defendant's contention is without merit.

Defendant next argues that the State failed to establish that the speed limit on West Dodge Road was 45 m.p.h. We agree. The complaint filed against defendant in the county court alleged a violation of Neb. Rev. Stat. § 39-662(2) (Reissue 1988), in that defendant was driving 75 m.p.h. in a 45-m.p.h. zone. That section delineates the maximum speeds for particular types of roads.

The prosecution implicitly assumes that since Neb. Rev. Stat. § 39-663(4) (Reissue 1988) authorizes a municipality to lower the maximum speed set forth in § 39-662(2), a violation of the lower maximum speed is also a violation of § 39-662(2), and thus an offense against the State of Nebraska. We neither reject nor accept this assumption. The prosecution offered no evidence of a municipal ordinance reflecting that the speed limit on West Dodge Road was 45 m.p.h. The speed limit for the area in question is 55 m.p.h. under § 39-662(2)(d). The speed of

defendant's car was established by competent evidence to be 75 m.p.h. Pursuant to the Waiver/Fine Schedule for Nebraska County Courts (Dec. 1, 1989), defendant's $100 fine is therefore modified to $50 to reflect a 20-m.p.h. speed difference.

We have examined defendant's remaining assignment of error, and it is wholly without merit. Accordingly, defendant's conviction and sentence are affirmed as modified.

AFFIRMED AS MODIFIED.

RONDA KAE CARLON, APPELLEE, V. THEODORE EARL CARLON, APPELLANT.
453 N.W.2d 742

Filed April 20, 1990. No. 88-217.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, upon the recommendation of the Appellate Division of the District Court, FUHRMAN, HOWARD, and MULLEN, District Judges. Affirmed as modified.

Clay B. Statmore for appellant.

Jeanelle Kleveland for appellee.

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

PER CURIAM.

Based on the briefs and the recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, the judgment of the district court is modified as set forth in the recommendation of the Appellate Division of the District Court. The judgment is therefore modified to provide that the appellant pay $340.50 per month as child support for both children and to provide that the payment of alimony shall terminate 5 years from the date of the entry of the decree of dissolution and, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

WILLIAM D. REED, APPELLANT, V. SHARON R. REED, APPELLEE.
453 N.W.2d 742

Filed April 20, 1990. No. 88-428.

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

James A. Cada, of Bailey, Polsky, Cada, Todd & Cope, for appellant.

Paul E. Galter, of Bauer, Galter & O'Brien, for appellee.

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

PER CURIAM.

The petitioner-appellant father, William D. Reed, assigns as error the district court's failure to modify the child support payments previously awarded the respondent-appellee mother, Sharon R. Reed.

We, as required, have reviewed the district court's action de novo on the record; we determine therefrom that the district court did not abuse its discretion in denying the father's application. Accordingly, the action of the district court is affirmed.

The mother is awarded the sum of $500 to apply toward the services of her attorney in this court.

AFFIRMED.

FAHRNBRUCH, J., not participating.

KENNETH W. KNOWLTON, APPELLANT, V. AIRPORT TRANSPORTATION CO., A NEBRASKA CORPORATION, APPELLEE.
454 N.W.2d 278

Filed April 20, 1990. No. 88-884.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.

2. **Workers' Compensation: Independent Contractor.** Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor.
3. **Workers' Compensation: Independent Contractor: Contracts.** Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workers' compensation statutes.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael F. Gutowski for appellant.

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

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

WHITE, J.

This is an appeal from an order of the Workers' Compensation Court. The compensation court denied benefits to the plaintiff. We affirm.

Plaintiff, Kenneth W. Knowlton, was involved in an auto accident on November 1, 1985, while driving a passenger van owned by defendant, Airport Transportation Co., but leased to Knowlton. Knowlton filed a petition in the Workers' Compensation Court, alleging that the accident occurred while he was employed by defendant. A single judge awarded compensation to Knowlton. Pursuant to defendant's application for rehearing, a three-judge panel dismissed Knowlton's petition, finding that he was an independent contractor. Knowlton appeals to this court, assigning as error the panel's finding that he was an independent contractor rather than defendant's employee.

Knowlton began driving a van for defendant in January 1982. At that time he was paid an hourly wage, and Social Security and income taxes were withheld from his pay. In May 1983, Knowlton entered into a lease agreement with defendant.

In August 1985, Knowlton entered into another lease agreement which was substantially similar to the first lease agreement. This lease agreement was in effect when Knowlton was involved in the accident. The agreement provided that defendant would lease a van to Knowlton for $225 per week. The agreement also provided:

> 8. The Second Party [Knowlton] (and all other drivers operating said limousine) shall perform this Agreement as an independent contractor and nothing herein contained shall be construed to be inconsistent with this relationship or status and nothing in this Agreement shall in any way be construed to constitute the Second Party (and all other drivers operating said limousine) as the agent, employee, or representative of the First Party [defendant]. As an independent contractor, the Second Party (and all other drivers operating said limousine) shall pay his own FICA, withholding, and such other taxes as may be required in prescribed form and shall file Schedule C-1, Self-Employment Tax Form, with his federal income tax return.

The conversion to a lease basis was prompted by a desire to provide the drivers with an incentive to earn more money by getting more contracts and making more runs. Under the plan, defendant made an agreement with several Omaha hotels to transport their guests from the airport to the hotel and from the hotel to the airport. Defendant billed the hotels monthly on a per room basis. When payments from the hotels were received, defendant deducted lease payments and dispersed the balance to the drivers based on the number of runs made.

Defendant retained ownership of the van, as required by Public Service Commission (PSC) regulations. The van was registered and licensed with the PSC and could not be used to compete with taxicabs, but could be used to transport cargo. Drivers were allowed to contract for the transportation of cargo. The driver could use the van for personal uses, including vacations, and was responsible for fuel and maintenance. Knowlton testified that he also drove the van home after work. The driver could, but was not required to, purchase fuel and maintenance services from the defendant. The lease agreement

contained various provisions reflecting PSC regulations. The rates charged by defendant were approved by the PSC. The drivers had no control over the rates.

Defendant would plan a route or a schedule as a convenience to the drivers and the hotel operators. With a single unified system the drivers operated more efficiently. The vans were equipped with radios, and the drivers were sometimes offered other runs, such as delivering flowers or packages. The drivers were free to accept or reject these offers as they chose, but all the money received by defendant for these runs was ultimately paid to the drivers. The drivers were also "on call," but again could accept or reject afterhours calls as desired. A defendant's witness testified that Airport Transportation retained some control over the drivers with regard to dispatching and accounting. If defendant was not satisfied with the driver's service, the remedy was a 30-day notice that the lease agreement was terminated.

Under the lease agreement defendant did not withhold Social Security or income taxes from the payments to Knowlton. Knowlton paid his own Social Security taxes and listed himself as a self-employed limousine driver on his tax returns.

This court has stated that the findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Brazee v. City of Lincoln,* 234 Neb. 680, 452 N.W.2d 529 (1990). " '[C]ontrol or the right of control is the chief criterion in the determination of whether one acts as an independent contractor.' " *Spulak v. Estep*, 216 Neb. 523, 527, 344 N.W.2d 475, 477 (1984). We have also stated that

> [w]here a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes.

(Syllabus of the court.) *Stephens v. Celeryvale Transport, Inc.*,

205 Neb. 12, 286 N.W.2d 420 (1979); *Spulak v. Estep, supra.*

We have reviewed the record and cannot say that the panel's conclusion that Knowlton was an independent contractor is clearly wrong. Accordingly, the judgment is affirmed.

AFFIRMED.

DELORIS EDGERTON, APPELLANT, V. MARY K. LAWRY, APPELLEE.
453 N.W.2d 743

Filed April 20, 1990. No. 88-941.

1. **Motor Vehicles: Negligence.** Negligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.
2. _____: _____. An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible.
3. _____: _____. If the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, SAMUEL V. COOPER, Judge. Judgment of District Court affirmed.

David L. Welch, of McCormack, Cooney, Mooney, Hillman & Elder, for appellant.

Lawrence E. Barrett, of Sodoro, Daly & Sodoro, for appellee.

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

PER CURIAM.

The district court affirmed the county court's dismissal of plaintiff-appellant Deloris Edgerton's petition, which alleges

that she sustained damage as the proximate result of defendant-appellee Mary K. Lawry's negligent driving. In support of this appeal, Edgerton asserts, in substance, that the district court erred in failing to rule that the county court erred on the record by failing to find that Lawry was negligent as a matter of law and failing to enter judgment in Edgerton's favor. We affirm.

The record is such that as the trier of fact, the county court could have found that between 7:30 and 8 o'clock on the morning of November 30, 1987, each of the parties was driving an automobile at between 20 and 25 miles per hour in an easterly direction on Gomez Avenue in Omaha, Nebraska. Although there had been a thaw and refreezing during the night and early morning hours, neither party had encountered any ice until approaching a point near the intersection of Gomez Avenue and 33d Street, an intersection at which eastbound traffic was controlled by a stop sign.

When Edgerton was 30 to 35 feet from the sign, she applied the brakes on her automobile in order to stop in response to the sign. As she did so, her automobile slid to the left into the curb of Gomez Avenue, making a quarter turn and coming to rest with its front wheel against the curb. Edgerton did not see the patch of ice on which her automobile slid until after the Lawry automobile struck the left rear door of the Edgerton vehicle.

Lawry had been traveling about a block behind Edgerton, but when Edgerton lost control of her automobile, Lawry was only two or three car lengths to the rear of the Edgerton automobile. By this time, Lawry had slowed her vehicle to between 15 to 20 miles per hour in preparation for stopping at the sign. She did not see the patch of ice on which Edgerton lost control of her automobile, but knew that something caused Edgerton's problem, and, thus, Lawry tapped the brakes and geared the manual transmission on her vehicle down to further slow her speed. Nonetheless, after traveling two or three car lengths, Lawry also lost control of her automobile and slid into the stopped Edgerton vehicle.

The applicable rules were recently summarized in *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989). We held therein that the defendant, who had been driving during a storm on a

street covered with snow and ice, was negligent as a matter of law when she failed to see the clump of ice or snow which caused her to lose control of her automobile and collide with the rear of a vehicle which had stopped in a line of traffic in response to a red traffic light. In reaching that holding, we reaffirmed that negligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. We also reasserted that an exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and is thus relatively indiscernible. We once again said that if the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions rather than intervening causes and thus do not exonerate a motorist from the application of the range of vision rule. The question in this case therefore resolves itself into whether it can be said as a matter of law that Lawry should have anticipated the presence of the ice, on which her automobile slid, in time to have avoided colliding with Edgerton's automobile. We conclude it cannot be so said.

Unlike the situation in *Burkey*, there was in this case no ongoing storm nor were the streets covered with ice or snow, circumstances which should put any reasonable driver on notice of the prevailing dangerous conditions and on specific notice of the fact the streets were slippery. Although in this instance there had been a thawing and refreezing, neither driver had encountered any ice prior to reaching the site of the collision. Indeed, Edgerton testified that she had driven for 25 miles without encountering such a condition. The fact that Edgerton failed to see the icy patch on which she lost control of her vehicle until after the collision had taken place supports the county judge's implied factual finding that Lawry had no reason to apprehend the presence of a foreign substance on the road until she saw Edgerton's vehicle begin to slide and that by that time

there was nothing Lawry could do to maintain control of her automobile.

Accordingly, the district court correctly concluded that the record made in the county court demonstrated no error.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS R. JURGENS, APPELLANT.
454 N.W.2d 280

Filed April 20, 1990. No. 88-980.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Remanded with directions.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

WHITE, J.

This is a rehearing of an issue which was not addressed in *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989). We remand for further factual findings.

In *State v. One 1987 Toyota Pickup, supra*, we held that a "check stop selective," conducted by the Nebraska State Patrol on October 23, 1987, violated Jurgens' fourth amendment rights because the State Patrol acted with unconstrained discretion in establishing and conducting a check stop selective which detained Jurgens and a codefendant who were traveling in Jurgens' pickup. Jurgens was arrested and his pickup was impounded after troopers observed marijuana in the pickup. That afternoon, Troopers Gill and Chrans obtained a search warrant for the pickup based upon their observations earlier that day. A search of the vehicle uncovered large quantities of

marijuana and various instruments used in cultivating marijuana.

That same day, Nebraska State Patrol Investigator Dishong obtained a search warrant for Jurgens' farm, where he had been investigating marijuana cultivation since July 1987. On several occasions Investigator Dishong made surreptitious inspections of the premises, finding marijuana in various stages of cultivation. The affidavit used to obtain this search warrant detailed his extensive investigations and observations of marijuana cultivation on the Jurgens farm. It also included a one-paragraph reference to the results of the vehicle search conducted earlier that day. A search warrant was issued, and a subsequent search of the farm uncovered large quantities of marijuana and equipment used to produce marijuana.

We held that the trial court did not err in admitting evidence obtained from the search of Jurgens' real property because the facts contained in the affidavit were obtained from a source independent of the illegal stop, and even if the reference in the affidavit to the search of Jurgens' vehicle is disregarded, the affidavit contained sufficient independent facts which would have justified the issuance of the affidavit. We upheld Jurgens' convictions because the evidence obtained from the search of the farm provided an ample basis to support his convictions for unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound.

After our decision was announced, Jurgens moved for a rehearing, citing for the first time *Murray v. United States,* 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). We sustained the motion and ordered that the parties brief whether *Murray* has an effect on the present case; whether *Murray* is retroactive; and, if these issues are answered in the affirmative, whether questions of fact are raised that require remand to the trial court for further findings of fact.

In *Murray v. United States*, federal law enforcement agents, who had Murray and a codefendant under surveillance, observed Murray and a codefendant drive two vehicles into a warehouse. When Murray and the codefendant drove the vehicles out a short time later, the agents observed a

tractor-trailer rig within the warehouse. The vehicles were followed, and the drivers were ultimately arrested. In a lawful search, both vehicles were found to contain marijuana. Several agents then returned to the warehouse and entered it. The warehouse was unoccupied. Once inside, the agents observed bales of marijuana. They left without disturbing the bales and obtained a search warrant. In applying for the warrant, the agents did not mention the prior entry and did not rely on any observations made during that entry. A search warrant was issued, and the agents reentered the warehouse, seizing 270 bales of marijuana.

In its opinion, the Court discussed the scope of the "independent source" rule, indicating that the rule would not apply and the evidence should be suppressed when a subsequent search was prompted by an earlier illegal search:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

487 U.S. at 542.

The Court indicated in a footnote to the opinion that the critical question is "whether the actual illegal search had any effect in producing the warrant . . . ." 487 U.S. at 542 n.3. The Court remanded to the trial court for further factual findings.

With regard to the retroactivity issue, in *United States v. Johnson*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), the Court stated that, subject to certain exceptions or threshold tests, "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." 457 U.S. at 562. Of the three exceptions listed by the Court, only one is applicable to the present case:

> First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision

> should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. [Citations omitted.]

457 U.S. at 549.

This exception, or more appropriately threshold test, indicates that when a decision of the U.S. Supreme Court did nothing more than apply settled precedent to different factual settings, a true retroactivity issue is not presented because the new decision is merely an interpretation of existing precedent.

We believe that *Murray v. United States,* 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), has application to the present case. Evidence was presented at the suppression hearing and at trial suggesting that Investigator Dishong's investigation of the Jurgens farm had terminated several days prior to the illegal check stop selective conducted by the Nebraska State Patrol. The evidence also suggests that Investigator Dishong was "prompted" to reopen the investigation and seek a search warrant when he was notified that Jurgens was arrested and marijuana was found in his pickup. We further believe *Murray* concerns the scope of the independent source doctrine as developed in earlier cases, see, e.g., *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); *Nix v. Williams,* 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); and *Segura v. United States,* 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), and is merely an interpretation of existing precedent. Therefore, *Murray* should be applied in the present case.

We find that the record before this court does not provide an adequate basis to resolve the issue. Further findings of fact must be made by the trial court. Accordingly, the cause is remanded with instructions that the trial court consider generally whether the warrant obtained by Investigator Dishong was derived from a source independent of the prior illegal stop, and specifically whether Investigator Dishong would have sought the warrant had the State Patrol not conducted the illegal check stop selective.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. HOMER RAY MCPHERSON, APPELLANT.
453 N.W.2d 745

Filed April 20, 1990. No. 89-060.

Appeal from the District Court for Adams County, BERNARD SPRAGUE, Judge, upon the recommendation of the Appellate Division of the District Court, REAGAN, ENDACOTT, and OLBERDING, District Judges. Sentence vacated, and cause remanded for resentencing.

Stephen A. Scherr, of Whelan & Scherr, P.C., for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, the court notes plain error as to the enhancement of the sentence, in that the record fails to disclose that defendant was represented by counsel at the time of the second conviction; therefore, the sentence is vacated, and the cause is remanded to the district court for resentencing.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. LARRY NUSS, APPELLANT.
454 N.W.2d 482

Filed April 20, 1990. No. 89-335.

1. **Criminal Law: Statutes: Legislature: Intent.** The conclusion that a crime is a continuing offense should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that the Legislature intended that it be treated as a

continuing one.

2. **Criminal Law: Limitations of Actions: Pleas.** The defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea.
3. **Criminal Law: Proof: Limitations of Actions.** The burden is on the State to prove all of the essential elements of the crime charged, including the fact that it was committed within the time fixed by law.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Reversed and remanded with directions to dismiss.

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

GRANT, J.

The defendant, Larry Nuss, appeals his convictions for violation of Neb. Rev. Stat. § 28-517 (Reissue 1989). The defendant was charged in two separate counts that he did "receive, retain or dispose of" stolen property on April 7 and on April 13, 1988. A jury found the defendant guilty and assessed the value of the property received or retained on April 7 at $319.92 and the value of the property received or retained on April 13 at $1,332.24. Theft is a Class IV felony when the value of the thing involved is $300 or more, but does not exceed $1,000, and is a Class III felony when the value of the thing involved exceeds $1,000. Neb. Rev. Stat. § 28-518 (Reissue 1989). Defendant was sentenced to imprisonment for a period of 20 months to 5 years on each count, with the sentences to run concurrently. Defendant timely appealed.

The defendant assigns as error the actions of the trial court in not finding that the informations were barred by the statute of limitations and in five other particulars concerning rulings on evidence by the court, instructions given by the court, and the court's failure to direct a verdict in defendant's favor. We reverse and remand the cause for dismissal based on defendant's first assignment of error, and need not discuss the

others.

The record shows the following. Defendant was employed by Burlington Northern Railroad (BN) from January to November 1977, from April to November 1978, and continuously from April 1979 until his resignation from BN on January 15, 1984. During the last 5 years of his employment, defendant worked as a pipefitter and sheet metal worker in BN's mechanical department in Alliance, Nebraska. After resigning, defendant moved to Phoenix, Arizona, where he lived until returning to Nebraska in 1987.

On April 6, 1988, the Morrill County sheriff was asked by defendant's wife, Reta, to come to the Nuss home in Bayard. Reta Nuss was in the process of leaving the defendant and requested the sheriff to be present while she removed her possessions from the house in Bayard and exchanged property with the defendant on a farm located outside of Bayard. The farm was owned by defendant's mother, Lena Nuss. Later that day, the sheriff telephoned a special agent of BN and advised him that while at defendant's house earlier that day, the sheriff had observed property with the initials "BN" engraved or marked on the property.

On April 7, 1988, the sheriff served the defendant at the farm with a warrant to search both defendant's residence in Bayard and the farmhouse located outside of town. The search resulted in the seizure of numerous handtools with BN markings and many other miscellaneous items. The inventory sheet prepared on the seizure consisted of seven pages of items, later identified as BN property, including hammers, safety glasses, flashlight batteries, wrenches, sockets, switch locks, pick handles, ax handles, first aid kits, etc. Following further investigation, a second warrant was obtained, and on April 13, 1988, another search was conducted at the farm. This search resulted in the seizure of more property, later identified as BN property, including at least 16 hammers, 10 first aid kits, numerous wrenches and sockets, two switch locks, a box of batteries, a box of pipefittings, a toolbox, space heaters, a shovel, and other railroad materials.

At trial, a BN employee in charge of materials testified that all BN property has stock code numbers identifying the

property to a particular vendor or to a group of items. The items without the BN markings were identified as BN property through a logo or by a shade of green paint unique to BN property. Testimony was also presented on BN's procedures for disposing of scrap material. A BN agent testified that BN employees are not allowed to carry materials belonging to the railroad out of the mechanical department. On occasion, an employee may purchase scrap material, but before such a purchase is allowed, the employee must get authorization for the purchase. However, no handtool with a useful life is disposed of in this manner.

Section 28-517 of the Nebraska Criminal Code, which is based on the Model Penal Code § 223.6 (1962), provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." The evidence does not support any determination that the defendant received property on a date or dates certain, nor that the defendant ever disposed of any property. The only basis for defendant's conviction in this case is that he "retained" the property on the days it was found by the sheriff.

Confusion arises because it is unclear as to whether the statute, in its present form, creates a separate offense of "retaining stolen property." The former statutory provisions dealing with the subject of receiving stolen property prohibited an individual from "receiving" and "concealing" such property, but did not prohibit one from "retaining" stolen property. See Neb. Rev. Stat. §§ 28-508 and 28-513 (Reissue 1975). Now there is but one offense of "theft by receiving," which includes the former crime of receiving stolen property. See Neb. Rev. Stat. § 28-510 (Reissue 1989). Unlike the words "receiving" and "disposing," the word "retaining" is not defined in Nebraska's Criminal Code. See Neb. Rev. Stat. § 28-509 (Reissue 1989). Since neither the statute nor legislative history on the enactment of § 28-517 refers to an intent to create a separate, additional crime of "theft by retaining," we do not now so hold.

Yet, the word "retaining" is not without meaning. As noted

in the comments to the Model Penal Code: "By defining 'receiving' to include the retention of possession, the Model Code also makes it possible to convict a person who receives without knowledge that the goods were stolen but who, upon learning of their status, nevertheless resolves to keep or sell them." Model Penal Code § 223.6, comment 2 at 235 (1980).

As the comment to the Model Penal Code suggests, the "retaining" language was inserted to ease the burden of proving intent in a situation where an accused does not form criminal intent until sometime after he receives the property. The element of intent the State is attempting to prove in this case is not the traditional element of whether defendant received property with knowledge that it was stolen, but, instead, whether he retained it with guilty knowledge, no matter how the defendant obtained possession of stolen property. In this case, there is no evidence as to the stealing of the property, nor as to any actual receiving of the property. This prosecution is based on defendant's retention of stolen property.

The retaining aspect of "theft by receiving" is also important in establishing venue. That is, since "[a]ll criminal cases shall be tried in the county where the offense was committed," and the crime of retaining can be committed at some place other than where the property was actually received, venue can be established where the retaining aspect of the crime was committed. See Neb. Rev. Stat. § 29-1301 (Reissue 1989). With this in mind, venue is proper in Morrill County, as the place where defendant would have committed the crime with the required intent, even though the defendant alleges the actual receiving of the property had to have occurred in Box Butte County, where BN's mechanical department is located.

We first determine that the defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea. *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951); *Emery v. State*, 138 Neb. 776, 295 N.W. 417 (1940). The defendant pled not guilty in this case and, in addition, specifically raised the statute of limitations defense before the trial court and this court. This issue is before us.

In his dispositive assignment of error, defendant contends that the 3-year statute of limitations prescribed by Neb. Rev.

Stat. § 29-110 (Reissue 1985) bars prosecution of the offenses. Specifically, the defendant contends that even if the property at issue were stolen, "[t]he statute of limitations commenses [sic] to run in a criminal charge of retaining stolen movable property from the time the defendant first retained the movable property with the necessary intent." (Emphasis omitted.) Brief for appellant at 25. The complaints filed April 18 and 26, 1988, allege the offenses occurred on April 7 and 13, 1988, on the days the property was discovered, allegedly in defendant's possession. Defendant alleges that if the dates of the offenses are before April 18, 1985, the offenses are barred by the statute, thus implying that the offenses alleged had to have occurred before January 15, 1984, which was the date of defendant's resignation from BN. The State, on the other hand, contends that the statute of limitations does not bar prosecution because the offenses with which the defendant was charged are continuing offenses, and the statute does not begin to run until the prohibited conduct terminates, that is, when the State discovers the unlawful retention.

We examined the subject of continuing offenses in *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). In *Schaaf*, we set out the definition of continuing offense as

> "a 'continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.' "

Id. at 152, 449 N.W.2d at 768; See, also, *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984); *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

Jurisdictions which have held that theft by receiving is a continuing offense have also adopted variations of the Model Penal Code's determination on how theft offenses should be graded. See, e.g., *State v. Temple*, 65 Haw. 261, 650 P.2d 1358 (1982). The model code provides:

> The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property

> or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

Model Penal Code § 223.1 at 126 (1962). Arguably, such language could be interpreted as indicating thefts are continuing offenses. However, Nebraska has not adopted such a statute.

Those jurisdictions which have found the aspect of retaining stolen property to be a separate and continuing offense have clear legislative mandates regarding when the statute of limitations begins to run for continuing offenses. See, e.g., *Temple, supra*. The Hawaii statute expressly provides: "An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated." Haw. Rev. Stat. § 701-108(4) (1985).

In Nebraska, there is no clear legislative intent showing that the Legislature intended to make theft by receiving a continuing course of conduct. Although the Nebraska Legislature adopted the Model Penal Code version of "theft by receiving," the Legislature has not enacted the model code's aggregation system, nor has the Legislature enacted a provision concerning when the statute of limitations commences for continuing offenses.

We have stated that a conclusion that a crime is a continuing offense " 'should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the Legislature] intended that it be treated as a continuing one.' " *Schaaf, supra* at 152, 449 N.W.2d at 768. There we held that theft by disposition under Neb. Rev. Stat. § 28-511(2) (Reissue 1985) was not a continuing offense.

In considering the question of continuing offenses, the U.S. Supreme Court refused to construe the draft registration statute as a continuing offense, stating:

> In deciding when the statute of limitations begins to run

> in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' *United States v. Scharton*, 285 U. S. 518, 522 [52 S. Ct. 416, 76 L. Ed. 917] (1932)." *United States v. Habig*, 390 U. S. 222, 227 [88 S. Ct. 926, 19 L. Ed. 2d 1055] (1968). . . . These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Toussie v. United States, 397 U.S. 112, 114-15, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970).

The question of continuing offense was earlier considered by the U.S. Supreme Court in *United States v. Irvine*, 98 U.S. 450, 25 L. Ed. 193 (1878). In the *Irvine* case, defendant Irvine wrongfully withheld pension benefits from a Mrs. Berkely. Berkely demanded the pension on December 24, 1870. An indictment was returned against Irvine on September 15, 1875. Defendant pled the statute of limitations of 2 years, but the prosecutor's position was, "You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute." 98 U.S. at 452. The Court's opinion states: "We do not so construe the act. Whenever the act or series of acts necessary

to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution." 98 U.S. at 452. The Court held that the withholding of the pension was not a continuing offense and that the statute of limitations was a defense.

In *United States v. Mendoza*, 122 F. Supp. 367 (N.D. Cal. 1954), the defendant was charged with retaining property which he knew was stolen from the United States. The court stated: "There is no evidence in the record showing that the retention of any of the property began in the period between May 5, 1951, and May 5, 1954, the latter date being the date that the indictment was filed." *Id.* at 367. The court cited *Irvine, supra*, and held:

> In the instant case criminal intent is an element of the crime, and therefore the statute of limitations should commence to run from the time that defendant first retained the property with the necessary intent.
>
> In a case cited by plaintiff, *U.S. v. Irvine*, 1878, 98 U.S. 450, 25 L.Ed. 193, the court in essence states that whenever the act or acts necessary to constitute a criminal withholding of the property have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution. This case has been the cornerstone for similar bankruptcy cases interpreting the word "conceal" as not to be a continuing offense. *Warren v. United States*, 5 Cir., 199 F. 753, 43 L.R.A.,N.S., 278; *United States v. Trotter*, D.C., 8 F.Supp. 275. Concealment of assets in bankruptcy, however, is now made a continuing offense by Title 18, U.S.C. § 3284. No such enactment makes retaining property a continuing offense, nor is there any case that so interprets it.

Mendoza, supra at 368.

In *State v. Webb*, 311 So. 2d 190, 191 (Fla. App. 1975), the court considered the application of the 2-year Florida statute of limitations to the violations of a statute providing, in part, "whoever buys, receives, or aids in the concealment of stolen money, goods, or property, knowing the same to have been

stolen, shall be guilty of a felony." The facts showed that on May 12, 1970, defendant Webb had stolen radio property, which he knew was stolen, installed on the premises of a radio station he operated. The information filed alleged that Webb committed the crime on July 20, 1973, which was the date of his arrest. The court stated:

> We hold that the crime of receiving and concealing stolen property is not a continuing offense and that the statute of limitations begins to run when the crime is complete, to wit: when the property is received and concealed with the knowledge that the same is stolen.
>
> Our Supreme Court in State v. King, Fla.1973, 282 So.2d 162, quoted with approval from 21 Am.Jur.2d, Criminal Law, § 157, where it is stated:
>
> " 'The statute of limitations begins to run from the time of commission of an offense, or when the crime is complete, *not the date the crime is discovered.*' [Emphasis supplied.]"

Webb, supra at 191. The court held that the Florida statute was silent as to the concept of a continuing offense and that that concept should not be applied in determining whether the prosecution of Webb's crime was barred by the statute of limitations. The court affirmed the dismissal of the case against Webb.

In *Duncan v. State*, 282 Md. 385, 391, 384 A.2d 456, 460 (1978), the court also followed *United States v. Irvine, supra*, and stated: "It was established a century ago that the criminal withholding of money or property was not a continuing offense." With regard to the specific case before it, the court held: "Duncan's act in receiving the coat with knowledge that it had been unlawfully obtained by Mally completed the offense. From that date limitations began to run against the prosecution for the offense." *Duncan, supra* at 394, 384 A.2d at 462.

In *People v. Kimbro*, 182 Ill. App. 3d 572, 538 N.E.2d 826 (1989), the court considered a case in which the record showed that in the fall of 1975 a certain tractor was stolen. Defendant's ex-wife testified that in the fall of 1975, defendant drove a tractor to their house and later told his ex-wife he had stolen the tractor. In 1986, when defendant was going through a divorce

with his wife, defendant asked a friend to store the tractor for him because he did not want his wife to get that property. The tractor was kept at the friend's farm until it was discovered on March 11, 1988, by a sheriff's department investigator. Defendant was charged with theft, in that he exerted unauthorized control over the tractor with intent to deprive the owner of its use. The court held that the statute of limitations began to run upon the original taking of the property in 1975 and that defendant did not commit a separate offense on March 11, 1988, when the defendant continued exerting unauthorized control over the tractor. See, also, *State v. Hersch*, 445 N.W.2d 626 (N.D. 1989); *State v. Ladely*, 82 Wash. 2d 172, 509 P.2d 658 (1973).

The Nebraska Legislature has not made the offense of "theft by receiving" a continuing offense, and absent legislative intent to do so, we do not now so hold.

The basic proposition that controls this case is that "[t]he burden is on the State to prove all of the essential elements of the crime charged, including the fact it was committed within the time fixed by law." *Jacox v. State*, 154 Neb. 416, 419, 48 N.W.2d 390, 392 (1951). The statute of limitations should be liberally construed in favor of the defendant in a criminal case. *Jacox, supra*. In the usual criminal case, this fact is established by the proof of the crime itself, that is, that the crime was committed at a time certain and that defense counsel and the court knew that that time is within the applicable statute of limitations. In this case, however, the crimes charged are "retaining" stolen goods.

As stated above, the crimes charged are not, under Nebraska law, continuing offenses. The State has not satisfied its burden as to when the crimes charged occurred. While defendant retained property that the jury could well find was stolen and that defendant knew was stolen, the State did not prove when those crimes occurred, and thus the State failed to prove all the elements of the crimes charged against defendant.

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND F. BADAMI, APPELLANT.

453 N.W.2d 746

Filed April 20, 1990. No. 89-364.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
3. **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.
4. _____: _____: _____. The key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime.
5. **Arrests: Search and Seizure.** The validity of a search incident to a lawful arrest depends on the legality of the arrest itself.
6. **Arrests: Search and Seizure: Probable Cause.** Where a formal arrest follows quickly on the heels of a challenged search, it is not particularly important that the search preceded the arrest rather than vice versa as long as the fruits of the search were not necessary to support probable cause to arrest.
7. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the brief.
8. **Convictions: Appeal and Error.** Generally, a conviction will not be turned aside in the absence of a showing that an error prejudiced the defendant.
9. _____: _____. A criminal conviction will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
10. _____: _____. A judgment of conviction will not be reversed on appeal unless the evidence supporting the conviction is so lacking in probative force that it is insufficient as a matter of law.
11. _____: _____. In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
12. **Criminal Law: Proof.** The State is not required to disprove every hypothesis but that of guilt.
13. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, W. MARK ASHFORD, Judge. Judgment of District Court affirmed.

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

Robert M. Spire, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

HASTINGS, C.J.

The defendant has appealed from the order of the district court affirming his conviction by the county court of operating a motor vehicle while under the influence of a drug, in violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987), a Class W misdemeanor.

Defendant assigns seven errors, summarized as follows: (1) the failure of the trial court to grant his pretrial motion to suppress certain evidence; (2), (3), (4), and (5) the failure of the court to sustain various objections to the admission of evidence; (6) the failure of the court to sustain defendant's motion to dismiss; and (7) the insufficiency of the evidence to sustain defendant's conviction.

On July 7, 1988, at about 5 p.m., Officer Butler of the Omaha Police Division observed a vehicle being driven in a reckless manner. The vehicle was bouncing off the median in the center of the street. The officer followed and further observed the vehicle bounce off the median several more times, and noticed the driver was either fanning himself or slapping himself in the face.

The officer then turned on his red lights and attempted to pull over the vehicle which was being driven by the defendant. After hitting the curb of the median one more time, defendant turned and stopped his vehicle.

When the defendant had stopped, the officer approached the vehicle and spoke with the defendant. There was evidence that the officer asked defendant what was wrong, and the defendant

stated he was very tired. Officer Butler noted the defendant was very fidgety and glassy eyed and spoke in a rapid manner. Officer Jacobson, who arrived on the scene as a backup, described defendant by stating that

> he had a very disheveled appearance. His hair was a mess. His eyes were glazed and didn't appear to be able to focus on anything. His pupils were very pinpoint, very small. He was overly responsive to requests that we asked him to do. A lot of hand gestures, a lot of moving around with his body, that sort of thing . . . .

The defendant was asked to perform four field sobriety tests in the presence of both officers. According to their testimony, defendant clearly failed each one. He became confused in reciting the alphabet; he was wobbly on the one-foot balancing test and could not continue the count to 30 as requested; he was unable to successfully count backward from 100 to 80 in that upon reaching 90, he started counting back to 100; and he was unable to do the finger-to-nose test. The defendant was given a breath test which was negative for alcohol. Neither Officer Butler nor Officer Jacobson smelled alcohol on the defendant or believed the defendant was under the influence of alcohol. However, based on their several years of experience as police officers in dealing with persons under the influence of drugs, they both gave as their opinions that defendant was under the influence of some drug which they were unable to specify.

The officers placed the defendant under arrest for suspicion of driving while under the influence of alcohol or a drug and proceeded to search him. In the course of their search the officers discovered in the defendant's pockets an unmarked medicine bottle containing some pills, a syringe, and a large quantity of cash.

While being placed in the police cruiser, defendant made a comment to the effect that maybe now he could get some help "for the problem." Officer Jacobson testified that after the arrest the defendant volunteered a statement, which the officer wrote down, that he, the defendant, had a drug problem and "maybe between this and my daughter I can quit."

The foregoing information has been gleaned from the testimony adduced at trial as well as at the hearing on the

motion to suppress the evidence obtained as a part of the search. The defendant, who only testified at the suppression hearing, disputed the fact that he hit the median strip more than once, and he also claimed that he successfully passed the various field sobriety tests.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *Id.*

The key to the resolution of the suppression issue is whether the officers had probable cause to arrest the defendant without a warrant. In *State v. Roach,* 234 Neb. 620, 624-25, 452 N.W.2d 262, 266 (1990), this court stated:

> 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. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). See, also, *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989).
>
> Probable cause exists where facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant one of reasonable caution in the belief the action was appropriate, then probable cause exists. Thus, the key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime. *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987).
>
> Probable cause for a warrantless arrest exists if,

> " 'under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.' " *United States v. Fixen*, 780 F.2d 1434, 1436 (9th Cir. 1986); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
>
> The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself. It is not necessary that an actual formal arrest occur before a search is undertaken as long as probable cause for arrest does exist prior to the search. The constitutional issue regarding a reasonable search as an incident to arrest depends upon the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a crime. *State v. Blakely, supra.*

Whether the arrest was made before the search, as testified to by the officers, or the arrest immediately followed the search, as claimed by the defendant, would be of no consequence.

> " '[W]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than visa [sic] versa [as long as] . . . the fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner.' "

234 Neb. at 626, 452 N.W.2d at 267.

The totality of the facts and circumstances known to the arresting officers includes the observation of defendant driving his vehicle in a dangerous and reckless manner, a clear failure to perform basic sobriety testing of both his physical and mental alertness, the aforementioned descriptions of his conduct and behavior, and the absence of evidence that defendant had consumed any great quantity of alcohol, all of which support the prudent belief that defendant had committed the crime of driving under the influence of a drug.

There is no constitutional or statutory requirement that before an arrest can be made the officer must conduct a trial.

Morrison v. United States, 491 F.2d 344 (8th Cir. 1974). The claim that probable cause to arrest was lacking is without merit. The scope of the search incident to arrest is not challenged. Consequently, the trial court was correct in not excluding any evidence gained from the valid arrest and search.

Approximately 30 days after the motion to suppress was overruled, a bench trial was had. The two officers who had testified at the suppression hearing gave substantially similar testimony at the trial. In addition, the parties stipulated that the bottle of pills found on the defendant as a result of the search contained a drug known as Dilaudid.

The State then called Bill Ihm, a chemist, to testify. After eliciting background information as to his professional and educational experience, he was asked what Dilaudid is. Without objection, the witness responded that the drug is a Schedule II narcotic, a synthetic narcotic with no extract from opium, and that the drug is a central nervous system depressant.

The State then produced photostatic copies of some pages of a pharmaceutical guide called the Physicians' Desk Reference (PDR), which were marked as exhibit 3. Exhibit 3 is not contained in the bill of exceptions, but described during the questioning of Ihm were copies of pages 1098 and 1099 of the 1988 PDR, which are said to refer to Dilaudid.

In response to questioning, and over objection, Ihm testified by stating what the PDR apparently said about Dilaudid and the use of heavy equipment and driving. In addition, he answered that according to the PDR the defects on the central nervous system caused by Dilaudid were sedation, drowsiness, mental clouding, impairment of mental and physical performance, and anxiety.

Upon further questioning, Ihm said his testimony was based not only on what the PDR said about Dilaudid, but also on his experience with reference materials over the period of his professional career. In this regard the following question and answer appear in the record: "THE COURT: And you've indicated, based on your own personal background and experience over the course of your professional career, as to the effects as you know them to be in regard to narcotics. Is that

correct? [Ihm]: True."

The trial court allowed all of the witness' testimony over a hearsay objection, stating that "it does fall under the exception of the hearsay rule as to find either by business exceptions or document exceptions, or by the catch-all exception . . . ."

The State then rested, and the defendant moved to dismiss because of insufficiency of the evidence. The record discloses no ruling on the motion. The defendant chose not to put on any evidence. The court found defendant guilty.

For the most part, defendant's second, third, fourth, and fifth assignments of error, as worded, request this court to review every evidential objection raised by defendant which the trial court overruled. However, most of those alleged errors are not discussed. This court will not consider assignments of error which are not discussed in the brief. *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989).

The only evidential rulings discussed in the brief are the denial of the motion to suppress discussed earlier, the failure to sustain foundational objections raised against the testimony of Officers Butler and Jacobson on whether the defendant was under the influence of a drug, and whether exhibit 3 and the testimony of the chemist derived therefrom constitute inadmissible hearsay.

Both police officers testified as to their experience in dealing with persons under the influence of drugs. They gave as their expert opinions, based on the actions of the defendant and the absence of any evidence of alcohol usage, that the defendant was under the influence of a drug.

Defendant's objection seems to be that the officers could not testify because they did not identify the drug involved. This argument has no validity. The officers were properly qualified as experts, and their opinions were based upon a sufficient factual basis. It is obvious that the defendant's driving ability was severely impaired so as to indicate that he was under the influence of something. The absence of evidence of alcohol usage pretty well eliminates that as a cause of defendant's activities. Defendant's claim that he was tired hardly explains the driving and behavior he displayed. With the situation in which the officers found themselves, they would have been

derelict in their duty not to have arrested defendant and taken him off the road. The officers had reasonable grounds to place defendant under arrest, and therefore the seizure of the pill bottle and syringe was lawful.

The arrest being lawful, the evidence of the possession of Dilaudid and drug paraphernalia by the defendant and his voluntary statement that he had a drug problem, although evidence of a circumstantial nature, provided a sufficient factual basis to support the officers' expert opinions and the finding of guilt made by the trial court.

As previously stated, exhibit 3, the PDR pages, was not found in the record. Whether the witness Ihm's testimony was based in part on what he had read in that work is of no consequence. Ihm testified without objection and without reference to the exhibit that he knew that Dilaudid was a scheduled drug, a narcotic, and a central nervous system depressant. The failure of the trial court to sustain defendant's objection to the reception of exhibit 3 into evidence would, at most, constitute harmless error. It is well established that a conviction will not be turned aside in the absence of a showing that an error prejudiced the defendant. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990).

The trial court heard the testimony of the officers regarding the driving antics and other actions of the defendant, the admission of the defendant that he had a drug problem, and the seizure of the drug Dilaudid and drug paraphernalia from the defendant, as well as the testimony of witness Ihm that Dilaudid is a central nervous system depressant. Although some of this evidence is circumstantial in nature, it is sufficient to support a finding of guilty beyond a reasonable doubt.

A criminal conviction will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Carter*, 234 Neb. 378, 451 N.W.2d 271 (1990).

A judgment of conviction will not be reversed on appeal unless the evidence supporting the conviction is so lacking in probative force that it is insufficient as a matter of law. *State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989); *State v. Wyatt*, 234 Neb. 349, 451 N.W.2d 84 (1990).

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Wokoma, supra.*

The State is not required to disprove every hypothesis but that of guilt. *State v. Wokoma, supra.*

One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes the guilt of the defendant beyond a reasonable doubt. *State v. Bodfield*, 228 Neb. 205, 421 N.W.2d 794 (1988); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKY J. COSTANZO, APPELLANT.

454 N.W.2d 283

Filed April 20, 1990. No. 89-418.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
2. **Motions for New Trial: Evidence: Proof.** A defendant who has filed a motion for new trial on the ground of newly discovered evidence has the burden to show that the alleged newly discovered evidence is of such a substantial nature that if it had been received in the original trial, it would have changed the result.
3. **Evidence: Words and Phrases.** "Newly discovered evidence" is evidence material to the defense that could not with reasonable diligence have been discovered and produced at trial.
4. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous.
5. **Postconviction: Evidence: Notice.** Unless the motion and the files and records

of the case show to the satisfaction of the court that the prisoner is entitled to no postconviction relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

J. Mark Barnett for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

FAHRNBRUCH, J.

Ricky J. Costanzo, now serving a prison term for first degree assault, claims in this appeal that the trial court erred in not granting him (1) a new trial because of newly discovered evidence and (2) postconviction relief on account of (a) ineffectiveness of counsel, (b) the State's failure to disclose exculpatory evidence, and (c) prosecutor misconduct.

The defendant's conviction and sentence in the district court for Douglas County were affirmed on direct appeal in *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). On this appeal, we affirm the trial court's denial of the defendant's motion for new trial. The trial court's postconviction relief ruling is reversed, and Costanzo's motion for postconviction relief is remanded to the district court for findings of fact and conclusions of law.

A motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed. *State v. Whiteley,* 234 Neb. 693, 452 N.W.2d 290 (1990). A defendant who has filed a motion for new trial on the ground of newly discovered evidence has the burden to show that the alleged newly discovered evidence is of such a substantial nature that if it had been received in the original trial, it would have changed the result. *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978). Generally, "newly discovered evidence" is evidence material to

the defense that could not with reasonable diligence have been discovered and produced at trial. *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988).

To support his contention that alleged newly discovered evidence could not with reasonable diligence have been discovered and produced at trial, Costanzo points an accusing finger at the prosecutor. Costanzo claims the prosecutor intentionally withheld the victim's medical records from the defendant and intentionally chose not to call the victim's treating physicians because they could not establish causation of the victim's injuries. In his testimony, the prosecutor said he could not recall ever reviewing or having the victim's medical records in his possession. The defendant's proof on the motion for new trial falls far short of reflecting that the prosecutor had the victim's records in his possession, that the prosecutor had any control over them, or that the records were not available elsewhere. It was brought out at Costanzo's preliminary hearing, the record of which was available to the defendant's counsel prior to trial, that a treating physician testified he did not determine the cause of the victim's injuries. There was conflicting evidence as to whether the prosecutor represented that the treating physicians were not available or whether it was merely inconvenient to call them.

By denying defendant's motion for a new trial, the district court obviously concluded there was no attempt on the prosecutor's part to conceal medical evidence or to make the victim's medical records inaccessible to the defendant at the time of trial. The district court did not abuse its discretion in overruling Costanzo's motion for a new trial.

After an evidentiary hearing, the district court, without making findings of fact and conclusions of law, overruled Costanzo's postconviction relief motion and supplemental petition.

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990).

Without such findings of fact and conclusions of law, we are unable to reach the merits of defendant's contention that the district court erred in denying his motion to vacate or set aside his conviction. Neb. Rev. Stat. § 29-3001 (Reissue 1989) provides, in part:

> Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and *make findings of fact and conclusions of law with respect thereto.*

(Emphasis supplied.)

Having granted defendant a hearing on his postconviction relief motion and supplemental petition pursuant to § 29-3001, the district court was obligated to "determine the issues and make findings of fact and conclusions of law." Accordingly, we reverse the judgment of the district court and remand this cause to that court, with directions to make findings of fact and conclusions of law in accordance with § 29-3001.

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

GARY LEE THOMAS, APPELLANT, V. GAIL THOMAS, APPELLEE, SANTEE SIOUX TRIBE OF NEBRASKA, A FEDERALLY RECOGNIZED INDIAN TRIBE, ET AL., INTERVENORS-APPELLEES.

453 N.W.2d 752

Filed April 20, 1990. No. 89-488.

Supreme Court. This court does not render advisory opinions, but simply decides cases and controversies.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

Mary Lee Skaff for appellant.

John Thomas, Knox County Attorney, for intervenor-appellee State of Nebraska.

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

WHITE, J.

This is an appeal from an order of the Knox County District Court declining jurisdiction in a child custody dispute and enforcing a visitation agreement from the Coeur d'Alene Tribal Court.

Gail Thomas and the appellant, Gary Lee Thomas, were married in Yankton, South Dakota, in 1980. On July 22, 1986, a petition for dissolution of marriage was filed in the Knox County District Court. The petition alleged that three minor children were born of the marriage and that the children had lived in Bloomfield, Nebraska, during the preceding 5 years, although two of the children were living in Washington at the time of the filing. On January 9, 1987, a decree was filed in the Knox County District Court dissolving this marriage. Paragraph 5 of the decree provided that

> the Tribal Court for the Spokane Tribe of Indians of the Spokane Indian Reservation of Washington has exercised jurisdiction over said minor children and each of them, and that said minor children are wards of that court. For that reason this Court, pursuant to §43-1504 of the Revised Statutes of Nebraska, declines to exercise jurisdiction over said minor children for all matters pertaining to custody, including the rights of visitation and child support.

It appears from the record that the parties to the dissolution requested that the Knox County District Court decline jurisdiction. It further appears from the record that the parties agreed that the Spokane Tribal Court should have jurisdiction. Neither party to the dissolution appealed from the decree.

Prior to entry of the decree, on October 20, 1986, the Spokane Tribal Court, at the request of Gail Thomas, granted temporary custody of the children to Dan and Mildred Iyall, the children's maternal grandparents. Her petitions alleged that the tribal court had jurisdiction over the children because they were

wards of that court. It is not clear from the record the basis upon which the Spokane Tribal Court determined it had jurisdiction to determine custody. Gail Thomas died in 1987.

On March 25, 1988, the Spokane Tribal Court ordered, pursuant to an "Agreed Order to Transfer Indian Child Custody Proceedings," that jurisdiction of all custody matters, including the October 20 order, be transferred to the Tribal Court of the Coeur d'Alene Tribe of Idaho, upon certification from that tribe that it has jurisdiction over such matters. The Coeur d'Alene Tribal Court certified jurisdiction, and the matter was transferred to that court. Although appellant's signature did not appear on the "Agreed Order to Transfer Indian Child Custody Proceedings," in August 1988, he filed, through counsel, written notification in the Coeur d'Alene Tribal Court that he would not contest that court's jurisdiction with regard to the custody matters.

We note here that the Coeur d'Alene Tribal Court has certified that all three children are members of the Coeur d'Alene Tribe. The Coeur d'Alene Tribe has also stated that it has subject matter jurisdiction to hear the custody proceedings and that it has personal jurisdiction over all parties involved. The children are also members of the Santee Sioux Tribe of Nebraska. The Santee tribe intervened in the custody proceedings in Nebraska, but the Knox County District Court declined to entertain the petition in intervention. Upon the tribe's motion, its appeal to this court was dismissed.

In the Coeur d'Alene Tribal Court, appellant and the Iyalls entered an "Agreed Order for Visitation," allowing the children to return to Nebraska for a short time. This order provided that the visit to Nebraska would be from December 19 to December 30, 1988. The children were to arrive and depart by airplane, and while in Nebraska they were to be under the exclusive care and control of Albert and Linda Thomas, appellant's parents. Appellant and the Thomases signed the December 15, 1988, order, agreeing to abide by its terms.

The children arrived in Nebraska on December 19, but were not returned to the Iyalls on December 30, as required by the terms of the visitation agreement. The Iyalls sought relief in the Coeur d'Alene Tribal Court. That court, on January 4, 1989,

ordered appellant and Albert and Linda Thomas to show cause why they should not be held in contempt for failure to obey the December 15 agreed-to order for visitation.

A telephone hearing was held on January 11, 1989. The court found that it had subject matter jurisdiction over the proceedings, and further found that it had personal jurisdiction over all parties. The court ordered that if appellant did not return the children by January 12, appellant and Albert and Linda Thomas would be held in contempt. The children were not immediately returned.

On January 11, the Knox County Attorney filed a motion in the Knox County District Court, requesting the court to enforce the agreed-to order of visitation and send the children back to the Iyalls. The matter was heard on January 18, 1989. Martha, Albert, and Linda Thomas appeared in person. Martha Thomas is appellant's sister. Appellant was not present. Evidence presented at that hearing showed that the children were living with Martha Thomas at the request of appellant, who wanted her to keep the children until he was released from incarceration. Appellant was serving a 6-month sentence that had commenced December 28, 1988, in the Knox County jail for driving while intoxicated, driving during a period of suspension, and operating a motor vehicle to avoid arrest. Both Albert and Martha Thomas admitted they violated the visitation order at appellant's request.

The court found that appellant has recognized the jurisdiction of the Coeur d'Alene Tribal Court and that Albert, Linda, and Martha Thomas have recognized that court's jurisdiction to the extent of the December 15 visitation order. The court gave that order full faith and credit "so far as a temporary order is concerned." The court further found that it would be in the best interests of the children that temporary custody of the children be returned to the Iyalls and ordered the Thomases to return the children to the temporary custody of the Iyalls. The court continued the matter to a later date, allowing the parties to respond fully.

On February 14, 1989, appellant filed a motion in the Knox County District Court, asking the court to vacate the January 18 order, enter a declaratory judgment that custody orders from

the Coeur d'Alene Tribal Court and the Spokane Tribal Court are not entitled to full faith and credit, enjoin the Iyalls from initiating proceedings based on the agreed-to order of visitation, order the Iyalls to return the children to appellant, and award the Santee tribe attorney fees.

The matter was heard on March 21. Appellant was present with counsel. Martha Thomas testified that the children had been returned to the Iyalls. The court found that the Nebraska Indian Child Welfare Act was inapplicable. The court found that it did not assume jurisdiction on January 18, but "purely and simply acted to give full faith and credit to the 'Agreed Order of Visitation' entered by the Coeur D' Alene Tribal Court, insofar as a temporary order was concerned."

The court further found that the Knox County District Court was an inconvenient forum under the provisions of Neb. Rev. Stat. § 43-1207 (3)(a), (b), (c), (d), and (e) (Reissue 1988) and that

> the Coeur D' Alene Tribal Court is the more appropriate forum to make a custody determination, in that all of the interested parties have recognized that the Coeur D' Alene Tribal Court has personal jurisdiction and further that all of the interested parties, except the Santee Sioux Tribe of Nebraska, have recognized that the Coeur D' Alene Tribal Court has subject matter jurisdiction.

The court also declined jurisdiction under Neb. Rev. Stat. § 43-1208 (Reissue 1988) because appellant, in directing the Thomases to retain possession of the children in violation of the visitation agreement, had engaged in reprehensible conduct.

In addition, the court declined to exercise jurisdiction because appellant

> failed to exhaust [his] Tribal Court remedies regarding the existence and extent of the subject matter jurisdiction of the Coeur D' Alene Tribal Court and the District Court of Knox County, Nebraska relied upon the authority of *National Farmers Union Insurance Companies v. The Crow Tribe of Indians, et. al.*, 471 U.S. 845, 85 L.Ed.2d 818, 105 S.Ct. 2447 (1985).

The court further declined to exercise jurisdiction with respect to appellant's February 14 motion seeking injunctive

relief, a declaratory judgment, the return of the children to Nebraska, and attorney fees and costs.

It is from this order that Gary Thomas appeals to this court, assigning as error that the court erred in finding that the Nebraska Indian Child Welfare Act was inapplicable, that the court erred in granting full faith and credit to the agreed-to order for visitation, that the court erred in finding that appellant violated the visitation order and caused his parents and sister to violate the order, and that the court erred in concluding that the appellant had to exhaust tribal remedies before appealing to another court.

We do not reach the merits of appellant's contentions. The children who are the subject of this dispute have been returned to the Iyalls. The matter is therefore moot. This court does not render advisory opinions, but simply decides cases and controversies. See *Gas 'N Shop v. State*, 234 Neb. 309, 451 N.W.2d 81 (1990). Accordingly, the order of the Knox County District Court is affirmed.

AFFIRMED.

IN RE INTEREST OF L.B., A.B., AND A.T., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

454 N.W.2d 285

Filed April 20, 1990. No. 89-678.

1. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the children.
2. **Pleas: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Michael J. Lehan, of Kelley, Kelley & Lehan, P.C., for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

GRANT, J.

This is an appeal from an order of the separate juvenile court of Douglas County terminating the parental rights of appellant, T.B., to three of her minor children. Appellant contends the trial court erred in determining that she willfully failed to substantially comply with the court-ordered rehabilitation plans; in that the court ordered a "continually changing . . . rehabilitation plan which was not reasonable . . . to the rehabilitative objective of reuniting [her] with her children"; in determining that termination was in the best interests of the children; and in not granting her motion for a new trial. We affirm.

On July 28, 1986, a petition was filed alleging that L.B., born September 29, 1983; A.B., born September 17, 1984; and A.T., born February 27, 1986, were children

> within the meaning of [Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988),] lacking proper parental care by reason of the faults or habits of [appellant] in that:
>
> A. Said children were placed in protective custody by Omaha Police on or about July 14, 1986, after having been found to be insufficiently supervised.
>
> . . . .
>
> C. On or about July 14, 1986, [L.B.] and [A.B.] were found to be in a filthy physical condition, with filthy clothing and suffering from head lice and numerous insect bites.
>
> . . . .
>
> E. There have been Child Protective Service referrals in the past one and one-half years regarding [T.B.], related to

filthy home conditions and improper care of said children. The petition also alleged that R.B. was the father of L.B. and A.B., but no relief against R.B. was requested. The father of A.T. was not named. Neither R.B. nor the father of A.T. is a party in the case before us.

At an adjudication hearing held on August 27, 1986, the jurisdictional facts were specifically admitted by appellant, accompanied by her attorney, in a hearing, after appellant was fully advised of her rights. Based on appellant's admissions, the court found that the children were juveniles within the meaning of § 43-247(3)(a) and ordered the children placed in the temporary care and custody of the Nebraska Department of Social Services. No appeal was taken from this order of adjudication. As stated in *In re Interest of M.B. and J.B.*, 233 Neb. 368, 369, 445 N.W.2d 618, 619 (1989): "It would thus be inappropriate to concern ourselves with the facts under which the juvenile court asserted jurisdiction over the children."

For the purposes of this case it is established that the children involved are children within the meaning of § 43-247(3)(a) in that they were placed in protective custody on July 14, 1986; that appellant's children had been found to be insufficiently supervised; that on July 14, 1986, L.B. and A.B. were in "a filthy physical condition, with filthy clothing and suffering from head lice and numerous insect bites"; and that during the year and one-half preceding the filing of the petition there had been Child Protective Services referrals "related to filthy home conditions and improper care of said children."

A disposition hearing was held September 24, 1986. The court ordered the mother to comply with a plan of rehabilitation. The plan included the requirements, among others, that the mother was to complete chemical dependency and psychological evaluations and follow the recommendations thereof, and that she participate in parenting education classes.

Seven review hearings were thereafter held, beginning with the first hearing on December 22, 1986, and ending with a review hearing on September 1, 1988. Each review hearing was followed by a rehabilitative order directed to appellant. The orders generally continued the requirements set out above.

Other specific conditions of each order sometimes changed. As an example, at a December 22, 1986, hearing appellant was pregnant with her fourth child. An appropriate order was made on December 22. The father of this fourth child was never identified, but appellant did state at a March 27, 1987, hearing that the fourth child was due "[a]ny day" and that she was no longer in a relationship with the father.

At the October 1, 1987, review hearing, appellant was additionally ordered to obtain independent housing, since her then living situation with her then boyfriend in his one-bedroom apartment prevented the FITS program from continuing inhome services to appellant.

A probation officer's report submitted at the review hearing held May 4, 1988, showed that appellant, her new baby, and her boyfriend moved in with T.B.'s mother a few weeks before the hearing. A chemical evaluation submitted to the court recommended counseling for a codependency problem, and a psychological evaluation suggested that appellant would benefit from obtaining a GED and by becoming involved in academic and career counseling. The court modified the plans accordingly.

On February 8, 1989, the county attorney, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988), filed a motion to terminate T.B.'s parental rights to L.B., A.B., and A.T. as a result of appellant's failure to comply with the court-ordered plans of rehabilitation. This motion listed 17 witnesses to be called by the State in support of its motion.

On April 10, 1989, appellant appeared with her counsel for hearing on the State's motion. Appellant waived trial and voluntarily admitted, in open court, the allegations contained in paragraphs I through IV of the termination motion. A portion of the hearing included the following:

> THE COURT: And you're further admitting that the three children are within the meaning of Section 43-292 Subsection 6; that reasonable efforts under the direction of the Court have failed to correct the conditions leading to the aforementioned determination that the children are within the meaning of the Juvenile Code?
>
> [Appellant]: Yes, I do.

> THE COURT: In that you didn't follow the recommendations with regard to the chemical dependency evaluation and co-dependency treatment; that you failed to participate in and complete the parenting training program?
>
> [Appellant]: Yes.
>
> THE COURT: And that you failed to cooperate with the Family Intervention Treatment Services. . . .
>
> [Appellant]: Yes.
>
> . . . .
>
> THE COURT: Okay. You failed to obtain independent housing?
>
> [Appellant]: Yes.
>
> THE COURT: And that lastly, you failed to obtain employment, GED or participate in any vocational training?
>
> [Appellant]: Yes.

Before accepting the pleas, the court explained to appellant her procedural rights under Neb. Rev. Stat. § 43-279.01 (Reissue 1988), and determined that appellant understood the consequences of her pleas. Appellant acknowledged that her pleas were voluntary, that she understood she was waiving her right to a trial, and that she understood her admissions could result in the court's terminating her parental rights. The State then requested a dismissal of paragraph V of the motion, which paragraph sought termination under § 43-292(4) for appellant's alleged sexual abuse of the children.

The court accepted appellant's pleas and, at the State's request, dismissed the allegations contained in paragraph V of the motion. On April 24, 1989, the juvenile court entered its order finding that the best interests of the children required the termination of appellant's parental rights to L.B., A.B., and A.T., and terminated those rights in accordance with § 43-292(6).

In an appeal from an order terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but where evidence is in conflict, this court considers and may give weight

to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275 (1990); *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990).

> A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the children.

In re Interest of C.N.S. and A.I.S., supra at 407-08, 451 N.W.2d at 277.

Appellant contends that while there is no question that the record contains evidence of appellant's admissions, the overall picture nevertheless shows that appellant has substantially complied with the provisions of the court-ordered plans. We cannot disregard the fact that appellant waived her right to present evidence in the juvenile court proceedings, and the State waived its right to present evidence on serious sexual molestation charges. Nor can we ignore the fact that appellant has admitted to the juvenile court, on more than one occasion, the very allegations which she now contests.

With full knowledge of her rights and of the possible consequences, appellant waived trial on the motion to terminate her parental rights and, in so doing, waived an opportunity to present evidence challenging the allegations of the motion to terminate her parental rights. In an apparent excess of caution, the court permitted appellant to testify as to factors which appellant contends "mitigate" her admissions. The record documents appellant's repeated noncompliance with the court orders. We find that appellant has willfully failed to comply with the provisions of her court-ordered rehabilitation plans.

Appellant blames any lack of compliance on her part on plans of rehabilitation which were unreasonable, inconsistent, and continually changed by the juvenile court. These contentions are without merit. The record shows that plans were modified but without major changes overall. The material

elements of the rehabilitation plans were consistently ordered throughout the course of the juvenile court proceedings and allowed more than adequate time for compliance. The plans were reasonable in helping appellant to the objective of reuniting her with her children. Appellant did not comply with these provisions.

Appellant has judicially admitted the facts that L.B., A.B., and A.T. are children as described in § 43-247(3)(a) and has admitted that reasonable rehabilitation efforts have failed to correct these conditions. "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true." *Sempek v. Sempek*, 198 Neb. 300, 304, 252 N.W.2d 284, 288 (1977).

We find that reasonable efforts, under the direction of the juvenile court, have failed to correct the conditions that resulted in the determination as to the status of the children; that pursuant to § 43-292(6), the parental rights of T.B. to the children named herein are terminated; and that such action is in the best interests of the children.

There is no merit in appellant's contention that the juvenile court erred in not granting a new trial. In view of appellant's counseled and knowing judicial admissions of the very facts required to be proved by the State, the appeal borders on the frivolous.

The judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN G. GIESSINGER, APPELLANT.

454 N.W.2d 289

Filed April 20, 1990. No. 89-832.

1. **Pretrial Procedure: Motions to Suppress.** The intention embodied in Neb. Rev. Stat. § 29-822 (Reissue 1989) is that unless a motion to suppress falls within one

of the statutorily specified exceptions, such a motion is to be ruled on and finally determined before trial.

2. **Trial: Evidence: Motions to Strike.** A motion to strike evidence to which there should have been an objection when the evidence was offered is merely another term for an objection and is governed by the rules pertaining to a timely objection.
3. **Trial: Evidence.** An objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.
4. **Trial: Evidence: Motions to Strike.** A motion to strike is not timely where testimony has been adduced without objection and where the grounds for the motion should have been apparent at the time of the testimony.
5. **Constitutional Law: Search and Seizure: Motor Vehicles.** An occupant of a vehicle ordinarily has a legitimate expectation to be free of unreasonable governmental intrusion so as to give him or her standing to challenge the stop as violative of the occupant's fourth amendment rights.
6. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle.
7. _____: _____: _____: _____. In determining whether facts known to a law enforcement officer at the time of the investigatory stop provided a reasonable basis for the stop, we must consider the totality of the circumstances, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
8. _____: _____: _____: _____. The officer making an investigatory stop must have a particularized and objective basis for suspecting the person stopped of criminal activity.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, RANDALL L. REHMEIER, Judge. Judgment of District Court affirmed.

Casey J. Quinn and Bonnie Harty for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

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

CAPORALE, J.

Defendant-appellant, John G. Giessinger, challenges the district court's affirmance of the county court's judgment adjudicating him guilty of driving a motor vehicle while his driver's license had been suspended, in violation of Neb. Rev. Stat. §§ 60-430.01 and 60-557 (Reissue 1988). Giessinger's five assignments of error consolidate into assertions that the district court failed to find error on the record by virtue of the county court's purportedly erroneous overruling of his motion to suppress evidence obtained through an allegedly unlawful investigatory stop. We affirm.

On November 12, 1988, the Nebraska Game and Parks Commission and the Nebraska State Patrol were jointly conducting a transitory roadblock operation in Otoe County, Nebraska, at the intersection of Highways 128 and 50. The commission officers were checking for game and fish permit violations, while the state troopers were inspecting operators' licenses, vehicle registrations, proofs of insurance, and vehicle equipment.

Participating in the roadblock was a commission conservation officer having statewide authority to enforce traffic laws as well as game, fish, and park regulations. At approximately 1:55 p.m., the conservation officer observed a brown Chevrolet pickup truck approaching the intersection at which the roadblock was located. The conservation officer noticed that when the pickup was approximately 200 to 250 yards from the roadblock, it slowed down, pulled off onto the shoulder of the highway, and stopped. The conservation officer shouted to one of the troopers that there was a vehicle pulling off the road. Through his binoculars, the conservation officer saw Giessinger stop the pickup and then saw Giessinger and the passenger of the vehicle switch places. When the conservation officer saw the two switch places, he decided to stop the pickup. He testified that although he had no evidence of any criminal activity, he believed that Giessinger's actions in pulling over and switching places with the passenger just before reaching the roadblock were suspicious.

When the pickup reached the roadblocked intersection, the conservation officer approached the driver's side of the vehicle

and asked the driver for his operator's license. The trooper approached the passenger side of the vehicle where Giessinger was sitting, asked Giessinger for his operator's license, and learned that Giessinger's motor vehicle operator's license had been suspended.

Pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1989), Giessinger moved in county court to suppress the evidence which was obtained pursuant to the stop and subsequent search, which in his motion he claims were "accomplished by law enforcement personnel by virtue of an unreasonable roadblock . . . ." The county court overruled Giessinger's motion on the basis that the investigatory stop was unrelated to the roadblock because the conservation officer had a particularized and objective basis for suspecting Giessinger of criminal activity and thus for stopping the vehicle.

Prior to the suppression hearing, the county court judge told defense counsel that the judge's usual practice was to handle the motion to suppress and the trial "collectively, at the same time, and [hear] evidence on the motion and also [receive] it as evidence at the trial at the same time," and asked defense counsel if he had "[a]ny problem with handling it that way." Defense counsel informed the judge that Giessinger might testify at the suppression hearing but not at trial, and the judge decided to consider the motion to suppress before proceeding with the trial.

In this regard we call attention to our recent holding in *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989), that the intention embodied in § 29-822 is that unless a motion to suppress falls within one of the statutorily specified exceptions, which do not apply in this case, such a motion is to be ruled on and finally determined before trial.

Perhaps as a result of the county court judge's suggestion that they implement the practice of combining the suppression hearing and the trial for purposes of receiving evidence, Giessinger failed to make a timely objection to the admission of the claimed objectionable evidence at the "trial" phase of the proceedings. He instead renewed his motion to suppress at the close of the State's evidence at trial and at the close of all the evidence at trial. However, even if we treat Giessinger's renewed

motions to suppress as motions to strike any testimony given at trial concerning the allegedly illegally obtained evidence, such motions to strike were not timely made. A motion to strike evidence to which there should have been an objection when the evidence was offered is merely another term for an objection and is governed by the rules pertaining to a timely objection. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). An objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent. *Id.* Accordingly, a motion to strike is not timely where testimony has been adduced without objection and where the grounds for the motion should have been apparent at the time of the testimony. *Id.* See, also, *State v. Welsh*, 232 Neb. 219, 440 N.W.2d 225 (1989) (error cannot be predicated upon the admission of evidence to which no objection was made at the time the evidence was adduced).

Despite the fact that Giessinger failed to object at trial, because of the confusion introduced into the proceedings by the county court judge's suggestion that the suppression hearing and the trial be combined, we will consider the merit of Giessinger's claim that his motion to suppress should have been sustained.

We begin by noting that Giessinger possesses the necessary standing to question the seizure of the automobile, for while the record does not disclose the identity of the owner of the subject motor vehicle, it does disclose that Giessinger was an occupant thereof. As we recently held in *State v. Harms, supra*, an occupant of a vehicle ordinarily has a legitimate expectation to be free of unreasonable governmental intrusion so as to give him or her standing to challenge the stop as violative of the occupant's fourth amendment rights.

Giessinger argues that he was stopped pursuant to the roadblock, that the roadblock was conducted unlawfully in violation of the fourth amendment to the U.S. Constitution, and that the evidence gathered as a result of his being stopped at the roadblock should have been suppressed. He is in error.

It is true that automobile drivers are not shorn of their 4th and 14th amendment protections when they leave their homes and enter their automobiles. *Delaware v. Prouse*, 440 U.S. 648,

99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). However, an investigative stop of a vehicle is justified where a law enforcement officer has a reasonable suspicion founded upon articulable facts which indicate that a crime has been committed or is being committed by occupants of the vehicle. *Id.*; *State v. Rein*, 234 Neb. 917, 453 N.W.2d 114 (1990); *State v. Carter*, 232 Neb. 666, 441 N.W.2d 640 (1989). In determining whether facts known to a law enforcement officer at the time of the investigatory stop provided a reasonable basis for the stop, we must consider the totality of the circumstances, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior. The officer must have a particularized and objective basis for suspecting the person stopped of criminal activity. *State v. Carter, supra*. A finding of a reasonable suspicion must be determined on a case-by-case basis.

A situation similar to that before us was considered in *Snyder v. State*, 538 N.E.2d 961 (Ind. App. 1989), where the police were conducting a "sobriety roadblock." When approximately 100 yards away, Snyder turned around in the road to avoid the roadblock. A state trooper left the roadblock and stopped Snyder. Prior to the stop, Snyder had committed no traffic violations, nor was he driving erratically. The trooper testified that the sole reason he stopped Snyder was that Snyder was apparently trying to avoid the roadblock. Rejecting Snyder's contention that he was seized pursuant to the roadblock, the court held that although

> a driver approaching a roadblock is not "seized" until actually reaching the roadblock, a driver's attempt to avoid the roadblock, by making a turn around, does raise a "specific and articulable fact" which gives rise to a reasonable suspicion on the part of a police officer that the driver may be committing a crime. Such a suspicion entitles the officer to detain the driver of the vehicle . . . .

Id. at 965.

In another similar case, *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988), Coffman, who had been convicted for

driving while under the influence of alcohol, challenged the validity of a police roadblock and argued that evidence should have been suppressed because the officers lacked probable cause to stop him. Coffman was stopped because, as he approached the roadblock, he pulled into a driveway, backed out onto the highway, and headed in the opposite direction. The officer who stopped Coffman testified that before stopping him, he did not observe Coffman driving erratically or suspect Coffman of any criminal activity. The court rejected Coffman's claim that the alleged unlawful roadblock made his arrest unlawful under the fruit of the poisonous tree doctrine, and held:

> [W]e do not agree with appellant's contention that the stop of his vehicle was unconstitutional or unlawful. We agree with the appellee that the question is whether the record will support a finding that the police officer could have "possessed the requisite reasonable suspicion necessary to effectuate a constitutionally permissible investigatory stop." We find that the record will support such a finding. There is evidence from which it could be found that the appellant was approaching a roadblock made clearly visible by the presence of police vehicles with flashing blue lights; that the appellant attempted to avoid the roadblock; and that the trained police officers who were conducting the roadblock could reasonably suspect that one who attempted to avoid this roadblock was trying to hide some type of unlawful activity.

Id. at 48-49, 759 S.W.2d at 575. See, also, *Tims v. State*, 26 Ark. App. 102, 760 S.W.2d 78 (1988), *modified on other grounds* 26 Ark. App. 106-A, 770 S.W.2d 211 (1989) (act of defendant in driving through a police roadblock gave officers a reasonable suspicion to detain him); *City of Las Cruces v. Betancourt*, 105 N.M. 655, 735 P.2d 1161 (1987) (defendant's actions in proceeding through police roadblock at high rate of speed provided officers with articulable facts upon which to stop the defendant, regardless of constitutionality of initial stop at roadblock); *Green v. State*, 530 So. 2d 480 (Fla. App. 1988), *rev. denied* 539 So. 2d 475 (Fla. 1989) (even though police roadblock was illegal, officer's stop of defendant prompted by

defendant's failure to follow directions of officer to stop at roadblock was valid); *Smith v. State*, 515 So. 2d 149 (Ala. Crim. App. 1987) (initial investigatory stop of defendant's vehicle was justified by state trooper's observation of defendant's vehicle coming around the curve in sight of the police roadblock, turning rapidly into driveway approximately 200 yards from roadblock, stopping some 50 feet from the house, and turning the lights off but not the engine); *Boches v. State*, 506 So. 2d 254 (Miss. 1987) (initial stop of defendant's vehicle after he turned vehicle away from police roadblock and headed in opposite direction was justified); *Stanley v. State*, 191 Ga. App. 603, 382 S.E.2d 686 (1989) (fact that defendant, who was driving toward police roadblock, stopped and backed approximately six to eight car lengths away from the roadblock was sufficient to give rise to a reasonable suspicion that defendant was or was about to be engaged in criminal activity).

But see, *Murphy v. Commonwealth*, 9 Va. App. 139, 384 S.E.2d 125 (1989) (act of driver in making a lawful right turn onto an existing roadway 350 feet before police roadblock does not give rise to reasonable suspicion of criminal activity unless the driver's turn or action is coupled with other articulable facts, such as erratic driving, a traffic violation, or some behavior which independently raises suspicion of criminal activity); *Pooler v. MVD*, 306 Or. 47, 755 P.2d 701 (1988) (State concedes that act of motorist in making legal U-turn before reaching police roadblock does not in itself constitute cause for a reasonable suspicion).

While there may be nothing suspicious in making a lawful right turn onto an existing roadway or in making a lawful U-turn before reaching a roadblock, we are persuaded that the conservation officer's observation of Giessinger's actions in driving the pickup onto the shoulder of the highway and switching places with the passenger prior to approaching the roadblock was sufficient to provide the officer with the reasonable suspicion necessary to justify the investigatory stop. That is to say, Giessinger's actions provided a basis independent of the roadblock which justified his stop.

Thus, we do not reach the question whether the roadblock was lawful, for while Giessinger has standing to challenge the

seizure of the vehicle in which he was riding, he does not have standing to challenge the seizure of other vehicles pursuant to the roadblock.

AFFIRMED.

DEANNA F. KUSKIE, APPELLEE, V. JERALD L. KUSKIE, APPELLANT.
453 N.W.2d 755

Filed April 20, 1990. No. 89-868.

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

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

Teresa K. Luther, of Knapp, Mues, Beavers, Luther & Fangmeyer, for appellee.

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

PER CURIAM.

The district court for Harlan County denied Jerald L. Kuskie's request to modify a dissolution decree so that he would have custody of his two minor children. Jerald Kuskie appeals.

We affirm the trial court's rulings that placed the legal custody of the children in the court, kept the children's physical possession in the natural mother on the condition that she and the children reside with her parents, liberalized the father's visitation rights with the children, and scheduled a subsequent review of the matter.

Child custody determinations are initially entrusted to the discretion of the trial court. *Hardy v. Hardy,* 234 Neb. 702, 452 N.W.2d 296 (1990). In the Supreme Court's review of cases involving the modification of a decree of dissolution with respect to a change of child custody, the court reviews the record de novo to determine if the trial court abused its discretion. *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989).

After a de novo review of the record, it cannot be said that the district court abused its discretion in refusing to modify the couple's decree of dissolution and to award custody of the parties' two children to the father.

AFFIRMED.

IN RE GUARDIANSHIP OF BRANDI NICOLE POTTER, A MINOR CHILD. STEVEN MICHAEL POTTER, APPELLANT, V. TERRI LYNN ROSCOE, APPELLEE.

453 N.W.2d 755

Filed April 20, 1990. No. 89-880.

1. **Jurisdiction: Appeal and Error.** An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken lacked jurisdiction.
2. **Judgments: Courts: Appeal and Error.** Probate judgments of the county court may not be brought to the district court for review by the error proceedings contemplated in Neb. Rev. Stat. § 25-1901 (Reissue 1989).

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Appeal dismissed.

Avis R. Andrews for appellant.

Daniel A. Smith, of Stanek & Smith, for appellee.

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

PER CURIAM.

Appellant, Steven Michael Potter, attempts to challenge the district court's affirmance of the county court judgment which appointed appellee, Terri Lynn Roscoe, as guardian of Potter's daughter, Brandi Nicole, a minor born July 14, 1985. We dismiss the appeal for want of jurisdiction.

It is well settled that if the district court did not acquire jurisdiction of this matter, neither did this court acquire jurisdiction of any purported appeal from the district court. *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); *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985). It therefore becomes necessary to review the manner in which this proceeding was brought to the district court.

The order in question was entered by the county court under the provisions of Neb. Rev. Stat. §§ 30-2601 et seq. (Reissue 1989) on April 6, 1989. On May 3, 1989, Potter filed in the district court a pleading entitled "Petition in Error" in which he describes himself as the "Plaintiff in error," asserts that the county court erred in a variety of ways, and prays that the district court reverse the county court's judgment. On May 8, 1989, Roscoe, through her attorney, executed a document acknowledging receipt of a copy of the foregoing district court pleading and waiving issuance and service of summons. That document was filed with the district court on May 17, 1989.

It is therefore clear that Potter sought to obtain district court review of the county court's judgment under the error proceedings permitted by Neb. Rev. Stat. § 25-1901 (Reissue 1989). The foregoing statute provides that, with an exception not material here, the district court may reverse, vacate, or modify the judgment of "any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court . . . ." However, in *SapaNajin v. Wolford*, 222 Neb. 387, 383 N.W.2d 796 (1986), we reasoned that by removing the former reference in § 25-1901 to county court judgments, the Legislature manifested a clear intent to eliminate proceedings in error as a method of obtaining district court review of decisions rendered by the county court, and thus concluded that § 25-1901 does not apply to judgments of the county court. Consequently, we ruled that the exclusive method of obtaining district court review of a decision of the county court is by appeal. Neb. Rev. Stat. § 25-2728 (Reissue 1989) makes provision for the appeal of county court judgments, including those arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1989) (of which the statutes relating to the guardianship of minors are a part), to the district court.

Nor will a liberal construction of Potter's district court

petition as one on appeal save his effort to have obtained district court review of the county court judgment. This is so because he neither, as required by Neb. Rev. Stat. § 25-2729 (Reissue 1989), filed in the county court a notice of appeal nor deposited with that court the designated docket fee.

We must therefore conclude that Potter's petition in error did not confer upon the district court jurisdiction to review the judgment of the county court and that, as a result, this court acquired no jurisdiction over the matter.

Accordingly, we must, and do hereby, dismiss this appeal.

APPEAL DISMISSED.

DONALD DENESIA, PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCILLE DENESIA, DECEASED, APPELLANT, V. ST. ELIZABETH COMMUNITY HEALTH CENTER, A NEBRASKA CORPORATION, ET AL., APPELLEES.

454 N.W.2d 294

Filed April 26, 1990. No. 87-996.

1. **Appeal and Error.** Errors assigned but not argued will not be considered.
2. **Jury Instructions: Proof: Appeal and Error.** In order to establish reversible error upon a trial 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. **Jury Instructions: Appeal and Error.** All jury instructions given 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.
4. _____: _____. It is not error on the part of a trial court to refuse to give a requested instruction if the substance of the request is contained in the instructions actually given.
5. **Jury Instructions: Proof: Appeal and Error.** In order to establish reversible error upon a trial court's giving of a certain instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded for a new trial.

Denzel R. Busick, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellee St. Elizabeth Community Health Center.

Fredric H. Kauffman and Sonya S. Ekart, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Bare.

Walter E. Zink II and Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Gard.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

In this suit joining an action for the wrongful death of Lucille Denesia and an action on behalf of her estate, the plaintiff-appellant, Donald Denesia, personal representative of the aforesaid decedent's estate, appeals from the district court's judgment of dismissal entered pursuant to a verdict in favor of the defendants-appellees, St. Elizabeth Community Health Center, a hospital located in Lincoln, Nebraska, Orlando G. Bare, M.D., a general practitioner, and Joseph R. Gard, M.D., a cardiologist. The personal representative assigns a number of errors, including that the district court erred in its charge to the jury by refusing, on the one hand, to include certain instructions the personal representative requested and, on the other, by including certain improper instructions. That assignment having merit, we reverse the district court's judgment and remand for a new trial without consideration of the remaining assignments, which present issues unlikely to occur upon retrial.

II. FACTS

Decedent, who was 64 years of age at the time, was admitted

to the hospital on August 14, 1983, at approximately 1 a.m. because after she and her husband had retired to bed that night, she became lethargic, made slow and inappropriate responses, experienced weakness in her left side, was unable to move her left leg, and eventually became unable to be aroused. Bare, who was on hospital rotation for the medical group with which he practiced at the time decedent was admitted, became decedent's primary care physician.

He initially diagnosed decedent as having suffered a transient ischemic attack, or "TIA," which "means that some part of the brain's central nervous system is temporarily deprived of a blood supply and that can cause symptoms" which will normally diminish within a 24-hour period. He also determined that decedent had a history of "atrial fibrillation," an abnormality in the rhythm of the heart which creates a danger of blood clot formation. Bare sought the consultations of David Smith, M.D., a neurologist, for decedent's neurological condition and of Gard for decedent's heart condition.

The physicians concluded that decedent had suffered a stroke caused by an embolus of cardiac origin, rather than a TIA. At trial, the experts generally agreed that the embolus which caused decedent's stroke was produced by her atrial fibrillation. An embolic stroke occurs when an embolus, that is, a blood clot originating in a part of the body other than the brain, usually the heart, is transmitted to the brain, where it lodges in a blood vessel and severs the blood supply and thus the oxygen supply to that area of the brain, which as a result atrophies and dies. The area of the brain which dies is called an infarction. The physicians concluded that decedent did not suffer from a hemorrhagic stroke, which occurs when one of the blood vessels of the brain ruptures and a hemorrhage, or bleeding, results.

After consulting with Smith and Gard, Bare decided to anticoagulate decedent's blood, using two drugs, heparin and Coumadin. Anticoagulation therapy is used when a patient has suffered an embolic stroke so as to prevent further clots from developing and to prevent the release of clots which have already formed. Heparin reduces the clotting factor of blood, thus increasing the time it takes for blood to clot, but does not

dissolve clots which have already formed. The use of heparin is inappropriate where a patient has suffered a hemorrhagic stroke because heparin may aggravate the bleeding.

According to Bare, Smith informed him that "there was a three-percent chance that using systemic anticoagulation Heparin therapy could exacerbate [decedent's condition] and turn it into a hemorrhagic [event, but that there was a] 14-percent risk . . . that if . . . she were not anticoagulated that within two weeks she would throw another clot to the brain." Bare discussed these risks with decedent and her family on the evening of August 16 and recommended the anticoagulation therapy.

The primary test used to monitor the dosage of heparin given to a patient is the partial thromboplastin time level, or "PTT," which determines the number of seconds it takes for the blood to clot. Prior to initiating the anticoagulation therapy, Bare determined that decedent's PTT values and blood count were normal, that she had an adequate number of platelets, and that she had no history of a bleeding problem. Several PTT's done prior to the initiation of the anticoagulation therapy revealed that decedent's blood took between 20 to 25 seconds to clot, and the desired therapeutic level of anticoagulation was between 40 to 50 seconds.

On August 17, Bare prescribed for decedent a 5,000-unit injection of heparin, to be followed by 25,000 units of heparin infused intravenously at the rate of 1,200 units per hour, and 10 milligrams of Coumadin by mouth. Bare further ordered that a PTT test be done on decedent's blood at 4 o'clock that afternoon and that the result of the test be called to him. The nurse on duty at the time gave decedent the 5,000-unit injection at around 12 o'clock noon and then started the intravenous infusion. The hospital laboratory withdrew blood from decedent at 4:05 p.m. and called the results of the PTT test to the nurses' station at 5:30 p.m. The test indicated that decedent's PTT was greater than 200 seconds, meaning that decedent's blood took longer than 200 seconds to clot.

The nurse then on duty, Cynthia Stewart, telephoned Bare's answering service at 5:30 p.m. in order to convey the PTT result, which Stewart recognized to have "an alert value," and

left a message for Bare to return her call. Stewart testified that it was her practice to report anything of significance to the physicians who were caring for the patient. According to Bare, he was in an emergency situation at another hospital all day and into the night, and although he had a beeper with him, he was never contacted by his answering service in regard to Stewart's 5:30 p.m. call.

Decedent had been experiencing a headache throughout the day and was given aspirin per Bare's order. At 6:43 p.m., decedent's heart experienced 6 seconds of atrial beats with no ventricular response. Stewart went to decedent's room, where she found decedent sitting on the side of her bed, vomiting but alert, and her skin was warm and dry. Decedent's pulse rate and blood pressure were a little elevated.

Stewart telephoned Gard at 6:50 p.m. and informed him about the heart problem. Stewart testified that although she could not remember what else she may have told Gard, her standard practice would have been to report decedent's vomiting and headache and the results of the PTT test. According to Gard, Stewart mentioned only that the laboratory had reported the PTT result and that she was waiting for Bare to return her telephone call, to which information Gard responded that Bare was the proper physician to notify concerning the PTT result. Gard further stated that he told Stewart to call him back if anything else of concern occurred. As the result of the telephone call, Gard thought that perhaps one of the heart medications decedent was taking was causing the nausea and ordered that her blood be tested to determine the amount of the medication present.

At 6:55 p.m., decedent said that she was no longer nauseated; at 7:15 p.m., she was resting in bed with her eyes closed, her color was good, and her skin was warm and dry; and at 8 p.m., she continued to rest and denied any complaints except "pain across the eyes that has been there all day."

At 8:10 p.m., Bare telephoned Stewart to determine decedent's condition. Again, Stewart could not remember what she told Bare, but testified that if she followed her standard practice, she would have informed Bare about the PTT result received at 5:30 p.m. and decedent's headache and vomiting.

According to Bare, Stewart did not inform him about the PTT result during this conversation. Bare ordered that the heparin infusion be decreased to 1,000 units per hour, that the aspirin be discontinued, and that decedent be given Tylenol as needed. Bare stated that he decreased the rate of heparin infusion because he had planned to taper the heparin sometime during the day and because it was possible the heparin was causing decedent's headache.

At 8:30 p.m., decedent again vomited and experienced a fast heart rate, but her skin remained warm and dry and her color pink. Stewart telephoned Bare, who ordered a medication for decedent's nausea and told Stewart to call a Dr. Forker, one of Gard's partners. Forker ordered that the level of Quinidex in decedent's blood be determined. Although Stewart gave decedent the antinausea medication at 9 p.m., decedent again vomited at 9:15.

Decedent apparently then rested until 11:20 p.m., when she again vomited, was unable to sit up on her own, and became lethargic, although she could nod her head in response to questions. Her right hand grasp was stronger than that of her left hand, and she was able to move her arms and legs only minimally. Her pupils, however, reacted quickly to light. Stewart telephoned Bare, who ordered Stewart to discontinue the infusion of heparin, to keep a close watch on decedent, and if decedent's condition worsened, to remove her to the intensive care unit and notify Gard. According to Bare, it was during this telephone conversation that he was first made aware of the results of the PTT test.

At 11:45 p.m., decedent would not respond when called, again vomited, was able to move her right hand to her mouth, and could not follow a command to squeeze the nurse's hand or nod, and although her left eye was still able to react to light, her right eye reacted sluggishly. Stewart removed decedent to the intensive care unit and telephoned Forker and Bare. At 2:30 a.m., decedent's PTT value was back down to 27 seconds. Decedent lapsed into a semicomatose state and died on May 16, 1985. A scan of decedent's brain revealed that decedent had suffered a massive cerebral hemorrhage. Decedent's death certificate recites that she died because of "cardiorespiratory

arrest, as a result of pneumonia, as a result of a cerebral vascular accident several months previous."

The personal representative presented the expert testimony of three witnesses, Ralph Lazzara, M.D., a cardiologist and internist who does not practice in Nebraska, Loren Jacobsen, M.D., a general practitioner who practices in Nebraska, and Ardith Ryberg, a registered critical care nurse.

Lazzara testified that the standard of care for prescribing, administering, and monitoring anticoagulation therapy is uniform throughout the United States. He stated that a PTT greater than 200 seconds is "grossly outside" the therapeutic range and placed decedent at risk of bleeding. According to Lazzara, decedent's brain hemorrhage probably began in the afternoon hours of August 17. Lazzara opined that the "abnormal laboratory factor indicated a severe difficulty with blood clotting which did contribute to the hemorrhage that she had in her brain" and that the continued infusion of heparin after 5:30 p.m. "caused and/or contributed to the brain hemorrhage." According to Lazzara, small emboli, which he opined decedent had, rarely produce significant hemorrhage absent anticoagulation therapy.

According to Lazzara, the nursing staff at the hospital deviated from the standard of care, in the process of giving anticoagulation therapy to decedent, "in the failure to assure that the physician was informed in a timely fashion of an alarmingly abnormal level of the blood test." Lazzara further opined that assuming Gard was informed of decedent's PTT result at 6:50 p.m., Gard breached the standard of care by failing to confirm that the information was transmitted to a physician who would take care of the situation or, if not, to handle the situation himself. Lazzara stated that Bare should have actively sought the result of the PTT test if not relayed to him in a reasonable amount of time, that at least at 8:10 p.m. he should have asked the nurse for the results, and that upon hearing the results, he should have discontinued the heparin infusion. Lazzara opined that Bare breached the standard of care by failing to react at 8:30 p.m. to decedent's symptoms of vomiting, worsening headache, prior preexisting cerebral vascular problem, and the elevated PTT value. According to

Lazzara, the negligence of the nursing staff, Gard, and Bare each "caused and/or contributed to the brain hemorrhage."

Lazzara, however, stated that the dosage of heparin given decedent was appropriate, that he did not disagree with the decision to anticoagulate her, and that even if decedent had not been given heparin, it was possible she could have suffered a cerebral hemorrhage as a result of the embolus in her brain.

Jacobsen testified similarly to Lazzara that the nursing staff breached the standard of care by failing to more quickly alert the physicians about the PTT result. He was of the opinion that Bare did not fall below the appropriate standard by failing to call for the results of the PTT, but that Bare should have placed himself in a position to be notified. Jacobsen further stated that the failure to terminate the heparin before 6:50 p.m. "exacerbated the hemorrhagic event"; that there was "a possibility" that if the heparin had been discontinued before 6:50 p.m., "the outcome [would] have been different"; and that "the sooner you stop the Heparin, the more likely she is to recover." Jacobsen admitted, however, that there exists less than a 5-percent chance of hemorrhage from a blood vessel rupture even absent anticoagulation therapy, and, thus, decedent's hemorrhage might have occurred even if the heparin had been discontinued at 6 p.m. and even if decedent had never been given heparin.

Ryberg testified that a PTT greater than 200 is abnormal and that in her opinion Stewart breached the standard of care by failing to notify the physician immediately of the PTT result and decedent's symptoms of vomiting, headache, and sleepiness.

The defendants also produced a number of experts. Fred J. Pettid, M.D., a family practitioner who practices in Omaha, opined that Stewart met the standard of practice expected of nurses in Lincoln, Nebraska, even assuming that she did not inform any physician about the PTT result until 8:30 p.m., because at the time Stewart received the result, decedent was in a stable condition and there was no significant neurological change in decedent until 11:20 p.m., at which time Stewart notified Bare. According to Pettid, there was "no evidence . . . that the Heparin was causing any bleeding difficulties" in

decedent. Pettid further testified that there was evidence to indicate that decedent's blood had the ability to coagulate by 8:45 and 9 p.m., because when decedent was given certain injections at those times, she did not exhibit any bleeding problems.

Registered Nurse Janet Cuddigan testified that assuming Stewart called Bare's answering service at 5:30 p.m. and at 6:50 p.m. informed Gard of the PTT value, Stewart met the standard of care. According to Cuddigan, decedent suffered no symptoms which would indicate that she was suffering a cerebral hemorrhage until 11:20 p.m.

Depak M. Gangahar, M.D., a cardiovascular surgeon who practices in Lincoln, expressed his opinion that Gard met the standard of care because Gard's responsibility was only to monitor decedent's heart condition and medications, which he did, and was not to monitor decedent's anticoagulation therapy, which was Bare's domain. However, Gangahar admitted, when questioned by the personal representative, that the PTT result had an alert value, that it indicated a heparin overdose in decedent, and that if he were Gard, he would have advised Stewart to be certain that Bare knew about the PTT result. According to Gangahar, neither he nor anyone else could know when decedent's cerebral hemorrhage occurred, but that if the hemorrhage did occur in the afternoon or evening of August 17, the elevated PTT would not help the situation.

Benjamin Gelber, M.D., a neurosurgeon who practices in Lincoln, testified that a patient who suffers an embolic stroke may suffer hemorrhage as the result of damage to the blood vessel in which the embolism is lodged regardless of the use of anticoagulants. He agreed that anticoagulation was the appropriate treatment for decedent. He further stated that the high PTT level taken at 4:05 p.m. would be expected after giving the patient a 5,000-unit injection and then intravenous infusion and that the PTT would lower to therapeutic levels with the passage of time. Although Gelber stated that if he had received a PTT result over 200 seconds, he would repeat the test at least within 4 hours, he also stated that he would not discontinue the heparin but would decrease it in order to achieve the therapeutic level. It was Gelber's opinion that the

most likely cause of decedent's hemorrhage was the embolic stroke and that the heparin did not cause the hemorrhage, but Gelber did state that it was possible the heparin caused the hemorrhage and that anticoagulants can make an existing hemorrhage worse.

Eugene R. Schwenke, M.D., a family practitioner who practices in Lincoln, opined that assuming Bare was involved in an emergency situation at another hospital and that Bare was not informed of the PTT at 8:10 p.m., Bare nevertheless complied with the applicable standard of care for Lincoln or similar communities. According to Schwenke, the PTT taken at 4:05 p.m. was merely a transient value that would decrease over time and that without a progression of neurological symptoms such as lightheadedness, dizziness, numbness, speech difficulty, blurred vision, difficulty walking, changes in motor activity, drooping of the face, headache or other pain, or generalized bleeding, a physician would have no reason to believe there had been a change in decedent's condition. Schwenke testified that Bare acted appropriately in not terminating the heparin until 11:20 p.m. when decedent exhibited neurological changes and that discontinuing the heparin at 8:10 or 8:30 p.m. would have created a further risk of more embolic strokes. Schwenke opined that decedent's hemorrhage resulted from her initial stroke, that the heparin was not the cause of the hemorrhage, and that the PTT of 200 at 5:30 p.m. had "no influence on the episode at 11:20."

Gard testified that a 3- to 6-percent risk exists that hemorrhage will occur as the result of an embolic stroke regardless of whether the patient is anticoagulated. Gard opined that decedent's hemorrhage was not caused by the heparin therapy and that there exists no correlation between the use of heparin and bleeding into an embolic infarct. Bare testified that the most common complication of heparin therapy is generalized bleeding and that because there was no evidence of such, he was of the opinion that decedent's hemorrhage was not caused by the heparin therapy.

As presented in the instructions to the jury, the personal representative claimed that the hospital was negligent because of the failure of its nurses to report within a reasonable time the

result of the PTT test, the episodes of vomiting, and decedent's complaints of headache to decedent's attending and consulting physicians or, if such physicians were unavailable, to other physicians on its hospital staff; that Gard was negligent in failing to properly inquire about or respond to the PTT result; and that Bare was negligent by failing to properly monitor decedent's anticoagulation therapy, to inquire about and respond to decedent's PTT result, and to make proper arrangements for another physician to handle his calls if he were unavailable.

III. ANALYSIS

As noted in part I above, the personal representative asserts the district court erred in charging the jury both by refusing to give certain instructions the personal representative requested and by giving certain instructions to which the personal representative objected.

1. Instructions Refused

While the personal representative assigns error to the refusal to give four requested instructions, his argument is limited to but two of them. Since errors assigned but not argued will not be considered, *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989), and Neb. Ct. R. of Prac. 9D(1)d (rev. 1989), we limit our analysis to the preexisting condition and concurring cause instructions discussed by the personal representative.

We begin that analysis by recalling that in order to establish reversible error upon a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). All of the instructions given 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. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d

270 (1990); *Rose v. City of Lincoln, supra.*

(a) Preexisting Condition

The district court refused the request that it instruct on the effect of preexisting conditions as follows:

> If you find from a preponderance of the evidence that [decedent], before, or at the time of receiving care and treatment by Defendants on August 17, 1983, was suffering from a physicial [sic] condition which pre-existed such care and treatment, and that such condition, if any, was aggravated or worsened by the professional negligence of the Defendants, or any of them, then if your verdict is for the Plaintiff, the Plaintiff is entitled to recover for the whole of the result, against such Defendant or Defendants whose negligence proximately caused or contributed to the result.
>
> There may be no recovery, however, for any results which would normally follow from any such pre-existing condition, regardless of the negligence of any of the Defendaants [sic].

The personal representative argues that because there was evidence that heparin can make a hemorrhage worse and that the hemorrhage began during the afternoon of August 17, the defendants were negligent at least in part by failing to terminate the infusion of heparin after that time; that is, that the hemorrhage was a preexisting condition which the defendants' negligence could be found to have exacerbated.

It is true that there is evidence to support a finding that decedent's hemorrhage began on the afternoon of August 17, that Stewart was negligent after that time in failing to report decedent's symptoms and elevated PTT level to the physicians, and that Gard and Bare were negligent after that time in failing to discover the elevated PTT level and terminate the heparin. It is also true that there is evidence that heparin can make an existing hemorrhage worse. However, there was not sufficient evidence on which a jury could base the conclusion that decedent would not have lapsed into a coma and died if the hemorrhage had been discovered and the infusion of heparin immediately terminated. Jacobsen stated that there was "a

possibility" that if the heparin had been discontinued before 6:50 p.m., "the outcome [would] have been different," and that the sooner the heparin was discontinued, the more likely decedent was to recover. Such testimony is merely speculative. Thus, the requested instruction was not warranted by the evidence.

(b) Concurring Cause

The personal representative next contends that because the case involved multiple defendants, the district court erred in refusing to instruct as follows:

> Where the independent acts or omissions to act of two or more persons combine to proximately cause an injury indivisible in its nature, each such act or omission to act is itself a proximate or concurrent cause, and any one or more of such persons may be held responsible for the entire injury. This is true even though one may have been more negligent than the other. It is no defense that all those who might have been held responsible are not made parties to this action.

This contention is also without merit, for the district court otherwise instructed the jury concerning concurring causes, using an instruction almost identical to the one the personal representative requested. It is not error on the part of a trial court to refuse to give a requested instruction if the substance of the request is contained in the instructions actually given. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989). While the instruction given does not specify that the independent acts or omissions which combine must be negligent acts or omissions, it is nevertheless a correct statement of the law when read in conjunction with the instruction which informed the jury that in order for the plaintiff to recover against any one of the defendants, the plaintiff must prove the negligence of that defendant. See, *London v. Stewart*, 221 Neb. 265, 376 N.W.2d 553 (1985); *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

2. Instructions Given

We thus move on to a consideration of the personal representative's quarrels with the instructions given. The

applicable rule is that in order to establish reversible error upon a court's giving of a certain instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

(a) Standard of Care

The first challenge is lodged against the instruction dealing with the standard of care applicable to physicians, reading as follows:

> Evidence of other physicians that they would have followed a different course of treatment than that followed by the defendants, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. Proof of a difference in judgment cannot amount to a proof of malpractice or medical negligence since such differences of opinion are consistent with the exercise of due care, or even the highest degree of care. The standard is set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing in the area of Lincoln or similar communities at that time.

We have considered the propriety of similar instructions in three other medical malpractice cases. In the oldest case, *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978), the plaintiff claimed that the giving of the following instruction was erroneous:

> "The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant . . . or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that treatment should have been performed differently."

Id. at 221, 266 N.W.2d at 907.

This court agreed with the plaintiff that the questioned

instruction, numbered 16, was prejudicially erroneous, explaining:

> Instruction No. 16 is taken directly from Kortus v. Jensen, 195 Neb. 261, 237 N.W.2d 845. In the context of the Kortus case the statement of law was correct, but in the context of the present case it is inapplicable and misleading. In the Kortus case there was a directed verdict in favor of the defendant doctor which this court affirmed because the evidence failed to establish the generally accepted and recognized standard of medical care and skill in the particular community, and failed to show that the defendant doctor negligently departed from that standard, other than to show that his technique differed from that of plaintiff's doctor. . . . It is apparent that statements of law applicable in a case in which the evidence fails to establish a prima facie case for submission to a jury are ordinarily inappropriate as instructions in a case in which a prima facie case has been established and the issues are to be submitted to a jury. The statements of law contained in instruction No. 16 are not applicable where there is ample medical testimony as to the acceptable medical standard in the community, and are incomplete in any event.
>
> The District Court had instructed the jury as to the duty of the defendants to use reasonable care and the standard of reasonable care in Omaha or similar communities, as well as instructing upon the burden of proof resting on the plaintiff. Those instructions were followed by instruction No. 16. The plaintiff's evidence of negligence was largely the testimony of doctors that they would have acted differently than the defendant doctor, or that the treatment by the defendant doctor should have been performed differently. Instruction No. 16, in practical effect, permitted the jury to infer that such testimony did not establish negligence and was not enough to establish the plaintiff's case.

201 Neb. at 221-22, 266 N.W.2d at 907.

In the next case, *Watson v. McNamara*, 229 Neb. 1, 424 N.W.2d 611 (1988), we agreed with the plaintiff that the

following instruction was prejudicially erroneous:

> "An Obstetrician-Gynecologist is not bound to use any particular method of diagnosis or treatment, and if, among Obstetrician-Gynecologists of ordinary skill and learning, more than one method of diagnosis or treatment is recognized as proper, it is not negligence for an Obstetrician-Gynecologist to adopt any of such methods. The fact that some other method of diagnosis or treatment existed, or the fact that some other specialist testified in this case that he might or would have used or advised another of a different method, does not, standing alone, establish that the defendant made or gave improper diagnosis or treatment; nor would it be an act of negligence or impropriety for the defendant not to have adopted another method."

Id. at 2, 424 N.W.2d at 612. We determined that the plaintiff had established a prima facie case of negligence. Following *Greenberg v. Bishop Clarkson Memorial Hospital, supra*, we stated:

> Certainly a physician is not liable for malpractice in choosing one of two or more recognized methods of diagnosis or treatment, so long as the method chosen conforms with the standard of care. We believe, however, that [the instruction at issue] permitted the jury to infer that the plaintiff's experts' testimony, even if believed, did not establish negligence and was not enough to establish the plaintiff's case.

Watson v. McNamara, supra at 2-3, 424 N.W.2d at 612.

In the most recent case, *Ourada v. Cochran*, 234 Neb. 63, 449 N.W.2d 211 (1989), we determined, for the reasons explicated in *Watson v. McNamara, supra*, that the giving of the following instruction was erroneous:

> "A physician who is a specialist is not bound to use any particular method of procedure; and if, among physicians of ordinary skill and learning in that specialty, more than one method of procedure is recognized as proper, it is not negligence for a physician to adopt any of such methods. The fact that some other method of procedure existed, or the fact that some other physician in that specialty

> testified in this case that he might or would have used or advised another or a different method, does not, standing alone, establish that the specialist used an improper procedure; nor would it be an act of negligence or impropriety for the specialist not to have adopted another method."

Ourada v. Cochran, supra at 66, 449 N.W.2d at 213-14.

So, too, in this case is the questioned standard of care instruction prejudicially erroneous. It misleads the jury into concluding that the expert testimony of physicians that a different course of treatment should have been followed fails to establish negligence. The reality is that such testimony may or may not establish negligence; it does if the different course would have been followed because the course actually employed failed to meet the required standard, but does not if the course actually employed was one of several which met the required standard.

Thus, we must determine at this point in our analysis that the district court did, as claimed by the personal representative, err in including in its jury charge a prejudicially erroneous instruction, to which he had objected. While that resolves the first assignment of error, we nonetheless consider the remaining issue it presents, as it is likely to resurface in any retrial of this case.

(b) Cumulative Instructions

The personal representative's additional claim of error in the charge to the jury is predicated on the giving of three instructions. He claims these instructions are repetitious of each other as well as of other instructions concerning a physician's standard of care and thereby unduly emphasize the burden of proof placed upon him.

The first of the instructions challenged as repetitious is the standard of care instruction included in the district court's jury charge set forth in part III(2)(a) above.

The second informed the jury:

> The law does not require of a doctor or nurse absolute accuracy either in their practice or judgment. It does not hold them to the standard of infallibility or make them an

> insurer of the safety or well being of their patient or require of them the utmost degree of skill known to their profession. It requires of them that in the practice of their profession or specialty they shall exercise that degree of care, skill and learning ordinarily possessed and used by members of their profession or specialty in the general locality in which they practice, or in similar localities.

And the third advised the jury:

> In determining whether the learning, skill and conduct of the defendants fulfilled the duties imposed on them by law, as they have been stated to you in these instructions, you are not permitted to set up an arbitrary standard of your own. The standard is set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing in Lincoln, Nebraska, or similar communities at the same time.

The foregoing instructions were given in addition to two other instructions which set forth the standard of care of health care providers. One of these other instructions reads, in part:

> By negligence in this lawsuit, with regard to the defendant physicians, is meant the doing of some act or the failure to do some act under the circumstances present which violates the standard of reasonable and ordinary care, skill and knowledge in Lincoln, Nebraska, or in similar communities.
>
> In determining what constitutes reasonable and ordinary care, skill and diligence on the part of the doctor in a particular community, the test is that which physicians in the same community and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients.
>
> By negligence in this lawsuit in regard to the defendant Saint Elizabeth Community Health Center is meant the doing of some act or the failure to do some act under the circumstances present which violates the standard of reasonable and ordinary care, skill and knowledge of hospital personnel in Lincoln, Nebraska, or similar communities.

The other instruction declares in part:

> In performing professional services, a doctor must use the care, skill and knowledge ordinarily possessed and used under like circumstances by physicians in good standing in his or similar localities. In the application of this knowledge and skill, the doctor must also use reasonable care.
>
> In performing professional services, a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care.

In mounting his attack on the repetitious nature of these standard of care instructions, the personal representative relies upon *Watson v. McNamara*, 229 Neb. 1, 424 N.W.2d 611 (1988), in which the plaintiff contended that the six standard of care instructions used in that case unduly emphasized the limitations on the physician's liability and misled the jury. We stated:

> After the standard of care was given in [one] instruction . . . it was repeated in one form or another in the instructions that followed, no less than five times. These instructions also recited an exhaustive litany of physician immunities. We have said that it is not reversible error for the trial court to repeat a proposition of law in the instructions in proper connection with facts or other principles involved or if it does not appear that the effect was to confuse or mislead the jury. *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976). It is also true that each of these instructions, save [one], standing alone, correctly stated the law. *Id.* These maxims notwithstanding, we believe that the applicable standard is that where instructions, considered in toto, so repetitiously cover a point of law or its application as to grossly overstate its effect on one side to the explicit detriment of the other side, it is error. *Samuelson v. Freeman*, 75 Wash. 2d 894, 454 P.2d 406 (1969).

229 Neb. at 3, 424 N.W.2d at 612-13.

We conclude that the three challenged instructions, when

combined with the other standard of care instructions given, so repetitiously emphasized the point that health care providers are not to be held to an arbitrary standard or one of infallibility as to overstate the point's effect and thereby confuse and mislead the jury.

IV. DECISION

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

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., not participating.

IN RE CHANGE OF NAME OF AUDREY JOY ANDREWS AND HOLLY FAE ANDREWS, MINORS, BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, LORI S. ANDREWS, NOW KNOWN AS LORI S. BRYDL. AUDREY JOY ANDREWS AND HOLLY FAE ANDREWS, BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, LORI S. ANDREWS, NOW KNOWN AS LORI S. BRYDL, APPELLANTS, V. KIM L. ANDREWS, APPELLEE.

454 N.W.2d 488

Filed April 26, 1990. No. 88-276.

1. **Minors: Names.** Whether a minor child's surname may be changed depends on, and is determined by, the best interests of the child.
2. **Minors: Names: Appeal and Error.** Appellate review of a trial court's decision concerning a requested change in the surname of a minor is a trial de novo on the record, wherein the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to the fact, that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Minors: Names.** Whether a change in a minor's surname is in the best interests of the child may depend on several factors, such as (1) misconduct by one of the child's parents, (2) a parent's failure to support the child, (3) parental failure to maintain contact with the child, (4) the length of time that a surname has been used for or by the child, and (5) whether the child's surname is different from the surname of the child's custodial parent. Additional factors to be considered

regarding a change in a minor child's surname include a child's reasonable preference for a surname; the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; the degree of community respect associated with the child's present surname and the proposed surname; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and the identification of the child as part of a family unit.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

Robert R. Otte, of Hecht, Sweet, Alesio, Morrow, Poppe & Otte, P.C., for appellants.

Michael L. Cruise for appellee.

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

SHANAHAN, J.

The district court for Lancaster County authorized Lori S. Andrews to change her surname to "Brydl," but denied Brydl's petition, as next friend, to change the surname of her minor daughters, Audrey Joy and Holly Fae, from "Andrews" to "Brydl-Andrews." Brydl contends that she sustained her burden to prove that the requested name change was in the best interests of her daughters, of whom Brydl has custody as the result of the dissolution of her marriage with Kim L. Andrews.

Brydl and her former husband, Andrews, are the parents of twin daughters, Holly Fae Andrews and Audrey Joy Andrews, who were born on January 4, 1986. During her marriage of 5 1/2 years to Andrews, Brydl went by "Lori Andrews," and the twins, as reflected on their birth certificates, bore the surname "Andrews" as well. Under a marital dissolution decree entered on August 13, 1987, Brydl was granted custody of the twins subject to the child visitation right of Andrews, who frequently visited his daughters and paid child support in accordance with the decree. Additionally, Andrews maintained medical insurance for the twins, who were also beneficiaries under a policy of insurance on Andrews' life.

In November 1987, Brydl, then bearing the surname

"Andrews" from her marriage, commenced a separate action pursuant to Neb. Rev. Stat. §§ 61-101 and 61-102 (Reissue 1986) to have her premarital name, "Brydl," restored to her and, further, to change the surname of her daughters from "Andrews" to "Brydl-Andrews." Andrews objected to the change of his children's surname, alleging that the "hyphenated last names are unnecessarily burdensome, confusing, unnecessary and promotes nothing beneficial for the children."

At the trial on January 27, 1988, Brydl testified that she wanted the name change for her daughters, then 2 years of age, because she wanted them to identify with her in reference to the name "Brydl" and to appreciate their Czech ancestry and heritage. Also, Brydl wanted the name change to eliminate possible confusion, such as might exist in the children's medical records, as a result of the difference between Brydl's premarital surname and her marital surname, "Andrews." Brydl acknowledged that if she were to remarry, her marital surname would involve a hyphen between "Brydl" and her subsequent spouse's surname, or, as Brydl expressed: "I would keep Brydl and go Brydl dash whatever." In the event of Brydl's remarriage, the twins' surname would remain "Brydl-Andrews" in accordance with a judgment authorizing such change in the children's surname.

Brydl called as a witness Dr. Rick McNeese, a psychologist who specialized in behavioral family practice, a specialty in which Dr. McNeese "deal[t] with a wide range of problems that occur within a family context, from child problems, adolescent, adult into geriatrics. . . . [A] particular orientation where you look at the interaction between people and their environment." According to Dr. McNeese, 2-year-old children, such as Audrey Joy and Holly Fae, are too young to identify with a specific surname. When asked whether a hyphenated surname would be in the best interests of the twins, Dr. McNeese stated:

> What's important, what would be the best interest of the children, I think is anything that will facilitate the attachment of the child to both parents and I think in this case, that type of name arrangement would be a factor that would work in the direction of the children's best interest.

. . . .

> . . . [W]hat's important to the child's interest is the attachment that child has to both parents. Any factor that can facilitate that is going to be important. . . . I think in this case, the name change is one of those factors that would contribute to that overall development of attachment which later on then provides a basis for curiosity and development of atonomy [sic], self-concept and self-esteem.

Dr. McNeese further testified that the hyphenated name change would have no effect on the relationship between the twins and their father, would help the girls identify more readily with their mother, and would allow the children to form an attachment with their mother, which would result in their "independence and security and identity." In this manner, the children will establish a "self-concept, who they are as a person . . . ."

Andrews testified that if his daughters have the hyphenated surname "Brydl-Andrews," he would not love them any less, but believed that Brydl was seeking the name change to distance Andrews from his children.

The district court found that Brydl was entitled to change her surname from "Andrews" to "Brydl," but concluded that Brydl had failed to meet her burden of proof that the requested change in the twins' surname would be in the best interests of the children.

We find no Nebraska statute, as an expression of state policy, which precludes the use of a hyphenated surname for a Nebraska-born child.

The vast majority of judicial decisions expressing a denial of a requested change in a minor's surname have arisen out of a factual setting wherein a divorced mother has remarried and sought to change her child's or children's surname from that of the mother's previous spouse to the surname of the mother's subsequent spouse, that is, the surname of the child's or children's stepfather. For example, in *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977), this court rejected a request by a mother, who was the custodial parent as the result of a marital dissolution, to change the surname of her children to Laflan, her subsequent husband's surname, because the changed

surname would result in the children's no longer bearing their father's surname. Courts in other jurisdictions have recognized that a father, as a noncustodial parent on account of a marital dissolution, has an interest in his child's retention of the paternal surname notwithstanding the surname of the child's stepfather. See, *Beyah v. Shelton*, 231 Va. 432, 344 S.E.2d 909 (1986); *Azzara v. Waller*, 495 So. 2d 277 (Fla. App. 1986); *Petition of Meyer*, 471 N.E.2d 718 (Ind. App. 1984); *In re Marriage of Omelson*, 112 Ill. App. 3d 725, 445 N.E.2d 951 (1983); *Application of Tubbs*, 620 P.2d 384 (Okla. 1980); *In re Application of Robinson for Change of Names*, 302 Minn. 34, 223 N.W.2d 138 (1974); Annot., 92 A.L.R.3d 1091 (1979).

However, the case now before us does not involve a requested or prospective abolition of a noncustodial father's surname in relation to the father's child. Rather, Brydl wants to add her premarital surname to the twins' current surname, which is the surname of Brydl's former spouse and the father of Brydl's children, and does not seek elimination of the name "Andrews" in reference to the twins' surname. Consequently, the proposed and requested change in the children's surname, namely, "Brydl-Andrews," reflects both maternal and paternal surnames.

"At common law, the interest of a father in having his child bear his surname was one of inherent concern. The custom of patrilineal succession dates back many centuries." *Cohee v. Cohee*, 210 Neb. 855, 857, 317 N.W.2d 381, 382 (1982). The reason most often given for a child's retention of the paternal surname is the need to preserve the father-child bond. *Rio v. Rio*, 132 Misc. 2d 316, 504 N.Y.S.2d 959 (1986). See, also, *In re Marriage of Presson*, 102 Ill. 2d 303, 465 N.E.2d 85 (1984); *West v. Wright*, 263 Md. 297, 283 A.2d 401 (1971). However, today's trend is toward parental and marital equality in reference to children, as typified by and reflected in legislative expressions that parental gender is excluded from consideration in determining a child custody issue; for example, see Neb. Rev. Stat. § 42-364(2) (Reissue 1988):

> In determining with which of the parents the children or any of them shall remain, the court shall not give preference to either parent based on the sex of the parent,

> and no presumption shall exist that either parent is more fit to have custody of the children than the other.

Thus, many courts have held that neither parent has a superior right in the determination of the surname for the parents' child. See, *Rio v. Rio, supra*; *Application of Rossell by Yacono*, 196 N.J. Super. 109, 481 A.2d 602 (1984) (parents have equal rights in determining their child's surname); *Daves v. Nastos*, 105 Wash. 2d 24, 711 P.2d 314 (1985) (even in a filiation proceeding, neither parent has a superior right to determine the child's name); *Jacobs v. Jacobs*, 309 N.W.2d 303 (Minn. 1981); *In re Marriage of Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980) (a father's right to name his child is abolished as the primary determinant for a child's surname). As this court recognized and stated in *Cohee v. Cohee, supra* at 860, 317 N.W.2d at 384: "No automatic preference as to the surname of a legitimate child now exists in Nebraska law. We believe each parent has an equal right and interest in determining the surname of a child."

Courts in other jurisdictions have recognized a mother's interest in her child's or children's bearing the mother's premarital or maiden surname. See, *Jacobs v. Jacobs, supra*; *Application of Rossell by Yacono, supra*; *State ex rel. Spence-Chapin Services v. Tedeno*, 101 Misc. 2d 485, 421 N.Y.S.2d 297 (1979); *Daves v. Nastos, supra*.

> In recognizing a father's right to have his child bear his surname, courts largely have ignored the impact a name may have on the mother-child relationship. Perhaps that is because mothers, usually given custodial preference in the past, generally had more regular contact and could maintain a psychological relationship without the need for the tie a surname provides. However, "the maternal surname might play a significant role in supporting the mother-child relationship, for example, in the cases where the father is the custodial parent or where the custodial mother goes by her birth-given surname."

(Emphasis omitted.) *In re Marriage of Schiffman, supra* at 647, 620 P.2d at 584, 169 Cal. Rptr. at 923.

Whether a minor child's surname may be changed depends on, and is determined by, the best interests of the child. *Cohee v.*

Cohee, supra; *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977). Thus, best interests of a child are the determinant for change of a child's surname much in the same manner as a child's best interests relate to child custody and parental visitation involved in a marital dissolution proceeding. See, § 42-364 (child custody determination and best interests of a child); *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). Consequently, appellate review of a trial court's decision concerning a requested change in the surname of a minor is a trial de novo on the record, wherein the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to the fact, that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Cain v. Cain*, 226 Neb. 203, 410 N.W.2d 476 (1987); *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982).

In *Spatz v. Spatz, supra*, this court stated:

> The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. The cases which have considered this question have granted a change of name only when the substantial welfare of the child requires that the name be changed. See Annotation, 53 A. L. R. 2d 914. Generally, where the father has supported the children and exercised his visitation rights relief has been denied. A change of name has been granted where the father's name was positively deleterious to the child because of the father's misconduct and notoriety. Generally, minor embarrassment or emotional upset has been held not sufficient to require that a change of name be granted.
>
> . . . "Society has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a

bond."

199 Neb. at 333-34, 258 N.W.2d at 815-16 (quoting from *In re Application of Robinson for Change of Names*, 302 Minn. 34, 223 N.W.2d 138 (1974)).

In *Cohee v. Cohee, supra*, this court approved use of a hyphenated surname for a minor child and concluded that the child's best interests required that the child bear the hyphenated surname Cohee-Dugger, a combination of the mother's premarital or maiden surname and the surname of the child's father. See, also, *Rio v. Rio*, 132 Misc. 2d 316, 504 N.Y.S.2d 959 (1986) (the child's best interests require that the child's name reflect her mother's premarital or maiden name and the surname of the child's father).

In a situation involving a request for a change in the surname of a child whose custody is an aspect of a marital dissolution, this court observed: "[C]ustody, along with the other factors, is to be considered in determining the best interests of the child." *Cohee v. Cohee, supra* at 861, 317 N.W.2d at 384. Consequently, whether a change in a minor's surname is in the best interests of the child may depend on several factors, such as (1) misconduct by one of the child's parents, (2) a parent's failure to support the child, (3) parental failure to maintain contact with the child, (4) the length of time that a surname has been used for or by the child, and (5) whether the child's surname is different from the surname of the child's custodial parent. *Cohee v. Cohee, supra*. Additional factors to be considered regarding a change in a minor child's surname include a child's reasonable preference for a surname; the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; the degree of community respect associated with the child's present surname and the proposed surname; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and the identification of the child as part of a family unit. *Daves v. Nastos*, 105 Wash. 2d 24, 711 P.2d 314 (1985); *In re Marriage of Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).

In the light of the foregoing factors, the evidence does not

establish, or even indicate, that Andrews has been guilty of misconduct toward the twins, has failed to support his daughters, or has failed to maintain visitation with them. At the time of trial, "Andrews" had been the children's surname for a period of 2 years, which, according to Dr. McNeese, is too little time for the twins to identify with that surname. Nevertheless, "Andrews" is not the surname of the twins' mother. The proposed change of the children's surname, however, would allow and, according to Dr. McNeese, would foster the twins' affiliation with both parents, who have different surnames. Although the children are too young to indicate a preference for a surname, the uncontradicted testimony of Dr. McNeese tends to establish that a change of the children's surname will be efficacious in the preservation and development of the children's relationship with each parent. Nothing indicates that the proposed name change, as requested, would be harmful to either of the children. Quite to the contrary, according to McNeese, the surname "Brydl-Andrews" will help the twins to identify themselves as a part of a family unit in relation to both sides of their family, maternal and paternal, and will facilitate and nurture the children's attachment to both parents and the families of their parents. Thus, while both Brydl and Andrews recounted the effect of the proposed name change on their individual lives, the testimony of Dr. McNeese remains intact without contradiction that the best interests of the twins are served by use of the hyphenated surname "Brydl-Andrews." As a result of our de novo review of the record, we conclude that the best interests of the children, Audrey Joy and Holly Fae, warrant the surname "Brydl-Andrews" for those children born of the marriage between Brydl and Andrews. Consequently, we reverse the judgment of the district court, which rejected "Brydl-Andrews" as the surname for the children involved in these proceedings, and remand this matter to the district court with direction to enter judgment that the surname of the children involved in these proceedings shall be and is "Brydl-Andrews."

REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., not participating.

IN RE ESTATE OF EVA M. WIDGER, DECEASED. MARLIN E. WIDGER ET AL., APPELLANTS, V. ORVILLE E. WIDGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF EVA M. WIDGER, DECEASED, APPELLEE.

454 N.W.2d 493

Filed April 26, 1990. No. 88-727.

1. **Appeal and Error.** On appeal, the district court reviews the county court judgment for error appearing on the record.
2. **Accounting: Equity.** An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity.
3. **Parties: Equity.** Where close relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court.
4. **Equity: Appeal and Error.** In an appeal from an equity action, the Supreme 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 Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Limitations of Actions: Laches: Equity.** Although ordinarily one has the undoubted right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute, when not to do so would work injustice in the particular case. What constitutes laches is to be determined in light of the circumstances of the particular case.
6. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
7. **Laches: Equity.** Laches is not tenable to defeat an equity cause when there has been no material change in a defendant's position.

Appeal from the District Court for Chase County, JACK H. HENDRIX, Judge, on appeal thereto from the County Court for Chase County, B. BERT LEFFLER, Judge. Judgment of District Court reversed, and cause remanded with directions.

Terry E. Savage for appellants.

Guy G. Curtis, of Curtis & Curtis Law Firm, for appellee.

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

FAHRNBRUCH, J.

Appellants claim that both the district court for Chase

County and the Chase County Court erred in denying their claims for rents and profits against the estate of Eva M. Widger because of laches. We reverse and remand with directions.

The appellants, two of Eva Widger's sons, Marlin E. and Percy D. Widger, and two of her grandchildren, James R. and Abbie Jo Widger, all partial owners of a Chase County farm, filed claims against the mother-grandmother's estate for their share of the farm's rents and profits. Owners of the remaining interests in the farm, Orville and Glenn Widger, did not file claims.

In 1943, subject to a life estate in their father, each of five Widger brothers inherited an undivided two-fifteenths interest and their mother, Eva Widger, obtained a one-third interest in the Chase County farm. Upon the father-husband's death in 1969, interests in the land were held five-fifteenths by Eva Widger; two-fifteenths by each of four brothers: Marlin, Percy, Orville, and Glenn; and one-fifteenth each by James and Abbie Widger, children of the fifth brother, who was by then deceased. Marlin Widger testified that after the claims were filed against the estate of Eva Widger, he obtained the interests of James and Abbie Widger, giving him a four-fifteenths interest in the farm.

From 1969 until she died on November 8, 1984, Eva Widger had sole possession of the farm. With the exception of Marlin Widger, none of the appellants ever instituted legal proceedings to collect a share of the farm's rents and profits. In 1974, Marlin sued his mother for rents and profits. He received a settlement.

After his mother's death, Marlin submitted to the personal representative of his mother's estate a claim wherein he asked for his share of the farm's rents and profits from 1975 through 1984. The other appellants submitted the same type of request, but extended the period to 1969 through 1984. The personal representative of Eva Widger's estate denied all claims. Thereupon, the appellants pursued their claims and filed petitions in the estate for an accounting of their respective shares of rents and profits from the farm. The personal representative filed an accounting for the years 1981 through 1984, which was received into evidence. After a hearing, the appellants' claims were denied by the Chase County Court. The

county judge concluded that the appellants were not entitled to recover rents and profits that had accrued during the lifetime of Eva Widger because of laches. On appeal, the district court reviewed the county court judgment for error appearing on the record, see Neb. Rev. Stat. § 25-2733 (Reissue 1989) (formerly Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1988)), and affirmed the judgment.

An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity. *Gesell v. Reeves*, 229 Neb. 842, 429 N.W.2d 363 (1988); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982).

Where close relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. *Id.* See, *Cook v. Wilkie*, 181 Neb. 596, 150 N.W.2d 124 (1967); *Fraser v. Temple*, 173 Neb. 367, 113 N.W.2d 319 (1962). In an appeal from an equity action, the Supreme 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 Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989).

Although ordinarily one has the undoubted right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute, when not to do so would work injustice in the particular case. What constitutes laches is to be determined in light of the circumstances of the particular case. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). However, the defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. *Production Credit Assn. of the Midlands v. Schmer, supra.* In addition, laches is not tenable to defeat an equity cause when there has been no material change in a defendant's

position. *State v. Jarchow*, 219 Neb. 88, 362 N.W.2d 19 (1985). See, also, *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978).

Having reviewed the record de novo, we conclude that there has been inexcusable neglect on the part of appellants in asserting their rights with respect to the property. Marlin Widger admits he made no attempts to seek legal recourse to secure rents or profits after his first action in 1974. Percy Widger testified that he approached Eva Widger about rents, but did not pursue the issue after she told him that he would have to take her to court to get them. Nancy Mathers, the mother of appellants James and Abbie Widger, admitted that even though she knew her children were entitled to rents, she did not want to sue Eva Widger.

The record contains no proof that Eva Widger materially changed her position or was otherwise prejudiced because of the appellants' failure to institute earlier proceedings to collect their share of the rents and profits on the farm. Therefore, the doctrine of laches does not apply.

Each appellant is entitled to his or her fractional share of rents and profits from the farm, but only for the 4-year period immediately preceding the filing of his or her claim, that being within the applicable statute of limitations. See Neb. Rev. Stat. § 25-206 (Reissue 1989). See, also, *Fraser v. Temple, supra*; *Beacom v. Daley*, 164 Neb. 120, 81 N.W.2d 907 (1957), *overruled on other grounds, Estate of Ruwe v. Ruwe*, 190 Neb. 663, 211 N.W.2d 610 (1973).

There being no other credible basis on which to determine a division of rents and profits, we find from the personal representative's accounting that the claims of Percy D. and Marlin E. Widger should each be allowed in the sum of $1,434 and that the claims filed by James R. Widger and Abbie Jo Widger should each be allowed in the sum of $717.

The judgment of the district court for Chase County is reversed, and the cause is remanded to that court with instructions to enter judgment in accordance with this opinion and to remand the cause to the Chase County Court with instructions to correct its judgment accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

ELLA DOWLING, APPELLANT AND CROSS-APPELLEE, V. MONROE D. DOWLING, JR., APPELLEE AND CROSS-APPELLANT.
454 N.W.2d 306

Filed April 26, 1990. No. 88-733.

Appeal from the District Court for Lancaster County, EARL J. WITTHOFF, Judge, upon the recommendation of the Appellate Division of the District Court, FUHRMAN, HOWARD, and MULLEN, District Judges. Reversed and remanded for further proceedings.

Karen B. Flowers, of McHenry & Flowers, for appellant.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellee.

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

PER CURIAM.

Upon consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we find that a question of fact exists for determination, and, accordingly, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DUANE W. SANDERS, APPELLANT.
455 N.W.2d 108

Filed May 4, 1990. No. 44019.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in

regard to such motions.

2. **Criminal Law: Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. The initial inquiry is whether an identification procedure was suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances.
3. **Trial: Identification Procedures.** If an identification procedure is suggestive, then it must be determined whether the in-court identification was nonetheless reliable based on the totality of the circumstances. In determining reliability, the factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. These same factors are applied to identifications by persons not actually witnessing the crime.
4. **Right to Counsel: Identification Procedures: Indictments and Informations.** The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against a defendant by way of complaint, indictment, or information.
5. **Constitutional Law: 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 or 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 defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.
6. **Effectiveness of Counsel: Proof.** A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel.
7. _____: _____. The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim.
8. _____: _____. A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
9. **Trial: Identification Procedures: Eyewitnesses.** If the eyewitness identification procedures were impermissibly suggestive, the identification is not admissible at the trial.
10. **Trial: Evidence.** The admissibility of relevant evidence is a matter within the trial court's discretion.
11. **Trial: Identification Procedures: Eyewitnesses: Jury Instructions.** When the trial court determines that an eyewitness identification is admissible, it is proper for a court to reject a defendant's proposed instruction which would have placed the issue of admissibility before the jury.

12. **Trial: Identification Procedures: Eyewitnesses: Juries.** Although the court determines the admissibility of eyewitness identification, it is the jury's function to determine the credibility of the eyewitness.
13. **Assault: Homicide: Lesser-Included Offenses.** Neither first nor second degree assault is a lesser-included offense of attempted second degree murder.
14. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.
15. **Sentences.** Except for the mandatory consecutive penalty for use of a firearm in the commission of a felony, it is within the discretion of the trial court that sentences imposed for separate crimes be served consecutively rather than concurrently.

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

Mark S. Trustin, of Trustin, Schweer, Ferraro & Van Robays, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellee.

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

FAHRNBRUCH, J.

Duane W. Sanders, confessed perpetrator of the operational acts with which he was charged, appeals his jury convictions and resulting sentences for an execution-type attempt to commit second degree murder, for robbery, and for the use of a firearm in the commission of a felony.

The defendant was sentenced to consecutive prison terms of 16 to 50 years on the attempted murder charge, 16 to 50 years for robbery, and 6 to 10 years on the firearm charge. We affirm the convictions and sentences by the district court for Douglas County.

In his assignments of error as summarized, Sanders claims (1) that a lineup in which he was identified was overly suggestive and therefore violated his due process rights, (2) that he was denied effective assistance of counsel during the lineup, (3) that his trial counsel was ineffective, and (4) that his sentences are excessive.

This is Sanders' third appearance before the Supreme Court

on this matter. His convictions were affirmed on direct appeal. See *State v. Sanders*, 209 Neb. xx (case No. 44019, Sept. 9, 1981). The denial of the defendant's postconviction relief was also affirmed, in *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985).

Sanders' direct appeal was reinstated by this court after the U.S. District Court for the District of Nebraska conditionally granted habeas corpus relief unless a direct appeal was reinstated. Although this appeal is nominally a direct appeal, there is also a record from the postconviction hearing. In the interest of judicial economy, we consider both the trial and postconviction records. See *State v. Holton*, 216 Neb. 594, 344 N.W.2d 661 (1984).

On Thursday, July 24, 1980, at approximately 11 to 11:30 p.m., an adult male, subsequently identified by three eyewitnesses as the defendant, Sanders, entered the Nifty Bar in Omaha and approached a counter. He was dressed in dark clothes. When Barbara J. O'Kane, a waitress, approached Sanders, he asked for change for a quarter. Larry B. Robinson, a part owner and bartender on the night in question, observed the defendant speak with O'Kane. As O'Kane turned from the cash register, she noticed Sanders standing on his toes looking down into the cash register. Robinson also observed Sanders bending over the bar looking in the direction of the cash register. After O'Kane gave him change for his quarter, Sanders left. Thomas P. Hegarty, a customer who was drinking his second beer of the evening, also noticed O'Kane make change and Sanders leaning over the counter. Hegarty later remarked to O'Kane and Robinson that it was odd that someone would obtain "change for a quarter and [leave] without using the telephone or anything like that." Approximately 45 minutes later, O'Kane saw Sanders walk across a lighted parking lot. The lighting was sufficient for her to see that the defendant was wearing black pants and a black shirt with silver threads.

O'Kane left the bar at 1:15 a.m., leaving Robinson alone to finish cleaning the premises. Approximately 5 minutes after O'Kane departed, there was a knock on the windowpane of the bar's front door. Robinson looked through the window and saw Sanders, who asked Robinson to change a $10 bill. The area

where Sanders was standing was illuminated by a floodlight directly overhead. After obtaining money from the cash register, Robinson again looked through the window to ensure that Sanders still had a $10 bill and that his hands held nothing else.

As Robinson opened the door, Sanders forced his way into the bar and revealed a handgun, either a .38-caliber weapon or .357 Magnum. After a brief struggle in the doorway, Robinson was forced to lie facedown on the floor. The defendant robbed Robinson of his watch, ring, and a wallet. From his prone position, Robinson observed Sanders remove money from the cash register. The bar was robbed of about $1,100.

As he was leaving, Sanders instructed Robinson not to leave for 10 to 15 minutes. The defendant then said, "On second thought, you're not going anywhere." From a distance of a few inches, Sanders shot Robinson in the back of the head. Robinson survived the potentially fatal gunshot wound. Alerted by the gunshot, nearby neighbors observed a figure in dark clothing leave the vicinity of the bar.

On July 29, O'Kane and Hegarty gave descriptions to a police artist of the man whom they saw in the Nifty Bar on July 24 getting change for a quarter. The artist formed composite pictures that resembled Sanders. Additionally, O'Kane, Hegarty, and Robinson viewed numerous photographs but were unable to positively identify anyone.

While in custody of Omaha police on September 30, Sanders, after being advised of and waiving his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was questioned about the Nifty Bar robbery by two police officers. Shortly after the interview began, Sanders asked to speak to Omaha Police Det. John R. Farmer. The detective, in response to the defendant's request, went to the interview room, where Sanders confessed that he had committed the robbery and shooting at the Nifty Bar. The defendant said that he was ashamed and had given the gun he used to a friend.

On the evening of September 30, O'Kane, Hegarty, and Robinson separately viewed a three-man lineup that included Sanders. O'Kane and Hegarty positively identified Sanders as

the man who had requested change for a quarter. Robinson instantly recognized Sanders as the man who shot him but, due to the traumatic event, was unable to verbalize to the police that Sanders was the perpetrator. After viewing the lineup, each witness was segregated from the other witnesses until all the witnesses had viewed the lineup.

Following a suppression hearing, the court found that the lineup was fair and not unduly suggestive or leading. The court further found that the defendant's confession to Officer Farmer was freely and voluntarily given after he was fully and fairly advised of his constitutional rights under *Miranda v. Arizona, supra*, and that Sanders made a knowing and intelligent waiver of those rights. Sanders has not raised any assignment of error regarding the admissibility of his confession or the sufficiency of the evidence to convict him.

At the suppression hearing and at trial, both O'Kane and Hegarty positively identified Sanders as the man who, on the evening of July 24, came into the Nifty Bar, obtained change for a quarter, looked over the counter at the cash register, and then left the tavern. Robinson, at both the suppression hearing and trial, positively identified Sanders as the man who talked with O'Kane, leaned over the counter and looked at the cash register, and left the Nifty Bar on the evening of July 24. Robinson also positively identified the defendant as the person who, after the bar was closed, sought change for a $10 bill, forced his way into the bar when Robinson opened the door, robbed Robinson and the tavern, and then shot Robinson.

SUGGESTIVENESS OF LINEUP

In his first assignment of error, Sanders contends that the lineup was so unduly suggestive that it was inevitable that he would be identified as the person involved in the robbery and shooting. He concludes, therefore, that the witnesses' in-court identifications of Sanders as the perpetrator should have been suppressed.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Garcia, ante* p. 53, 453 N.W.2d 469

(1990). In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motions. *Id.*

As we held in *Garcia, supra* at 58, 453 N.W.2d at 473:

> An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989). The initial inquiry is whether an identification procedure was suggestive. *See, State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), *overruled on other grounds, State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987); *State v. Tramble*, 187 Neb. 488, 191 N.W.2d 822 (1971); *Salam v. Lockhart*, 874 F.2d 525 (8th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 252, 107 L. Ed. 2d 202; *State v. Collette*, 199 Conn. 308, 507 A.2d 99 (1986); *State v. Vaughn*, 101 Wash. 2d 604, 682 P.2d 878 (1984); 1 W. LaFave & J. Israel, Criminal Procedure, § 7.4 (West 1984). A determination of impermissible suggestiveness is based on the totality of the circumstances. *Swoopes, supra.*

After a thorough review of the record, based upon the totality of the circumstances, we cannot say that the trial court was clearly wrong in finding that the lineup in which Sanders participated was not unnecessarily suggestive.

But even assuming arguendo that Sanders' lineup was unnecessarily suggestive, the in-court identifications nonetheless were reliable based upon the totality of the circumstances and therefore were admissible in evidence.

As we also held in *Garcia, supra* at 58, 453 N.W.2d at 473:

> If an identification procedure is suggestive, then it must be determined whether the in-court identification was nonetheless reliable based on the totality of the circumstances. *Richard, supra*; *Vaughn, supra*; *Collette, supra*. In determining reliability, the factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of

> attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989).

These same factors are applied to identifications by persons not actually witnessing the crime. See, *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989); *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989).

On the evening before the crime, Robinson, from a distance of between 15 and 20 feet, saw the defendant when he entered the Nifty Bar, ostensibly for change, and again when Sanders leaned over the counter while O'Kane was getting change. At that time, the bar was well lighted and it was not particularly busy, although the tables were all full. On the two occasions Robinson looked through the front door window when the defendant returned after closing, the two men were only 1 1/2 to 2 feet apart. At that time, there was a floodlight directly above the defendant. Robinson also viewed Sanders when he entered the bar, during a brief struggle, and when the defendant removed money from behind the bar. Significantly, the robbery occurred over a 3- to 4-minute period.

At times, O'Kane was only a foot from Sanders during the 3 to 5 minutes in which she made change. A short time later, the waitress also saw Sanders walk across an illuminated parking lot.

From a distance of 5 to 10 feet, Hegarty had an unobstructed view while the defendant was getting change from O'Kane. This witness periodically glanced at Sanders for about 1 1/2 to 2 minutes and watched the defendant lean over the bar.

On the first occasion that Sanders entered the bar, Robinson noticed him because he was unfamiliar and Robinson attempted to make new customers feel welcome. When the defendant, under the pretense of requiring change, returned to the Nifty Bar after it was closed, Robinson checked to ensure that Sanders had money and that he was unarmed. During the robbery, it can reasonably be inferred that Robinson's attention was heightened since his life was being threatened.

O'Kane focused on Sanders while she was making change.

Her attention was drawn to the defendant when he stood on his toes and looked down into the cash register.

Hegarty testified that he noticed the defendant because it was unusual for a person of Sanders' race to patronize the bar and because the defendant left without using the change which he had just requested.

The description given by Robinson to the police and the descriptions given by O'Kane and Hegarty for the composite drawings substantially matched Sanders.

Although Robinson could not identify Sanders at the lineup, he testified at the suppression hearing and at the trial that he instantly recognized his attacker at the lineup but was unable to articulate this because of the trauma. Both O'Kane and Hegarty immediately positively identified Sanders in the lineup. Neither displayed any doubt.

In view of all the circumstances, the length of time between the events at the bar on July 24 and 25 and the lineup on September 30 was not so long as to lead to a mistaken identification. See, *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988) (involving 2 months between time of crime and confrontation); *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980) (determining that lineup 2 1/2 months after sexual assault was not unnecessarily suggestive or conducive to mistaken identification). Moreover, in Sanders' case, each of the witnesses testified that his or her in-court identification was based on his or her individual perceptions from the night of the crime.

We note that although there was evidence that the police indicated to two of the witnesses that the lineup would contain a suspect, this does not render the identification procedure unduly suggestive inasmuch as a witness would assume that to be the case. See *State v. Garcia, ante* p. 53, 453 N.W.2d 469 (1990).

The trial court's finding regarding the lineup is not clearly erroneous. Therefore, the lineup was not so unnecessarily suggestive and conducive to an irreparably mistaken identification that Sanders was denied due process of law.

RIGHT TO COUNSEL AT LINEUP

In his second assignment of error, the defendant asserts that his right to have counsel present at the lineup was violated.

The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against a defendant by way of complaint, indictment, or information. *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986). See, also, *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985); *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). Language in *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989), *State v. Smith*, 209 Neb. 86, 306 N.W.2d 181 (1981), and *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976), to the effect that "until an information has been filed, a defendant has no constitutional right to have the assistance of counsel during a police showup" is overly restrictive and is disapproved.

Sanders' lineup was conducted on September 30, 1980. No adversary judicial proceedings for the crimes of attempted second degree murder, robbery, and use of a firearm to commit a felony were initiated until October 9, 1980. Since Sanders' right to counsel had not attached at the time of the lineup, this assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or 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 defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel. *Id.* The defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support the claim. *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990). As noted in *State v. Hawthorne*, 230 Neb.

343, 347, 431 N.W.2d 630, 633 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)):

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

Lineup

In his first contention regarding ineffective assistance of counsel, Sanders argues that although his trial counsel challenged the lineup at a suppression hearing, he did not attack the suggestiveness of the lineup. The basis for this claim is unclear. The record reflects that the court conducted a suppression hearing on the identification procedures and that the court found that the lineup was fair and not unduly suggestive and leading. At any rate, as has already been stated, the district court's finding to the effect that the lineup was not so unnecessarily suggestive and conducive to an irreparably mistaken identification that Sanders was denied due process of law is not clearly erroneous. Because the defendant has not demonstrated prejudice, this assignment of error is without merit.

Jury Instruction on Lineup

In his second contention regarding ineffective assistance of counsel, Sanders argues that his counsel should have asked the court to instruct the jury that the eyewitness identification may have been tainted due to a suggestive lineup. If the eyewitness identification procedures were impermissibly suggestive, the identification is not admissible at the trial. The admissibility of relevant evidence is a matter within the trial court's discretion. *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). When the trial court determines that an eyewitness identification is admissible, it is proper for a court to reject a defendant's proposed instruction which would have placed the issue of admissibility before the jury. See, *State v. McGee*, 52 Wis. 2d

736, 190 N.W.2d 893 (1971); *People v. Gordon*, 44 Colo. App. 266, 615 P.2d 62 (1980).

Although the court determines the admissibility of eyewitness identification, it is the jury's function to determine the credibility of the eyewitness. Sanders' jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes involved. These instructions allowed the jury to properly evaluate the credibility of the witnesses' identification testimony. See, *McGee, supra*; *State v. Swink*, 620 S.W.2d 63 (Mo. App. 1981). Therefore, Sanders' attorney was not deficient in failing to request such a jury instruction.

Lesser-Included Offense Jury Instruction

Under this assignment of error, Sanders contends that first or second degree assault is a lesser-included offense of second degree murder. Since his attorney did not request a jury instruction on assault in the first and second degree, the defendant argues that he was denied effective assistance of counsel.

Sanders was charged with and convicted of *attempted* second degree murder, not second degree murder. The initial question, then, is whether either first or second degree assault is a lesser-included offense of *attempted* second degree murder. Because one may be guilty of attempted second degree murder without causing injury to the intended victim and because first degree assault cannot be committed without causing serious bodily injury, this court has held that first degree assault is not a lesser-included offense of attempted second degree murder. See *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). This rationale applies with equal force to second degree assault, which also requires bodily injury as an element of the offense. See Neb. Rev. Stat. § 28-309 (Reissue 1979). Because a lesser-included offense instruction on assault would have been improper in this case, defense counsel was not deficient in failing to request a first or second degree assault instruction.

Failure to Challenge Absence of Counsel at Lineup

Sanders contends that since his constitutional rights were violated when he was not allowed representation at his lineup, his trial counsel's failure to challenge the lineup on that basis

denied him the effective assistance of counsel. There being no right to counsel at a lineup until a complaint, indictment, or information is filed, *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986), *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985), and *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the defendant's trial counsel was not deficient in failing to contend that Sanders was denied effective assistance of counsel at the lineup.

Failure to Investigate and Call a Witness

Sanders' sister, Millicent Johnson, testified at trial that Sanders was at her home from 9:45 p.m. on the 24th until at least 4 o'clock the following morning. The defendant claims that Fletcher Young would have corroborated his sister's testimony, which the jury may have suspected due to the familial relationship. At the postconviction hearing, Young testified that Sanders was at Johnson's home when Young left the home at 10 or 11 p.m. on July 24. Because his attorney never contacted, investigated, or called Young as a witness, Sanders contends that he was denied effective assistance of counsel.

Young's testimony does not provide Sanders with an alibi. Young may have seen the defendant at his sister's house at 10 or 11 p.m., but the perpetrator did not appear at the Nifty Bar until 11 to 11:30 p.m. Moreover, Sanders overlooks Officer Farmer's testimony that the defendant confessed to the crimes involved.

In view of Young's flawed alibi testimony and Sanders' confession, there is no reasonable probability that if Sanders' counsel had investigated, interrogated, and called Young as a witness, the results of Sanders' trial would have been different.

Presentence Report Review

In his brief, Sanders claims that his counsel was ineffective because he failed to review the defendant's presentence report with him or on his behalf.

There is nothing in either the trial or postconviction records to indicate that Sanders' counsel failed to review the presentence report with Sanders or on his behalf. See *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990).

Even if Sanders' counsel did fail to review the presentence

report with the defendant or on his behalf, Sanders has not shown how he was prejudiced by this alleged deficiency in his counsel's performance. See *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). This assignment of error is meritless.

EXCESSIVENESS OF SENTENCE

In his last assigned error, Sanders claims that because his sentences were dictated by inordinate emotion, the sentences were excessive and must be reduced. A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). Attempted second degree murder is punishable by imprisonment for 1 to 50 years. See Neb. Rev. Stat. §§ 28-105 (Reissue 1979) and 28-201 and 28-304 (Reissue 1989). Robbery is also punishable by imprisonment for 1 to 50 years. See § 28-105 and Neb. Rev. Stat. § 28-324 (Reissue 1989). The penalty for use of a firearm in the commission of a felony includes imprisonment for 1 to 20 years; the sentence must run consecutively to the underlying felony sentence. See § 28-105 and Neb. Rev. Stat. § 28-1205 (Reissue 1989). Sanders was sentenced within these statutorily prescribed limits. Except for the mandatory consecutive firearm penalty, it is within the discretion of the trial court that sentences imposed for separate crimes be served consecutively rather than concurrently. *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978). Considering that it was pure chance that Robinson survived an execution-style shooting from close quarters into the back of his skull, Sanders might well have been charged with a capital crime under slightly different circumstances. At sentencing, the trial court found there were no mitigating circumstances in the defendant's favor.

Because of the enormity and brutality of the crimes and Sanders' prior felony record, it cannot be said that the sentencing court abused its discretion.

The defendant's convictions and sentences are affirmed.

AFFIRMED.

WILLIAM F. WURST AND CARLA M. WURST, APPELLANTS, V. BLUE RIVER BANK OF MCCOOL JUNCTION, NEBRASKA, APPELLEE.

454 N.W.2d 665

Filed May 4, 1990. No. 88-313.

1. **Contracts: Intent.** A court is not free to speculate about terms absent from a written contract. Where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.
2. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
3. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
4. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
5. **Contracts.** When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
6. **Contracts: Intent.** In attempting to ascertain the meaning of ambiguous terms of a contract, a court must determine the actual intent of the contracting parties, considering facts and circumstances which motivated each party to enter the contract, and the nature and subject matter of the contract.
7. _____: _____. When construction of a contractual provision is necessary, a court may consider the conduct of the parties, performing their contract, to ascertain the parties' intent regarding their contract.
8. **Contracts: Mental Competency: Proof.** One asserting lack of requisite mental capacity in relation to an instrument has the burden to prove such lack of mental capacity.
9. **Debtors and Creditors: Consideration: Time.** Extension of time to pay a mature and valid debt is sufficient consideration to support a promise to pay the debt at the later date.

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

Stephen Speicher for appellants.

Stephen H. Nelsen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In an action commenced in the district court for York County, William F. Wurst and Carla M. Wurst contended that the Blue River Bank of McCool Junction, Nebraska (Bank), now the First National Bank of York, had breached a loan agreement by not discharging all of Wursts' indebtedness to the Bank, which had received proceeds from the sale of Wursts' farmland. After a bench trial, the district court dismissed Wursts' action.

STANDARD OF REVIEW

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Alliance Nat. Bank v. State Surety Co., supra*; *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988).

Oddo v. Speedway Scaffold Co., 233 Neb. 1, 2, 443 N.W.2d 596, 598-99 (1989). See, also, *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985).

BACKGROUND FOR WURSTS' ACTION

Wursts owned a York County farm, which included 130 acres of irrigated farmland and a 6-acre site for Wursts' residence. Until 1978, William Wurst had farmed the land, but, on account of his severe back problem, was forced to give up farming. Wursts leased their farmland on a cash basis while William tried his hand at selling feed. However, chronic back problems compelled William to give up the feed business.

Over a span of approximately 11 years, Wursts and the Bank had engaged in a business relationship during which K.D. Patitz, manager of the Bank, became well acquainted with Wursts and handled their financial matters. In 1980, William

Wurst approached Patitz about obtaining a business loan to conduct a trucking operation. Wurst wanted to buy one truck, an Aerodyne cab-over model with a V-8 Caterpillar engine, for the proposed trucking business. Since William had no experience in trucking, Patitz advised against a loan for the truck purchase. When Wurst persisted and offered the Wursts' farmland and residence as collateral for a truck loan, he told Patitz that if the Bank would not lend them the money, they would secure financing elsewhere. As the result of Wurst's persuasion, Patitz authorized a bank loan to Wursts, which was sufficient for purchase of a Kenworth truck and commencement of a trucking business. Before making the loan, the amount of which is undisclosed by the record, Patitz warned Wurst that if the trucking business failed, they could lose everything. Sometime in 1981, after Wursts had granted the Bank a mortgage on their farmland and residence, Wursts purchased a Kenworth truck for $76,000 and began their trucking operation.

Although their trucking business became unprofitable, Wursts continually borrowed money from the Bank to meet their business and personal living expenses. In June 1981, Wursts listed the farmland for sale through United Farm Agency, which listing excluded Wursts' residence. Throughout the fall of 1981, Wursts continued to borrow from the Bank to make up for operating deficits from the trucking business. Around November or December 1981, when it became apparent that the 130 acres of farmland were not selling through United Farm Agency, Patitz suggested to Wursts that they take some action to reduce their bank debt, which by February 1982 exceeded $163,000. Of the Wursts' bank debt, $140,000 was attributable to the unprofitable trucking business. On January 13, 1982, Wursts executed a new mortgage for $168,000 to the Bank, covering their farmland and residence as security for the new mortgage. In February 1982, the Bank and Wursts entered into a loan agreement in which the parties acknowledged Wursts' current debt of $163,796.95 to the Bank at the date of February 8, 1982. Also in the loan agreement, the Bank agreed "to the renewal and extension of the present indebtedness, plus the new advance

[$4,203.05] as requested by the borrower." Pursuant to the loan agreement, Wursts signed two promissory notes, one for $150,000 and the other for $13,796.95, which were due on August 2, 1982. Wursts' indebtedness was secured by the January 1982 mortgage, a financing statement covering all agricultural products from Wursts' farm, a motor vehicle lien on the Kenworth truck, and the "[p]ersonal signatures of William F. Wurst and Carla M. Wurst." Additionally, the loan agreement provided:

> 5. Borrower hereby acknowledges that he has listed for sale his 130 acres of farm real estate located in the Southwest Quarter (SW1/4) of Section Twenty-four (24), Township Ten (10) North, Range Three (3), West of the 6th P.M., in York County, Nebraska.
>
> 6. It is hereby understood and agreed that if this real estate is not sold by private treaty by June 1, 1982, it will be listed for sale at public auction, with said auction to be held prior to July 1, 1982 and final settlement on the sale of real estate, on or before August 2, 1982.
>
> 7. It is further agreed that the proceeds from the sale of the York County real estate will be applied to and will pay the total indebtedness to The Blue River Bank, McCool Junction, Nebraska at the time of final settlement.

When the loan agreement was entered, both the Bank and Wursts believed that the agreement was a means for eventual liquidation of Wursts' assets and reduction of their indebtedness to the Bank. William Wurst told Patitz to do "whatever would be necessary" to pay off the Wurst debts.

From March 1982 through July of that year, the Bank continued to advance funds to Wursts for operating expenses in the trucking business and for their personal expenses. Although the loan agreement provided for a total advance of $4,203.05, by July the Bank had advanced $24,380 to Wursts, which brought Wursts' bank indebtedness to a sum of almost $200,000.

Throughout most of 1982, Carla Wurst suffered "atypical depression," which, according to her psychiatrist, Dr. Robert Osborne, was a "persistent, ongoing, severe depressive disorder," severe enough to impair her ability to make decisions

or solve problems. William Wurst displayed depression but was not treated by Dr. Osborne until December 1982. Dr. Osborne evaluated William Wurst in January 1983. Although Dr. Osborne had no information to indicate that William Wurst was incapable of understanding the nature and effect of his actions when the loan agreement was signed, Dr. Osborne believed that the depression suffered by William Wurst may have affected Wurst's ability to make decisions and rendered Wurst apathetic toward the consequences of the loan agreement.

In July 1982, Wursts' farmland was sold at public auction, which resulted in $170,000 applied to the Wurst indebtedness. Since the proceeds from the farmland sale were insufficient to satisfy Wursts' entire indebtedness reflected on the Bank's records, Patitz suggested that Wursts sell their home or their Kenworth truck. When the promissory notes which Wursts had given pursuant to the loan agreement with the Bank were overdue, Wursts, on September 3, 1982, signed two "extension notes" in the total of $33,796.95. Both notes were due on November 15, 1982. Wursts tried to sell the Kenworth on their own, but their efforts failed. In November 1982, Patitz arranged for the Kenworth to be sold to a local truck dealer. Wursts consented to the sale of their truck, which was sold for $38,750. From the proceeds of the truck sale, $35,056.24 was applied to the two extension promissory notes which Wursts had signed earlier in September 1982. The difference between the truck sale price of $38,750 and the balance of Wursts' bank indebtedness of $35,056.24, namely, the sum of $3,693.76, was delivered to Wursts. As a consequence of the payment from the proceeds of the truck sale, the Bank returned to Wursts all their promissory notes and released all security and collateral pertaining to the Wurst debt.

Wursts had never indicated a lack of understanding concerning their transactions with the Bank, never objected to the various sales or the amounts realized from the sales of their property, and did not object to Patitz' applying any sale proceeds on their indebtedness to the Bank. The Bank was unaware of an alleged problem with the Wurst account until April 1983, when an attorney representing Wursts contacted the

Bank. In April 1985, Wursts filed their damages action against the Bank and claimed that the Bank had failed to carry out paragraph 7 of the loan agreement, which, according to Wursts, required the Bank to release them from all liability for any indebtedness existing after the sale of their farmland and payment of the land sale proceeds to the Bank. Wursts also claimed that there was no consideration for the two "extension notes" executed in September 1982. Wursts further alleged that the Bank forced them to sell the Kenworth truck for less than its fair market value and required them to turn over the proceeds from the truck sale to the Bank when Wursts owed nothing to the Bank. Thus, Wursts sought to recover the amounts paid to the Bank from the sale of the truck, plus the difference between the truck's fair market value and its sale price, a difference of $12,000. Wursts contended that paragraph 7 of the loan agreement, containing the language "the proceeds from the sale of the York County real estate will be applied to and will pay the total indebtedness to [the Bank]," meant that any money received by the Bank from the sale of Wursts' farmland would satisfy their entire indebtedness to the Bank, regardless of the actual amount of the debt at the time of the sale or the amount realized from sale of the farmland. In its answer, inter alia, the Bank generally denied the cause of action alleged by Wursts.

The trial court found that the evidence failed to substantiate Wursts' claim that, by virtue of paragraph 7 of the loan agreement, the sale of Wursts' farmland and the Bank's receipt of proceeds from that sale extinguished all liability for Wursts' indebtedness. In its conclusions, the court stated: "The Loan Agreement, mortgages and subsequent loans were all part of a single continuning [sic] transaction which is evidenced by the [parties'] performance. There was no agreement that the sale of real estate excluding the residence would pay total indebtedness." The court then concluded that Wursts had failed to prove a cause of action against the Bank for a breach of contract and dismissed Wursts' action.

Throughout several assignments of error, Wursts contend, in substance, that the district court erred by disregarding the effect of paragraph 7 of the loan agreement, which stated: "[T]he proceeds from the sale of the York County real estate will be

applied to and will pay the total indebtedness to The Blue River Bank, McCool Junction, Nebraska at the time of final settlement." Wursts argue that the phrase "will pay the total indebtedness" means that their payment to the Bank from the proceeds of the farmland sale operated to discharge their entire indebtedness to the Bank. Also, Wursts assert that each of them lacked the requisite mental capacity to comprehend their promissory notes executed in September 1982 and, further, contend that their extension promissory notes, executed in September 1982, are unsupported by consideration.

AMBIGUITY IN LOAN AGREEMENT

A court is not free to speculate about terms absent from a written contract. *Craig v. Hastings State Bank*, 221 Neb. 746, 380 N.W.2d 618 (1986). "Where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain." *Id.* at 750, 380 N.W.2d at 621.

"Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989). See, also, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987).

"Whether a document is ambiguous is a question of law initially determined by a trial court." *Knox v. Cook, supra* at 391, 446 N.W.2d at 4. See, also, *Dammann v. Litty, supra*; *First Nat. Bank in Mitchell v. Kurtz*, 232 Neb. 254, 440 N.W.2d 432 (1989); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Dammann v. Litty, supra*; *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

We find, as a matter of law, that there is ambiguity in the language of paragraph 7 of the Wurst-Bank loan agreement, namely, "the proceeds from the sale of the [farmland] will be

applied to and will pay the total indebtedness." On one hand, the language in question is susceptible to the reasonable interpretation that the Bank's receipt of proceeds from the sale of Wursts' land satisfied and discharged the entire Wurst indebtedness to the Bank. However, the indicated language in the loan agreement may also be reasonably interpreted to mean that the Bank's receipt of the sale proceeds constituted a payment on Wursts' debt and resulted in a credit on any unpaid balance of Wursts' indebtedness existing when the Bank received the sale proceeds.

"When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder." *Dammann v. Litty, supra* at 671, 452 N.W.2d at 527. See, also, *First Nat. Bank in Mitchell v. Kurtz, supra*; *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988).

"In attempting to ascertain the meaning of ambiguous terms of a contract, a court must determine the actual intent of the contracting parties, considering facts and circumstances which motivated each party to enter the contract, and the nature and subject matter of the contract." *Frenzen v. Taylor*, 232 Neb. 41, 48, 439 N.W.2d 473, 478 (1989). See, also, *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988).

When construction of a contractual provision is necessary, a court may consider the conduct of the parties, performing their contract, to ascertain the parties' intent regarding their contract. As this court expressed in *Municipal Energy Agency of Neb. v. City of Cambridge*, 230 Neb. 61, 65-66, 430 N.W.2d 44, 47 (1988):

> An aid in interpreting contracts is the course of performance of the parties. In *Smith v. Daub*, 219 Neb. 698, 703, 365 N.W.2d 816, 820 (1985), we held that "in attempting to construe the meaning of a contract . . . the interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract, and ordinarily such construction of the contract should be

enforced." See, also, *Lortscher v. Winchell*, 178 Neb. 302, 133 N.W.2d 448 (1965).

In *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 524-25, 227 N.W.2d 864, 868-69 (1975), this court held: "In the construction of questioned provisions in a contract, the rule has long been established in this jurisdiction that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced. . . . This is a rule of justice and equity, and we apply it herein. . . ."

See, also, *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988); *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985); *Lauritzen v. Davis, supra*; *DeFilipps v. Skinner*, 211 Neb. 801, 320 N.W.2d 737 (1982).

In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract.

Philp v. First Nat. Bank & Trust Co., 212 Neb. 791, 797, 326 N.W.2d 48, 52 (1982). See, also, *Lone Oak Farm Corp. v. Riverside Fertilizer, supra*.

The district court made the factual determination that there was no agreement that the Bank's receipt of proceeds from the sale of Wursts' farmland constituted payment of Wursts' entire indebtedness to the Bank. Embodied in the foregoing conclusion is the district court's determination regarding "the actual intent of the contracting parties, considering facts and circumstances which motivated each party to enter the contract, and the nature and subject matter of the contract." See *Frenzen v. Taylor, supra* at 48, 439 N.W.2d at 478. In determining the meaning of paragraph 7 of the loan agreement, the district court undoubtedly considered the parties' interpretative conduct in relation to performance of the loan agreement. When the proceeds of the farmland sale were

insufficient to satisfy the indebtedness reflected on the Bank's books, Wursts signed two promissory notes for the balance of the indebtedness—conduct which was inconsistent with the later assertion that proceeds from the farmland sale extinguished all their indebtedness to the Bank. The district court most likely concluded that if Wursts' indebtedness were to be extinguished by the farmland sale and the sale proceeds paid to the Bank, Wursts would not have signed the promissory notes in September 1982. Thus, Wursts' extension promissory notes in September 1982, reflecting an unpaid debt of $33,796.95 to the Bank, presented a factual inconsistency concerning Wursts' assertion that the parties intended to extinguish Wursts' entire indebtedness as the result of the Bank's receipt of proceeds from the farmland sale in the preceding July. Moreover, Wursts' allowing the Bank to receive the proceeds from the truck sale arranged by the Bank and retain $35,056.24 out of the sale proceeds, without objection until almost 6 months after the sale and the disposition of sale proceeds, undermines Wursts' position that no indebtedness existed after the farmland sale. Given the ambiguity in the loan agreement, the district court's factual determination regarding the intended meaning of the loan agreement is not clearly erroneous.

MENTAL CAPACITY

Wursts assert that the district court erred in its finding that each of the Wursts had the requisite mental capacity to execute the extension notes of September 1982.

> [F]or want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.

Dunbier v. Rafert, 170 Neb. 570, 589, 103 N.W.2d 814, 827 (1960). Therefore, one asserting lack of requisite mental capacity in relation to an instrument has the burden to prove such lack of mental capacity.

As a factual determination, the district court concluded that Wursts failed to establish any deficiency in their mental capacity regarding the extension notes, a conclusion which is not clearly erroneous.

CONSIDERATION

Wursts' contention that their September 1982 promissory notes lacked consideration is without merit. Extension of time to pay a mature and valid debt is sufficient consideration to support a promise to pay the debt at the later date. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893 (Tex. App. 1989); *Hammel v. Ziegler Financing Corp.*, 113 Wis. 2d 73, 334 N.W.2d 913 (1983). See, also, *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984) (contract consideration is sufficient if there is any detriment to the promisee or benefit to the promisor). As a result of the undisputed facts, we conclude, as a matter of law, that adequate consideration supported Wursts' extension notes of September 1982. Hence, the district court's decision concerning consideration is correct.

We are unable to conclude that any finding by the district court is clearly erroneous. For that reason, the district court's judgment is affirmed.

AFFIRMED.

HIWAY 20 TERMINAL, INC., A NEBRASKA CORPORATION, APPELLEE, V. TRI-COUNTY AGRI-SUPPLY, INC., A NEBRASKA CORPORATION, APPELLEE, CORNHUSKER CASUALTY COMPANY, GARNISHEE-APPELLANT.

HIWAY 20 TERMINAL, INC., A NEBRASKA CORPORATION, APPELLEE, V. ABILD, INC., DOING BUSINESS AS ATLANTIC STEEL ERECTORS, AN IOWA CORPORATION, APPELLEE, MARYLAND CASUALTY COMPANY, GARNISHEE-APPELLANT.

454 N.W.2d 671

Filed May 4, 1990. Nos. 88-333, 88-855.

1. **Appeal and Error.** Assignments of error not discussed are not considered by the Supreme Court.

2. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding, and the factual findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
3. **Trial: Presumptions: Waiver.** Generally, a motion which is never called to the attention of the court is presumed to have been waived or abandoned by the moving party, and, where no ruling appears to have been made on a motion, the presumption is, unless it otherwise appears, that the motion was waived or abandoned.
4. **Trial: Jury Instructions: Verdicts.** At an instruction conference parties should object to any errors of commission or omission in the verdict forms to be submitted to the jury.

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

Donald R. Witt, of Baylor, Evnen, Curtiss, Grimit & Witt, for garnishee-appellant Cornhusker Casualty.

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for garnishee-appellant Maryland Casualty.

Peter T. Hoffman and Kim M. Robak, of Rembolt Ludtke Parker & Berger, for appellee Hiway 20.

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

GRANT, J.

This appeal stems from judgments entered in an earlier case in the Brown County District Court in favor of Hiway 20 Terminal, Inc. (Hiway 20), plaintiff-appellee herein, on general jury verdicts against the defendants, Abild, Inc., doing business as Atlantic Steel Erectors (Abild), and Tri-County Agri-Supply, Inc. (Tri-County), in the amount of $325,653.10. Identical judgments were entered in separate cases which had been consolidated for trial. The judgments were affirmed on appeal in *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989).

While the appeals were pending in the Supreme Court, Hiway 20 initiated garnishment proceedings to collect the judgments. In their answers to interrogatories in those proceedings, Maryland Casualty Company (Maryland) acknowledged that it had an insurance policy insuring Abild and Cornhusker Casualty Company (Cornhusker) similarly

acknowledged that it had a policy insuring Tri-County, but the insurers denied that the policies included coverage for all damages awarded at trial. Maryland and Cornhusker admit liability for some of the damages awarded, but contend that the judgments also include damages not covered by the policies of insurance issued to Abild and Tri-County.

In the garnishment proceedings, following a hearing on an application for determination of Maryland's and Cornhusker's liability, the court found Maryland and Cornhusker each indebted to Hiway 20 for the full amount of the judgments. Maryland and Cornhusker timely appealed. The cases, although briefed separately, were consolidated for argument and will be considered in one opinion.

Generally, Cornhusker and Maryland assign error to the district court's determination that they, as garnishees, are liable for the entire amount of damages awarded Hiway 20. More specifically, they contend that the court erred in (1) failing to grant Tri-County's motion for a special verdict at trial and (2) denying a motion to go behind the general verdicts in order to determine the scope of insurance coverage.

Cornhusker additionally assigns error to, but does not address, the court's action in overruling a motion to dismiss Hiway 20's amended application for determination of liability and the court's calculation of interest on the judgment. Assignments of error not discussed are not considered by the Supreme Court. *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989).

Essentially, appellants contend in their two assignments of error that a motion for a special verdict was made at the trial of the underlying case. Appellants contend that they followed the suggestion in *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979), and requested special verdict forms and that because their motions were improperly overruled, the cases should be remanded for an apportionment hearing to determine the portion of the damages award which they, as garnishees, should be required to pay under the insurance policies. In *Herrera, supra*, Herrera's insurer was a party for a time to the underlying Herrera-Jefferson case, but

withdrew its appearance and ultimately furnished a defense to defendant Jefferson, an uninsured motorist, in the suit brought by Herrera. Herrera obtained a judgment against Jefferson and then brought a declaratory judgment action against his insurer to collect on the judgment based on Herrera's uninsured motorist coverage. Although a judgment had been entered, the insurer nevertheless asked the court to apportion the damages for the reason that the judgment included items of damage not covered by the uninsured motorist clause. On appeal, we stated in *Herrera, supra* at 483, 279 N.W.2d at 144:

> Although evidence of property damage was presented to the jury, the verdict did not delineate what amount, if any, was for the plaintiff's property damage and what amount was for his personal injuries. The jury may or may not have included an amount in its verdict for the plaintiff's property damage. Many types of damages were claimed by plaintiff, and we have no way of knowing what elements were considered, or the basis on which the jury determined the amount of damages finally awarded. Their reasons inhere in their verdict, and may not be inquired into. Defendant is asking this court to grant it the opportunity to relitigate and recompute the amount of its insured's bodily injuries by showing that property damage may have been included in the jury's verdict in the original suit against the uninsured motorist. That result could have been reached by means of a request for a special or itemized verdict; and if deemed material as a defense should have been done in the original trial, and not by extended litigation.

While it is uncontroverted that Tri-County filed a "Motion For Special Verdict Forms" with the clerk of the court, Hiway 20 contends it was not adequate because it was not brought before the court for hearing and determination. Maryland and Cornhusker allege that the motion was filed and later overruled, either by general order or by implication, in the instruction conference at the underlying trial. Abild did not file a motion for a special verdict.

The motion for special verdict forms was filed by Tri-County on March 2, 1987, at 2 p.m. A conference was held, with the

jury not present, by the court with counsel for all parties present beginning at 1:16 p.m. on March 2. The record indicates that, at that time, a jury had already been selected, impaneled, and sworn. The conference apparently concerned the appropriateness of evidence and instructions on the damages issue as to whether contractual damages included certain consequential damages to which Hiway 20 claimed it was entitled, in any event, under negligence theories. At this conference, counsel representing Tri-County stated:

> Well, again, that could be dealt with in the instructions and with the verdict forms. We have filed proposed verdict forms that separate out the damages, at least for our side, and I imagine that Abild might want to do the same thing. There would be a special verdict form wherein the jury would decide what the specific amounts to be associated with the various elements of damages would be that the plaintiff is alleging.

The court responded, "Well, that is a possibility." Hiway 20's counsel then argued that the decision as to that question was not appropriate at that particular time and directed the court's attention to *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). The court concluded the conference by stating, "Okay. I will read that."

With that determination of fact and conclusion of law, we agree. We have stated that garnishment is a legal proceeding and that the factual findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Otoe Cty. Nat. Bank v. Froelich*, 234 Neb. 1, 448 N.W.2d 917 (1989). The trial court in these garnishment proceedings found that there was "no evidence whatsoever that this Motion [for special verdict forms] or any other request for a special verdict was brought to the attention of the [trial] court," and determined that "[h]aving failed to raise any objections properly at the time of trial, the defendants cannot now be permitted to raise them in this [garnishment] proceeding."

Tri-County's motion for the special verdict forms was never specifically noticed for hearing before the trial court. The Rules of the District Court of the Fifteenth Judicial District of

Nebraska (December 1983), the judicial district in which the underlying trial was held, provide, in part:

> (2) Hearing Day. All motions shall be heard on the motion day following the expiration of ten days after filing. Motion days shall be each regular session date of the applicable docket as reflected by the term order of the Court and term cards issued by the Court. With the consent of the Court, motions may be specially noticed for hearing on other days.

It is clear that the motion was never set for special hearing and was never specifically addressed by the trial court. In the instruction conference held after the evidence had been adduced, the trial court's attention was not directed to Tri-County's motion, nor did counsel for Abild and Tri-County object to the verdict forms which were submitted to the jury in connection with instruction No. 22.

> Generally a motion which is never called to the attention of the court is presumed to have been waived or abandoned by the moving party, and, where no ruling appears to have been made on a motion, the presumption is, unless it otherwise appears, that the motion was waived or abandoned.

60 C.J.S. *Motions & Orders* § 42 at 63 (1969). The party filing a motion has the responsibility to bring the motion to the trial court's attention for resolution. *Gordon v. Bauer*, 177 Ill. App. 3d 1073, 532 N.E.2d 855 (1988). Since the trial court was never given an opportunity to nor requested to rule on that motion, appellants in this case may not successfully base an appeal on the judge's failure to act. In any event, we find the garnishment hearing judge properly found that no request was made for hearing on the motion.

Counsel for Abild and Tri-County never objected to the verdict forms which were submitted to the jury in connection with instruction No. 22. "Objections to the forms of verdict should be made before or at the time the verdict is returned." *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 532, 198 N.W.2d 57, 64 (1972).

> It is good practice for the judge to prepare forms of verdict which will meet all requirements of the case, and,

> in an abundance of caution, submit the same to the counsel in the case, and, if they do not agree on the forms, counsel should make his objection at that time, before the instructions are read to the jury. If no objection is made by counsel at that time, it is usually considered that objections are waived.

McGrew Machine Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 99, 245 N.W. 263, 265 (1932). Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted. With respect to instructions, we stated in *Haumont v. Alexander*, 190 Neb. 637, 641, 211 N.W.2d 119, 122 (1973):

> The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any omission or misstatement in the instructions given by the court. In most instances the trial court covers the substance of proper submitted instructions in those given by it. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

Similarly, at an instruction conference parties should object to any errors of commission or omission in the verdict forms to be submitted to the jury. The assignments of error challenging the court's failure to submit special verdict forms are without merit.

Maryland and Cornhusker nevertheless contend that the jury verdict can be dissected and the damages for which they are liable determined. They contend that the consequential damages can be determined by subtracting the amounts requested for diminution in value and temporary repairs from the total judgment. However, what the appellants are asking us to do is to speculate or to assume that the jury awarded the full amounts requested for diminution in value and temporary repairs. "We, of course, do not know what motivated the jury to bring back a verdict in the amount they did, as their discussions and reasons inhere in the verdict itself and may not be inquired into." *Palma v. Barta*, 203 Neb. 459, 470, 279

N.W.2d 130, 137 (1979). See, also, Neb. Rev. Stat. § 27-606(2) (Reissue 1989).

In the light of the basis for our decision, there is no need for this court, at this time, to enter into the thicket surrounding the problems facing defense counsel when the duties of such counsel become blurred between the obligation of counsel to the insurance company involved and the obligation of counsel to the insurance company's insured.

The elements the jury considered in determining damages inhere in the verdict. Under the record in this case, Maryland and Cornhusker are liable for the entire judgment entered against their respective insureds. The judgments are affirmed.

AFFIRMED.

IN RE ESTATE OF RICHARD J. MCFAYDEN, DECEASED. RICHARD E. MCFAYDEN AND MARY S. MCFAYDEN, COPERSONAL REPRESENTATIVES OF THE ESTATE OF RICHARD J. MCFAYDEN, DECEASED, APPELLEES AND CROSS-APPELLANTS, V. BETTY JANE SAMPLE, APPELLANT AND CROSS-APPELLEE.

454 N.W.2d 676

Filed May 4, 1990. No. 88-351.

1. **Decedents' Estates: Appeal and Error.** The Supreme Court reviews probate cases for error appearing on the record.
2. **Trial: Statutes.** Statutory interpretation presents a question of law.
3. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent of the conclusion reached by the court whose judgment is subject to review.
4. **Decedents' Estates: Wills: Gifts: Value of Goods.** Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift, or the testator declares in a writing contemporaneous with the gift that it is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in a writing contemporaneous with the gift that it is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first. Neb. Rev. Stat. § 30-2350 (Reissue 1989).

5. **Wills: Words and Phrases.** "Devise," when used as a noun, means a testamentary disposition of real or personal property.
6. **Gifts: Intent.** When a person has donated property as a gift inter vivos, he or she cannot subsequently, by acts indicating a subsequent change of intention, affect the gift thus completed.
7. _____: _____. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.
8. **Gifts: Wills.** After a gift has been delivered, the only way for a donor to set it off against a devise would be by a codicil or by another document testamentary in nature.
9. **Loans: Words and Phrases.** A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest.
10. **Gifts: Intent.** A donor may express in the gift that the gift is an advancement.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. MCGOWAN, Judge. Judgment of District Court affirmed in part, and in part reversed, and cause remanded with directions.

James T. Gleason, of Stalnaker, Becker, Buresh & Gleason, P.C., for appellant.

Charles F. Gotch and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

FAHRNBRUCH, J.

The issue in this appeal is whether a testamentary cash devise to a longtime friend should be reduced by the value of the decedent's inter vivos gifts to that friend.

We hold there should be no reduction in the testamentary cash devise and remand the cause to the district court with instructions.

The operative facts are not in dispute, but only the legal effect of writings by the donor, Richard J. McFayden. For Christmas of 1983, McFayden, a widower, gave a $780.70 fox fur stole to his longtime friend, Betty Jane Sample, a widow. In February 1984, McFayden was diagnosed as having terminal cancer. On the day in February that he was dismissed from the

hospital, McFayden gave Sample a gold cigarette case having an approximate value of $1,500.

On April 3, McFayden executed his last will and testament. In it, he made a $75,000 devise to Sample. After making other specific devises totaling $18,000, McFayden left the remainder of his nearly $3 million estate to his two adult children to share equally. There is nothing in McFayden's will to indicate that any past or future inter vivos gifts to Sample should be considered advancements against her $75,000 devise.

On April 10, a $5,000 check written on the trust account of McFayden's lawyer was deposited in Sample's bank account. On May 16, McFayden gave Sample a $36,859 diamond ring. There was no notation on the check or any contemporaneous written declaration or any writing accompanying the check or the diamond ring at the time of delivery characterizing either gift as an advancement against Sample's bequest. McFayden's gifts to Sample from Christmas of 1983 to and including May 16, 1984, totaled $44,139.70. McFayden's gift of the diamond ring to Sample created substantial friction between Sample and McFayden's two adult children on the day Sample received it.

On May 17, with his lawyer as a witness, McFayden executed a document entitled "Statement of Purpose and Intention." In this instrument, McFayden acknowledged that he had made gifts to Sample because she was a close friend of his and his children's; that the gifts were reasonable and appropriate and were given based on his independent judgment with no undue influence; that any *future gifts* would be made on the same basis; and that the document was made in order to clarify his motives and the circumstances surrounding the gifts. There was no mention of loans in McFayden's statement of purpose and intention.

Thereafter, McFayden issued checks in the following amounts to Sample: $4,500 on May 21, 1984, $16,500 on May 31, and $5,000 on June 12. Sample also received $2,000 in silver dollars from McFayden on May 30. These gifts totaled $28,000. At no time between May 21 and May 31, when each of the gifts was delivered, was there any declaration in writing on the checks or otherwise by McFayden characterizing any of the gifts as advancements against McFayden's $75,000 devise to

Sample.

Almost a month after the gift of silver dollars, McFayden, on June 27, again with his lawyer as a witness, executed a document termed "Cash Distribution Statement." In the opening paragraph, he provided that "[s]ome or all" of the distributions to Sample, both those already made and any made at the time or thereafter, were intended to be present or future gifts in the following fashion: The first $10,000 of these distributions made in any calendar year were to be completed gifts to Sample at the time of distribution. The statement further provided that the distributions in excess of $10,000 were to be interest-free loans, and any amounts forgiven were to be considered completed gifts at the time(s) of forgiveness. Any amounts not repaid by Sample or forgiven during McFayden's lifetime were to be considered forgiven at the time of his death. Importantly for purposes of this case, McFayden declared that "[a]ll of the distributions described here which I may forgive during my lifetime or which may be forgiven at the time of my death as specified here shall be treated as advances to Betty [Sample] of a portion or all of this $75,000 specific bequest contained in my will." Finally, it was McFayden's stated intention that Sample ultimately receive from him and/or his estate (a) the sum of $75,000 or (b) the total amount of these distributions, whichever of (a) or (b) was the larger.

McFayden gave Sample a check for $7,500 on June 30, 1984. In his check register was the notation that the check was for "services rendered." The last check given to Sample by McFayden was in the amount of $4,500 and was dated July 12, 1984. These two gifts totaled $12,000. McFayden died on July 30, 1984, at the age of 58 years. From Christmas of 1983 until his death, McFayden had given gifts to Sample totaling $84,139.70.

In probate proceedings before the Douglas County Court, McFayden's children claimed that Sample's $75,000 devise was satisfied by McFayden during his lifetime through the gifts he made to Sample.

The county court found that none of the gifts to Sample on or before May 17, 1984, constituted advancements under Neb. Rev. Stat. § 30-2350 (Reissue 1989). The county court further

determined that the gifts McFayden gave to Sample on May 21, May 31, June 12, June 30, and July 12, 1984, totaling $38,000, were in partial satisfaction of Sample's devise. No determination was made as to whether the May 30, 1984, gift of silver dollars having a value of $2,000 was in partial satisfaction of the devise. The county court held that Sample was entitled to $37,000 from McFayden's estate. The district court affirmed the decision of the county court. Sample timely appealed to this court, and the McFayden children, as copersonal representatives of McFayden's estate, cross-appealed.

Sample's assignments of error may be summarized as claiming that the district court for Douglas County erred in affirming the county court's finding that the gifts made by McFayden to Sample after May 17, 1984, should apply on satisfaction of the devise to Sample in McFayden's will. In their cross-appeal, the copersonal representatives (McFayden's children) allege that the district court incorrectly determined that none of the distributions made prior to May 17, 1984, and one made on May 30, 1984, were in satisfaction of Sample's devise. The copersonal representatives do not allege that the gifts to Sample were the result of fraud, undue influence, duress, or lack of capacity on the part of McFayden, nor does the record support any such theories.

Before addressing the parties' assignments of error, a brief overview of the law is in order.

The Supreme Court reviews probate cases for error appearing on the record. *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989); *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989). Statutory interpretation presents a question of law. See, *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988).

Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent of the conclusion reached by the court whose judgment is subject to review. *In re Estate of Peterson*, 230 Neb. 744, 433 N.W.2d 500 (1988).

Between 1866 and January 1, 1977, when Neb. Rev. Stat. § 30-2310 (Reissue 1989) became operative, Nebraska's statutory law provided:

> Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement *to any child or other lineal descendant*, shall be considered as a part of the estate of the intestate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the estate of the intestate.

(Emphasis supplied.) Neb. Rev. Stat. § 30-112 (Reissue 1964).

Until 1939, the doctrine of advancements in Nebraska applied only to intestate estates. See, *In re Estate of Wantz*, 137 Neb. 307, 289 N.W. 363 (1939); *Stanton v. Stanton*, 134 Neb. 660, 279 N.W. 336 (1938). However, in *Wantz, supra*, this court held that the doctrine of advancements was also applicable to wills. The court said that when the testator's intention was clear that sums advanced should be deducted from bequests made, the testator's intention must control.

The *Wantz* court also held that

> [a testator's] intention to adeem [satisfy] a legacy may be shown by parol evidence, including that of the testator's conduct subsequent to the execution of the will, and entries made in an account book and other memorandum [sic] properly identified, showing the amount of such payments, are admissible as proof of such satisfaction or ademption. When the evidence shows such an intention on the part of the testator to adeem or satisfy a legacy subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it.

Wantz, supra at 311, 289 N.W. at 366.

The holding in *Wantz* that parol evidence could be used to prove an advancement overlooked this court's prior holdings. In *Boden v. Mier*, 71 Neb. 191, 98 N.W. 701 (1904), and *Stark v. Stark*, 128 Neb. 524, 259 N.W. 523 (1935), we held that parol evidence was *inadmissible* to prove an advancement. *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946), followed the parol evidence rule in *Wantz, supra*. When Nebraska's version of the Uniform Probate Code became operative on January 1, 1977, the evidentiary rule regarding parol proof of advancements or ademptions espoused in *Wantz, supra*, and *Austin, supra*,

became obsolete. The statute revitalized the rule in *Boden, supra*, and *Stark, supra*, that parol evidence must be excluded in determining whether a gift constitutes an advancement. Section 30-2350 now provides:

> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part *only if the will provides for deduction of the lifetime gift, or the testator declares in a writing contemporaneous with the gift that it is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in a writing contemporaneous with the gift that it is in satisfaction.* For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

(Emphasis supplied.) See Nebraska comment to § 30-2350. (For source of Nebraska comments, see prologue to the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1989).) See § 30-2310 in regard to intestate estates.

"Devise," when used as a noun, means a testamentary disposition of real or personal property. § 30-2209.

From a reading of the statute, it is readily apparent that § 30-2350 no longer permits the use of parol evidence to prove that a testator or testatrix intended an inter vivos gift to be an advancement toward, or ademptive of, a devise in the testator's or testatrix's will. Section 30-2350 limits the proof of an ademptive gift to (1) a recitation in the will that the value of the lifetime gift is to be deducted from the beneficiary's devise; or (2) the testator's *writing contemporaneous with the gift* that its value is to be deducted from the devise or is in satisfaction of the devise; or (3) the devisee's acknowledgment in a writing *contemporaneous with the gift* that it is in whole or in part satisfaction of the devise.

No one has contended that there was a recitation in McFayden's will, nor was there a codicil stating, that his inter vivos gifts to Sample were to be considered as advancements against McFayden's devise to her. The cash distribution statement cannot be considered as a testamentary disposition or

a codicil to McFayden's last will and testament because it was not executed as required by §§ 30-2327 or 30-2328. Neither is there any contention that Sample did, in writing, contemporaneous with receiving any of McFayden's gifts, acknowledge that any gift was in whole or in part in satisfaction of the devise to her in McFayden's will. Nothing in his statement of purpose and intention even remotely suggests that any gifts McFayden made to Sample before May 17, 1984, or the gifts he intended to make in the future would be in partial or full satisfaction of the bequest to Sample in McFayden's will.

We first determine whether the distributions made prior to the execution of the cash distribution statement constituted advances on Sample's devise. When a person has donated property as a gift inter vivos, he or she cannot subsequently, by acts indicating a subsequent change of intention, affect the gift thus completed. *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980). See, also, *Elliott v. Western Coal Co.*, 243 Ill. 614, 90 N.E. 1104 (1910) (holding that an absolute gift cannot thereafter be changed into an advance of an heir's share of an intestate estate). " ' "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee." . . .' " *Guardian State Bank & Trust Co. v. Jacobson*, 220 Neb. 235, 239, 369 N.W.2d 80, 83 (1985) (quoting *Saathoff, supra*). It would appear under *Elliott, supra*, that after a gift has been delivered, the only way for a donor to set it off against a devise would be by a codicil or by another document testamentary in nature. The record is uncontradicted that at the times the distributions were made prior to June 27, 1984, there was donative intent, delivery, and acceptance of the gifts. Because the effect of a gift inter vivos cannot be changed by a subsequent act, as held in *Saathoff, supra*, the distributions made prior to June 27, 1984, were not in satisfaction of Sample's devise.

The remaining issue is whether all or a portion of the distributions made by McFayden to Sample after June 27 adeemed by satisfaction part of Sample's devise. McFayden gave Sample a $7,500 check on June 30 and a $4,500 check on July 12.

Since in the cash distribution statement McFayden characterized some of the distributions to Sample as loans, it must first be determined whether the checks subsequent to June 27 were loans or gifts. " ' "A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, *upon an agreement*, express or implied, to repay the sum loaned, with or without interest." . . .' " (Emphasis supplied.) *Cartney v. Olson*, 154 Neb. 546, 549, 48 N.W.2d 653, 655 (1951). There is a recitation in his cash distribution statement that McFayden loaned money to Sample. However, there is no evidence that Sample ever agreed to repay any of the monetary distributions or other personal property she received from McFayden. In his May 17, 1984, statement of purpose and intention, McFayden characterized not only past but also future distributions to Sample as gifts. The parties, in their stipulation filed in county court, refer to the distributions of cash and noncash property as being "gifts."

Since parol evidence is inadmissible to determine whether a gift is an advancement, and since there is nothing in McFayden's will concerning advancements, we must look only to the documents the decedent executed on May 17 and June 27, 1984, the checks issued on June 30 and July 12, and a check register involving the two checks in our determination of whether those checks were advancements against the devise to Sample.

A donor may express *in* the gift that the gift is an advancement. It is noted that McFayden made no notation to that effect on the $7,500 check of June 30 nor on the $4,500 check of July 12, although there was a line on each check which could have been utilized to place the words "advancement on payee's devise." The check register contains notations, presumably made at the time the checks were written, evidencing the purposes of a number of the checks. There is no notation in the register reflecting that either the June 30 or July 12 check to Sample was an advancement on her devise. To the contrary, the check register, for whatever reason not explained in the evidence, carries the notation that the $7,500 June 30 check was for services rendered. That check register notation negates any contention that the June 30 check was an

advancement against Sample's devise. Clearly, the evidence is insufficient as a matter of law to prove that McFayden intended the June 30 check to be an advancement on Sample's devise.

We also conclude that the gift of $4,500 on July 12 was not an advancement on Sample's devise. Clearly, the purpose behind the contemporaneous writing requirement is to disallow parol evidence. In this case, the $4,500 check was given more than 2 weeks after the execution of the cash distribution statement. There is nothing in writing to show the testator's intent at the time the July 12 check was delivered. Thus, parol evidence would be necessary to determine McFayden's state of mind on July 12. This is the very evidence the Legislature sought to eliminate. Based on the admissible competent evidence presented in this case, it is concluded that the McFayden children have failed to carry by competent and relevant evidence their burden of proof as the parties claiming that the July 12 check was an advancement. See *Travis v. Travis*, 189 Neb. 242, 202 N.W.2d 185 (1972).

The result we reach in regard to all the gifts McFayden made to Sample is also dictated by McFayden's failure to declare *in writing contemporaneous with each gift* that it was to be deducted from Sample's devise, as required by § 30-2350. By providing that in addition to a clause in the testator's will or, contemporaneous with a gift, a written acknowledgement by the devisee, the only admissible proof of an advancement is the testator's declaration in writing contemporaneous with the gift, § 30-2350 eliminates as proof a written blanket declaration that future inter vivos gifts to a devisee are to be considered advancements. Such an interpretation prevents confusion as to whether a future birthday or Christmas gift or the cashing of a check for a testator by a devisee constitutes an advancement on a devise. It also eliminates parol evidence in regard to advancements, which is the very essence of § 30-2350.

We have reviewed the cross-appeal of the appellees, in which they claim the trial court erred in determining that (1) none of the gifts prior to May 17, 1984, adeem or satisfy the devise to Sample and (2) certain distributions occurring after May 17, 1984, were not in satisfaction of the devise to Sample. In view of our holdings in this opinion, we find appellees' assignments of

error are without merit.

The factual findings of the Douglas County Court were clearly wrong as a matter of law, and the district court's judgment is similarly clearly wrong.

None of the gifts McFayden made to Sample during his lifetime shall be used to reduce the $75,000 devise to Sample in McFayden's will.

This cause is remanded to the district court for Douglas County with instructions to remand the case to the Douglas County Court with instructions to enter judgment in accordance with this opinion.

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

LLOYD R. TRACKWELL, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, AND STATE OF NEBRASKA, APPELLEES.

454 N.W.2d 497

Filed May 4, 1990. No. 88-509.

1. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to the jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the damage.
2. **Jury Instructions: Appeal and Error.** Jury instructions are to be confined to the issues found in the pleadings and which find support in the evidence; generally, it is error to submit an issue which is not sustained by the evidence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for a new trial.

T.J. Hallinan and Gordon D. Ehrlich, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Terry C. Dougherty, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Burlington Northern.

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

PER CURIAM.

Plaintiff, Lloyd R. Trackwell, appeals the judgment entered pursuant to verdict which dismissed his negligence action against appellee Burlington Northern Railroad Company. Trackwell's employer, defendant-appellee State of Nebraska, was made a party to protect its workers' compensation subrogation claim. Trackwell claims, among other things, that the trial court erred in submitting to the jury an issue concerning his purported assumption of the risk. That assignment of error having merit, we reverse and remand for a new trial.

On December 3, 1984, Trackwell was on duty as a state trooper for the Nebraska State Patrol when he heard over the railroad frequency of his scanner that an accident had occurred between a Burlington train and a 5- to 7-foot track car. A Burlington employee, Tim Knapp, had been operating the track car and had parked it on a sidetrack alongside Burlington's main line near Thedford, Nebraska. The track car apparently rolled to a railroad switch which connected the sidetrack with the main line, and at that point collided with a train which was traveling along that line. The collision derailed the track car, leaving it partially blocking the main line.

Trackwell proceeded to the scene of the mishap to determine whether anyone had been injured, found Knapp at the scene, and determined that no one had been hurt.

While the testimony is conflicting as to whether Trackwell first offered his assistance or whether Knapp first asked for Trackwell's assistance, both testify that Trackwell agreed to help Knapp move the track car off the main line, and Knapp did, at some point, ask Trackwell to help him with this task.

Knapp testified that in communicating with Trackwell before moving the track car, "[w]hat I told him was I just wanted to get it off the track, and the quickest way was just to shove it up over the — that south rail . . . ." Trackwell proceeded to grasp the track car's handlebar and asked Knapp if it was "okay" to lift the handlebar; Knapp responded affirmatively. Trackwell then

lifted one end of the track car off the ground. Meanwhile, Knapp, who was on the other side of the track car and out of Trackwell's sight, pushed and shoved it.

Trackwell testified that Knapp's efforts in pushing the track car caused it to move in his direction, thus increasing the amount of weight Trackwell was supporting. The added weight and the movement of the track car caused Trackwell's right ankle to twist, and the twisting of his ankle precipitated the fracture of Trackwell's leg.

In his petition, Trackwell alleged:

> 5. On December 3, 1984, [Trackwell], during the course and scope of his employment [as a trooper], was working with one of [Burlington's] employees to clear track wreckage when he positioned himself to lift a [track car] back on the track and as a proximate result of the negligent and careless acts of omission and comission [sic] of the employee of [Burlington] as hereby alleged said [track] car rolled over onto [Trackwell], proximately resulting in injuries to [him].
>
> 6. [Trackwell's] injuries were a proximate result of the negligence of [Burlington's] employee while acting in the scope of his employment in the following particulars:
>
> (a) Failure to use reasonable care in clearing the wreckage from the track;
>
> (b) Failure . . . to warn [Trackwell] of his course of action;
>
> (c) That said employee did push said wreckage onto and against [Trackwell].
>
> 7. As a result of the negligence of [Burlington's] employee, [Trackwell] suffered injuries consisting of injuries to his right leg, right ankle, and right foot.

Burlington's answer to the petition asserts, among other defenses, that Trackwell knowingly assumed the risk which caused his injury.

One of the trial court's instructions states in part:

> [Trackwell] claims in his petition that [Burlington] was negligent in one or more of the following particulars:
>
> 1. Failure to use reasonable care in clearing the wreckage from the track;

2. Failure of [Burlington's] employee to warn [Trackwell] of his course of action;

[Trackwell] further claims that he was injured as a proximate result of that negligence, and he therefore prays for judgment against [Burlington] for his damages.

. . . .

In defense to [Trackwell's] claim, [Burlington] alleges that

. . . .

b. [Trackwell] assumed the risk of his own injury.

Another of the trial court's instructions states in part:

In connection with the defense of "assumption of risk" the burden is upon [Burlington] to prove, by a preponderance of the evidence, each and all of the following propositions:

1. That [Trackwell] knew and appreciated the danger;

2. That [Trackwell] voluntarily or deliberately exposed himself to that danger; and

3. That as a proximate result of that danger the injury to [Trackwell] occurred.

If [Burlington] has failed to establish any or all of the above numbered propositions by a preponderance of the evidence, you will disregard such defense.

If [Burlington] has established each of the above numbered propositions by a preponderance of the evidence, your verdict will be in favor of [Burlington] and against [Trackwell] whether or not you find that [Burlington's] alleged negligence was also a proximate cause of [Trackwell's] injuries.

Although, despite the contrary assertion in the petition, the record clearly shows that the track car did not strike or fall onto Trackwell, he nonetheless correctly points out that the record contains no evidence that he assumed the risk that Knapp would fail to use reasonable care in attempting to remove the track car from the main line.

Burlington argues that the assumption of risk instruction was properly based upon the following testimony as given by Trackwell:

Q. Regardless of who asked whom, you did agree to

help move the motor car, though?

A. Yes, I did.

Q. You did that voluntarily?

A. Yes.

. . . .

Q. As you looked at the motor car before you tried to lift it did you know how much it weighed?

A. No.

. . . .

Q. As you looked at it before you tried to lift it you did realize it was heavy?

A. Yes.

. . . .

Q. The motor car was heavy enough that it would be something that you would not want to have dropped on you; would you agree with that statement?

A. Yes.

Q. Or pushed up against you?

A. Yes.

Q. Would you agree that you'd have to exercise caution in the way you lifted it in order not to strain or hurt yourself?

A. Yes.

Q. You realized those things before you tried to lift the motor car; didn't you?

A. Yes.

Q. Before attempting to lift the motor car, did you realize that it could be dangerous to lift and move that motor car unless that was done properly?

A. Yes.

Q. Do you realize that if you were struck or pushed down by that motor car that you could be injured?

A. Yes.

Q. And you realized that also before you attempted to move it?

A. Yes.

Q. Knowing that, you went ahead and voluntarily participated in the operation of moving the motor car; is that correct?

A. That's correct.

The foregoing testimony reveals that Trackwell was generally aware of the potential danger inherent in attempting to move heavy equipment such as the track car. However, Knapp, in working with Trackwell in an effort to move the track car, was under a duty to conform to the legal standard of reasonable conduct in light of the apparent risk. See, *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). Consequently, Trackwell was entitled to expect that Knapp would use reasonable care in moving the track car. That is, Trackwell could expect that Knapp would not act negligently in attempting to move the track car.

While Trackwell's testimony does indicate that Trackwell was aware of the general risk inherent in moving heavy equipment and that he accepted, that is, assumed, that risk, neither Trackwell's testimony nor any other portion of the record supports a contention that Trackwell assumed the added risk resulting from Knapp's allegedly negligent conduct in moving the track car.

In *Vanek v. Prohaska*, 233 Neb. 848, 852, 448 N.W.2d 573, 576 (1989), this court stated:

> When a defendant pleads assumption of risk as an affirmative defense in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *Mandery* [*v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988)]. Before the defense of assumption of risk was submissible to the jury, evidence must have shown that the decedent (1) *knew* of the danger, (2) understood the danger, and (3) voluntarily exposed herself to the *danger which proximately caused* the plaintiff's damage. *Mandery, supra.*

(Emphasis in original.) The first of the three requirements set forth in *Vanek* is not satisfied in this case, as the record before this court contains no evidence to support a determination that Trackwell knew that Knapp would act negligently.

Whether Knapp acted negligently is, of course, a question

for a trier of fact to decide. In order to recover, Trackwell must first prove that Knapp's actions were in fact negligent. Once Trackwell accomplishes this, he must then show that such negligence was the proximate cause of his injury and damages. However, in the absence of any evidence that Trackwell knew that Knapp would act in a negligent manner, Burlington was not entitled to an assumption of risk instruction.

As in *Vanek*, submitting the assumption of risk defense to the jury was prejudicial to Trackwell's substantial right to a fair trial and constituted reversible error, as the evidence was insufficient to sustain an affirmative finding on the assumption of risk issue.

Jury instructions are to be confined to the issues found in the pleadings and which find support in the evidence. Generally, it is error to submit an issue which is not sustained by the evidence. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990).

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. JOUBERT, APPELLANT.

455 N.W.2d 117

Filed May 4, 1990. No. 89-224.

1. **Postconviction: Proof: Appeal and Error.** One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the postconviction court will not be disturbed unless they are clearly wrong.
2. **Postconviction: Evidence: Witnesses.** It is the postconviction judge who, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness.
3. **Postconviction: Judges: Recusal.** A judge who has presided at trial is not automatically disqualified from subsequently considering a postconviction action.
4. _____: _____: _____. The mere assertion by a convicted defendant that he may wish to call the trial judge as a witness in a postconviction hearing does not, by itself, provide grounds for disqualifying the trial judge from presiding over the postconviction proceeding.
5. **Judges: Recusal: Appeal and Error.** A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's discretion, and an order

overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

6. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
7. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction action seeking relief on the basis of ineffective counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
8. **Criminal Law: Effectiveness of Counsel: Proof.** The standard for determining the adequacy of a criminal defense attorney's performance is whether the attorney performed at least as well as an attorney with ordinary training and skill in the criminal law in the area.
9. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
10. **Effectiveness of Counsel.** While a particular lawyer's level of experience may shed light on his or her performance, it is the lawyer's performance that must be evaluated.
11. _____. In questioning the nature of interpersonal relationships between attorneys who worked together, the consideration is not how well they got along, but how well they performed their function.
12. **Expert Witnesses: Effectiveness of Counsel: Proof.** Expert evidence is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective.
13. **Venue: Juror Qualifications.** Compared to a public opinion poll, voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward an accused.
14. **Witnesses: Effectiveness of Counsel: Proof.** A claim of prejudice based upon counsel's failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be.
15. **Effectiveness of Counsel: Pleas: Death Penalty.** It is not a per se violation of a defendant's right to effective assistance of counsel if he is advised to plead guilty when the imposition of the death penalty is possible.
16. **Judges: Evidence: Presumptions.** It is presumed that judges disregard evidence which should not have been admitted.

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

J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Defendant, John J. Joubert, appeals from the denial of the motion he filed pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), seeking an order "vacating or setting aside" each of the two convictions for first degree murder and the resulting sentences of death which were affirmed on direct appeal in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986) (*Joubert I*). He asserts, in summary, that the postconviction judge erred in failing to (1) disqualify himself, (2) find that Joubert's trial attorneys were ineffective by virtue of a conflict of interest and by virtue of advising him to plead guilty, and (3) find that the receipt of certain victim impact statements into evidence at the penalty phase of the trial did not prejudice Joubert. We affirm.

II. ANALYSIS

We begin our review of this matter by recalling that one seeking postconviction relief has the burden of establishing the basis for such relief and that the findings of the postconviction court will not be disturbed unless they are clearly wrong. *State v. Williams,* 234 Neb. 890, 453 N.W.2d 399 (1990); *State v. Reeves,* 234 Neb. 711, 453 N.W.2d 359 (1990); *State v. Harton,* 230 Neb. 167, 430 N.W.2d 313 (1988). Moreover, it is the postconviction judge who, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness. *State v. Costanzo, ante* p. 126, 454 N.W.2d 283 (1990); *State v. Reeves, supra*; *State v. Domingus,* 234 Neb. 267, 450 N.W.2d 668 (1990). With those cardinal principles in mind, we proceed to an analysis of each of Joubert's claims for relief.

1. Nondisqualification

With respect to the first summarized assignment of error, Joubert argues that his postconviction action should at least be remanded for a new hearing because the postconviction judge, who was also the judge presiding over the guilt phase of the trial

and, as such, accepted Joubert's pleas of guilty, refused to disqualify himself from presiding over the postconviction proceedings.

Joubert based this disqualification motion upon the assertion that the judge would be called as a witness in the proceedings. This assertion, in turn, rested upon a portion of the argument relating to Joubert's second assignment of error, i.e., that Joubert's trial attorneys were ineffective in failing to litigate the issue of the admissibility of his confession, a matter which is analyzed later in part II(2)(b)(iii) of this opinion.

In attempting to support his disqualification motion, Joubert argued that his trial attorneys' failure to litigate the motion to suppress his confession could have been the result of off-the-record in camera communications between the trial attorneys and the judge. Thus, Joubert reasoned that the judge should be available as a witness and therefore, to preserve his availability as such, should not preside over the postconviction hearing. See Neb. Rev. Stat. § 27-605 (Reissue 1989), which provides that a presiding judge at the trial may not testify in that trial as a witness.

At a hearing on this motion Joubert, through his postconviction attorney, argued:

> So then you get in the situation you say, "Well, how do I know you're going to use me as a witness . . . ? How do I know I have to disqualify myself?" So that I have to respond "I don't know until I find out. I don't know until I inquire whether, in fact, you have any information which may or may not be probative in this case." I think I have a right and an obligation to so inquire.

After further argument and a rebuttal by the State, the judge stated the following:

> At this point of time I'm going to deny the motion to recuse. That's without prejudice to going ahead and file [sic] your notice to take depositions, but let me indicate in advance to you that a motion to quash . . . will be looked upon with favor until you develop some evidence somewhere, either by the testimony of [the prosecutor] or the testimony of Mr. Miller or testimony of somebody that, in fact, there were communications with me that

were not on the record.

> Now, I can indicate to you, and it may save you time, to my memory there aren't any. I think I had [the court reporter] every single time when I had Mr. Miller and [the prosecutor] and certainly I know that when the defendant was present, and if they testify to the contrary, I'm not saying they're right or wrong. Maybe my memory's failing
>
> . . . .
>
> . . . .
>
> . . . [I]f you develop some testimony or evidence that makes me a witness on the factual matters, you don't need to file another motion to recuse. I'll step down on my own motion . . . if, in fact, it turns out that I become a witness to some factual matters.

Thus, Joubert's disqualification motion was denied because there was no indication that there was any basis for his claim that the judge was a necessary witness in the postconviction proceeding.

Joubert's brief cites *The People v. Wilson*, 37 Ill. 2d 617, 230 N.E.2d 194 (1967), for the proposition that in a death penalty postconviction proceeding, a judge who has knowledge of off-the-record statements from a prior proceeding at the district court level should recuse himself from the postconviction hearing, and states:

> Indeed it is clear that petitioner herein was prevented from access to relevant evidence. There can be no doubt that there were many conversations that took place off the record in the judge's chambers during the proceedings of the Joubert case on the District Court level. *Wilson*. As such, Joubert was denied access to this material in the form of a judge's recollection of what transpired during the Joubert case. The judge from the prior proceeding was directly involved and has a version of the facts which are relevant and material and may at times offer information not available from other sources.

Brief for appellant at 37. However, the record before this court reveals no evidence of any relevant off-the-record conversations involving the judge, nor does the record support an assertion that the judge had any information not readily

available from other sources. The judge said discovery could be pursued on the issue and that he would recuse himself on his own motion if evidence that he had been involved in relevant off-the-record conversations were discovered. The record presents no such evidence.

There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action. *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982). Furthermore, the mere assertion by a convicted defendant that he may wish to call the trial judge as a witness in a postconviction hearing does not, by itself, provide grounds for disqualifying the trial judge from presiding over the postconviction proceeding. See, *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986); *Logan v. State*, 712 S.W.2d 9 (Mo. App. 1986); *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984); *People v. Neal*, 123 Ill. App. 3d 148, 462 N.E.2d 814 (1984).

Joubert also argues that the postconviction judge exhibited bias when he examined witnesses during the postconviction proceeding and through the comments which he made during that proceeding.

As stated in *State v. Ellefson*, 231 Neb. 120, 122, 435 N.W.2d 653, 655-56 (1989):

> A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. [*State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988).] A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987).

The comments and questions of the postconviction judge cited by Joubert as evidence of bias, including the judge's inquiry as to whether Miller had not defended a particular case, were offered by the judge in an effort to clarify the record which was being created, and do not support an inference of prejudice or predisposition on his part. Consequently, Joubert's first summarized assignment of error is without merit.

2. Effectiveness of Counsel

In the second summarized assignment of error Joubert urges that he was denied the effective assistance of counsel guaranteed him by the 6th amendment to the federal Constitution and made applicable to the State through that document's 14th amendment. He assigns as grounds for this assertion the claims that his attorneys had a conflict of interest and performed defectively in advising him to plead guilty.

The analysis of the claim that Joubert's attorneys were ineffective begins with the rule that in a postconviction action seeking relief on the basis of ineffective counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Sanders, ante* p. 183, 455 N.W.2d 108 (1990); *State v. Williams,* 234 Neb. 890, 453 N.W.2d 399 (1990); *State v. Domingus,* 234 Neb. 267, 450 N.W.2d 668 (1990); *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The standard for determining the adequacy of a criminal defense attorney's performance is whether the attorney performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. *State v. Williams, supra*; *State v. Reeves,* 234 Neb. 711, 453 N.W.2d 359 (1990); *State v. Domingus, supra.* In this connection *Strickland v. Washington* admonishes at 466 U.S. at 689-90:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac,* 456 U. S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983).

. . . .

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Domingus, supra*, citing *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

With that background we move on to a review of the claims on which is based Joubert's assertion that his trial attorneys

were ineffective.

(a) Conflict of Interest

Joubert's first claim is that his trial attorneys had a conflict of interest arising from the professional relationship between George Burr, one of his attorneys, and Judy and Leonard Eberle, the parents of the late Danny Joe Eberle, one of Joubert's victims.

After Joubert's arrest and through his appeal in *Joubert I*, he was represented by the Sarpy County Public Defender's office. When that office began to represent Joubert, it was comprised of the elected Sarpy County Public Defender, James Miller, and his two assistants, Owen Giles and Burr. Such remained the composition of the office until approximately September 21, 1984, when Burr was discharged.

Sometime between Joubert's July 3, 1984, guilty pleas and the date Burr was discharged, Burr was directed by Miller to contact the Eberles and see if they would be willing to write a letter requesting that the judge sentence Joubert to imprisonment for life rather than to death. Burr was selected for this task because he, like the Eberles, was a Bellevue resident. When Burr called Judy Eberle, she reminded him that he had previously handled the Eberles' adoption of a daughter. Burr testified that prior to this conversation with Judy Eberle, he had forgotten his previous representation of the Eberles but later confirmed, through his "old files," that he had in fact done so. The adoption had occurred 8 to 10 years earlier, apparently in 1975 or 1976. Burr then informed Miller and Giles of this past representation, a matter previously unknown to them.

On December 7, 1984, Burr filed a federal bankruptcy petition on behalf of the Eberles. The evidence as to when the Eberles and Burr first discussed the matters resulting in this representation is in conflict, but the postconviction judge found as fact that such occurred after the "sentencing hearings and order of sentence." The postconviction judge then concluded that Joubert's attorneys had a conflict of interest only with respect to their "actions subsequent to the sentencing and prior to" Burr's departure from the public defender's

office, a conclusion which is difficult to understand in light of the fact that Burr was discharged from the public defender's office on approximately September 21, 1984, while Joubert's sentencing did not occur until October 9, 1984. Thus, it appears that the postconviction judge may have erred in finding that a conflict of interest existed at all. However, even if it were assumed that a conflict of interest existed because of any relationship between Burr and the Eberles, the record still fails to support a claim that Joubert's convictions should be set aside or vacated.

In *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986), Williams was convicted of first degree murder and sentenced to death. At trial and during his first postconviction action, Williams was represented by the Lancaster County Public Defender's office. In his second motion for postconviction relief, Williams alleged that a member of the public defender's office had represented Williams' wife in an action to dissolve her marriage with Williams and that this constituted a conflict of interest that deprived him of effective assistance of counsel. Williams claimed that the conflict had prevented his trial counsel from calling his wife as a witness during his trial in support of his insanity defense.

In concluding that because Williams failed to show he was adversely affected by his counsel's possible conflict of interest, the *Williams* court noted:

> In *Strickland v. Washington*, [466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the Court discussed a "per se rule of prejudice" and a "rule of presumed prejudice":
>
> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic, ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the

government to prevent.

"One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e. g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' *Cuyler v. Sullivan, supra*, at 350, 348 (footnote omitted)." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As indicated in *Strickland v. Washington, supra*, a conflict of interest, per se, does not annihilate or frustrate a defendant's constitutional right to effective assistance of counsel, necessitating reversal of a judgment in a criminal case. However, there is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.

Regarding prejudice on account of ineffective assistance of counsel, *Strickland* contains the following observation by the Court:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.* at 697.
>
> Putting aside the question whether an actual conflict of interest exists in the case before us, and following the suggestion in *Strickland*, we dispose of Williams' appeal on the basis of presence or absence of prejudice.

State v. Williams, 224 Neb. 114, 121-22, 396 N.W.2d 114, 119-20 (1986).

As in *Williams*, it is appropriate in this case to put aside the question whether an actual conflict of interest existed, to follow the suggestion in *Strickland*, and to dispose of the issue on the basis of the presence or absence of prejudice.

While Joubert speculates in his brief that Burr's professional relationship with the Eberles "might motivate a less than zealous defense" of him, brief for appellant at 16, the reality is that neither the record nor Joubert's brief illustrates that Burr's relationship with the Eberles had any effect whatsoever on Joubert's defense. That being so, Joubert's claim that his attorneys were ineffective by virtue of a conflict of interest is without merit.

(b) Plea Advice

As the result of a plea bargain, Joubert pled guilty to the two

charges of first degree murder, in exchange for which the State dismissed two kidnapping and two using a knife to commit a felony charges; refrained from arguing for the death penalty; refrained from offering in evidence a presentence investigation; refrained from making "*any effort* in regard to the Maine case" (emphasis supplied) (investigating Joubert's involvement in the murder of still another young boy); and agreed Joubert could remain silent notwithstanding his pleas.

The significance of the reference to the "Maine case" is illustrated by the fact the prosecutor informed Giles that the State had been working with authorities from Maine regarding another murder which had occurred in that state. Based upon his communications with the prosecutor, Giles testified that if Joubert had been convicted at a trial on his Nebraska charges, the State would have attempted to prove that Joubert had committed the murder being investigated in Maine. Giles noted that if the State had been successful in presenting such proof, this prior uncharged murder would have represented an aggravating circumstance which would have increased Joubert's chances of receiving a death sentence. Because Joubert had informed his attorneys that he in fact had been involved in a Maine homicide, Miller and Giles concluded that it was important to prevent the State from presenting evidence with respect to that additional murder, and took that into consideration in advising Joubert to plead guilty.

Joubert now claims his trial attorneys were ineffective in advising him to so plead as a combined result of the dynamics arising from his attorneys' lack of experience and inability to get along with each other, their failure to develop evidence in support of a change of venue, their failure to obtain a ruling on their motion to suppress his confession, their failure to somehow extract a guarantee that the death penalty would not be invoked, and their failure to file and litigate every possible motion. We review each of these claims in turn.

(i) Attorney Dynamics

Joubert's claim that his attorneys were deficient in part by advising him to plead guilty because they were inexperienced and did not get along with each other leads to no meaningful

analysis. As the U.S. Supreme Court observed in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), while a particular lawyer's level of experience may shed light on his or her performance, it is the lawyer's performance that must be evaluated. The same is true with respect to the nature of the relationship between lawyers who worked together; the question is not how well they got along, but how well they performed their function.

We note that as to the matter of performance, a number of attorneys testified at the postconviction hearing to a variety of opinions concerning what Joubert's trial attorneys should or should not have done. Expert testimony must be such as to assist the trier of fact to understand the evidence or to determine a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1989). The question of whether counsel performed in accordance with the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is a legal matter concerning which judges are required to be their own experts; judging the law is one of the more important judicial functions. Thus, expert evidence is generally not admissible as proof that the assistance of counsel in a criminal case was ineffective. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Ohler*, 219 Neb. 840, 366 N.W.2d 771 (1985). It is true that in a postconviction action decided after *Ohler* and before *Gagliano*, *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986), we, without comment, noted the testimony of an attorney concerning what he would have done with respect to the State's closing argument at trial. A close reading of the opinion reveals, however, that the analysis would have been the same had we ignored the attorney's testimony. The fact is that the expert evidence in this case adds nothing of probative value to the record.

Having determined that no useful purpose would be served by a detailed review of the level of experience attained by Joubert's attorneys or of their interpersonal relationships, we move on to Joubert's other concerns.

(ii) Venue Motion

Joubert asserts that he was denied effective assistance of

counsel in part by virtue of his attorneys' advice to plead guilty before the trial court had ruled on his motion for a change of venue and in part by his attorneys' failure to present more evidence, including a public opinion poll, in support of that motion. In denying Joubert relief on this issue, the postconviction judge found that the venue motion would have been "held under advisement, or denied without prejudice to renewing it, until an attempt was made to impanel a jury in Sarpy County . . . even if defense counsel had submitted a public opinion poll in support of the motion."

In accordance with the reasoning adopted in earlier cases, this court, in *State v. Boppre,* 234 Neb. 922, 453 N.W.2d 406 (1990), recently held that compared to a public opinion poll, voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward an accused and that it was not error for the trial court in that case to refuse to grant a motion for a public opinion poll. Similarly, Joubert's attorneys did not perform deficiently in electing not to conduct a public opinion poll.

Furthermore, as found by the postconviction court, Joubert has failed to show how a ruling on his venue motion would have affected his pleas. Before Joubert pled, the trial court stated that if an impartial jury could not be impaneled in Sarpy County, the motion would have then been considered. Joubert, like all defendants, was assured of an impartial jury wherever his trial was held. Thus, it cannot be said that his decision to plead guilty, or the outcome of a trial, had one been held, would have been affected by a ruling on the change of venue motion.

(iii) Motion to Suppress Confession

Joubert places great emphasis on his trial attorneys' failure to insist upon a ruling, before he pled, on his then pending motion to suppress the confession he gave to the police.

The circumstances surrounding this aspect of Joubert's pleas are detailed in *Joubert I* and will not be reiterated in detail here. It is sufficient to note that the trial court, in an effort to avoid pretrial publicity which would adversely affect its ability to impanel an impartial jury, refused to conduct a hearing on the

suppression motion until after a jury had been selected. In determining to so handle the matter, the trial court stated that Joubert could enter his guilty pleas and still have the option of having the court hear his motion to suppress. The trial court further stated that if Joubert succeeded in suppressing his confession, he would then be allowed to withdraw his pleas of guilty. Nonetheless, when it actually accepted the pleas, the trial court asked Joubert:

> [D]o you understand there is a motion pending to suppress statements or confessions that you had allegedly made at the time of your arrest? Do you understand that if I accept the pleas of guilty, that that motion likewise is gone and you can never raise that again as an issue?

Joubert replied, "I understand."

In this postconviction proceeding Joubert testified that when he pled guilty, he was not aware of the option to be heard on the motion to suppress after he entered his guilty pleas. Giles also testified he was unaware of that option. However, Miller testified that he had informed Joubert of the option, and the postconviction court accepted Miller's version of the facts on this question.

Whatever might be said of the manner in which the suppression motion was handled becomes unimportant if the confession was not suppressible. In that connection, we bring to mind this court's observation in *Joubert I* that "it was difficult to imagine" what evidence could have been presented which would have convinced the trial court to suppress the confession. In now recycling this issue, Joubert presents nothing which supports a determination that his confession was made other than freely, voluntarily, intelligently, and understandingly and free of any promises or inducements.

Not only did the trial court's colloquy with Joubert, as reported in *Joubert I*, establish that he was fully aware of the rights afforded him by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), but the confession itself establishes that Joubert was aware of those rights. The confession reveals that Joubert knew he was talking with police authorities, that he had the right to remain silent, that anything he said would be used against him in a court of law, that he had

the right to have an attorney present during questioning, and that if he could not afford an attorney, the court would appoint one for him. The confession also reveals that with full knowledge of those rights, Joubert elected to expressly waive the presence of an attorney. He further expressly acknowledged his willingness to make statements to the police. The confession also discloses that Joubert had not, in the 24 hours preceding the confession, ingested either alcohol or other drugs and that he had eaten within the preceding 2 or 3 hours. At the commencement of the confession Joubert acknowledged that he had been neither coerced nor threatened, nor had he received any promises.

The confession was obtained constitutionally and therefore, as the postconviction judge determined, was not suppressible. Consequently, the failure of Joubert's attorneys to insist that the suppression motion be ruled upon before permitting him to plead, if professionally deficient, a matter we do not decide, resulted in no prejudice.

(iv) Motion to Suppress Identification

Joubert further claims that his trial attorneys performed deficiently in failing to call unnamed witnesses to testify about the "line up wherein [Joubert] was identified." Brief for appellant at 6.

The record reveals that Joubert's attorneys filed a motion to suppress, on a variety of grounds, any pretrial and courtroom identification of Joubert by sundry persons endorsed as witnesses by the State. After an evidential hearing, the trial judge overruled the motion with the proviso that if the State were to call a particular witness who had been hypnotized, the State would have to show that such witness' recollection was on a basis independent of the hypnosis.

Joubert does not tell us what the unnamed witness would have said. He only argues that the step was necessary to determine if any evidence of police misconduct with respect to the lineup procedures could be discovered. The rule, however, is that a claim of prejudice based upon counsel's failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be. *State v. Hill*, 214

Neb. 865, 336 N.W.2d 325 (1983). Furthermore, no claim is made, nor does the record show, that there were any witnesses to the crimes. Given that circumstance and the completeness of Joubert's confession, we are unable to discern how any identification of him could materially affect the certainty of his conviction had he gone to trial, nor his decision to plead guilty.

(v) Life Guaranty

Next, Joubert contends, in effect, that it is a per se violation of a defendant's right to effective assistance of counsel if he is advised to plead guilty when the imposition of the death penalty is possible. He urges the view that a defendant in a first degree murder case should be advised to plead guilty only if the criminal justice system has been so manipulated as to make imposition of the death penalty impossible, such as would be the case, for example, if the prosecutor were to agree, properly or improperly, to refrain from adducing at the penalty phase of the trial any evidence of aggravating circumstances.

While those personally opposed to the death penalty may espouse this approach, it is apparent that such is not the law. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a case in which the defendant was sentenced to death after pleading guilty to three counts of murder. See, also, *Post v. Ohio*, 484 U.S. 1079, 108 S. Ct. 1061, 98 L. Ed. 2d 1023 (1988) (Marshall, J., dissenting) (certiorari denied in case wherein defendant was sentenced to death by a three-judge panel after entering plea of no contest to charges of aggravated murder and aggravated robbery).

It is interesting to note that the late Clarence Darrow, an attorney whose advocacy was generally considered to be quite effective, found it appropriate to advise his clients to plead guilty in the case of the State of Illinois v. Nathan Leopold, Jr., and Richard Loeb before the criminal court of Cook County, notwithstanding that imposition of the death penalty was possible. See, *Clark v. United States*, 259 F.2d 184 (D.C. Cir. 1958) (Burger, J., dissenting); *United States v. Perez-Casillas*, 593 F. Supp. 794 (D. Puerto Rico 1984).

(vi) Other Possible Motions

Joubert's final complaint with respect to this summarized

assignment of error is that his trial attorneys were ineffective because they failed to file and litigate "every motion of even questionable merit." Brief for appellant at 25. He, however, does not identify what motions his attorneys should have filed. Neither does the record reveal any basis for unfiled motions of arguable merit. What the record does reveal is that his trial attorneys filed 27 motions on Joubert's behalf. Contrary to Joubert's suggestion that his attorneys were dutybound to engage in defense efforts predestined to fail, we have held that "[n]o incompetence or prejudice can be implied by trial counsel's failure to do that which ought not be done." *State v. Hunt*, 212 Neb. 304, 307, 322 N.W.2d 624, 628 (1982).

(c) Resolution of Assignment

Since each of Joubert's claims of his trial attorneys' ineffectiveness is without legal merit, those claims neither individually nor in combination with each other support the assertion that his trial attorneys were ineffective.

The reality is that Joubert's trial attorneys were faced with what could only appear to any reasonable attorney as the certain conviction of their client, and thus opted to limit, as best they could, the evidence of aggravating circumstances which the State could present and thereby lessen the possibility that Joubert would be sentenced to death. While hindsight has proven that strategy to be unsuccessful, it was nevertheless the product of reasonable professional judgment.

3. Victim Impact Statements

In the third and last summarized assignment of error, Joubert argues that his sentence is constitutionally infirm because the panel of judges who sentenced him received in evidence victim impact statements in the form of letters from the parents of Joubert's victims. Regarding these letters, the sentencing panel stated the following: "To the extent these letters have provided a catharsis for those writing them, we acknowledge receiving and reading them. Nevertheless, these letters have no probative value or weight in our determinations. . . ." Joubert nonetheless argues that receipt of the documents in evidence requires that his sentence be reversed, citing *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440

(1987). Joubert's reliance on *Booth* is clearly misplaced.

Booth involved a Maryland statute which required the Maryland State Division of Parole and Probation to compile a presentence report which, in all felony cases, included a victim impact statement describing the effect of the crime on the victim and the victim's family. The U.S. Supreme Court determined that it was improper for a jury to consider such victim impact statements in a capital sentencing decision.

Even if we ignore the differences between the nature of an impact statement prepared by a professional under statutory mandate and letters from the parents of the victims, *Booth* is nonetheless distinguishable from this case in that the sentence in *Booth* was imposed by a jury of laypersons and, here, the sentences were imposed by a panel of jurists. Indeed, the U.S. Supreme Court had an opportunity to extend the *Booth* holding to a situation involving judge sentencing in *Post v. Ohio*, 484 U.S. 1079, 108 S. Ct. 1061, 98 L. Ed. 2d 1023 (1988), and refused to do so by denying certiorari. The situation is no different than that presented in a bench trial where the judge suppresses a confession, presides over the trial, and then imposes sentence. The fact that a judge reviews a confession does not disqualify him from continuing to preside over the remaining phases of the trial. This is so because it is presumed that judges disregard evidence which should not have been admitted. *State v. Sheridan*, 230 Neb. 979, 434 N.W.2d 338 (1989); *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). The panel in this case specifically declared that it was acting in accordance with the presumption.

We are not unmindful that recently in *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), we reasoned that *Booth* did not control the result therein because it was not to be applied retroactively. *Reeves* employs a correct alternative analysis which appropriately disposed of the issue under the facts of that case. However, the broader analysis required by the facts of this case provides an alternative which would have led to the same result as the narrower analysis employed in *Reeves*.

There is no merit to the third summarized assignment of error.

III. DECISION

The record failing to support any of the summarized assignments of error, the judgment of the postconviction judge is affirmed.

AFFIRMED.

KENNETH A. MUCKEY, APPELLANT, V. DOUGLAS A. DITTOE ET AL., APPELLEES.

454 N.W.2d 682

Filed May 4, 1990. No. 89-448.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court reviews 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. **Negligence: Property: Liability.** Ordinarily, a person who is not the owner and is not in control of property is not liable for negligence with respect to such property.
4. **Negligence: Property: Proof.** As a general rule, it is indispensable to any recovery for damages caused by the defective condition of property that the plaintiff show by evidence that defendant was at the time of the accident in control of the premises upon which plaintiff was injured.
5. **Property: Words and Phrases.** A possessor of land may be defined as (1) a person who is in occupation of the land with intent to control it; (2) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or (3) a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (1) and (2).

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Alan M. Thelen, of Breeling & Welling, for appellant.

Randall L. Goyette and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Lesoing.

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

PER CURIAM.

Plaintiff, Kenneth A. Muckey, in this personal injury action appeals from the order of the district court granting summary judgment in favor of the defendant Lorele A. Lesoing, assigning the sustaining of the motion for summary judgment as the sole error. We affirm.

Plaintiff was employed as a delivery person for an independent contractor which delivered furniture for Nebraska Furniture Mart. On January 20, 1988, a delivery crew which included plaintiff Muckey attempted to deliver a freezer to 3811 J Street in Lincoln, Nebraska. The crew found no one at home, and Muckey then walked up to the front door to place a tag upon it. While returning to the delivery truck, Muckey allegedly slipped upon a patch of ice in the driveway, fell, and sustained personal injuries.

The defendant Douglas A. Dittoe is the owner of the J Street premises where the accident occurred. About 3 to 4 weeks before the accident, Dittoe and Lesoing became engaged to be married. Thus, they were engaged on January 11, 1988, when Lesoing purchased a freezer from Nebraska Furniture Mart and requested that it be delivered to Dittoe's address.

Plaintiff brought suit for his alleged injuries, and in this matter we are concerned only with the possible liability of Lesoing. As to her, Muckey's petition alleged that she was in possession and control of the subject premises and that she was negligent in not keeping those premises safe and by failing to adequately warn Muckey. Muckey also alleges that his presence upon the subject premises is that of an invitee.

In her amended answer, Lesoing states that she was not at any relevant time an owner or possessor of the subject premises.

The trial court, finding that Lesoing neither occupied nor controlled the subject premises on January 20, granted Lesoing's motion for summary judgment and dismissed the petition as against her.

At the time of the accident Dittoe was the sole owner of the subject premises. Lesoing maintained a separate residence at

another address in Lincoln.

When Dittoe was shopping for a house, he and Lesoing looked at the J Street residence together. Yet, Lesoing made no monetary contributions either for the purchase of Dittoe's home or to help with payment of any of the utility charges.

Dittoe did all of the yard work. He did his own snow shoveling and had shoveled the driveway on the morning of January 20. When asked if she ever shoveled the snow off Dittoe's driveway or sidewalk, Lesoing responded: "Not to my knowledge. I could have, I don't know. . . . If it was there I would have shoveled it if Doug wasn't home, but not to my knowledge."

In regard to interior work at the premises, Lesoing noted that she "might have helped him paint rooms or something like that" and that she probably did some cleaning. As to her cleaning, Dittoe commented that she did "very little."

The freezer was purchased for the use of both Dittoe and Lesoing, although Lesoing selected and paid for it. Dittoe knew that the freezer was to be delivered to his residence, but both he and Lesoing believed that the freezer would be delivered on Saturday, January 23, 1988. Dittoe intended to be home that Saturday to take delivery.

Lesoing has a key to Dittoe's house. She stayed overnight at Dittoe's home about three times a week. She would also go to his home at times when he was not there. In fact, she was free to come and go as she desired. However, the night before the accident, she was at her own residence, and the first time she was at the subject premises the day of the accident was after she was called at work by the delivery people about the fact that no one was home when the delivery was first attempted. She then went to the Dittoe home, met the delivery crew, and accepted delivery of the freezer.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990). In appellate review of a

summary judgment, the court reviews 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. *Peterson, supra.*

Actually, there is no dispute as to the facts. There is no indication that Lesoing was either the owner of or in control of the premises.

In *Kliewer v. Hall Constr. Co.*, 229 Neb. 867, 872, 429 N.W.2d 373, 377 (1988), this court said:

> "Ordinarily a person who is not the owner and is not in control of property is not liable for negligence with respect to such property." 65 C.J.S. *Negligence* § 94 at 1051 (1966). [Citation omitted.] "[T]he person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place." Prosser and Keeton on the Law of Torts, *Owners and Occupiers of Land* § 57 at 386 (5th ed. 1984).

Quoting *Wilson v. North Central Gas Co.*, 163 Neb. 664, 80 N.W.2d 685 (1957), we observed again in *Kliewer, supra* at 872, 429 N.W.2d at 377, that it is " 'indispensable to any recovery . . . that appellant show by evidence that appellee was at the time of the accident in control of the premises upon which appellant was injured. . . .' "

Finally, in distinguishing a case relied upon by the plaintiff in *Kliewer*, *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975), this court relied on Restatement (Second) of Torts § 328E (1965), which defines a possessor of land as

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

The Restatement, *supra* at 170.

Muckey has failed to establish that Lesoing fell within any of the three Restatement categories or in any manner exhibited a

degree of control or possession of the subject premises which would justify holding Lesoing liable under these circumstances.

The district court was correct in granting summary judgment, and that judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VON O. EARY, APPELLANT.

454 N.W.2d 685

Filed May 4, 1990. No. 89-672.

1. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
2. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Doubtful or marginal cases should be determined largely by the preference to be accorded warrants.
3. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
4. _____: _____. In making a determination as to a trial court's ruling on a motion to suppress, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions.
5. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances in each case.
6. **Controlled Substances: Judicial Notice.** A court can take judicial notice that substances such as cocaine may be easily and quickly disposed of by flushing down a drain.
7. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

8. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence is sufficient to support a finding of guilty of possession of a controlled substance with intent to distribute, deliver, or dispense.
9. _____: _____: _____. Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute.
10. **Sentences: Appeal and Error.** It is well established that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Steven Lefler, of Lefler & Flick, for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

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

HASTINGS, C.J.

A jury found defendant, Von O. Eary, guilty of count I, unlawful possession with intent to deliver a controlled substance, marijuana, and count II, possession of a controlled substance, cocaine. He was sentenced to imprisonment for terms of 4 to 6 years on count I and 1 to 2 years on count II, to be served concurrently.

Defendant has appealed, assigning as error that (1) the trial court overruled defendant's motion to suppress, (2) the trial court failed to sustain defendant's motion for a directed verdict, (3) the trial court imposed excessive sentences, and (4) the trial court failed to grant defendant's motion for mistrial. We affirm.

On November 2, 1988, police officers of the city of Omaha executed a search warrant for room No. 1052 at the New Tower Inn Motel at 7764 Dodge Street in Omaha. Present in the room at the time were the defendant and a Gale Wilkinson. The officers discovered and seized Eary's driver's license, with residue of cocaine on it; a pipe containing residue of crack cocaine; a plastic container containing baking soda, which was described during the trial as a substance that can be used to convert hydrochloride cocaine into crack cocaine; a bottle of

rubbing alcohol, about which there was testimony indicating it can be used as a heating device for the ignition of cocaine; a vial containing 20 milligrams of hydrochloride cocaine; a second pipe containing the residue of crack cocaine; a test tube, a spoon, surgical scissors, cotton balls, and cigarette papers; a screwdriver with a white substance on it; a baggie containing 8 grams of marijuana; four plastic bags containing approximately one-quarter pound of marijuana each; writings upon a legal pad and a business card alleged to represent records kept in the course of drug dealing; and over $15,000 in cash, $10,750 of which was found in a brown paper sack.

The affidavit for the issuance of the warrant was signed by two police officers and alleged that they had reasonable grounds to believe that cocaine and marijuana, drug administering instruments, and records and moneys pertaining to an illegal narcotics operation would be found.

This belief was based on information furnished to the police by various individuals. One such individual, identified as "Source #1," was a confidential informant who the police affiants alleged had proven to be reliable in the past. Source #1 had provided information and had made purchases of narcotics under the supervision of the narcotics unit which had resulted in the issuance of 10 search warrants and numerous arrests.

Source #1, on July 7, 1988, advised a lieutenant of the Omaha Police Division that a party by the name of Von Eary was dealing cocaine in the Omaha area and received his supply from a party in Phoenix, Arizona. The source had observed Eary in possession of 2 pounds of cocaine while Eary was living in an apartment in Omaha.

The informant, on July 20, 1988, provided the same lieutenant with two phone numbers, one in the name of Gale and the other in the name of a male party named R.J. Gale was alleged to be working at a lounge in Omaha and was alleged to be dealing "8-ball" quantities of drugs, and R.J. was alleged to be dealing unknown quantities of drugs which were directly supplied by Eary.

In checking one of the phone numbers, a member of the police department found it to be subscribed to by R.J. Riggs. The police records showed that on March 14, 1983,

information was received that Richard J. Riggs was dealing illicit narcotics in the Omaha area and was living at that time in Fremont, Nebraska.

On October 25, 1988, the police received information from an employee at the New Tower Inn Motel concerning a suspicious party staying at the motel. The informing party stated that a man identifying himself as Von Eary stayed at the motel October 22, 23, and 24 and that he paid for his room in cash on a daily basis, refused maid service, and made numerous local and some long-distance phone calls. After Eary checked out of the motel, employees found in the room a small eyeglass case which contained a small quantity of what they suspected to be marijuana. Eary later returned to the motel and claimed the case.

The list of phone numbers called by Eary included one of the two numbers that were earlier furnished by Source #1, who stated that "a party by the name of Gale would be contacted at that number by Von Eary, arranging the sale of cocaine." On November 2, 1988, one of the police affiants learned that the phone number was listed to a G. Wilkinson in Fremont, Nebraska.

On November 1, 1988, another police affiant was contacted by the front desk manager of the Ramada Inn Airport Motel. That person stated that a suspicious party by the name of Von Eary checked into the motel on October 29, 1988, stayed October 30 and 31, and was scheduled to check out on November 1. The manager was suspicious of Eary because he paid cash for his room on a daily basis, requested that his room not be cleaned by maid service, and made numerous local calls and one long-distance call. The manager also stated that on October 30 they had to wake Eary up at 1 o'clock in the afternoon to see if he was going to stay another night.

On November 2, 1988, a police officer contacted the Ramada desk manager and was supplied with several phone numbers that Eary had called. One of the numbers called was the one Source #1 had indicated was in the name of R.J., who was being supplied cocaine by Eary.

Another police officer was contacted on November 1, 1988, by the management of the New Tower Inn Motel concerning a

party by the name of Von Eary, who registered on November 1, paid cash for his room, and used an "instant cash card" for identification. It was also discovered that the same phone number for R.J. had been called on November 2, presumably by Eary.

The officers making the affidavit also stated that based on numerous past narcotics investigations made by them within the last year, they have found that narcotics dealers frequently will pay for motel rooms in cash, will extend their stays day-by-day with cash payments, and will frequently refuse maid service so as to prevent observation of drug activities.

The motion to suppress sought to challenge the admissibility of evidence seized during the execution of the search warrant issued on the basis of the foregoing affidavit. The only evidence introduced at the hearing on this motion was the affidavit, the search warrant, and the inventory and return for the physical evidence discovered.

Under the first assignment of error, the defendant contends that the affidavit requesting the search warrant lacked probable cause and that the no-knock entry authorized was improper.

This court has adopted the "totality of the circumstances" test articulated by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *reh'g denied* 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453, to evaluate the sufficiency of an affidavit used to obtain a search warrant. *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989). Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989); *State v. Sneed and Smith, supra.*

In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Sneed and Smith, supra*; *Illinois v. Gates, supra.* See, also, *State v. Armendariz, supra.* The duty of the

reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Doubtful or marginal cases should be determined largely by the preference to be accorded warrants. *State v. Sneed and Smith, supra*. See, also, *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989).

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Garcia, ante* p. 53, 453 N.W.2d 469 (1990); *State v. Juhl,* 234 Neb. 33, 449 N.W.2d 202 (1989).

In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions. *State v. Garcia, supra*.

Defendant argues that the search warrant was issued only upon the assumption that defendant fit the profile of a drug dealer. Since probable cause exists independent of the drug dealer profile referred to in the affidavits, it is unnecessary to consider appellant's challenge in that regard. He also insists that the earlier facts set forth in the affidavit relating to information about the defendant received in July were stale and therefore unreliable.

It is true that we have said that proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975). Whether the proof satisfies this test is determined by the circumstances in each case. *State v. Hodge and Carpenter, supra*; *State v. Kallos, supra*.

Under the "totality of the circumstances" analysis, we have no problem affirming the trial court's finding of probable cause. There were facts alleged in the affidavit which substantiated that defendant was dealing drugs as recently as July of the same year in which the warrant was issued. The police had reliable information from citizen informants within

a day or two of the issuance of the search warrant that defendant was engaging in the same activities as he was 4 months earlier, i.e., making phone calls to known drug contacts, moving from motel to motel, refusing maid service to his room, and being in possession of suspected marijuana.

Defendant's objection to the no-knock feature of the search warrant is without merit. As recently as *State v. Armendariz*, 234 Neb. 170, 449 N.W.2d 555 (1989), this court reaffirmed the constitutionality of Neb. Rev. Stat. § 29-411 (Reissue 1989), which sanctions a forcible entry into a dwelling if the magistrate issuing the warrant has inserted a direction to the officer executing it that the officer need not give notice of entry. We held that "the court can take judicial notice that substances such as cocaine may be easily and quickly disposed of by flushing down a drain." *State v. Armendariz, supra* at 174, 449 N.W.2d at 558. The affidavit in this instance sets forth facts in support of the authorization and justification of the no-knock entry.

Defendant also asserts, without support by argument, that the no-knock provision of this warrant violates article I, § 7, of the Constitution of the State of Nebraska. As a general rule, we do not consider errors asserted but not argued. However, we note in passing that this particular section of the Nebraska Constitution tracks exactly the provisions of the fourth amendment to the Constitution of the United States.

In *State v. Meyer*, 209 Neb. 757, 311 N.W.2d 520 (1981), this court concluded that neither *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), nor *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), nullifies the provision of § 29-411 of the Nebraska statutes relating to no-knock warrants and that such provision does not offend the fourth amendment prohibition against unreasonable searches and seizure. The same ruling would apply to the provision in the Constitution of the State of Nebraska.

In defendant's second assignment of error, he argues that the trial court erroneously permitted the testifying officer to express an opinion that defendant was engaged in dealing drugs, that there was insufficient evidence to establish the elements of possession of a drug with the intent to deliver, and

that, therefore, his motion for a directed verdict should have been sustained.

In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

In the first place, the record fully supports the experience and expertise of the officer giving that opinion. Secondly, during cross-examination of an earlier witness for the State, the following questions and answers were given:

> Q [by defense counsel]. Officer Sanchelli, cutting to the chase, you think Von's guilty, right? I mean, you just said he's a profitable drug dealer. You think he's guilty, right?
>
> A. From the evidence I saw the day of the search warrant, I have my opinion.
>
> Q. You think he's guilty, right? You can say it if you think he's guilty.
>
> A. I do, yes.

Finally, in *State v. Salas*, 231 Neb. 471, 475, 436 N.W.2d 547, 550 (1989), this court said:

> Circumstantial evidence is sufficient to support a finding of guilty of possession of a controlled substance with intent to distribute, deliver, or dispense. [Citations omitted.] Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute.

There is no merit to this assignment of error.

It is well established that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Nelson, ante* p. 15, 453 N.W.2d 454 (1990).

Possession of a controlled substance with the intent to deliver is a Class III felony, with a prescribed sentence of imprisonment of from 1 to 20 years. Possession of cocaine is a Class IV felony, for which a term of imprisonment of up to 5 years is authorized.

The courts are now recognizing that possession of controlled substances, to say nothing of possession with the intent to deliver, is not a victimless crime. There was no abuse of discretion by the sentencing court.

Finally, defendant argues that he should have been granted a mistrial because of misconduct by the prosecutor. This complaint borders on the ridiculous.

Defense counsel was inquiring of a police officer witness "how things work a little bit in the county attorney's office," relating to when and under what circumstances the county attorney may send a police officer out to investigate a matter. The prosecuting attorney objected to the form of the question as calling for speculation and a conclusion which "this witness can't make." The prosecuting attorney went on to say, "He [defense counsel] can ask me if he wants and I will tell him." The objection was sustained, but defense counsel persisted and asked, "Does that mean I can ask [the prosecuting attorney] then?" The prosecuting attorney then answered by stating, "If you want to put me on the stand as a witness, I will be more than happy to tell you everything you want to know about your defendant."

Defense counsel then moved for a mistrial "based upon the prosecutor's remark implying that there is some sort of felony record or some sort of record against Mr. Eary that the jury is not privy to." In denying the motion for a mistrial, the court inquired of counsel if he wanted the court to admonish the jury, and upon receiving an affirmative answer, the court directed the jury that it was not to draw any inference that there was any existing criminal record of the defendant.

A mistrial is properly granted only when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. The decision of 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 abuse of discretion. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). See, also, *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989).

The judgment of the district court is affirmed.

AFFIRMED.

LAWRENCE E. VON TERSCH, APPELLEE AND CROSS-APPELLANT, V. GERALDINE A. VON TERSCH, APPELLANT AND CROSS-APPELLEE.

455 N.W.2d 130

Filed May 4, 1990. No. 89-776.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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. **Divorce: Child Custody.** A custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

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

Lorin C. Galvin for appellant.

James S. Jansen, of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellee.

Kelly K. Duncan for amicus curiae Rutherford Institute of Nebraska.

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

SHANAHAN, J.

In this appeal from the district court for Douglas County, which dissolved the marriage of Geraldine A. Von Tersch and Lawrence E. Von Tersch, Geraldine Von Tersch (Geri), as custodial parent, contends that the district court erred in (1) requiring that the parties' minor children attend a public school rather than a private school of Geri's choice and (2) awarding insufficient child support, distributing the parties' marital property, allocating debts, awarding an inadequate attorney fee for Geri's lawyer, assessing Geri with the costs of the eventual sale of the parties' residence, and charging the gross marital estate with the costs of a psychological child custody evaluation. Lawrence Von Tersch (Larry) cross-appeals, contending that the district court erred in granting Geri custody of the Von Tersch minor children and in ordering Larry to refrain from drinking alcoholic liquor in relation to visitation of his children.

Von Tersches were married in November 1964 and have four children from their marriage. Only two of the Von Tersch children are legally affected by the dissolution proceedings, namely, Kurtis and Kyle, twin boys born May 17, 1980. During the early years of the marriage, Larry earned a degree in physical education in 1967 and, after graduation, taught high school physical education from 1967 through 1973, although his teaching career was interrupted by 1 year's military service in Vietnam. Eventually, Larry became a high school head football coach and physical education instructor, but in 1984 left teaching and joined the sales force for an Omaha-based corporation. At the time of trial, Larry had an annual gross salary of $37,000 as a senior account representative.

When Larry and Geri married, Geri worked as a medical assistant and secretary at Physicians Clinic, but took time off regarding the birth of the two oldest Von Tersch children. In 1979, Geri went to work as a secretary and receptionist and earned approximately $4.50 per hour, but, due to complications in her pregnancy with the Von Tersch twins, had to leave her secretarial-receptionist job. Since the twins' birth, Geri has not been employed outside the Von Tersch home. However, at the time of trial, Geri worked full time as a volunteer secretary and

teacher's aide at the grade school attended by the Von Tersch twins and received no compensation for her services at the twins' school. Throughout the marriage, Geri was mainly responsible for rearing the Von Tersch children.

The Von Tersch marital estate included a southwest Omaha residence, which was valued at $62,500 and was subject to a $20,000 mortgage. Von Tersches also owned 2 acres of land in rural Douglas County, which was sold for $9,300 some 3 weeks before the dissolution trial. Other assets included a money market account, a 401K plan with Larry's employer, an IRA account, stock and various insurance policies, two automobiles, and miscellaneous household goods and furnishings.

Prior to trial in the marital dissolution proceedings, the Von Tersch family had attended a Catholic church fairly regularly until 1978, when they began going to various Protestant churches. In 1986, Geri commenced attending services at the Sword of the Spirit Church and enrolled the Von Tersch twins in kindergarten at the church's school, a "private Christian school" which had as its primary purpose "to train the student in the Christian way of life and to give the student a good general education." Although Larry and Geri do not share the same religious beliefs, the dissimilarities of their religions are not a major source of controversy between the couple. After Larry returned to the Catholic church in May 1988, the parties alternated the twins' church attendance, that is, one Sunday Larry took the boys to his church, and the following Sunday Geri took them to her church. Neither party objects to this arrangement, which exposes the twins to both the Catholic faith and Geri's religious beliefs.

Geri and Larry experienced various difficulties, such as problems arising from Larry's drinking and gambling activities. On at least five occasions, professional counselors suggested that Larry seek treatment for his drinking problem. Geri expressed concern about Larry's drinking in the presence of the twins, particularly when he was driving the car in which the twins were riding. Larry regularly attended races at horse or dog tracks.

Geri and Larry differed in their views on rearing and

disciplining the twins, and also disagreed about the twins' participation in sports, especially when Geri balked at the boys' playing soccer. As a former physical education teacher, Larry felt that the twins' participation in sports was very important to their development and, consequently, encouraged and coached the twins in baseball, soccer, hockey, and basketball.

The couple attended marriage counseling, but their marital problems persisted. In September 1985, Larry filed a petition for dissolution of his marriage to Geri. The court entered a temporary order that the parties have joint custody of the children. Nevertheless, Larry and Geri continued to live together in the family residence and attempted to reconcile their differences. Despite a provision in the temporary order that attendance at a public school was in the twins' best interests, Geri wanted the twins to attend Sword of the Spirit school. Larry, however, believed that the boys would be better off in a public school. "[T]o make the marriage workable," Larry acquiesced in Geri's wishes for education of the twins.

Sword of the Spirit school is a small private school operated in urban Omaha. Although the school was founded in 1981 and was state approved, after adoption of "Rule 13" of the Nebraska Department of Education's regulations and procedures in 1984, the school elected to become exempt from state approval or accreditation requirements and standards, an exemption authorized by 92 Neb. Admin. Code, ch. 13, § 003.01 (1984), and Neb. Rev. Stat. §§ 79-1701 et seq. (Reissue 1987) which, generally, provide for exemption from state accreditation or approval requirements, such as certification requirements for teachers in private, denominational, and parochial schools.

Children attending the Sword of the Spirit school are taught in small classes, consisting of approximately 12 students. The school has 14 teachers, some of whom are teachers certified by the state, while others are not. Teachers assigned for the Von Tersch twins held valid teaching certificates. The school's academic program follows traditional approaches to education with a wide range of subjects. The kindergarten curriculum consists of language arts, science, and arithmetic. For first grade and succeeding grades, the curriculum, in addition to the

aforementioned kindergarten subjects, includes history, geography, health, safety, and manners. All classes engage in daily Bible study. At the time of trial, the Von Tersch twins were in the third grade, with satisfactory performance in their studies.

In 1988, the court appointed a guardian ad litem for the Von Tersch twins and ordered a comprehensive child custody evaluation, which was rendered by Joseph L. Rizzo, a clinical psychologist. The custody evaluation included interviews with Geri and Larry, psychological evaluations of the parents and the twins, and psychoeducational testing of the twins by a certified school psychologist. Dr. Rizzo described the twins as "very socially conscious, precocious, challenging, and seem to have the capability of generating a wide variety of interests."

Regarding the Sword of the Spirit school and the needs of the twins, Dr. Rizzo stated:

> [T]he strong focus on academic basics [at the school] will have a very limiting effect as these children are not the Above Average children who can self teach themselves. They, themselves, tend to be in need of structure, guidance and active teaching, in which The Sword of the Spirit School is limited. Additionally, not having any supplemental programs in place as of this date in Art, Physical Education, Reading, Shop, Special Ed as well as not having any laboratory, Science or Laboratory Math courses compounds and generates a sense of awkwardness and potential vulnerability for the children.

Dr. Rizzo believed that Geri "takes responsibility of the children extremely seriously," but indicated that she minimizes the twins' needs to be with their peers or to have time to themselves. Dr. Rizzo stated that, while Larry admits a history of drinking and gambling, he tended to downplay the importance or effect of those activities on his marriage and family, and was "manifesting an untreated alcohol abuse reaction and . . . approaching the bounds of a problem area in regard to his gambling." Regarding the relationship between the parents and the twins, Dr. Rizzo indicated that the twins are very close to both Geri and Larry, and are very troubled by the divorce.

The court granted Geri custody of the twins, subject to Larry's right of visitation concerning the twins. Regarding visitation, the court ordered that Larry refrain from drinking alcohol for the 4 hours preceding any visitation during which he would operate a motor vehicle in which the twins would be passengers. Larry was ordered to pay child support of $300 per month per child and alimony of $300 per month for 121 months. Geri was ordered to register the boys in the Millard public school system for the school term beginning in the fall of 1989. Out of the $9,300 in proceeds from the sale of the rural land in Douglas County, $2,450 was set aside to pay Dr. Rizzo's fee and the fee of the guardian ad litem. Geri was awarded the family residence, subject to the existing mortgage, plus an IRA account and the 1988 state and federal income tax refunds. According to the court's division and distribution of Von Tersches' marital estate, Geri's share of the estate was valued at $36,411, while Larry's share was valued at $36,340. Larry was granted a lien on the family residence for $9,612, which represented his share of the net equity in the Von Tersch residence and which was due and payable on occurrence of any of several events, including emancipation of the minor Von Tersch children. In lieu of interest assessed on account of deferred payment of Larry's share of the residential equity, Geri bore the costs of any eventual sale of the Von Tersch residence.

STANDARD OF REVIEW

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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.

Huffman v. Huffman, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989). See, also, *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433

N.W.2d 192 (1988).

COURT-ORDERED EDUCATION IN A PUBLIC SCHOOL

In the dissolution decree pertaining to child custody, the court ordered Geri to register the Von Tersch twins "in and have them attend a school in the Millard Public School System, commencing in the Fall of 1989, and continue in said school system thereafter until further order of the Court." Geri contends this order infringes on her rights under the first amendment, namely, her freedom of religion, see U.S. Const. amend. I, and refers to *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), which, when read together, support the constitutional principle that a state cannot interfere with a parent's liberty interest to direct the upbringing of the parent's child or children, including educational and religious instruction, in the absence of jeopardy to the child's health, safety, or significant social concerns. See, also, U.S. Const. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law).

While Geri points out the constitutional limitations on a state's interference with parents in the religious upbringing of their children, we do not believe that the Von Tersch case rises to the level of a question about a parent's constitutionally protected right concerning religious training or upbringing of the parent's child. Larry does not object to his sons' attending Sword of the Spirit school and receiving religious instruction at the school. Rather, Larry's disapproval of the school is based on the school's physical structure, lack of state certified teachers, and the absence of supplemental classes, such as physical education, art, music, industrial arts, and computer programming. As previously noted, although Larry and Geri have "religious differences," neither complains that the twins' exposure to the differing parental religions has a deleterious or detrimental effect on the health, safety, or well-being of the twins. Also, Larry expresses no disagreement about or

disapproval of daily Bible study by the twins as students at Sword of the Spirit school, or instruction emphasizing Bible-based principles. The district court concluded that the issue of the twins' education was determined by the best interests of the twins, independent of any consideration based on religion or religious belief. The language in the custody provision of the dissolution decree indicates that public school attendance was ordered for secular reasons only. From our de novo review of the record, we find no first amendment issue arising from the district court's order for education of the Von Tersch twins.

The issue remains, however, whether the district court abused its discretion in ordering that the twins attend public school, rather than private school, against the wishes of the custodial parent, Geri. Courts of most jurisdictions take the view and, therefore, espouse the principle that when parents in a marital dissolution proceeding disagree about the course of their child's education, a court should decline to enter an order directing the child's education and should leave the child's education to a determination by the custodial parent in the absence of unusual circumstances or a showing that the child's health, safety, or well-being are, or will be, endangered by the parental decision concerning the child's education. See, *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1985) (control over a child's education remains in the custodial parent in the absence of a showing that the parental decision on education causes mental or physical harm to the child); *Majnaric v. Majnaric*, 46 Ohio App. 2d 157, 347 N.E.2d 552 (1975) (child custody implies that the custodial parent has the immediate personal care and control of the child, including the right to determine what school the child will attend); *Selby v. Selby*, 124 N.E.2d 772 (Ohio App. 1952) (generally, a court has limited power to restrict the custodial parent's choice of a school to be attended by the child); *Fanning v. Warfield*, 252 Md. 18, 248 A.2d 890 (1969) (in a marital dissolution proceeding, child custody, in the absence of some extraordinary or highly unusual circumstances, includes the right of the custodial parent to make decisions about the child's education); *Mester v. Mester*, 58 Misc. 2d 790, 296 N.Y.S.2d 193 (1969) (the nature and extent

of a child's education is a value judgment committed to the custodial parent, whose decision may be subject to judicial interference on an affirmative showing that the parental decision injures the child); *Zande v. Zande*, 3 N.C. App. 149, 164 S.E.2d 523 (1968) (custodial parent determines what education the child will have); *Bateman v. Bateman*, 224 Ga. 20, 159 S.E.2d 387 (1968) (child custody includes corresponding privileges, such as the right to decide what educational advantages children shall receive); *Montandon v. Montandon*, 242 Cal. App. 2d 886, 52 Cal. Rptr. 43 (1966) (a custodial parent is permitted to select the religious, cultural, and educational forum of the child), *overruled on other grounds, In re Marriage of Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 922 (1980); *Jenks v. Jenks*, 385 S.W.2d 370 (Mo. App. 1964) (the right of a custodial parent to direct a child's training and education, whether religious or secular, is contained within custody itself and should be free from court interference unless the court is convinced that the welfare of the child demands judicial intervention); *Kritzik v. Kritzik*, 21 Wis. 2d 442, 124 N.W.2d 581 (1963) (educational decisions for a child are left to the custodial parent).

The rationale for the preceding principle regarding a custodial parent's determination with respect to a child's education is abundantly clear: As a matter of practicality, a court, being somewhat a stranger to both a child and the parent in a marital dissolution proceeding, is usually ill equipped to fully comprehend and act astutely on the varied and exact but everyday needs of the child and, therefore, should not substitute judicial judgment for that of the custodial parent who selects schooling or education for the child. See *Griffin v. Griffin, supra*. As stated in *Jenks v. Jenks, supra* at 377:

> Courts are not so constituted as to be able to regulate the details of a child's upbringing. It exhausts the imagination to speculate on the difficulties to which they would subject themselves were they to enter the home or the school or the playground and undertake to exercise on all occasions the authority which one party or the other would be bound to ascribe to them. Considerations of the most practical kind, therefore, dictate that in these cases the duty of

> attending to the details of the child's rearing be delegated to a custodian, and, as an indispensable concomitant of the appointment, that the custodian be vested not only with commensurate authority but with that degree of discretion upon which the expeditious exercise of authority invariably depends. It must be presumed in the absence of a contrary showing that the custodian, whether he be the child's parent or a stranger, will discharge his duties with fidelity and good judgment.

We have previously stated that a custodial parent in a marital dissolution proceeding normally has the right to control the religious training of a child legally affected by the proceeding unless there is a demonstrated serious threat to the health or well-being of the child. *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966). See, also, *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981); *Kaufmann v. Kaufmann*, 140 Neb. 299, 299 N.W. 617 (1941), *overruled on other grounds, Lakey v. Gudgel*, 158 Neb. 116, 62 N.W.2d 525 (1954). The aforementioned rule regarding a custodial parent's determination of a child's religion provides an analogue for a similar rule concerning a child's education. Accordingly, we hold that a custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

In Von Tersches' case, Dr. Rizzo indicated that continued attendance at the Sword of the Spirit school would reduce the twins' opportunity for social interaction and competition, to the extent that they may "tend to perceive themselves as being perhaps more qualified and competent than they truly are." However, none supplied evidence that Sword of the Spirit school in any way adversely affects the Von Tersch twins' physical or mental health and well-being. Although the argument is made that a public school, with numerous extracurricular activities, elaborate science labs, sports facilities, and computer sciences, provides more opportunities to a student than does Sword of the Spirit school, we decline to

evaluate the relative educational merits of the schools or school systems. While it is possible that the twins' social progression might be enhanced through public school education, there has been no evidentially demonstrated harm, actual or likely, to the twins' safety, well-being, or health, either physical or mental, from their continued attendance at Sword of the Spirit school. Therefore, the evidence does not establish that the Sword of the Spirit school has, or will have, a detrimental effect on the Von Tersch twins.

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

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). See, also, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

In the case now before us, the trial court abused its discretion by intruding upon the right of a custodial parent to determine the nature and extent of educating a child for whom the parent has been granted custody. Accordingly, we reverse the district court's judgment that the Von Tersch twins must be educated in a public school.

OTHER ASSIGNED ERRORS

Regarding Geri Von Tersch's contention that the court abused its discretion regarding child support, alimony, property division, and fees in the proceedings, we have conducted a de novo review of the district court's judgment and conclude that, regarding the matters just mentioned, Geri Von Tersch has failed to establish that the district court abused its discretion. Hence, the district court's judgment regarding child support, alimony, property division, and fees is affirmed. See, *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988) (amount of child support is discretionary with the trial court); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990) (child custody and amount of alimony are discretionary with the trial court); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986) (nature

of property division is discretionary with the trial court); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986) (allowance and amount of a guardian ad litem fee are discretionary with the trial court).

CROSS-APPEAL

In his cross-appeal, Larry Von Tersch argues that the district court erred in awarding custody of the minor children to Geri, and in ordering Larry to refrain from drinking intoxicating beverages for the 4 hours preceding a visitation during which Larry would be operating a motor vehicle in which the Von Tersch twins would be passengers.

> When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. . . .
>
> . . . .
>
> . . . [N]either parent is presumed to be more fit than the other or granted custodial preference on the basis of gender.

Ritter v. Ritter, supra at 210-11, 450 N.W.2d at 210-11 (1990).

> In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

Christen v. Christen, 228 Neb. 268, 271-72, 422 N.W.2d 92, 95 (1988). See, also, *Ritter v. Ritter, supra*.

No dispute exists concerning the fitness of Geri or Larry Von Tersch as a parent. The district court found that both parties were fit to have custody of the Von Tersch children, but that the best interests of the children warranted custody in Geri, subject to Larry's visitation of the children. Both parents have a close relationship with the twins. "In determining whether a noncustodial parent will have visitation rights and the nature of such visitation rights, the best interests of a child are the primary and paramount consideration by a court." *Gerber v. Gerber*, 225 Neb. 611, 618, 407 N.W.2d 497, 502 (1987). In view of the extent of Larry's use of alcohol, the district court's requirement that Larry's visitation of his children be liquor-free is not an abuse of discretion by the trial court. Consequently, the district court did not abuse its discretion in granting child custody to Geri Von Tersch or in imposing a restriction on the child visitation by Larry Von Tersch.

CONCLUSION

For the reasons given above, that part of the district court's judgment requiring that Geri place Kurtis and Kyle in Millard Public Schools is reversed, but the judgment of the district court in all other respects is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

BOSLAUGH, J., dissenting in part.

The record shows that both the guardian ad litem and the psychologist, Dr. Rizzo, were concerned about the continued attendance of the children at the Sword of the Spirit school.

It was the opinion of the psychologist that if the children continued to attend the Sword of the Spirit school, "their performance would need to be monitored on a yearly basis to see if they are in fact continuing to acquire 'the basics'." He further stated that if the children did leave the Sword of the Spirit school to go into a standard junior high school, "they will probably have a very difficult time because they will be substantially behind in the social and emotional and will need at least one to two years to shift into the public school system."

In view of this evidence, it seems to me that the trial court did not abuse its discretion in finding that it was in the best interests of the children to attend a public school and in ordering the

respondent to register the children in the Millard public school system commencing in the fall of 1989.

IN RE INTEREST OF C.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. M.A., APPELLANT.

455 N.W.2d 138

Filed May 4, 1990. No. 89-780.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Constitutional Law: Speedy Trial.** The speedy trial provisions of U.S. Const. amend. VI, Neb. Const. art. I, § 11, and Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1989) apply only to criminal trials.
3. **Parental Rights.** A proceeding to terminate parental rights is statutorily mandated and brought about to protect a child; it is not criminal in nature.
4. **Parental Rights: Speedy Trial: Time.** The Nebraska Juvenile Code provides that an adjudication hearing be held within a 6-month period after the petition is filed. The 6-month period is to be calculated in the same manner as the 6-month period is calculated in criminal cases under Neb. Rev. Stat. § 29-1207 (Reissue 1989).
5. _____: _____: _____. The statutory provision, Neb. Rev. Stat. § 43-278 (Reissue 1988), requiring that an adjudication hearing be held within 6 months after a juvenile petition is filed is directory, not mandatory.
6. **Parental Rights: Evidence.** An order terminating parental rights must be based on clear and convincing evidence.
7. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
8. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
9. _____. A parent's failure to take proper measures to protect children from abuse by another furnishes sufficient cause to terminate parental rights.
10. _____. A mother's fright does not, by itself, excuse her failure to extricate children from a dangerous environment.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Mark J. Slowiaczek for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

FAHRNBRUCH, J.

The appellant, M.A., seeks to overturn a juvenile court order terminating her parental rights in her 5-year-old daughter, C.P.

M.A. claims the termination order was improper because the Douglas County Separate Juvenile Court (1) did not hold an adjudication hearing within the time directed by statute and (2) erroneously found that termination of M.A.'s parental rights was in the best interests of the child. We affirm.

Appellant's parental rights were terminated because she substantially and continuously or repeatedly neglected C.P. and refused to give her child necessary parental care and protection. T.P., the natural father, has not appealed the order terminating his parental rights.

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

In re Interest of M.M., C.M., and D.M., 234 Neb. 839, 840, 452 N.W.2d 753, 755 (1990).

Based on a de novo review of the record and giving weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another, the record reflects the following. C.P. was born on September 22, 1983, to T.P. and M.B., now known as M.A. T.P. also fathered another child by M.A. That child is not involved in this action. T.P. and M.A.

were never married, but periodically resided together for some period of time before and after C.P. was born.

During the term of her pregnancy with C.P., T.P. hit and kicked M.A. After the child was born, T.P. punched M.A., slammed her head into cabinets, threatened to kill her with a knife, threw objects at M.A., and bit her on the arms, legs, and breasts. This abuse was on an ongoing basis. M.A. left T.P. on several occasions due to T.P.'s mistreatment. In addition, M.A. observed T.P. hit C.P. with a stick, board, and belt and observed him strike the child about the face and head with his hand and fist, leaving marks and bruises.

On January 18, 1984, while M.A. and T.P. were living apart, M.A. informed the Omaha Police Division that T.P. abducted C.P. from M.A.'s home when M.A. told T.P. that she was going to take the child to Arkansas. C.P. was returned to M.A. The police advised M.A. to seek legal action to determine which party was entitled to custody of the child.

The record is unclear as to when T.P. and M.A. permanently broke off their relationship, but it appears to have occurred some time prior to 1987. After T.P. and M.A. separated, M.A. initially took C.P. with her but, at a later date, allowed T.P. to have custody of their child. T.P. had custody of C.P. from 1985 until the child was brought to the attention of authorities in May 1988.

M.A. has seen C.P. on only one occasion since sometime before April 1987. On April 13, 1988, M.A. briefly glimpsed her daughter in T.P.'s car when T.P.'s mother took birthday gifts to M.A.'s two sons. M.A. testified that she stopped visiting her daughter because she got married.

Before December 1987, T.P., along with C.P., began residing with G.P. and her two children. T.P. was not the father of G.P.'s two sons, 4-year-old J.B. and C.B., who was an 18-month-old infant. T.P. and G.P. had a daughter, A.P., born in May 1988.

On approximately May 19, 1988, C.B., in a life-threatening condition, was taken to a hospital by G.P. and T.P. The child had a subdural hematoma, which is a bleeding inside his skull, that was placing pressure on the brain. C.B. had been severely abused for some period of time. He had a number of fractures and bruises, some of which were older and in the process of

healing. C.B. subsequently died from his head injuries. The evidence in this case reflects that the fatal injuries occurred when T.P. threw C.B. at J.B. and C.B. hit the floor.

Due to the nature of C.B.'s injuries and the unknown whereabouts of the other children, Omaha police officers became concerned about the other children's safety. On the evening on which C.B. was taken to a hospital, police, after being misdirected, located C.B.'s siblings and C.P. at their home. The home was found to be filthy and littered with clothing, debris, cat feces, and discarded food. It smelled of urine. C.P. was disheveled and dirty, with matted hair.

The police transported the children to a hospital, where they were examined by an emergency room physician. A physical examination of J.B. revealed a number of fractures, bruises, cuts, and areas of swelling. It was later determined that T.P. had brutally abused J.B. for some months. The extent of the abuse is recited in *In re Interest of J.B. and A.P., ante* p. 74, 453 N.W.2d 477 (1990).

C.P.'s examining physician described her as very anxious and nervous. During his examination of C.P., the doctor did not find any physical injuries. However, C.P. informed a police officer that her father "beat [her] ass." G.P. also testified that when the child wet her pants, T.P. beat her with a belt.

On June 2, 1988, a petition was filed in the separate juvenile court of Douglas County to terminate the parental rights of M.A. in C.P. This case was consolidated for trial in the juvenile court with the case that was decided by *In re Interest of J.B. and A.P., supra*. The children were initially placed in the custody of the Nebraska Department of Social Services. After holding a detention hearing on June 28, 1988, the court ordered that temporary custody of C.P. be continued with the Department of Social Services for appropriate foster care placement. After conducting an adjudication hearing on May 3 and 4, 1989, the court found by clear and convincing evidence that C.P. was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). In relevant part, § 43-247(3)(a) provides the juvenile court with exclusive original jurisdiction over any juvenile

> who is abandoned by his or her parent . . . who lacks

> proper parental care by reason of the fault or habits of his or her parent . . . whose parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the juvenile.

After finding by clear and convincing evidence the existence of the condition described in Neb. Rev. Stat. § 43-292(2) (Reissue 1988), the court terminated M.A.'s parental rights in C.P. Section 43-292(2) provides that parental rights to a child may be terminated where "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

As indicated, the petition to terminate M.A.'s parental rights in C.P. was filed on June 2, 1988. On August 15, 1988, the parties agreed that the termination proceedings would be postponed until after completion of T.P.'s criminal trial for second degree murder of C.B. and first degree assault and child abuse on J.B. T.P. was found guilty of the three charges on November 17, 1988. He was sentenced on January 6, 1989. On May 3, 1989, M.A. filed a motion to dismiss the petition on the basis that the adjudication hearing was not held within the time directed by statute. The juvenile court judge overruled M.A.'s dismissal motion, immediately after which the adjudication hearing commenced.

M.A. incorrectly argues that the 6-month speedy criminal trial provision, Neb. Rev. Stat § 29-1207 (Reissue 1989), is applicable to this case. She contends that the adjudication hearing in this case was not held within the 6-month time limit directed by the Nebraska Juvenile Code. M.A. is correct in asserting that 335 days elapsed from the time the petition to terminate her parental rights was filed until the adjudication hearing. After deducting time excludable from the 6-month period, there were still 240 days between the filing of the termination petition and commencement of the adjudication hearing, which is well beyond the 6-month period. M.A. concludes that because of the delay in hearing the petition to terminate her parental rights, the petition should have been dismissed. We disagree.

The speedy trial provisions of U.S. Const. amend. VI, Neb.

Const. art. I, § 11, and Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1989) apply only to criminal trials. *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989). A proceeding to terminate parental rights is statutorily mandated and brought about to protect a child; it is not criminal in nature. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984) (holding that absent questions which would subject a parent to criminal sanctions, the protections afforded by the fifth amendment privilege against self-incrimination do not apply to parental termination proceedings); *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563 (1983) (determining that a parent does not possess a right to have counsel present at interviews between the parent and an expert witness). Thus, it is clear that the speedy trial right guaranteed by the U.S. and Nebraska Constitutions and §§ 29-1205 to 29-1209 does not apply to parental termination proceedings.

The Nebraska Juvenile Code provides that an adjudication hearing be held within a 6-month period after the petition is filed. Neb. Rev. Stat. §§ 43-278 and 43-279.01(1)(f) (Reissue 1988). The 6-month period is to be calculated in the same manner as the 6-month period is calculated in criminal cases under § 29-1207. § 43-278.

Although § 43-278 directs that an adjudication hearing be held within 6 months after a petition is filed, the Legislature has not directed that the case be dismissed, nor has the Legislature forged a remedy that deprives the juvenile court of jurisdiction to adjudicate a parental termination case, in the event that § 43-278 is violated. This is in contrast to the remedy for a violation of a criminal defendant's speedy trial right where the defendant is entitled to an absolute discharge from the offense charged and any other offense required by law to be joined to that offense. See § 29-1207. The question thus arises, What happens in the absence of legislative direction when an untimely parental termination hearing is held?

The Supreme Court of Vermont recently addressed this issue. *In re J.R.*, 153 Vt. 85, 570 A.2d 154 (1989), involved a child who had been sexually abused and placed in the custody and guardianship of the Vermont Department of Social and Rehabilitation Services. After the case was appealed for the

second time and remanded, the trial court failed to conduct a dispositional hearing within the statutory time limits. The parents contended that because the hearing was held in an untimely fashion, the district court erred in not dismissing the case. The *J.R.* court relied on the general rule that "where the statute is merely 'directory'—that is, directs the manner of doing something, but is not the essence of the authority for doing it—compliance with the manner is not considered essential to the validity of the proceeding." *J.R., supra* at 92, 570 A.2d at 157. Thus, the court held that since the statute's time limit was only directory, it was proper not to dismiss the case. In its most recently reported decision on the issue at hand, the Vermont Supreme Court stated that its decisions reflect that the parent's right to a speedy adjudication must be weighed with the child's best interests. See *In re M.C.P.*, 153 Vt. 275, 571 A.2d 627 (1989) (involving a sexually and physically abused child placed in the legal custody of the Vermont Department of Social and Rehabilitation Services).

The rule regarding directory legislation is reflected in the case law of this state, although not in the context of a hearing to terminate parental rights. In *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987), the defendant was acquitted by reason of insanity and ordered admitted to the Lincoln Regional Center for a 90-day evaluation. Because the State failed to conduct an evidentiary hearing before the expiration of the 90-day period as provided in Neb. Rev. Stat. § 29-3702 (Reissue 1989), Steele argued that the court lacked jurisdiction and that he must be released from the Lincoln Regional Center. Relying on the rule that a provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory, this court held that the statute's time limits were directory, not mandatory. Therefore, Steele was not released from custody.

We were also confronted with the failure to conduct an evidentiary hearing as provided in § 29-3702 in *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989). The defendant in *Hayden* claimed that the 90-day evaluation period should be analogized to his right to a speedy trial. Again, this court held

that the time limits set forth in § 29-3702 are directory, not mandatory, and that dismissal of the proceedings was not a proper remedy for a nonprejudicial violation of the statute. In other contexts, it has been determined that a legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory. See, *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985) (deciding that the failure of a sheriff to immediately serve parents with notice that their child had been taken into custody under Neb. Rev. Stat. § 43-250 (Reissue 1984) and to file a petition within 48 hours after taking custody of the child as required by Neb. Rev. Stat. § 43-275 (Reissue 1988) did not deprive the county court of jurisdiction); *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976) (concluding that the statutory provision requiring the Court of Industrial Relations to hear each case within 60 days from the date a petition is filed and to enter an order thereon within 30 days after the hearing is directory and not mandatory).

Based on the foregoing cases, we conclude that the statutory provision requiring that an adjudication hearing be held within 6 months after a juvenile petition is filed is directory, not mandatory. In view of the fact that a juvenile's best interests are primary considerations in a parental termination proceeding, see *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990), an opposite conclusion might well circumvent this purpose and allow form to prevail over substance. For instance, it would be absurd to return a sexually abused child to the party who abused the child for the sole reason that the hearing was held 181 days after the petition was filed. Section 43-278 governs the time for an adjudication hearing of a juvenile petition and does not relate to the essence of the thing to be done. We agree with the *J.R.* court that although the statutory time limit is directory, the violation of that time limit might, under certain circumstances, prejudice parents in some cases. In this case, M.A. has failed to show how she was prejudiced by the delay in the adjudication hearing. M.A.'s first assignment of error is meritless.

In her second and final assignment of error, M.A. contends

that the State has failed to show by clear and convincing evidence that it was in C.P.'s best interests to terminate her mother's parental rights.

In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in § 43-292 exists. Section 43-292 provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.

An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988). " '[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.' " *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 157 (1987). The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). A parent's natural right to the custody of his or her own child must yield when the two requirements of § 43-292 have been met. *In re Interest of J.S., A.C., and C.S., supra*. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. *Id.* Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. *Id.* "It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parents that is

required." *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 766, 386 N.W.2d 877, 883 (1986).

M.A. herself was brutalized by T.P. She also observed T.P. hit C.P. with a board, stick, and belt and observed him strike C.P.'s face and head. By her own admission, these beatings left marks and bruises on C.P. Despite this firsthand knowledge of T.P.'s violent and abusive propensities, she allowed her child to be placed in his care and custody. Due to M.A.'s neglect, her child was placed in an intolerable situation where she witnessed long-term abuse which resulted in the death of an 18-month-old infant. Moreover, one of the police officers who removed C.P. from T.P.'s home testified that absent the physical abuse, he would still have taken the children because of the unwholesome and unsafe environment in which they were living. A parent's failure to take proper measures to protect children from abuse by another furnishes sufficient cause to terminate parental rights under the statutory subsection at issue. *In re Interest of J.B. and A.P., ante* p. 74, 453 N.W.2d 477 (1990). See, *In re Interest of Hollenbeck,* 212 Neb. 253, 322 N.W.2d 635 (1982); *In re Interest of Cook,* 208 Neb. 549, 304 N.W.2d 390 (1981).

M.A. claims that in addition to the abduction report, she called the police department and Child Protective Services to assist her in obtaining custody of C.P. However, neither the police nor Child Protective Services had records of any of these alleged reports. Though M.A. stated that she did not attempt to obtain custody of C.P. because she was frightened of T.P. "[i]n a way," this does not excuse her conduct. Even if we accept this qualified expression of fear, a mother's fright does not, by itself, excuse her failure to extricate children from a dangerous environment. See *In re Interest of J.B. and A.P., supra.*

There is further evidence that clearly and convincingly establishes that M.A. substantially and continuously or repeatedly neglected C.P. and refused to give C.P. necessary parental care and protection. M.A. declined to visit C.P. for at least a year prior to the events of May 19, 1988. This failure exhibits M.A.'s lack of genuine interest in giving her child the required necessary parental care and protection. It also shows M.A. substantially and continuously for at least a year neglected C.P. In view of the facts that her child lived in the

same city as M.A. and the mother was aware of the child's location, M.A.'s attempts to excuse her failure to visit C.P. are not convincing. Indeed, M.A. testified that she quit visiting the child because she married.

Having determined that there existed clear and convincing evidence of the condition described in § 43-292(2), we next consider whether the record establishes by clear and convincing evidence that it was in C.P.'s best interests to terminate her natural mother's parental rights. There was expert testimony that M.A. suffered from "battered woman's syndrome," a condition of learned helplessness, and had been involved in several abusive relationships prior to and after her relationship with T.P. That syndrome, if untreated, affects a woman's ability to protect her children from abuse and places the children at risk. Although in April 1988 M.A. agreed to obtain treatment for the battered woman's syndrome she suffered, there is no evidence that she had obtained treatment for her malady by the time of the termination hearing on May 3, 1989.

After M.A. and T.P. separated, there were reports to Child Protective Services regarding abuse to M.A.'s other sons, this abuse being committed by a man whom she married after severing her relationship with T.P. A caseworker testified that the abuse reported to Child Protective Services was substantiated.

The evidence that M.A. had been unable or unwilling to protect C.P. in the past and has continued to endanger her other children by engaging in abusive relationships clearly and convincingly establishes that it is in C.P.'s best interests to terminate her natural mother's parental rights. M.A.'s final assignment of error is without merit.

AFFIRMED.

JERRY C. WYMAN, APPELLEE, V. MARY J. WYMAN, APPELLANT.
454 N.W.2d 692

Filed May 4, 1990. No. 89-1138.

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

Richard Register for appellant.

Leo J. Eskey for appellee.

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

PER CURIAM.

This is an action in which respondent wife appeals from an order of the district court for Dodge County granting physical custody of the parties' minor child to petitioner-appellee, while retaining legal custody of the child with the court.

Child custody determinations are initially entrusted to the discretion of the trial court and will be affirmed in the absence of an abuse of that discretion.

We have reviewed the trial court's judgment de novo on the record, as we are required to do, and determine that the trial court did not abuse its discretion. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

CLAUDE T. WEIMER AND ASSOCIATION OF COMMONWEALTH CLAIMANTS, AN UNINCORPORATED ASSOCIATION, APPELLANTS AND CROSS-APPELLEES, V. PAUL AMEN ET AL., APPELLEES, COMMERCE GROUP, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.
455 N.W.2d 145

Filed May 11, 1990. Nos. 88-430, 88-652.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

2. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.
3. **Banks and Banking: Receivers: Debtors and Creditors.** Neb. Rev. Stat. § 8-199 (Reissue 1983) grants the receiver broad authority to enforce all debts or other obligations of whatever kind or nature due to the creditors of the failed institution which arise by virtue of the institution's insolvency.
4. **Banks and Banking: Receivers: Claims.** In the absence of an allegation of an individual harm upon which a claimant can directly bring suit, claims are derivative and are properly pursued by the receiver under Neb. Rev. Stat. § 8-199 (Reissue 1983).
5. **Constitutional Law: Statutes.** No vested rights are impaired by a statutory or constitutional provision which creates a remedy for an existing right.
6. **Constitutional Law: Due Process: Banks and Banking: Receivers.** Neb. Rev. Stat. § 8-199 (Reissue 1983) does not unconstitutionally deny access to the courts, violate due process, nor take property for a public purpose without just compensation.
7. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.
8. **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.
9. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which may be deduced from such facts, but does not accept conclusions of the pleader.
10. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
11. **Actions: Banks and Banking: Receivers.** A depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit.
12. **Courts: Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a

different ground from that assigned by the trial court, the Supreme Court will affirm.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees Amen and Lake.

Gary L. Dolan, Trev E. Peterson, and Shirley K. Poland-Williams, of Knudsen, Berkheimer, Richardson & Endacott; James B. Cavanagh, of Erickson & Sederstrom, P.C.; John M. Guthery and Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C.; Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Cline, Williams, Wright, Johnson & Oldfather; Faegre & Benson; and Crosby, Guenzel, Davis, Kessner & Kuester for appellees Commerce Group et al.

BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN and COLWELL, D. JJ., Retired.

PER CURIAM.

Claude T. Weimer, for himself, and the Association of Commonwealth Claimants, an unincorporated association, as assignees of various depositors of the Commonwealth Savings Company, brought an action against the defendants, alleging numerous improprieties in the management and supervision of the Commonwealth Savings Company, resulting in its subsequent insolvency, collapse, and liquidation. The defendants are Paul Amen, former director of the Department of Banking and Finance of the State of Nebraska; Barry Lake, former Department of Banking and Finance general counsel; various financial institutions, including members of the Nebraska Depository Institution Guaranty Corporation (NDIGC); and certain employees of the financial institutions, including the directors of the NDIGC.

Amen and Lake filed a motion for summary judgment, alleging that the causes of action against them were released by

the settlement of a tort claim by the receiver of the Commonwealth Savings Company, said settlement being approved by order of the district court for Lancaster County, funded by the Legislature, and paid by the State Treasurer to the receiver. The district court sustained the motion and dismissed the petition as to Amen and Lake.

The remaining defendants filed demurrers to the amended petition, claiming, among other things, that plaintiffs were not the real party in interest and therefore lacked standing to bring suit. The district court sustained the demurrers on this basis and dismissed the petition, as it contained an incurable defect.

The plaintiffs appealed from the order granting summary judgment (case No. 88-430) and from the judgment sustaining the defendants' demurrers and dismissing the plaintiffs' petition (case No. 88-652). As both appeals are from a single district court case and present essentially the same issues, we will consider and dispose of both appeals in a single opinion.

A review of the receivership proceedings in the matter of the insolvency of Commonwealth Savings Company is set forth here in order to explain how the case at bar arrived at the present juncture.

The Commonwealth Savings Company (hereafter Commonwealth) was an industrial loan and investment company in Lincoln, Nebraska. On November 1, 1983, the Department of Banking and Finance (hereafter the department) took possession of Commonwealth pursuant to Neb. Rev. Stat. §§ 8-416 (Reissue 1987) and 8-187 (Reissue 1983). On November 8, 1983, the district court for Lancaster County issued an order declaring Commonwealth insolvent and appointed the department as the receiver and liquidating agent of Commonwealth according to § 8-416 and Neb. Rev. Stat. § 8-198 (Reissue 1983).

The receiver proceeded to file with the State Claims Board two tort claims against the State of Nebraska pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissues 1981 & 1987 & Supp. 1983). The first claim was filed on December 23, 1983, on behalf of the creditors of Commonwealth against the State, its officers, and employees for $56 million. The creditors alleged that negligent, willful,

wanton, and fraudulent acts of the officers and employees caused the creditors' losses.

The second claim, filed on January 10, 1984, for $56,433,959.29, was brought on behalf of "a special class of creditors — those certificate of indebtedness holders who have a unique and special claim under the Nebraska Depository Institution Guaranty Corporation Act, Sections 21-17,127 through 21-17,145 R.R.S. Nebr. 1943 (Reissue 1977)." This claim essentially stated the same allegations against the same persons as in the first claim, and made further allegations attacking the constitutionality of Neb. Rev. Stat. § 21-17,141 (Reissue 1987).

The State Claims Board heard these claims on February 13, 1984, and on February 29 adopted a "decision" as to the claims. The decision enunciated that "the Board has decided that there is a strong possibility of some liability on the part of the State of Nebraska arising out of certain actions of the Banking Department with regard to the Nebraska Depository Institution Guaranty Corporation Act." Based on its deliberations, the board decided that, pursuant to its statutory authority in § 81-8,211 (Reissue 1987), the State should compromise and settle the claims.

It is also provided in § 81-8,211 that any claim settled in an amount of more than $5,000 shall be submitted for approval by the district court for Lancaster County. The claims were thus submitted, and on March 2, 1984, a journal entry was filed by the district court's presiding judge ordering that a three-judge panel decide the matter due to the complexity of the legal issues presented, the public interest in the matter, and the need for a prompt decision by the court. On March 5, one of the judges was excused from service in the case, and the matter proceeded before a two-judge panel.

A hearing was held on March 12 where evidence was adduced and briefs were submitted to the court on the matter of approval of the State Claims Board's proposal of settlement.

On March 16, the district court denied the petition and application seeking approval of the State Claims Board's "decision" of February 29. In its 30-page order, the court determined that it was required to exercise its discretion and

was not merely a "rubber stamp" with respect to action of the board, basing this determination on case law and the following portion of § 81-8,211: "The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues."

The court found that the decision of the State Claims Board

> (1) Is not a compromise, settlement or allowance of a claim and therefore such action is in excess of the Board's authority.
>
> (2) Is unsupported by competent, material and substantial evidence in view of the entire record.
>
> (3) Is based on conclusions of law which are clearly erroneous and unsupported by any evidence in the record to the contrary.
>
> (4) Is arbitrary and capricious.

The court clearly went to great lengths in striving to discharge its duty of making a *legal* determination of whether the board's decision should be approved, as seen in part of the dicta in the court's order:

> Were it within our power to base our approval on moral grounds or on concepts of fundamental fairness, we would not hesitate to do so. However, our decision, as the structure of society as a whole, must rest upon the rule of law. . . . Almost all applicable law is clearly contrary to the position taken by the Receiver. The statutes are clear.
>
> . . . Frankly, we do not and cannot expect the majority of these people [who suffered grievous losses] to understand or appreciate the decision we must make which may appear to be based on legal technicalities. However, we are not free to depart from the law as clearly set forth in applicable statutes and judicial decisions.

Upon the receiver's motion, the matter was remanded to the State Claims Board. On April 2, the receiver filed a miscellaneous (contract) claim with the board. The contract claim essentially alleged that the NDIGC was an agency or instrumentality of the State, and therefore the State should be obligated to pay up to $30,000 on each of the guaranteed accounts at Commonwealth.

On June 12, 1984, the State Claims Board filed an amended

petition and application in the district court for Lancaster County. The amended petition stated that on May 25, 1984, the State Claims Board held a further hearing pursuant to duly publicized notice with regard to the receiver's tort and contract claims. The amended petition further stated that the State Claims Board unanimously adopted both a decision and an "Agreement for Compromise of Tort Claim" at a duly publicized open meeting on May 31. This second decision by the board declared that, after considering both claims but without deciding the contract claim, a compromise settlement should be executed in the amount of $33 million. The amended petition and application therefore sought approval of the settlement in the district court, as required by § 81-8,211.

After a hearing on the matter on July 10, 1984, the district court issued a 46-page order on July 27 which denied approval of the board's "decision" of May 31 for the following reasons:

> a. Our conclusions as to the law applicable to this matter are substantially the same as expressed in our prior Order. The law, particularly in light of the decision in Varig Airlines [467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)], is not supportive of the Receiver's position. Therefore, the Receiver's probabilities of success should the claim be litigated are not encouraging.
>
> b. There has been an inadequate showing as to the amount of damages which reasonably may be incurred, particularly in regard to the valuation of the remaining assets of Commonwealth.
>
> c. This proposed settlement, like the prior decision, virtually provides for reimbursement of one hundred percent of the possible loss when the liquidating value of the assets is included. Based on the likelihood of success should the claim be litigated, the Decision of the Board clearly is excessive and is not a fair and reasonable settlement when confronted with the minimal likelihood of liability.
>
> d. The Decision of the Board is based on conclusions of law which are clearly erroneous.

Pursuant to stipulation of the parties filed on October 30, the district court remanded the matter to the State Claims Board

for the sole purpose of allowing the receiver to withdraw the claim, pursuant to § 81-8,213 (Reissue 1987), and to file suit on the claim.

The record further shows that the receiver proceeded to file suit against the State of Nebraska on March 20, 1985, in the district court for Lancaster County. The receiver alleged numerous (33) acts of wrongful and negligent conduct by the department in failing to supervise, regulate, and examine Commonwealth, including wrongful and negligent conduct of the department's director in admitting Commonwealth as a member of the NDIGC. The State's answer generally denied all allegations in the receiver's petition.

On March 29 the parties to the action filed an application for approval of settlement pursuant to § 81-8,218 (Reissue 1987), requesting the court's approval of a compromise settlement of all claims of the plaintiff, holders of all certificates of indebtedness of plaintiff, and all other creditors of plaintiff. Conditions of the settlement included the payment to the receiver of the sum of $8.5 million as a full and complete compromise settlement of any and all claims of the receiver (on behalf of itself and its representatives) against the State, the department, and their past, present, and future officials and employees. A release of all claims by the receiver to be executed upon payment of the $8.5 million accompanied the application.

As the settlement affected the initial district court receivership proceedings wherein Commonwealth was first declared insolvent, the receiver also filed therein, on April 1, 1985, an application requesting that the district court set a hearing date for the application for authority to settle in the receiver's suit against the State and to authorize notice of the hearing to Commonwealth creditors by sending a notice to each creditor by mail, and by publication in a newspaper of general circulation for three consecutive weeks prior to the hearing.

The district court entered orders dated April 1 in each of the aforementioned cases, setting the hearing for April 22 and approving the form and method of notice to the creditors. On April 15, the presiding judge of the district court for Lancaster County appointed a two-judge panel to consider the matter.

After the hearing, the court entered an order on April 26 that

the application for approval of settlement be approved and forwarded to the Legislature for review and the appropriation of funds. In its order, the court found that proper notice had been given to the creditors pursuant to law and the order of the court. The court noted that the substantial majority of creditors who expressed an opinion at or before the hearing were either opposed to the proposed settlement or had reservations concerning the terms of the release or the future actions of the Legislature. The court stated, however, that it could not modify the proposed amount of the settlement or any of its provisions. The court had only the authority to approve or disapprove.

The court said that in reviewing the proposed settlement it adhered to its statement in the prior orders denying the State Claims Board's proposed settlement: " 'Therefore, this court, in exercising its discretion herein must reach a conclusion as to the likelihood of liability on the part of the State, the amount of damages resulting from such liability and whether any proposed settlement is fair, adequate and reasonable to both the claimants and the State.' "

Thus reviewing the matter, the court concluded that the proposed settlement was fair, adequate, and reasonable to both the claimants and the State, and could find no legal or other reason to disapprove it. The court also entered an abbreviated order approving the settlement in the initial Commonwealth matter of insolvency.

The record shows that a state treasury warrant was issued to the receiver in the amount of $8,518,228.09 and that the release was signed on September 26, 1985, by the receiver.

INTERPRETATION OF § 8-199

Appellants assign error to the district court in its interpretation of Neb. Rev. Stat. § 8-199 (Reissue 1983). Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its

plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

We find that the plain, direct, and unambiguous language of § 8-199 allows the receiver to enforce "all debts or other obligations of whatever kind or nature due" to the creditors of the failed institution, including those asserted by the appellants. This construction is consistent with the role of a corporate receiver:

> A corporate receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone.

66 Am. Jur. 2d *Receivers* § 450 (1973).

Appellants contend that they alone can enforce their alleged causes of action, and cite as a proposition of law that the receiver of an insolvent institution may not take possession of property that did not belong to the insolvent institution. Appellants cite *Frederick v. McRae*, 157 Minn. 366, 196 N.W. 270 (1923), in support of this proposition. That case holds that a depositor can have an individual right of action in deceit which could not be brought by the receiver if the bank officers fraudulently accepted deposits while knowing the bank was insolvent. Nebraska law has long recognized that a depositor may have an individual action under this scenario. See, *Higgins v. Hayden*, 53 Neb. 61, 73 N.W. 280 (1897); *Wilson v. Coburn*, 35 Neb. 530, 53 N.W. 466 (1892). However, appellants do not sufficiently state such a cause of action.

We believe that appellants' alleged actions are properly characterized in *In re Sunrise Securities Litigation*, 108 Bankr. 471, 476 (E.D. Pa. 1989):

> In general, "wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover." *In re Longhorn Securities Litigation*, 573 F.Supp. 255, 272 (W.D. Okla.1983), *citing Adato v. Kagan*, 559 F.2d 1111, 1117 (2d Cir.1979). Under such circumstances, "[t]he damage to depositors is indirect only and it is generally recognized that for such matters a depositor has no direct and individual right of action against a director." *Michelsen v. Penney*, 10 F.Supp. 537, 539 (S.D.N.Y.1934). *See* 1 Michie, *Banks and Banking*, Ch. 3, § 69, at 479 (1986) ("where the amount for which the officers and directors may be liable results from matters affecting all creditors, they constitute assets of the corporation for the benefit of all depositors and creditors, and suit therefor must be brought by the bank or its receiver") . . . .

In re Sunrise Securities Litigation further holds that when a depositor claims to have been defrauded by a misrepresentation or omission in a statement directed to the general public, he or she does not allege a wrong that is distinctly the depositor's and not common to other depositors or creditors, and therefore claims an indirect injury.

Appellants' petition alleges that misrepresentations were made to the general public, not to a single depositor or specific group of depositors. Further, appellants allege that the appellees' willful and negligent actions harmed all depositors and, in at least one instance, harmed Commonwealth *creditors*. The petition is not even clear whether the Association of Commonwealth Claimants represents all Commonwealth depositors.

Other cases cited by appellants, including *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933), *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931), and *Rogers v. Selleck*, 117 Neb. 569, 221 N.W. 702 (1928), affirm the acts of the respective receivers in enforcing causes of

action on behalf of creditors and are not supportive of appellants' contention that they distinctly own their alleged causes of action.

We therefore find that the appellants have not alleged an individual harm, but that their claims are derivative and clearly are properly pursued by the receiver under § 8-199.

The appellants also challenge the constitutionality of § 8-199, alleging that it denies access to the courts, deprives appellants of due process, and takes property of citizens for a public purpose without just compensation. In *Department of Banking v. Hedges*, 136 Neb. 382, 286 N.W. 277 (1939), this court upheld the constitutionality of a receivership procedure under predecessor statutes which allowed the Department of Banking and its superintendent to bring actions on behalf of creditors. Therein we stated:

> In 9 C.J.S. 170, sec. 88, it is said:
>
> "However, unless the Constitution specifically prescribes and limits the persons by whom such actions may be brought, it is within the power of the legislature to authorize particular persons to sue, and statutes conferring such authority have been sustained. Further, since such legislation is procedural, and since methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature where no new right is created nor any penalty imposed, a statutory change as to the person who may enforce the liability may apply to stockholders who became such before its enactment as well as to those who became such thereafter. . . ."
>
> . . . .
>
> In *Luikart v. Bunz,* [125 Neb. 867, 252 N.W. 473 (1934)], the effect of the decision is: ". . . No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right."

Hedges, supra at 393-94, 286 N.W. at 284.

We have also more recently held that, in regard to obtaining a remedy through the courts, article 1, § 13, of the Nebraska Constitution is not violated when one party brings an action on another's behalf. See, e.g., *Pullen v. Novak*, 169 Neb. 211, 99

N.W.2d 16 (1959) (guardian or next friend may sue on behalf of infants to recover damages done to their person or property by tortious acts of another). Likewise, we hold that § 8-199 merely imposes a procedural remedy which does not affect the substantial rights of the parties, and therefore does not unconstitutionally deny appellants access to the courts.

Regarding the due process challenge, both appellants and appellees cite *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948). That case sets forth the following on due process:

> The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. 12 Am. Jur., Constitutional Law, § 575, p. 271.
>
> As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C.J.S., Constitutional Law, § 569, p. 1156.

Rein, supra at 82, 30 N.W.2d at 557-58.

As our previous discussion shows, the Legislature clearly had the power to enact § 8-199 as a procedural remedy. Further, the statute has a reasonable relationship to the receiver's purpose of wrapping up the business of the insolvent institution and treating all creditors equitably and fairly. The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue claims, negotiate compromise settlements, and execute binding releases. Finally, in granting the receiver broad authority to

enforce claims on behalf of not only the failed institution but of shareholders and *all* creditors in order to accumulate all possible assets, the power of the Legislature was exercised in neither an arbitrary, capricious, nor unreasonably discriminatory manner. We therefore find that § 8-199 satisfies due process requirements.

Lastly, we find no merit in appellants' argument that § 8-199 allows an unconstitutional taking. We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. Simply stated, appellants' "property" is not being taken without compensation, but, rather, the enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure compensation for all creditors in an equitable and nonpreferential manner.

We therefore find no merit in appellants' constitutional challenges to § 8-199.

DEFENDANTS AMEN AND LAKE

There is no dispute that Amen and Lake, as department employees, were properly made defendants in the receiver's suit against the State and in the case at bar. The receiver's petition in its action against the State makes 33 separate allegations of "*wrongful* and negligent conduct of the Department, its Director and its employees," which necessarily encompass the appellants' causes of action against Amen and Lake. The appellants merely contend that they, and not the receiver, are the proper parties to bring their causes of action. Such contention, as we have stated, is without merit.

Appellants also assign error to the district court in accepting a release signed by the receiver as a bar to this action. The receiver's ability to settle or compromise any doubtful debts is enumerated in § 8-199 and Neb. Rev. Stat. §§ 8-1,103 and 8-1,104 (Reissue 1983). The receiver's ability to settle a doubtful debt has also been upheld by this court. See *State v. German Savings Bank*, 65 Neb. 416, 91 N.W. 414 (1902). After going through the State Claims Board and having a proposed settlement rejected twice, the receiver clearly saw this claim as a doubtful debt and therefore entered into a compromise settlement in its claim against the State. Further, the receiver is

empowered, under § 8-199, to "make, execute, and deliver any and all . . . instruments necessary and proper to effectuate . . . the settlement of any obligations . . . ." The same power specifically stating "releases" is also granted in § 8-1,103. Section 81-8,223 (Reissue 1987) provides that an award in a state tort claim shall constitute a complete release by the claimant of any claim against the State and against the employee of the State whose act or omission gave rise to the claim, by reason of the same subject matter. The receiver was therefore within its statutory authority in executing the release as a necessary and proper instrument to effectuate the settlement.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990). 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. *Peterson, supra; John, supra.*

Viewing the evidence in a light most favorable to appellants, our conclusion remains that the receiver acted at all times within its statutory authority and that Amen and Lake, by virtue of the release, were entitled to summary judgment as a matter of law.

REMAINING DEFENDANTS

The district court sustained the remaining defendants' demurrers on the basis that the plaintiffs were not the real party in interest and therefore lacked the capacity to bring suit. See Neb. Rev. Stat. § 25-806 (Reissue 1989).

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *St. Paul Fire &*

Marine Ins. Co. v. Touche Ross & Co., 234 Neb. 789, 452 N.W.2d 746 (1990); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Meyerson, supra*; *S.I.D. No. 272, supra*.

We have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver. However, the record shows that the receiver sued only the State of Nebraska, the department, and its employees. If the appellants in fact state a cause of action against the NDIGC or other defendants, this leaves Commonwealth, its creditors, and its depositors with a claim which the receiver failed or neglected to pursue.

The liability of the NDIGC and the State toward the depositors was alleged in the second claim brought before the State Claims Board by the receiver. This raises the question of whether the NDIGC is an agency of the State; for if it is, it would be free of liability by virtue of the release executed by the receiver. The State Tort Claims Act, § 81-8,210(1) (Reissue 1987), says that for the purposes of the act: "State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations."

The Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat. §§ 21-17,127 et seq. (Reissue 1987), lists four purposes of the act in § 21-17,128. One of those purposes involves a duty of the department "[t]o assist in the detection and prevention of depository institution insolvencies or liquidations," while the other purposes relate solely to the objectives and operations of the corporation. In § 21-17,132 the act gives the corporation all powers granted to nonprofit corporations (which are not state agencies) as provided in Neb. Rev. Stat. ch. 21, art. 19 (Reissue 1987). Sections 21-17,134 and

21-17,136 indicate that the department acts in a supervisory or regulatory role toward the NDIGC, just as it does with all chartered financial institutions—most of which are private corporations. The NDIGC is formed by private financial institutions, and the members of its board of directors must be officers of those institutions. See §§ 21-17,132 and 21-17,133. The corporation is operated neither by state employees nor at the direction of state government.

An examination of the legislative history of the act shows that the corporation was not intended to be an arm or instrumentality of the State. Testimony on 1976 Neb. Laws, L.B. 948 (the provisions of which would eventually become the NDIGC act), was presented at a hearing before the Banking Committee. James Moylan, a proponent of the bill, stated:

> I think if you want to take the Banking Department and then show the areas that it operates in, it will be banks, industrials, credit unions, savings and loans and right along beside it will be the guaranty corporation. And their relationship to it will be conducted pretty much by this act when you get over to the Banking Act, it's this way with banks; it's this way with credit unions; it's this way with savings and loans; so, it would be another institution that they would have.

Banking Committee Hearing, L.B. 948, 84th Leg., 2d Sess. 25 (Jan. 27, 1976).

Charles Aron of the department stated: "It is our understanding of the concept of this type of a corporation to basically insure the deposits in the credit unions with this as a complement to the supervision done by the Department of Banking not in lieu of supervision." *Id.* at 29.

Further, William Riley, director of the department, stated:

> [T]he Department is not looking to this type of legislation to make our job a [sic] regulation and supervision of both credit union and cooperatives easier for us. . . .
>
> . . . .
>
> . . . Well, I guess the feeling that I don't want to give this committee because I've demonstrated it to the credit unions, is that we are not using this as an arm for better supervision and regulation.

Id. at 31, 33.

Based on our reading of the act and its legislative history (in particular the foregoing statements), we conclude and find that the NDIGC is an "essentially private" corporation and is not an instrumentality or agency of the State of Nebraska. Consequently, appellants have stated a cause of action at least against the NDIGC based on statutory and common-law contractual liability toward Commonwealth and its depositors.

Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While § 8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the receiver fails or neglects to enforce a claim. Therefore, in remaining consistent with general corporate law and the federal common law, we hold that a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit. See, *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989); *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973); *Michelsen v. Penney*, 10 F. Supp. 537 (S.D.N.Y. 1934).

In order for appellants to state a derivative action, their petition must allege the fact that a demand has been made on the receiver or that such a demand would be futile. The petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action. Consequently, we affirm the action of the trial court in sustaining the demurrers, but for the reason set forth above. See *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988) (where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm).

The defense of the statute of limitations is raised by way of cross-appeal or otherwise in the briefs of certain appellees. However, as the district court made no ruling on this issue, we

decline to express an opinion on the matter at this time and leave to the trial court the propriety of this defense and any others that may arise after the appellants are given an opportunity to amend their petition.

The order in case No. 88-430 granting summary judgment to defendants Amen and Lake is affirmed. In case No. 88-652, we affirm the order of the trial court in sustaining the demurrers, but reverse that part of the trial court's order dismissing the petition and remand this cause with directions to allow the appellants to amend their petition.

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

STOCO, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. MADISON'S, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

454 N.W.2d 692

Filed May 11, 1990. No. 88-437.

1. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court should be affirmed.
2. **Directed Verdict: Appeal and Error.** When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, the Supreme Court's review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
3. **Directed Verdict.** The party against whom a motion for directed verdict is made 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.
4. **Judgments: Verdicts: Appeal and Error.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material evidence admitted which is favorable to the party against

whom the motion is directed. The party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. A jury verdict will not be disturbed unless clearly wrong.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Affirmed.

John M. Gerrard, of Domina, Gerrard, Copple & Stratton, P.C., for appellant.

Michael T. Brogan, of Brogan & Stafford, P.C., and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiff, Stoco, Inc., filed this action against the defendant, Madison's, Inc., seeking damages for the loss of its 1985 barley crop as a result of the defendant's alleged negligence and breach of warranty in applying agricultural chemicals and fertilizer to certain fields farmed by the plaintiff.

The second amended petition alleged that Madison's was negligent (1) in applying dry urea fertilizer on four of the plaintiff's barley fields during March and April 1985, causing streaking and resulting crop loss, and (2) in applying 2,4-D herbicide on May 28, 1985, on three of the plaintiff's barley fields. The plaintiff also alleged that the defendant breached its implied warranty of fitness in that the 2,4-D herbicide was not fit for use on the barley crop at the May 28, 1985, stage of growth, and the use of the herbicide was not accompanied by reasonable warning concerning potential damage when used at a late stage of plant growth.

In its answer, the defendant denied that it sold the 2,4-D herbicide to the plaintiff and alleged it acted as the plaintiff's agent in purchasing the herbicide from Richard Poland, who sprayed three of the barley fields with 2,4-D on May 28, 1985. The defendant further alleged that the plaintiff was contributorily negligent in failing to use ordinary care (1) in heeding the defendant's warning regarding the timing of the 2,4-D herbicide application and (2) to properly manage and

monitor the growth and development of the barley crop so as to make reasonable farming decisions. The defendant also alleged that the plaintiff failed to avoid the consequences of any uneven distribution of fertilizer by not applying additional fertilizer in late May or early June 1985, upon learning of a possible streaking problem.

After the plaintiff's rest, the trial court sustained the defendant's motions for directed verdict on the issues of breach of implied warranty of merchantability of the fertilizer and herbicide and breach of implied warranty of fitness regarding the fertilizer.

The jury returned a verdict in favor of the defendant and the plaintiff's motion for judgment notwithstanding the verdict and alternative motion for new trial were denied. The plaintiff has appealed and contends that the district court erred in (1) instructing the jury on the issue of contributory negligence regarding the application of fertilizer and herbicide to the barley fields, (2) instructing the jury on the issue of mitigation of damages, (3) failing to direct a verdict in favor of the plaintiff, and (4) finding that the jury's verdict was substantiated by the evidence.

The defendant has cross-appealed, contending the district court erred in failing to direct a verdict in favor of the defendant regarding liability on the fertilizer cause of action.

With respect to the plaintiff's first and second assignments of error, the plaintiff's brief does not specify the jury instructions actually complained of. Although the bill of exceptions shows that the plaintiff objected to proposed instructions Nos. 3, 4, and 7, the instructions which were given to the jury are not included in the record.

Neb. Ct. R. of Prac. 4A(2) (rev. 1989) provides that the appellant shall direct the clerk of the court "to include in the transcript such additional parts of the record as he or she shall specify in the praecipe, *including the instructions given by the trial court, if the appellant intends to assign error in the giving of any instruction* . . . ." (Emphasis supplied.) The record shows that the appellant did not direct the clerk to include the jury instructions in the transcript.

"It is incumbent on the party appealing to present a record

which supports the errors assigned, and absent such a record, the decision of the lower court should be affirmed." *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 561, 437 N.W.2d 453, 456 (1989); *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990). See, also, *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985). We therefore do not consider the plaintiff's assignments of error pertaining to alleged errors in instructing the jury.

The remaining issues are whether the trial court erred in failing to direct a verdict in favor of the plaintiff and in overruling the plaintiff's motion for judgment notwithstanding the verdict.

At the close of all the evidence the plaintiff moved for a directed verdict on the issue of the defendant's negligence in applying fertilizer and herbicide to the fields in question. When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, this court's review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). The party against whom a motion for directed verdict is made 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. *Id.*

Similarly, on a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material evidence admitted which is favorable to the party against whom the motion is directed. The party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. A jury verdict will not be disturbed unless clearly wrong. *Id.*

The record shows that Brock Stoltenberg was the president of the plaintiff corporation, which was engaged in general farming and the production of barley. Stoltenberg's primary education and training were in the fields of accounting and

computer operations. After 10 years of employment with Mutual of Omaha, Stoltenberg decided to become a full-time farmer in 1982. Stoltenberg's experience with barley began in 1983 when he raised a 10-acre garden plot in the Missouri River "pocket area" of South Dakota, which barley he raised for goose feed. In 1984, he increased his barley production to 75 acres.

In 1985, Stoltenberg decided to plant several hundred acres of barley on rented land in Brown County, Nebraska. The four parcels of land that were the subject of this action are referred to in the record as Kinney Field No. 2, Leach Field No. 3, Leach Field No. 4, and Leach Field No. 5. No crops had been planted the previous crop year on Leach Fields Nos. 3, 4, and 5. Kinney Field No. 2 had been partially planted with alfalfa.

The defendant corporation was engaged in the business of selling agricultural chemicals and fertilizer in Ainsworth, Nebraska. When George Madison, the owner of Madison's, contacted Stoltenberg in February 1985 to solicit Stoco's fertilizer business, Stoltenberg decided to purchase fertilizer from Madison's.

In the third week of February 1985, Stoltenberg and John Ferguson, an agronomist employed by Madison's, visited each of the fields to take soil samples. After soil testing was completed, Ferguson and Madison made suggestions and recommendations to Stoltenberg as to the manner and amounts of fertilizer to be applied.

Madison testified that his company was not made aware that Stoltenberg intended to grow barley until the time the fertilizer recommendations were made, and that Stoltenberg merely said to send the soil samples in to the laboratory " 'for corn or small grain.' " Stoltenberg did not tell Madison's at this time that he had set a yield goal of 140 bushels of barley per acre.

Madison's advised Stoltenberg that he could use either dry urea or a liquid fertilizer. George Madison recommended that liquid fertilizer be applied because the dry urea might cause streaking if wind conditions were unfavorable. Madison also observed that dry urea did not blend well with other additives because the weights of the materials were different, which would cause an uneven distribution of the nitrogen. Stoltenberg

wanted to keep the cost of the fertilizer to around $20 per acre. Since the liquid fertilizer was apparently more expensive than dry urea, Stoltenberg chose to apply dry urea and additives. Ferguson testified that 92 pounds of nitrogen were actually applied to each acre, and that recommendation was primarily based on the plaintiff's cost requirements.

An employee of Madison's applied dry urea fertilizer to the fields in late March or early April 1985. There is evidence that Stoltenberg urged Madison's to complete the fertilization process so that disking and planting could continue, even when the wind was too strong. In early April 1985, the plaintiff planted the four fields with certified barley seed.

In addition to the rainfall in Brown County in the spring and summer of 1985, the plaintiff placed approximately 22 inches of water on each field by pivot irrigation throughout the growing season. Although the plaintiff claims that the irrigation and care of the barley crop were in accordance with good farming practices, there is evidence that the fields were kept too dry during the growing season. Stoltenberg admitted that there were a number of times when the pivot irrigation systems were stopped because of mechanical problems, including engine breakdowns.

There was testimony that the plaintiff's attempt to raise barley in the Nebraska Sandhills country was a first of its kind. Dr. Everett J. Dennis, a certified professional agronomist, crop scientist, and soil scientist with considerable agricultural experience in the Sandhills area, testified that in his expert opinion, barley should not be planted in acid soils. There is evidence that the soil in the four fields was mildly to extremely acid.

In late April 1985, Stoltenberg noticed grass and weed infestation in the barley fields. Ferguson and Stoltenberg discussed the weed situation in February 1985 and again in April 1985. Stoltenberg testified he advised Ferguson that weeds were not his expertise and that he expected Madison's to take care of any weed problems with appropriate recommendations and application of herbicide. George Madison testified, however, that "Mr. Stoltenberg gave us the impression that he knew as much about [herbicides] as we did."

Stoltenberg did not have a management contract with Madison's and did not pay separate consulting or management fees to the defendant.

During their discussions, Ferguson suggested that the plaintiff could use Buctril herbicide. Stoltenberg was familiar with Buctril, having used it on his South Dakota barley the previous crop year, but selected the less expensive 2,4-D herbicide. There is evidence that Buctril, although more expensive, does not cause as much damage to the growing crop as 2,4-D.

Madison's used a ground floater to apply 2,4-D to Kinney Field No. 2 on about May 18, 1985, and Stoco made no claim for yield loss due to 2,4-D damage on that field. The barley was taller in the three Leach fields (which had been planted before the Kinney field), so Stoltenberg decided to go with an aerial application of 2,4-D on those fields.

Although Madison's was not in the aerial application business, it provided the courtesy of finding an aerial applicator for Stoco so that the applicator and the customer could "make their own deals." On May 15, 1985, Madison's began contacting aerial sprayers to apply herbicide to the barley in Leach Fields Nos. 3, 4, and 5.

In mid-May, Madison's contacted Larry Ebert, who said he would apply 2,4-D to the Leach fields for $4.90 per acre. The growth stage of the barley as of May 15 was such that 2,4-D could be safely applied. Stoltenberg admitted that if he had chosen to employ the Ebert Flying Service, he would likely have had no 2,4-D problem, but he did not want to pay $4.90 per acre. Stoltenberg asked Madison's to see if they could get a better price.

After making other calls, George Madison contacted Richard Poland of Sargent, Nebraska, on May 17. Poland stated that he needed to know the exact chemical and rate of application before quoting a price.

George Madison contacted Poland again on May 22. During that conversation, he and Poland discussed a possible rate of application of 2,4-D. Poland asked Madison's to check the growth stage of the crop, which Ferguson did, finding the stage still appropriate on May 22 for 2,4-D application. Poland

quoted a price on May 23 or 24 and arrangements were made for Poland to spray the fields. Poland did not purchase the 2,4-D which he used from Madison's.

Due to some delays, including equipment failure and wind conditions, Poland did not apply the herbicide to Leach Fields Nos. 3, 4, and 5 until May 28. Madison's provided a water tank and Ferguson provided flagging services for Poland, but Madison's was not paid for these items.

Prior to the aerial application of 2,4-D on the three Leach fields, Ferguson contacted Stoltenberg and said that he (Ferguson) was getting concerned that if the spraying was further delayed, " 'we may be getting late.' " Stoltenberg directed Ferguson to just " '[g]et her done.' " Ferguson testified that he checked the growth stage of the crop on May 28 and saw that it would be coming into the early boot stage in another few days. Stoltenberg admitted that he could have decided not to apply the 2,4-D in late May, but realized the weeds would have reduced his yield anyway.

Within 4 or 5 days after the 2,4-D had been applied, Stoltenberg contacted Madison's because things out at the Leach fields did not appear to be right. Stoltenberg later contacted Madison's in person. Poland and Madison had telephone conversations on June 4 and 6, 1985, regarding a perceived problem in the Leach fields.

Poland inspected the crop on June 7. He observed a curling effect on the weeds in the Leach fields and noticed that some bottom leaves of selected barley plants were yellowing. He testified, however, that the crop was not damaged from the 2,4-D.

In June 1985, Madison's asked for Stoltenberg's permission to allow an agronomist to examine the fields. Stoltenberg would allow the agronomist to go on the field only if Madison's first agreed to stipulate that Stoco had "beautiful" barley fields before they were sprayed with 2,4-D.

The plaintiff raised the barley crop to maturity in each of the four fields and obtained average yields of 65.75 bushels per acre on Kinney Field No. 2, 9.8 bushels per acre on Leach Field No. 3, 20.05 bushels per acre on Leach Field No. 4, and 22.9 bushels per acre on Leach Field No. 5.

Dr. Dennis, who testified for the defendant, used photographic evidence, weather bureau statistics, soil tests, and admissions made by the plaintiff to establish several factors contributing to Stoco's yield showing. The photographs of the fields were taken on June 11, 1985. Dr. Dennis noted a "poor stand" in the fields, that is, a lower than normal population of plants per acre. He testified that poor stand might be caused by dryness during germination time, wind, and blowouts while the plants were small. Dr. Dennis noted that barley should not be planted in acid soils and that the soils in question were extremely acid.

Dr. Dennis also observed symptoms of barley yellow dwarf virus in many of the photographs, as well as dry soil. He testified that a plant pathologist from the University of Nebraska had inspected the fields and reported the presence of barley yellow dwarf virus in the fields. This disease would cause a rather severe stunting of the plants, but had nothing to do with fertilization or herbicides. The photographs of the Stoco fields also showed damage due to aphids. Dr. Dennis observed in the photographs "none of the typical crinkling of the flag leaf, nor the crinkling of the awns . . . that is common with 2,4-D damage."

Based on materials compiled by the University of Nebraska Extension Service and other sources of information, Dr. Dennis concluded that barley may be sprayed with 2,4-D through the early boot stage of plant development and that the Stoco barley was in an acceptable stage for aerial application of 2,4-D when it was sprayed. Dr. Dennis found no evidence of 2,4-D damage as of June 11, 1985.

Dr. Dennis stated that the photographs of Kinney Field No. 2 indicated there was a streaking effect from the spreader, causing some strips of barley to appear greener and fuller than others. He had no opinion as to whether the streaking had any effect on yield, because the greener areas might not necessarily have produced more grain than the plants in the sparse areas. Dr. Dennis was of the opinion that the application of fertilizer did not cause any damage to the barley crop in that Stoco's alleged 140-bushel-per-acre goal was unrealistic, considering the amount of fertilizer that was applied to the fields. He testified

that a yield goal of 50 bushels per acre was more realistic for the Sandhills area and for Nebraska as a whole.

Although the plaintiff's expert witnesses had testified to the contrary, Dr. Dennis testified that any crop loss experienced on Leach Fields Nos. 3, 4, and 5 was caused by the acid nature of the soil, viruses, and loss of stand due to insects, wind damage, or desiccation.

Dr. Dennis also commented on the "hands-off" farm management approach employed by Stoltenberg:

> Q. . . . . In your many years of experience have you ever seen the case where a farmer has turned over the management of his operation to a fertilizer and chemical dealer?
>
> A. In all of my experience I have never seen a situation where the farmer would simply tell the fertilizer dealer that he had carte blanche to do whatever was necessary. The farmer, along with his banker, determines what is going to go on the field and what's to be spent, and the spending of the money is the regulating factor that determines what fertilizer or what chemical is going to be put on, and very often the two expectations are considerably different.

The evidence, when taken in the light most favorable to Madison's, was more than sufficient to sustain the jury verdict in favor of the defendant. The evidence was such that reasonable minds could differ and could not draw but one conclusion from the evidence. The trial court did not err in failing to grant the plaintiff's motion for directed verdict and motion for judgment notwithstanding the verdict.

It is unnecessary to consider the issues raised in the defendant's cross-appeal. The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

LOWELL BRAY, APPELLEE, V. KATE, INC., DOING BUSINESS AS STOCKADE RESTAURANT & LOUNGE, APPELLANT.

454 N.W.2d 698

Filed May 11, 1990. No. 88-516.

1. **Directed Verdict.** In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. _____. In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on 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 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 (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
4. **Negligence.** A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.
5. _____. The defense of assumption of risk presupposes that the injured party had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to that risk.

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

Michael A. Fortune and Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellant.

Terrence J. Salerno, of Schrempp & Salerno, for appellee.

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

WHITE, J.

This is an appeal from a jury verdict for plaintiff in a negligence action. We affirm.

Plaintiff, Lowell Bray, filed a petition in the Douglas County District Court seeking damages for injuries sustained when he slipped on ice on defendant's premises. In its amended answer, the defendant, Kate, Inc., doing business as Stockade Restaurant & Lounge, denied the petition's allegations and alleged that plaintiff was contributorily negligent in failing to keep a proper lookout and in walking in such a manner that he lost his balance. It further alleged that plaintiff "voluntarily assumed the risk of whatever dangerous condition existed."

The matter was tried to a jury. Evidence presented by Bray at trial showed that the Millard area in Douglas County, Nebraska, received approximately 2.2 inches of snow during the December 9, 1985, 24-hour period. The snow had accumulated throughout the day on December 9, with the snowfall ending sometime between midnight and 3 a.m. on December 10. The temperature on those 2 days was approximately 15 to 21 degrees.

Bray worked in an office located on the west side of Millard Avenue in Millard. On December 10, Bray left his office to have lunch across the street at the Stockade Restaurant, owned by defendant. The restaurant is located on the corner of 134th Street and Millard Avenue. To get to the restaurant, Bray crossed Millard Avenue; walked along the restaurant's west sidewalk, which runs parallel to Millard Avenue; turned the corner and walked along the restaurant's south sidewalk, which runs parallel to 134th Street; and eventually reached an entrance located on the south side. Bray, having dined there about three times weekly, testified this was his usual route. He testified that although the sidewalks were covered with several inches of snow, he walked with little difficulty across the sidewalks, using a snowpacked path.

Upon nearing the door, Bray noticed two women, who were also moving toward the door, coming from a rear parking lot. Wanting to open the door for the women, Bray used "a little extra effort" to reach the door first, whereupon he slipped and fell, injuring his shoulder. He testified that he knew he slipped on ice because he "felt the ice when [he] slipped," but that he did not know there was ice near the door prior to the fall. Bray offered no evidence that others actually saw the ice near the

door that day. Prior to resting his case, Bray read into evidence an admission that the defendant's premises were not salted on or about December 10, 1985. At the close of plaintiff's evidence, the defendant moved for a directed verdict. This motion was overruled.

The defendant then presented evidence tending to show that its management personnel had a snow and ice removal procedure, but that they had no notice or knowledge that ice was near the front door. At the close of its evidence, defendant renewed its motion for directed verdict. This motion was overruled.

The jury returned a verdict for Bray. Defendant subsequently moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. This motion was also overruled, and defendant appealed to this court.

Summarized, defendant contends on appeal that the trial court erred in overruling its motions for directed verdict because the evidence showed that, as a matter of law, defendant owed no duty to plaintiff; plaintiff was contributorily negligent; and plaintiff assumed the risk of any injury. This court has stated that in order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990). In considering the evidence for the purpose of a motion for directed verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Ginn, supra.*

In its brief, defendant urges this court to adopt a possessor's duty of care other than the duty which is now required under Nebraska law. We decline to do so. Recently, in *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989), this court synthesized our earlier cases and clearly stated the duty of care a possessor of land owes to an invitee:

> In view of this court's decisions in *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668

> (1983), and *Carnes v. Weesner*, [229 Neb. 641, 428 N.W.2d 493 (1988)], the correct statement of Nebraska law is: A possessor of land is subject to liability for injury caused to a business invitee by a condition on 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 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 (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

231 Neb. at 855-56, 438 N.W.2d at 493.

In *Burns*, we also stated that a plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.

In *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989), we stated that the defense of assumption of risk presupposes that the injured party had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to that risk.

As to the existence of a duty to the invitee and the existence of the invitee's contributory negligence, a clear factual issue was presented and resolved by the jury verdict. As to the issue of assumption of risk by the invitee, we are convinced that it was not established as a matter of law. The issue of whether there was sufficient evidence to submit to the jury the defense of assumption of risk is not before us, and we do not decide that issue. The trial court did not err in overruling the motions for directed verdict. Accordingly, the judgment for the plaintiff, Lowell Bray, is affirmed.

AFFIRMED.

BOSLAUGH, J., dissents.

DAVID J. SNYDER, APPELLANT, V. IBP, INC., APPELLEE.

455 N.W.2d 157

Filed May 11, 1990. No. 89-489.

1. **Workers' Compensation: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party. The findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong.
2. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-121 (Reissue 1988), impairments to the body as a whole are compensated in terms of loss of earning power or capacity, but impairments of scheduled members are compensated on the basis of loss of physical function.
3. _____. The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.
4. _____. When a worker has reached maximum recovery, the remaining disability is permanent.
5. **Workers' Compensation: Evidence.** Where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony.
6. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
7. **Workers' Compensation: Attorney Fees.** When a workers' compensation case is remanded for a rehearing on an issue as to which this court has determined that a proper rehearing has not been held, the hearing held after remand is a rehearing in which expenses and attorney fees may be awarded pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Paul W. Deck, of Deck & Deck, for appellant.

Wayne E. Boyd for appellee.

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

BOSLAUGH, J.

The plaintiff, David J. Snyder, injured his right shoulder on December 27, 1983, as a result of an accident arising out of and in the course of his employment by the defendant, IBP, inc. On January 16, 1985, he recovered an award for compensation for

temporary total disability for 22 weeks, which award was affirmed in *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986) (*Snyder I*).

On June 26, 1986, the plaintiff filed a petition for modification in the compensation court, alleging that he sustained an increase of incapacity due solely to the injury of December 27, 1983. A three-judge panel of the compensation court dismissed the petition for modification on June 25, 1987. That judgment was reversed in *Snyder v. IBP, inc.*, 229 Neb. 224, 426 N.W.2d 261 (1988), and the cause remanded for further proceedings.

A rehearing on remand was held on October 13, 1988. The compensation court found that subsequent to the January 16, 1985, award on rehearing, the plaintiff suffered an increase in incapacity due solely to the December 27, 1983, injury, equating to a 10-percent permanent loss of the use of his right arm. The compensation court found that as a result of the increase in incapacity, the plaintiff was entitled to further compensation benefits of $184 per week for 22.5 weeks and ordered the defendant to pay a total of $2,083 of specified hospital and medical expenses, but declined to award the plaintiff an attorney fee.

The plaintiff has appealed, contending the April 13, 1989, modification of award was inadequate in light of the evidence presented and that the compensation court erred in failing to award him an attorney fee.

I. Adequacy of Award

In determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party. The findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990); *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990); *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 449 N.W.2d 197 (1989). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

The plaintiff first contends that he is entitled to

compensation for an injury to the body as a whole, rather than for partial loss of use of his right arm. Under Neb. Rev. Stat. § 48-121 (Reissue 1988), impairments to the body as a whole are compensated in terms of loss of earning power or capacity, but impairments of scheduled members are compensated on the basis of loss of physical function. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983); *Snyder I, supra*. The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury. *Nordby v. Gould, Inc., supra*; *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

In support of his contention that he suffered an injury to the body as a whole, the plaintiff emphasizes certain testimony relating to headaches, neck pain, and the proximity of the situs of the injury to the trunk of the body. Considering the evidence in the light most favorable to the successful party, however, the record supports the finding of the compensation court that the location of the residual impairment was the plaintiff's right upper extremity.

Dr. Dougherty, the defendant's expert witness, examined the plaintiff in January 1984 and again on February 19, 1987. Dr. Dougherty was of the opinion that the plaintiff suffered a 10- to 15-percent permanent partial disability of the right upper extremity, involving the use of the arm and shoulder. Dr. Dougherty testified that the plaintiff had no disability related to the trunk of the body and that the plaintiff's disability was limited to the use of his right arm.

The plaintiff's treating physician, Dr. Mumford, testified that although he could extrapolate the shoulder injury to the body as a whole, he did not have any opinion about trunk involvement. Noting that the collarbone and shoulder blade attach to the trunk of the body, Dr. Mumford stated, "It would be a semantic deal as to whether they are part of the body or part of the shoulder or part of the arm." Dr. Mumford also testified that as a result of the shoulder injury, the plaintiff cannot use his arm.

The record supports the finding that the plaintiff's injury is permanent in nature. We have said that when a worker has reached maximum recovery, the remaining disability is

permanent. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). On this point, the plaintiff testified that he had never recovered from the shoulder injury of December 27, 1983, and that the shoulder had gotten worse. Arthroscopic surgery in April 1984 and February 1986 did not alleviate the plaintiff's discomfort. Both physicians stated that the plaintiff's shoulder had degenerated. Dr. Mumford testified that the plaintiff's condition would not improve and might get worse and that it was questionable whether the plaintiff would benefit from another surgical procedure.

The next issue to be considered is the degree of disability found by the compensation court. As stated above, Dr. Dougherty's opinion was that the plaintiff suffered a 10- to 15-percent permanent partial disability of the right upper extremity. Dr. Mumford assessed the plaintiff's level of impairment at 30 percent disability of the shoulder on July 5, 1985; 15 percent on December 13, 1985; and 15 percent on January 8, 1986. On April 29, 1987, Dr. Mumford testified that the plaintiff suffered a total of 25 percent permanent partial disability to the right upper extremity. The record contains subsequent correspondence from Dr. Mumford stating that the disability of the plaintiff's upper extremity had increased an additional 5 percent, and that the disability was due to the accident of December 27, 1983. The record also contains evidence that the plaintiff's muscles had not atrophied, that he had suffered no nerve damage, and that he was using the arm.

Where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony. *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). Section 48-121(3) provides that for disability resulting from permanent schedule injuries, the compensation "shall be in addition to the amount paid for temporary disability . . . ." The findings by the compensation court that the plaintiff suffered a 10-percent permanent loss of the use of his right arm and that the plaintiff suffered an increase in incapacity are not clearly wrong. The plaintiff's assignment of error is without merit.

II. Attorney Fees

The April 13, 1989, order of the compensation court states:

> The Court declines to award an attorney's fee for the rehearing because it considers that a reasonable controversy existed regarding:
>
> (1) The unconstitutionality of the six months provisions of Sections 48-140 and 48-141, and;
>
> (2) Whether the plaintiff had shown with requisite medical certainty or probability that he suffered an increase in incapacity due solely to the injury of December 27, 1983. In that connection, the medical report finally supplying the requisite certainty . . . was not submitted to the Court until December 23, 1988, which was subsequent even to the further rehearing.

The plaintiff contends that he was entitled to an attorney fee pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988) and, in the alternative, that a part of § 48-125 is unconstitutional.

We decline to consider the plaintiff's constitutional arguments because they were not raised in the compensation court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Gardner v. Beatrice Foods Co., supra.* Also, since we determine that the plaintiff is entitled to recover an attorney fee for the rehearing after remand, the plaintiff lacks standing to challenge the statute.

In *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 31, 449 N.W.2d 197, 201 (1989), we noted that § 48-125 provides for an award of attorney fees and expenses in four types of situations:

> (1) A reasonable fee shall be awarded, both in the compensation court and in this court, when the employer refuses payment, or neglects to pay compensation for 30 days after an employee's injury, and the compensation court later makes an award . . . (2) a reasonable fee shall be awarded when an employer files an application for rehearing before the compensation court from an award of a single judge of that court and does not obtain a reduction in the award; (3) a reasonable fee may be awarded when an employee applies for a rehearing from

> the order of a single judge denying any award and obtains an award on rehearing; and (4) a reasonable fee may be awarded when an employee applies for a rehearing from an award of a single judge and increases the award on rehearing.

We held in *Behrens v. American Stores Packing Co., supra*, that when a workers' compensation case is remanded for a rehearing on an issue as to which this court has determined that a proper rehearing has not been held, the hearing held after remand is a rehearing in which expenses and attorney fees may be awarded pursuant to § 48-125.

We further held:

> The concept of the presence of a reasonable controversy is to be applied only to the determination as to whether an employee is entitled to the statutory penalties, not including attorney fees, as set out in § 48-125.
>
> . . . Whether there is a reasonable controversy or not has nothing to do with the award of attorney fees in workers' compensation cases, except in cases where an employer has erroneously refused to make payments after having been given 30 days' notice of disability. In every case tried before the compensation court, there is a reasonable controversy as to some facts before the court. Section 48-125 provides when fees are to be awarded.

Behrens, supra at 32-33, 449 N.W.2d at 201-02.

In light of our holding in *Behrens*, the compensation court erred in declining to award an attorney fee for the rehearing on the ground that reasonable controversies existed.

The record shows that the plaintiff's petition for modification was dismissed by a single judge of the compensation court on November 18, 1986. The plaintiff then filed a motion for rehearing and, on April 13, 1989, obtained an award for an increase in disability after the rehearing on remand. Section 48-125 provides, in part:

> If the employee files an application for a rehearing before the compensation court from an order of a judge of the compensation court denying an award and obtains an award . . . the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs

against the employer for such rehearing, and the Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Supreme Court.

Under § 48-125, the plaintiff is entitled to recover an attorney fee in the compensation court for the rehearing on remand on October 13, 1988, and in this court.

The finding and judgment of the Workers' Compensation Court that the plaintiff is entitled to recover compensation for an increase in incapacity due solely to the December 27, 1983, injury, equating to a 10-percent permanent loss of the use of his right arm, together with additional medical and hospital expenses, is affirmed. That part of the judgment of the compensation court denying the plaintiff an attorney fee in that court is reversed, and the cause is remanded with directions to allow the plaintiff a fee for the services of his attorney in that court for the rehearing on remand on October 13, 1988.

The plaintiff is allowed the sum of $1,000 for the services of his attorney in this court.

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

WHITE, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. JACK YOST, ALSO KNOWN AS CHOPPER YOST, APPELLANT.

455 N.W.2d 162

Filed May 11, 1990. No. 89-655.

Sentences: Appeal and Error. Sentencing is within the discretion of the trial court, and the Supreme Court reviews a sentence on appeal for an abuse of discretion.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Sentence of restitution vacated, and cause remanded with directions.

Richard H. Hoch, of Hoch & Steinheider, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

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

WHITE, J.

This is an appeal from an order of the Otoe County District Court ordering defendant to pay restitution, in addition to his sentence of incarceration. We vacate the restitution order and remand for a new sentencing hearing.

On March 30, 1989, defendant appeared with counsel before the Otoe County District Court and pled guilty on an amended information charging the offense of aiding and abetting an arson in the second degree, a Class III felony. Defendant admitted that he agreed to and did act as a lookout while another individual set fire on a property owned by a Mr. and Mrs. Anderson. He stated that he thought the other individual was only going to set fire to some tires or a wrecked car behind the Anderson building, but instead the fire spread to the building and burned it and an adjoining building, owned by a Mr. and Mrs. Barton, to the ground. Defendant has raised no assignments of error regarding the plea acceptance, and that part of the record is not before this court.

A sentencing hearing was held on May 5, 1989. Defendant was present with court-appointed counsel. Defendant was sentenced to not less than 3 nor more than 5 years in the Nebraska Penal and Correctional Complex and was ordered to pay costs of this action. The sentencing order also provided:

> IT IS FURTHER ORDERED, ADJUDGED AND CONSIDERED by the Court that the victims Mr. and Mrs. Walter Anderson have judgment of and against the defendant Jack Yost, also known as Chopper Yost, in the sum of $75,000.00 together with interest thereon from this date forward at the rate of 10.51 percent per annum. The amount of this judgment is exclusive of amounts paid by the insurer of the Anderson premises.
>
> IT IS FURTHER ORDERED, ADJUDGED AND CONSIDERED by the Court that Mr. & Mrs. Bob Barton have and recover judgment of and against the defendant

Jack Yost, also known as Chopper Yost, in the sum of $30,000.00 together with interest thereon at the rate of 10.51 percent per annum.

On appeal to this court, defendant's sole assignment of error is that the trial court abused its discretion and jurisdiction in entering judgment for the Andersons and the Bartons without the submission of evidence and the opportunity for a separate hearing. He has raised no assignment of error concerning the length of his sentence.

This court has stated that sentencing is within the discretion of the trial court, and we review a sentence on appeal for an abuse of discretion. See, *State v. Brown, ante* p. 10, 453 N.W.2d 576 (1990); *State v. Kitt,* 232 Neb. 237, 440 N.W.2d 234 (1989).

Initially, these dollar amounts are properly termed "restitution" and are controlled by the provisions of Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1989). This court has stated that restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as punishment for a crime. *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988); *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987). Neb. Const. art. VII, § 5, requires that penalties "shall belong and be paid over to the counties respectively" to be "appropriated exclusively to the use and support of the common schools in the respective subdivisions . . . ." But see, *State v. Arvizo*, 233 Neb. 327, 444 N.W.2d 921 (1989); *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989) (implicitly holding that restitution ordered pursuant to § 29-2280 is properly payable to the victims). We do not decide in this appeal the constitutionality of §§ 29-2280 to 29-2289, which contemplate the payment of restitution to the victim, nor do we reconsider our holdings in *War Bonnett, supra*, and *Duran, supra*.

We also note here that § 29-2287 provides that an award of restitution does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action.

Section 29-2280 provides that a sentencing court *may* order the defendant to make restitution for the actual physical injury, property damage, or loss sustained by the victim as a direct result of the offense for which the defendant has been

convicted. Once the court has made the decision to order restitution, § 29-2281 provides in pertinent part:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim.

In the present case the sole basis for the damages determination was the presentence report (PSR) prepared by the probation officer. The probation officer was not present at the sentencing hearing, and there was no testimony presented as to money damages. The PSR included only the following references to damages:

> Walter and Bettymae Anderson said the fire cost them $75,000 **above** their insurance. . . .
>
> The Cornhusker Casualty Company of Omaha has paid Mr. Anderson $16,000 on his building, $10,000 on his property, and $1,400 on his radio. A claim for approximately $5,000 for the clean up has been submitted, but it has not been paid as of yet.
>
> Bob and Belva Barton lived in their building. Mr. Barton called me on 4/18/89. He said they not only lost their livelihood but their home. . . . They didn't have any insurance. He would estimate their loss at $30,000. He said he would be glad to get at least a third of that amount back. . . .
>
> . . . .
>
> The present offense caused approximately $137,400 in property damage. Besides destroying two businesses, it left the Barton family homeless.

A letter written to the court by Walter Anderson, and included in the PSR, contained this reference: "This fire cost us $75,000.00 above our insurance. We did not have much insurance on the building, $26,000.00, and contents." This reference was also included: "We had thousands of dollars in

tools, bought over the years, in the building that is lost now. Also thousands of new and resaleable [sic] used parts and antique car parts. We had extra, expensive new spare parts, to repair our small and large wreckers." A fire incident report contained an estimate of the monetary damages to both properties. Another fire incident report related what an insurance agent told a fire investigator regarding the Andersons' insurance coverage on the property.

Although § 29-2280 requires the sentencing court, when determining the amount of restitution, to "order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim," we have serious concerns whether, without an evidentiary hearing, the bare statements contained in the PSR are sufficiently reliable to meet § 29-2281, which requires that "[t]he amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."

In any event, it is clear from the record that the sentencing court did not meaningfully consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations, nor did the trial court balance these considerations against the obligation to the victims. This is mandatory under § 29-2281, once the sentencing judge has decided to order restitution as part of the defendant's sentence. The evidence indicates that at the time of the sentencing defendant was unemployed and indigent. Defendant's girlfriend was pregnant, and he was admitting paternity.

We hold that although the sentencing judge did not abuse his discretion in ordering defendant to pay restitution, he did err in failing to consider the factors set forth in § 29-2281 once he made the decision to order restitution. Accordingly, the order of restitution is vacated, and the cause is remanded for a new sentencing hearing.

SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN A. EBERT, APPELLANT.

455 N.W.2d 165

Filed May 11, 1990. No. 89-697.

1. **Speedy Trial: Prisoners.** Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1989) provide a procedure by which a Nebraska prison inmate may assert his or her right to a speedy trial on pending Nebraska charges.
2. _____: _____. Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1989) provide two ways by which the trial of charges pending against instate prisoners may be expedited.
3. **Extradition and Detainer: Prosecuting Attorneys: Prisoners.** Under Neb. Rev. Stat. § 29-3804 (Reissue 1989) a prosecutor may request that a prisoner against whom a detainer has been lodged be made available for trial.
4. **Speedy Trial: Prisoners.** Under Neb. Rev. Stat. § 29-3803 (Reissue 1989) a prisoner may request final disposition be made of any charges pending against the prisoner.
5. **Speedy Trial: Prisoners: Prosecuting Attorneys: Time.** The 180-day period under Neb. Rev. Stat. § 29-3805 (Reissue 1989), within which untried charges must be brought to trial, commences to run after the prosecutor receives a certificate from the Director of Correctional Services as a result of a request by the prisoner under Neb. Rev. Stat. § 29-3803 (Reissue 1989) for final disposition of pending charges or to run after a request by the prosecutor under Neb. Rev. Stat. § 29-3804 (Reissue 1989) that the prisoner be made available for trial.
6. **Speedy Trial: Prisoners.** The procedure set out in Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1989), rather than that in Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1989), applies to instate prisoners.

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

Brian R. Watkins for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

BOSLAUGH, J.

The defendant, Steven A. Ebert, was convicted of third offense drunk driving, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986), was sentenced to 3 months in the county jail, and was fined $500 and costs, and his operator's

license was suspended for 15 years. The judgment was affirmed by the district court upon appeal. The defendant has appealed to this court, contending the courts below erred in overruling his motion for discharge based on the State's failure to bring him to trial within 180 days.

The record shows that on January 21, 1987, the defendant was cited in Lincoln, Nebraska, for third offense drunk driving. He was living in Lincoln on that date, but "moved" to Beatrice on February 1, 1987, where he was incarcerated in the Gage County jail on a burglary charge. The defendant remained in jail in Gage County until March 23, 1987, when he was transferred to a Nebraska penal correctional facility in Lincoln to serve a term of 2 to 4 years for his burglary conviction.

While he was in the Gage County jail, the defendant received a letter dated February 13, 1987, from the Lincoln Police Department sent by certified mail advising him that he was scheduled to appear in the Lancaster County Court on March 10, 1987, and that "[a] 'hold' is being placed onyou [sic] by County Court and youwill [sic] be returned to Lincoln when Gage County releases you." The defendant failed to appear in court in Lincoln on March 10.

A detainer was filed with the Department of Correctional Services on July 18, 1988. The defendant was arraigned in the Lancaster County Court on July 29, 1988, and entered a plea of not guilty. Present counsel entered his appearance on September 1, 1988, and trial was set for September 21.

On September 21, 1988, the defendant filed a motion for discharge alleging that the charge pending against him should be dismissed because the State had failed to bring him to trial within 6 months from the date of the alleged offense, in violation of the U.S. and Nebraska Constitutions and Neb. Rev. Stat. §§ 29-1208 and 29-3805 (Reissue 1989). At the hearing on the motion on September 27, the defendant testified that he had never filed any papers of any kind requesting that the matter be brought to trial. The defendant's motion for discharge was overruled by the county court on November 29, 1988.

After a trial on stipulated facts on February 1, 1989, the defendant was found guilty. He was sentenced on March 10,

1989. The judgment of the county court was affirmed by the district court on May 24, 1989.

Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1989) provide a procedure by which a Nebraska prison inmate may assert his or her right to a speedy trial on pending Nebraska charges. *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986). Section 29-3804 also allows the prosecutor to expedite the disposition of criminal charges pending against instate prisoners.

Section 29-3802 provides that the Director of Correctional Services (Director) must promptly inform, in writing, each prisoner in the custody of the Department of Correctional Services (Department) of any untried indictment, information, or complaint against him or her in this state, of which the Director has knowledge. In the present case, although the record is silent as to whether the Director was aware of or informed the defendant of the charge pending against him in Lancaster County, the defendant had actual knowledge of the charge.

The statutes provide two ways by which the trial of charges pending against instate prisoners may be expedited. First, the prisoner defendant may request, in writing to the Director, the disposition of untried charges, pursuant to § 29-3803. As we noted in *State v. Soule, supra*, if a prisoner makes such a request, the Director must issue a certificate informing the prosecutor of the prisoner's status with the Department, and must inform the court in which the untried charges are pending of the prisoner's request for final disposition of the untried charges. The Director also must offer to deliver custody of the prisoner to the appropriate authority in the city or county in which the untried charge is pending. In this case, the defendant did not request final disposition of the charge pending in Lancaster County.

Second, the prosecutor may seek to obtain access to the defendant pursuant to § 29-3804. Under that section, the prosecutor in a city or county in which an untried indictment, information, or complaint is pending is entitled to have a prisoner against whom the prosecutor has lodged a detainer made available upon presentation of a written request for temporary custody or availability to the Director. Generally

speaking, a "detainer" is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction. *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). If the prosecutor has filed a detainer against the prisoner and makes a written request for temporary custody or availability pursuant to § 29-3804, the Director must issue a certificate advising the prosecutor of the prisoner's status with the Department and must also "[o]ffer to deliver temporary custody of the prisoner to the appropriate authority in the city or county where the untried indictment, information, or complaint is pending in order that speedy and efficient prosecution may be had." In this case, the prosecutor did not file a written request for temporary custody or availability.

Section 29-3805 provides that the untried charges must be brought to trial within 180 days after the prosecutor receives a certificate from the Director pursuant to §§ 29-3803 or 29-3804. If the charges are not tried within 180 days, "no court of this state shall any longer have jurisdiction thereof nor shall the untried indictment, information, or complaint be of any further force or effect and it shall be dismissed with prejudice." § 29-3805.

The defendant contends that the filing of a detainer by the prosecutor is necessary to trigger the application of this procedure and that § 29-3803 does not apply in this case because the prosecutor did not file a detainer against the defendant until approximately 17 months after the complaint was filed. Thus, the defendant argues, he should have been discharged pursuant to § 29-1208.

The State argues that §§ 29-3801 et seq. impose no duty on the prosecutor to file detainers against prisoners and that the prosecution need not proceed to trial unless and until the prisoner defendant exercises his option to request disposition of the charges pursuant to § 29-3803.

In *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986), the defendant was convicted of robbery in Douglas County and on April 26, 1984, was committed to the Nebraska Department of Correctional Services to serve a sentence of 2 to 4 years. On May 14, 1984, the Sarpy County sheriff filed a detainer with the

Department in connection with a burglary charge pending against the defendant in Sarpy County. The defendant then demanded the disposition of the untried charges pursuant to § 29-3801, but was brought to trial more than 180 days after his request was received by the prosecutor and filed in the county court. We determined that the 180-day period had been extended 7 days due to the defendant's request for a continuance and that the decision of the trial court denying the defendant's motion to dismiss was correct.

In *Soule*, we noted that the procedure under §§ 29-3801 to 29-3809 sets out a different timeframe from that set out in Neb. Rev. Stat. § 29-1207(2) (Reissue 1989) concerning mandatory disposition of untried indictments or informations within 6 months, or authorized continuances. This court declined to apply the law and decisions under the "speedy trial" requirements of Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1989) to the circumstances presented in *Soule* and held that the procedure set forth in §§ 29-3801 et seq. applied to instate prisoners. We also held that

> the time within which an instate prisoner must be tried under §§ 29-3801 to 29-3809 begins to run when the county attorney of the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.

State v. Soule, supra at 623, 379 N.W.2d at 764.

Section 29-3805 provides, in part, that "[w]ithin one hundred eighty days after the prosecutor receives a certificate from the director pursuant to section 29-3803 or 29-3804 . . . the untried indictment, information, or complaint shall be brought to trial with the prisoner or his or her counsel being present." The receipt by the prosecutor of a certificate from the Director triggers the 180-day period. See *State v. Soule, supra*.

In the present case, the prosecuting attorney did not receive a certificate from the Director pursuant to § 29-3803 because the defendant made no request under that section for final disposition of the untried complaint. The prosecuting attorney did not receive a certificate from the Director pursuant to

§ 29-3804 because the prosecutor had made no request under that section.

We hold that the procedure set out in §§ 29-3801 to 29-3809, rather than that in §§ 29-1201 to 29-1209, applies to instate prisoners. *State v. Soule, supra.* These sections do not require the prosecutor to file a detainer against any prisoner, but only require that a detainer be filed if the prosecutor elects to seek temporary custody or availability of a prisoner pursuant to § 29-3804. The filing of a detainer is not required in order for a prisoner to assert his or her right to a speedy trial pursuant to § 29-3803.

In the present case, the record shows that the defendant failed to appear in court on March 10, 1987, and that a detainer was filed against him on July 18, 1988. A journal entry dated July 22, 1988, states that at the defendant's request, the case was reset for arraignment on July 29, 1988. Apparently, arrangements were made to have the defendant transported to his arraignment. The defendant appeared in court on July 29 and entered a plea of not guilty. Trial was originally set for September 28. On August 26, 1988, the case was continued until September 1 on the written motion of defense counsel for the reason that "Defendant and the City Prosecutor have reached an agreement concerning disposition of the charges." Present counsel entered his appearance on September 1, 1988, and, at the defendant's request, the trial was rescheduled for September 21. On September 21, the defendant filed his motion for discharge. The motion was overruled on November 29, and the trial was held on February 1, 1989.

Although the record is silent as to whether the prosecutor ever received a certificate from the Director, which would trigger the 180-day period, the record shows that the defendant was tried 193 days after July 22, 1988, the date on which he apparently requested that this case be reset for arraignment. Excluding the 68-day continuance occasioned by the defendant's own motion for discharge, the defendant was tried within 180 days of his request. See § 29-3805.

The record shows that the defendant was fully aware of the complaint pending against him in Lancaster County, but did not take advantage of the provisions of § 29-3803 to secure

disposition of this charge. The prosecutor has no duty to proceed pursuant to § 29-3804, and the defendant was not entitled to be discharged pursuant to § 29-3805. The defendant agreed to be tried on a stipulation of facts and has shown no prejudice resulting from the delayed trial of this matter.

The judgment of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

CURTIS A. FENSTER, APPELLANT AND CROSS-APPELLEE, V. CLARK BROTHERS SANITATION ET AL., APPELLEES AND CROSS-APPELLANTS.

455 N.W.2d 169

Filed May 11, 1990. No. 89-865.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation.** The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1988) compensates impairments of the body as a whole in terms of employability and loss of earning capacity, but compensates impairments of the scheduled members on the basis of loss of physical function.
4. _____. An employee suffering a schedule injury is entitled only to the compensation provided for in Neb. Rev. Stat. § 48-121(3) (Reissue 1988), unless some unusual or extraordinary condition as to the other members or parts of the body develops as a result of the injury.
5. _____. When an employee suffers a schedule injury, the presence or absence of industrial disability (loss of earning capacity) is immaterial.
6. _____. Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact.
7. _____. The test for determining whether a disability is to a scheduled member or the body as a whole is not the situs of the injury, but, rather, the location of the residual impairment.

8. **Workers' Compensation: Proof.** In order to be entitled to compensation benefits, an employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
9. **Workers' Compensation.** An injured worker is not entitled to an award based on loss of earning power when the injury confined to a scheduled member renders the worker unable to engage in work for which he or she has prior training and experience.
10. **Workers' Compensation: Limitations of Actions.** Generally, a payment for compensation benefits made by an employer's insurance carrier for an accident which predated its coverage tolls the statute of limitations and binds the employer.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

John A. Wagoner for appellant.

Cathleen H. Snell, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellees.

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

HASTINGS, C.J.

The plaintiff appeals from an award of the Workers' Compensation Court finding that he suffered a compensable schedule injury, i.e., a 20-percent permanent partial disability to his right arm, see Neb. Rev. Stat. § 48-121(3) (Reissue 1988), rather than an injury to his body as a whole, see § 48-121(2), which would entitle him to an award based on his loss of earning power. The defendants, Clark Brothers Sanitation and Alliance Insurance Company, cross-appeal the compensation court's finding that the statute of limitations did not bar plaintiff's claim. We reverse and remand for further proceedings, noting plain error, but affirm as to the cross-appeal.

The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990); Neb. Rev. Stat. § 48-185 (Reissue 1988).

On September 30, 1981, plaintiff was employed by Clark

Brothers Sanitation as a garbage hauler and suffered a rotator cuff tear to his right shoulder while lifting a full 60-gallon trash barrel.

Plaintiff incurred medical and hospital expenses and was temporarily totally disabled from September 30, 1981, to and including February 15, 1982; from June 8, 1982, to and including August 5, 1982; from January 4, 1983, to and including March 30, 1983; and from August 27, 1986, to and including March 9, 1987.

At the time of this accident, Clark Brothers' insurer was Alliance. Alliance paid plaintiff's medical and hospital bills and disability compensation up to September 14, 1984. In the fall of 1984, Aetna Life & Casualty Company became Clark Brothers' insurer. Thereafter, plaintiff began filing all of his claims, even those relating to his right shoulder injury of September 30, 1981, with Aetna.

Plaintiff underwent surgery for carpal tunnel syndrome in his right wrist on December 4, 1984, and for lateral epicondylitis in his left elbow on November 14, 1985. All medical and hospital expenses as well as compensation benefits for temporary total disability were paid by Aetna.

In 1986, plaintiff returned to Dr. John Albers because he was experiencing recurring problems with his right shoulder. Dr. Albers is the orthopedic surgeon who had performed surgery and cared for plaintiff for the rotator cuff tear, the carpal tunnel syndrome, and the lateral epicondylitis. On October 16, 1986, a staple which had been put in plaintiff's right shoulder in 1983 was surgically removed. Aetna paid medical and hospital expenses for the procedure as well as compensation for temporary total disability from August 28, 1986, to November 12, 1986. On February 12, 1987, on the advice of Dr. Albers, plaintiff visited the Mayo Clinic in Rochester, Minnesota, for an orthopedic examination of his right shoulder. Aetna paid medical and hospital expenses relating to the visit as well as compensation for temporary total disability from February 12 to March 9, 1987.

Plaintiff visited the Mayo Clinic for another examination of his right shoulder on March 31, 1988. None of his expenses relating to this visit have been reimbursed.

On October 16, 1987, plaintiff filed a petition in the Workers' Compensation Court alleging that on or about November 13, 1984, in loading refuse on the truck he was operating, he injured his right shoulder and right arm, which resulted in a permanent and total impairment in the use of his right upper extremity, including the shoulder. Named as defendants were Clark Brothers and Aetna. The compensation court, after a hearing, found that the evidence disclosed the occurrence of only one accident and injury arising out of and in the course of plaintiff's employment with Clark Brothers, which occurred in the latter part of September 1981. According to the court, there was no medical evidence of a causal connection between plaintiff's claimed disability and any accident and injury subsequent to September 1981.

Plaintiff filed another petition in the compensation court on June 7, 1988, alleging an injury to his right shoulder and arm arising in the course of his employment as the result of an accident occurring on or about October 1, 1981. Named as defendants were Clark Brothers and Alliance. In their answer, the defendants alleged that the last compensation benefit or medical expense paid to plaintiff was accomplished on September 14, 1984, and, therefore, more than 2 years having expired from the date of the last payment of compensation on the claim, plaintiff's claim was barred by Neb. Rev. Stat. § 48-137 (Reissue 1988).

An award on rehearing was entered July 27, 1989, following a consolidated hearing on the claim involving Aetna and the claim involving Alliance. The court found that all compensation benefits for the carpal tunnel syndrome and lateral epicondylitis had been paid and that those conditions had no causal connection with the injury of October 1, 1981.

The court further found that as a result of the injury of *October 1*, 1981, in lifting the 60-gallon trash barrel, plaintiff was temporarily totally disabled for those periods of time previously detailed, totaling $60^{5}/_{7}$ weeks, beginning *October 30*, 1981, and ending on March 9, 1987, and was suffering from a 20-percent permanent partial disability of his right arm. This contrasts with an original award entered by one judge of the compensation court which found plaintiff to have suffered a

50-percent temporary loss of earning power through July 20, 1988, and to be suffering from the same continuing temporary loss of earning power for an additional indefinite period of time.

The compensation court then addressed the defense of the statute of limitations. The court set forth the various details of treatment and payments previously mentioned. It found that Aetna had paid the various hospital and medical expenses associated with the removal of the staple from plaintiff's shoulder in October 1986 and that those payments were made within 2 years of the filing of the consolidated actions then pending in the compensation court. The court went on to find that although those payments were mistakenly made in that they were made for treatment of an injury that predated the period of its coverage, nevertheless, Aetna having been one of Clark Brothers' workers' compensation carriers, the payments were in effect made by the employer and operated to toll the running of the statute of limitations.

The court went on to order payment by Alliance of certain hospital and medical expenses, to award credit to Alliance for certain disability compensation payments previously made, and further to find plaintiff to be suffering from a 20-percent permanent partial disability of the right arm for which compensation benefits were awarded. Finally, the compensation court found that because the defendants had secured a reduction in the amount of the award initially entered, there would be no award of attorney fees.

Plaintiff was examined by Dr. John Yost, an orthopedic surgeon, on September 27, 1988. In his report of the examination, Dr. Yost stated that he felt that plaintiff's subjective complaints far outweighed any and all objective findings. He estimated plaintiff's permanent partial disability of the right upper extremity at 15 percent.

Although the record does not seem to disclose testimony or a report by Dr. Albers, plaintiff's treating surgeon, as to a percent of disability, there is a letter of November 23, 1988, to plaintiff's attorney in which Dr. Albers states that "I feel that as a result of this injury, he has approximately 20% permanent partial physical impairment to his right upper extremity." The award

entered by the compensation court finds that "[b]oth these orthopedic surgeons [Dr. Albers and Dr. Yost] expressed their opinions in terms of the loss of use of the plaintiff's right arm."

Although plaintiff adduced considerable evidence suggesting a severe limitation in his earning capacity and ability to do any kind of physical labor, he conceded during argument that his disability was in the arm. The rather sketchy testimony on this issue given by the plaintiff, although he complains of pain in his shoulder rather than in his arm, seems to suggest that his problem relates to his inability to use his right arm. In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990).

The statutory scheme found in § 48-121 compensates impairments of the body as a whole in terms of employability and loss of earning capacity, but compensates impairments of the scheduled members on the basis of loss of physical function. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983).

It is a well-established rule in Nebraska that an employee suffering a schedule injury is entitled only to the compensation provided for in § 48-121(3), unless some unusual or extraordinary condition as to the other members or parts of the body develops as a result of the injury. *Evans v. American Community Stores*, 222 Neb. 538, 385 N.W.2d 91 (1986). See, also, *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986). When an employee suffers a schedule injury, the presence or absence of industrial disability (loss of earning capacity) is immaterial. *Goers v. Bud Irons Excavating*, 207 Neb. 579, 300 N.W.2d 29 (1980); *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980).

Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact. *Goers v. Bud Irons Excavating, supra.* The test for determining whether a disability is to a scheduled member or the body as a whole is not the situs of the injury, but, rather, the location of the residual impairment. *Nordby v. Gould, Inc., supra.*

Plaintiff adduced substantial evidence that because of his learning disability he was ill equipped to perform other than minimum-paying jobs and his arm disability prevented him from obtaining any type of well-paying labor jobs. According to plaintiff, the unusual or extraordinary condition in this case is that his learning disability prevents his rehabilitative training, thereby preventing him from having any particular earning power.

Plaintiff's position is untenable for two reasons. First, an employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Hollinger v. Consolidated Motor Freight, supra.* Plaintiff's learning disability, even if it could be considered an "unusual or extraordinary condition as to the other members or parts of the body," was not caused by the injury to his right shoulder. Second, this court has rejected the argument that an injured worker is entitled to an award based on loss of earning power when injury confined to a scheduled member renders the worker unable to engage in work for which he has prior training and experience. See *Broderson v. Federal Chemical Co.*, 199 Neb. 278, 258 N.W.2d 137 (1977).

The evidence supports the factual finding of the compensation court that plaintiff's disability is limited to a permanent partial loss of use of his right arm.

Although it is not assigned as error and although our review is limited to error appearing in the record and is not de novo, we can and do note plain error in the computation of compensation benefits. The compensation court found the first period of temporary total disability to be from *October 30*, 1981, rather than from *September 30*, 1981. Therefore, plaintiff is entitled to temporary total disability compensation for an additional $4^1/_7$ weeks—an increase of $745.71.

The compensation court awarded plaintiff $180 per week for 35 weeks for a 20-percent permanent partial disability to his right arm. Section 48-121(3) (Cum. Supp. 1980) provides, for the loss of an arm, for an award of "sixty-six and two-thirds per cent of daily wages during two hundred twenty-five weeks." Twenty percent of 225 is, of course, 45 weeks. Accordingly, plaintiff is entitled to an additional 10 weeks of compensation

at $180 per week—an increase of $1,800.

Plaintiff was awarded $269.84 as reimbursement for expenses incurred during his two trips to the Mayo Clinic. The expenses total $336.44, or an additional $66.60.

Defendants were ordered to pay $441 to Rochester Methodist Hospital and $1,039.10 to Dr. Robert H. Cofield. Aetna made these payments. However, a $128.20 bill for plaintiff's March 31, 1988, visit to the Mayo Clinic was not paid or included in the award. Therefore, plaintiff's award should be reduced by $1,351.90.

Defendants were given credit for $7,225 in disability compensation paid to plaintiff. However, exhibit 64 discloses that defendants paid $7,225.69 in disability compensation, so plaintiff's award should be reduced by $0.69.

Because this cause must be reversed and remanded for a recomputation of the benefits, which will show that plaintiff is entitled to an increase in his award of $1,259.72, he is entitled to an attorney fee pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988).

We now address defendants' cross-appeal insisting that the statute of limitations barred this action by plaintiff.

The facts are relatively simple and straightforward. If we are limited to a consideration of the payments of compensation benefits actually made by Alliance, more than 2 years intervened between the last payment and the filing of this action, and thus the action would be barred under the provisions of § 48-137. On the other hand, if the payments made by Aetna on behalf of Clark Brothers are properly chargeable to, or rather are capable of being credited to, Clark Brothers, the statute has not run.

The court on rehearing found the statute of limitations did not bar plaintiff's claim. The court reasoned that after September 14, 1984, the date of Alliance's last payment, Aetna paid various medical expenses which related to plaintiff's shoulder injury. According to the court, these payments, although mistakenly made for treatment of an injury which predated the period of Aetna's insurance coverage, were payments made by the employer, Clark Brothers, and operated to toll the running of the statute of limitations as to both Clark

Brothers and Alliance, the insurer on the date of the shoulder injury.

Defendants cite the following from 2B A. Larson, The Law of Workmen's Compensation § 78.43(e) at 15-272.27 (1989): "Payment of compensation tolls the statute only as to the injury for which the payment is intended as compensation; it cannot toll the statute as to another injury received in a prior accident." According to defendants, all payments made by Aetna were intended to be compensation for an alleged injury of November 13, 1984, not for the shoulder injury sustained in 1981, and therefore the payments should not have the effect of tolling the statute of limitations.

Defendants ignore the following finding of the compensation court:

> On November 7, 1984, the plaintiff consulted Dr. Albers for pain in his right arm and right hand. At the time of that visit, Dr. Albers also x-rayed the plaintiff's right shoulder. This charge was paid by Aetna Life and Casualty Company on April 22, 1985. When the plaintiff had the staples removed from his right shoulder in October of 1986, Aetna paid various hospital and medical expenses incurred at that time as reflected in Exhibit 72 and both of these actions were filed within two years of the payments made by Aetna Life and Casualty Company. The payments made by Aetna were mistakenly made, in that they were paid for treatment of an injury that predated the period of its insurance coverage.

Although the checks from Aetna all listed November 13, 1984, as the date of loss, it is clear that some of the checks are for expenses related to the shoulder injury which occurred in September 1981. Therefore, the provision cited from the Larson treatise is not applicable to the instant case.

Defendants further argue that Aetna's payments were voluntary and not their fault and, therefore, they should not be bound by the actions of Aetna. The Idaho Supreme Court addressed a similar argument in *Facer v. E. R. Steed Equipment Company*, 95 Idaho 608, 514 P.2d 841 (1973). The plaintiff was injured in an accident which occurred sometime in March 1969 while the State Insurance Fund (SIF) was the employer's surety.

On April 1, 1969, American Hardware Mutual Insurance Company (AHMIC) became the employer's surety. On December 31, 1969, AHMIC paid medical expenses relating to the March 1969 injury. The plaintiff filed a petition for workers' compensation on June 1, 1971. SIF argued that the statute of limitations had run and it could not be bound by the voluntary payments made by a third party. The court disagreed, finding that payment made by AHMIC

> was compensation for injuries for which claimant's employer admits liability and must be considered, in substance, as compensation paid by the employer. By making this payment claimant's employer through its surety tolled the statute of limitations and bound the appellant [SIF] to his act. Under the facts presented by the record it would be a grave injustice to disallow claimant compensation for his injuries because he was unaware of a change of sureties by his employer.

Id. at 613, 514 P.2d at 846. See, also, *Bureau of Adult Corrections v. Dernberger*, 529 A.2d 245 (Del. 1987).

Defendants' final argument is that by the time plaintiff had the staple removed from his shoulder on October 16, 1986, the 2-year statute of limitations which began running on September 14, 1984, the date of the last payment made by Alliance, had expired. Therefore, according to defendants, the voluntary payment by Aetna made after the applicable statute of limitations had run could not toll the statute of limitations which had already expired. Defendants' argument, although legally correct, overlooks one important fact. As found by the compensation court, Aetna made a payment on April 22, 1985, for a visit to Dr. Albers for pain in plaintiff's right arm and right hand, during which visit Dr. Albers x-rayed plaintiff's right shoulder. This payment, made before the applicable statute of limitations had run, could and did toll the statute of limitations.

The judgment of the Workers' Compensation Court is reversed, and the cause is remanded for further proceedings consistent with this opinion regarding the appeal of the plaintiff, but the judgment is affirmed as to the cross-appeal. Plaintiff is awarded $1,000 to apply to his attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ESSIE HARP, APPELLANT, V. H. RUPRECHT, DOING BUSINESS AS ELKHORN MEDICAL ASSOCIATES, APPELLEE.

455 N.W.2d 176

Filed May 18, 1990. No. 88-285.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, upon the recommendation of the Appellate Division of the District Court, RIST, BARTU, and GARDEN, District Judges. Reversed and remanded for further proceedings.

Dan D. Stoller for appellant.

Joni R. Kerr, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

PER CURIAM.

Upon our consideration of the record, briefs, and recommendation of the Appellate Division of the District Court, we find that a question exists as to a material fact or the inference to be drawn therefrom, and, accordingly, the defendant was not entitled to summary judgment. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RICHARD THOMPSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

455 N.W.2d 538

Filed May 18, 1990. No. 88-385.

1. **Municipal Corporations: Wages: Claims.** Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), the Nebraska Wage Payment and Collection Act, did not apply to wage claims against a city.

2. **Statutes.** Generally, where a general statute, if standing alone, would include the same matter as a special act and thus conflict with it, the special act will be considered as an exception to the general statute.
3. **Statutes: Legislature: Municipal Corporations.** When the Legislature enacts a law affecting municipal affairs, which is of statewide concern, the state law takes precedence over any municipal action taken under a home rule charter.
4. **Municipal Corporations: Wages: Claims.** The filing of a claim pursuant to Neb. Rev. Stat. § 14-804 (Reissue 1987) is a procedural prerequisite to the prosecution of wage claims against a city in the district court.
5. **Municipal Corporations: Claims: Jurisdiction: Time: Appeal and Error.** The district court does not have jurisdiction to hear an appeal from a city council's disallowance of a claim that accrued more than 18 months prior to the filing or presentation of the claim.
6. **Municipal Corporations: Wages: Claims: Limitations of Actions.** Neb. Rev. Stat. § 14-806 (Reissue 1987) operates as a statute of limitations for wage claims against a city of the metropolitan class.

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

S. Caporale for appellants.

Herbert M. Fitle, Omaha City Attorney, and Timothy K. Kelso for appellees.

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

GRANT, J.

This is an appeal from an order of the district court for Douglas County dismissing the claim of plaintiffs-appellants, who are employees of the City of Omaha, for overtime wages earned but uncompensated during the 5-year period preceding the filing of the petition in the district court. Plaintiffs' petition included a prayer for costs and attorney fees under Neb. Rev. Stat. § 48-1231 (Reissue 1988) of the Nebraska Wage Payment and Collection Act. Defendants-appellees are the City of Omaha and various officials of the city, herein collectively called the city. We affirm.

A stipulation by the parties reflects the following facts. On September 10, 1984, the employees filed a claim seeking payment for overtime wages, earned but uncompensated, with the city comptroller in accordance with Neb. Rev. Stat. § 14-804 (Reissue 1987). Although it is not explicitly stated in

the record, the pleadings, the stipulation, and the brief of appellants imply that the claim submitted to the city comptroller requested compensation for wages earned during a period extending beyond the 18 months preceding the filing of the claim. On December 18, 1984, the Omaha City Council awarded the employees compensation for overtime earned during the 18-month period immediately preceding the filing of the claim. The employees did not appeal from that award.

On January 21, 1985, the employees filed this action against the city in the district court for Douglas County, seeking payment of all wages the city "unlawfully refused to pay" within 5 years of the filing of the petition. As liberally construed, the petition alleges a contract action for overtime wages due and owing. The parties stipulated that the employees had been paid for the 18 months preceding the filing of their claim with the city and that the amount sought in the court action "is reduced to and is made for the sum allegedly due and owing" which exceeds the 18-month period. The petition also sought costs and attorney fees pursuant to § 48-1231.

The city answered and, among other denials and affirmative allegations, affirmatively alleged that the district court had "no jurisdiction to make an award for any amounts allegedly due and owing beyond the eighteen month period contained in Section 14-806," that the "Plaintiffs have failed to comply with the statutory requirements to appeal said decision as set forth in Section 14-813," and that "this action, or a portion thereof, is barred or limited by the applicable statute of limitations."

The district court dismissed the petition. The court's memorandum noted that the Wage Payment and Collection Act did not apply to municipalities and, in any event, was not an alternative to the wage collection procedure set forth in Neb. Rev. Stat. §§ 14-804 to 14-806 and 14-813 (Reissue 1987), hereinafter referred to as the claims statutes. The district court noted that compliance with § 14-804 was a procedural prerequisite to an action on a wage claim against the city and apparently concluded that compliance with § 14-813 was also a procedural prerequisite to such an action.

In this court the employees assign the following errors:

1. The Court erred in finding that Appellants [sic]

action does not come within the Wage Payment and Collection Act.

2. The Court erred in finding that Section 18-804 [sic] and Section 14-813 R.R.S. 1943 are applicable to this case.

3. The Court erred in finding that 18-804 [sic] and 14-813 R.R.S. 1943 apply to claims in excess of eighteen (18) months.

4. The Court erred in finding 14-803 [sic] is a general statute of limitation and not merely a limitation on the power of the Omaha City Council.

Brief for appellants at 1-2.

With reference to the first assignment of error, we agree with the district court that Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), the Nebraska Wage Payment and Collection Act, did not apply to wage claims against the city. The plain language of § 48-1229 did not include political subdivisions within the definition of employers to which the act applies. That section stated in part: "(1) Employer shall mean any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor thereof, employing any person as an employee, except that employer shall not be construed to include the state . . . ." In *Omaha Public Schools v. Hall*, 211 Neb. 618, 319 N.W.2d 730 (1982), we held that similar language in a different statute, Neb. Rev. Stat. § 48-1102 (Cum. Supp. 1967), did not include political subdivisions. The analysis and conclusion in *Hall, supra*, control here. Sections 48-1228 et seq. did not apply to this wage claim against the city. We note that in 1988, the Legislature amended § 48-1229 to specifically include political subdivisions, but that amendment does not affect this case. The district court was correct in its determination that §§ 48-1228 et seq. did not apply to this action against the city.

Even if the Wage Payment and Collection Act was applicable to the claim at bar, there is no merit to the employees' contention that the Wage Payment and Collection Act is a special provision in regard to wage claims and takes precedence over the claims statutes. Generally, " ' "[w]here the general statute, if standing alone, would include the same matter as the

special act, and thus conflict with it, the special act will be considered as an exception to the general statute . . . ." ' " *SID No. 1 v. County of Adams*, 209 Neb. 108, 113, 306 N.W.2d 584, 586 (1981). The act is not a special provision governing the same subject matter as the claims statutes. The Wage Payment and Collection Act provides for the award of attorney fees and costs to a successful wage claimant and does not concern conditions governing claims against a city of the metropolitan class. The statutes do not conflict. Application of the Wage Payment and Collection Act would not alter the need to satisfy the requisites of the claims statutes.

The issue raised by the second, third, and fourth assignments of error appears to be whether the employees have any legal means to recover wages due and owing from the city for a period more than 18 months prior to the date that a claim is filed with the city comptroller and, if so, what procedure sustains that remedy.

At the time of the filing of the petition, Omaha was a city of the "metropolitan" class as defined by Neb. Rev. Stat. § 14-101 (Reissue 1987). As such, Omaha had the power "to sue and be sued" and "to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers." *Id.* As Omaha was a city of the metropolitan class, the claims statutes were generally applicable to wage claims against the city.

In arguing that the claims statutes do not apply in this case, the employees contend that Omaha is a home rule charter city, and wage claims against Omaha are solely of local concern. We have decided in this regard that "when the Legislature enacts a law affecting municipal affairs which is of state-wide concern, the state law takes precedence over any municipal action taken under the home rule charter." *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 104, 77 N.W.2d 862, 868 (1956). The claims statutes affect access to the state courts and the state law remedies. These are issues of statewide concern. Consequently, Omaha's home rule charter does not affect the applicability of the claims statutes to wage claims against the city.

Having determined that the claims statutes are generally applicable to a wage claim against the city, we must then

determine how their application affects the employees' right to bring wage claims against the city for any period more than 18 months prior to the filing of the claim with the city comptroller. Section 14-804 provides:

> Before any claim against the city . . . is allowed, the claimant or his agent or attorney shall verify the same by his affidavit . . . . All claims against the city must be filed with the city comptroller. When the claim of any person against the city is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813.

We have held that the filing of a claim pursuant to § 14-804 is a procedural prerequisite to the prosecution of wage claims against the city in the district court. See, *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986); *Halbleib v. City of Omaha*, 222 Neb. 844, 388 N.W.2d 60 (1986). We agree with the district court that the filing of a claim pursuant to § 14-804 was a necessary prerequisite to the action in this case.

Next, we consider the effect of § 14-806 on the employees' claims. That section states:

> No bill or claim for labor, salary or material, or for extra service or overtime or account of any kind against the city, after it has been adversely reported on and rejected by the administration under which it has been incurred, and no bill, account or claim, not presented or claimed within eighteen months after it was incurred and payable, shall be allowed or authorized to be paid by any mayor and council except through the judgment of a court of competent jurisdiction. . . .

In *Redell v. City of Omaha*, 80 Neb. 178, 113 N.W. 1054 (1907), we interpreted the language of Comp. St. ch. 12*a*, § 58 (1903) (the predecessor of § 14-806) with reference to a wage claim impliedly accruing prior to 18 months before the claim was filed with the city. The earlier statute contained essentially the same language as § 14-806. The city council in *Redell* rejected the claim, and the claimant appealed the ruling of the city council to the district court. The district court dismissed the claim. The dismissal was appealed to this court, and we stated:

> It is not disputed that the plaintiff's claim is embraced by the prohibition and does not fall within the exception of the foregoing statute. . . . The legislature could not have chosen language more apt for the expression of an intent that a demand so situated shall be extinguished, so far as the judicial powers of the mayor and council are concerned. The enactment is not analogous to an ordinary statute of limitations, which the defendant may waive at his discretion. . . . The limitation is of the power and jurisdiction of the auditing body itself, whose disobedience thereto would be a void act. It is axiomatic that a court in which an appeal may be prosecuted must derive its jurisdiction from the tribunal from which the appeal is taken. It would be absurd to say that the court may treat as erroneous and reverse an order made by the mayor and council in obedience to a peremptory statute. . . . They were as powerless to reject the claim as they were to allow it. The one order is equally as void or futile as the other would have been, and there is nothing from which an appeal can be taken. Their order of disallowance, for the reason given, was purely ministerial and formal, and in no sense judicial. It will be soon enough to ascertain what is meant by the saving clause or exception when the question is presented in some court having jurisdiction and in a manner calling for its decision.

Redell, supra at 180-81, 113 N.W. at 1054-55. In summary, *Redell* held that a city council's disallowance of a claim because it accrued prior to 18 months before the filing of the claim with the city was not appealable. The disallowance was not discretionary and not "judicial" in nature. The city council had no statutory authority to allow such a claim; therefore, there was nothing from which an appeal could be taken. As *Redell* indicates, the district court did not have jurisdiction to hear an appeal from the city council's disallowance of a claim that accrued more than 18 months prior to the filing or presentation of the claim.

Consequently, there was no reason for the employees in this case to utilize the procedures in § 14-813 to appeal the resolution of the city council. Such an appeal would have been

fruitless, and failure to bring such an appeal is not an appropriate basis for dismissal of the action in this case.

The narrow issue then becomes whether § 14-806 acts as a statute of limitations and restricts the action at bar. Appellees contend that a claim for wages accruing prior to 18 months before the filing of the claim is "extinguished" by § 14-806 with reference to the courts as well as to the mayor and city council. We agree. Section 14-806 was ostensibly enacted to serve two purposes: (1) to prevent a subsequent administration from overturning a prior administration's rejection of a claim and (2) to limit claims against the city to those claims that are timely presented and therefore place a more reasonable burden of investigation upon the city. Section 14-806 operates as a statute of limitations for wage claims against a city of the metropolitan class. To interpret the statute otherwise would create an awkward, and we think unintended, rule requiring a party to bring two separate claims before two separate tribunals. A party would be required to bring a claim before the city council or mayor and possibly appeal that determination, and at the same time the party would be required to bring a separate claim in the state courts for the part of the claim accruing more than 18 months before the filing of the claim.

The exception in § 14-806 which permits the mayor and council to pay claims pursuant to "the judgment of a court of competent jurisdiction" provides for an effective appeal where a claim accruing within 18 months of the filing of the claim is rejected by the administration under which it was incurred. Section 14-806 prevents a mayor and city council from overturning the decision of a prior administration to reject a claim, but provides that the mayor and city council may pay the claim once a court has determined that the rejection of the claim was wrongful. Without the exception, the statute would prevent an administration from paying wages accrued and properly claimed but wrongfully rejected by a prior administration.

We note that the statute, as initially enacted in 1897, see Comp. Stat. ch. 12*a*, § 58 (1897), and as interpreted in *Redell v. City of Omaha*, 80 Neb. 178, 113 N.W. 1054 (1907), included the following language: "No bill . . . shall be allowed or

authorized to be paid by any mayor and council *of a subsequent administration,* except through the order of a court of competent jurisdiction." (Emphasis supplied.) The emphasized language was deleted in the 1905 recodification of the chapter covering metropolitan cities. This deletion broadens the scope of the statute.

We conclude that the dismissal of the employees' petition was correct, and the judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

MARY JO LOWE, APPELLANT, V. RICHARD ELWIN LOWE, APPELLEE.
455 N.W.2d 176

Filed May 18, 1990. No. 88-400.

Appeal from the District Court for Buffalo County, DEWAYNE WOLF, Judge, upon the recommendation of the Appellate Division of the District Court, RIST, BARTU, and GARDEN, District Judges. Affirmed as modified.

Vincent L. Dowding, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

Marmion F. Yeagley, of State, Yeagley & George, for appellee.

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

PER CURIAM.

Upon consideration of the briefs and the recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, we find that the trial court abused its discretion in fixing the amount of child support and alimony, and order that the decree of the district court be modified to provide for child support in the amount of $575 per month and for alimony in the amount of $700 per month for a period of 7

years, the first 4 years of alimony payments to be terminable only upon appellant's death. Thereafter, as to any alimony unaccrued following said 4-year period, the alimony is to be terminable upon the death or remarriage of appellant or upon the death of the appellee. As so modified, the judgment of the district court is affirmed. Appellee is further ordered to pay the sum of $1,500 to apply to appellant's attorney fees.

AFFIRMED AS MODIFIED.

STATE FARM FIRE AND CASUALTY COMPANY, APPELLEE, V. H. JUDSON VAN GORDER, JR., INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTIVE PRESBYTER, APPELLANT, JOHN DOE, A MINOR, BY AND THROUGH HIS NEXT FRIEND, PATRICK RISKOWSKI, ET AL., APPELLEES.

455 N.W.2d 543

Filed May 18, 1990. No. 88-560.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, the Supreme Court views the evidence in the light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Actions: Assault: Negligence: Intent.** There is no such cause of action as negligent assault and battery. An assault and battery is an intentional act, whereas negligence is unintentional.
4. **Insurance: Negligence: Intent.** An injury is expected or intended from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury *or* if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.
5. **Sexual Assault: Intent.** Regardless of the actor's subjective intent, an intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.

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

Scott E. Sidwell, of Sidwell & Shofstall, for appellant.

Patrick W. Healey, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellee State Farm.

Roger R. Holthaus for appellee John Doe.

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

FAHRNBRUCH, J.

H. Judson van Gorder, Jr., appeals a summary judgment declaring that his sexually abusive acts upon a young male, John Doe, were intended and therefore not covered by van Gorder's homeowner's insurance policy which was issued by State Farm Fire and Casualty Company (State Farm).

We affirm the finding of the district court for Buffalo County that State Farm is not required to defend van Gorder in any civil case or to pay any judgment that might be entered on account of his abusive sexual acts with John Doe.

In a criminal action, appellant, who during the time period when the sexual acts with John Doe occurred was an ordained minister, was convicted by a Buffalo County jury and thereafter was imprisoned for first degree sexual assault on John Doe. Following appellant's conviction, his victim, John Doe, filed a civil suit against van Gorder in the U.S. District Court for the District of Nebraska, seeking damages for appellant's sexual assaults.

Thereafter, State Farm petitioned the district court for Buffalo County for a declaratory judgment on the applicability of an exclusionary clause in a homeowner's insurance policy it had issued to van Gorder. State Farm sought a declaration that it had no obligation to defend any civil suit nor to pay any judgment that might arise from appellant's sexual acts with John Doe. Both State Farm and van Gorder filed motions for summary judgment.

After a hearing, the district court sustained State Farm's motion for summary judgment, concluding that

> there is no genuine issue of fact. The insured intended to assault or commit a battery upon this claimant [John Doe] and did commit an assault or battery upon this claimant.

> The bodily injury (the battery) was intended by Defendant VanGorder [sic] and the policy does not cover this act nor its consequences.

The district court overruled van Gorder's motion for a new trial.

On appeal, appellant contends the district court erred in (1) granting State Farm's motion for summary judgment; (2) ruling that the exclusionary clause of the homeowner's policy was operative to exclude coverage; and (3) finding, as a matter of law, that any injury ultimately proved by John Doe was expected or intended by appellant as the natural and probable result of his intentional acts, without regard to appellant's actual subjective intent.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. See, *Muckey v. Dittoe, ante* p. 250, 454 N.W.2d 682 (1990); *Peterson v. Don Peterson & Assoc. Ins. Agency,* 234 Neb. 651, 452 N.W.2d 517 (1990); *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989). In reviewing an order granting a summary judgment, the Supreme Court views the evidence in the light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. See, *Muckey v. Dittoe, supra*; *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990); *State Farm Fire & Cas. Co. v. Victor, supra*.

John Doe's complaint in the U.S. district court alleges van Gorder "assaulted and physically and mentally abused Plaintiff, beginning in 1980 when Plaintiff was 12 years old and continuing for approximately 6 years except for the months of March and April, 1984." The complaint further alleges such assaults and attacks inflicted pain, fear, and suffering; caused physical and emotional damage; and caused permanent psychological and physical injury to John Doe. John Doe contends that "van Gorder performed some of the assaults with the aid of whips, paddles, handcuffs, brushes, and assorted

other equipment."

John Doe attempts to base his civil case on negligence, but ascribes to appellant specific acts of committing intentional and negligent assault and battery and taking advantage of his ministerial authority to entice John Doe into seclusion in order to touch, fondle, and penetrate him. John Doe also alleged in his civil suit that van Gorder failed to act in a reasonably prudent manner to avoid injury and harm to the complainant.

Regardless of the label John Doe affixes to the sexual abuse toward him, van Gorder's sexually abusive acts with John Doe were intentional as a matter of law. There is no such cause of action as negligent assault and battery. An assault and battery is an intentional act, whereas negligence is unintentional. *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948). Likewise, sexually abusive acts are intentional. Consequently, as a matter of law, John Doe's petition succeeds in merely alleging damages resulting from van Gorder's intentional acts of sexual abuse upon John Doe.

The pivotal issue for this court's consideration is whether the injury alleged by John Doe was expected or intended by van Gorder within the contemplation of the exclusionary clause contained in van Gorder's homeowner's insurance policy. The exclusionary clause reads, in part: "1. Coverage L — Personal Liability and Coverage M — Medical Payments to Others do not apply to: a. bodily injury or property damage which is expected or intended by the insured."

A nearly identical provision was interpreted by this court in *State Farm Fire & Cas. Co. v. Victor, supra*, wherein we concluded that an injury is expected or intended from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury *or* if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.

Because we conclude that the character of van Gorder's acts was such that an intent to inflict injury can be inferred as a matter of law, we need not determine his subjective intent in inflicting bodily injury upon John Doe.

Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982), was also a declaratory judgment action to determine coverage under a homeowner's insurance policy. Hill and his

wife maintained a home for foster children. During the 15 months that a minor male child lived there, Hill engaged in sexual contact with the child. A tort action was filed on behalf of the child. Hill's homeowner's policy excluded from coverage " 'bodily injury or property damage which is either expected or intended from the standpoint of the insured.' " *Id.* at 835. The Minnesota Supreme Court, after citing its previous decisions that intent can be inferred when the character of the act is such as to justify such an inference, held that Hill's conduct was such that "an intention to inflict injury can be inferred as a matter of law," and that "Hill's acts are excluded from coverage under the homeowner's policy." *Id.* See, also, *Horace Mann Ins. Co. v. Ind. Sch. Dist.*, 355 N.W.2d 413 (Minn. 1984) (male teacher had sexual relations with a 10th-grade female student, and the insurance coverage under his homeowner's policy was excluded because even though he did not subjectively intend to harm the girl, as a matter of law an intent to injure could be inferred); *Estate of Lehmann by Lehmann v. Metzger*, 355 N.W.2d 425 (Minn. 1984) (intent to injure inferred, as a matter of law, in case where uncle had repeatedly sexually assaulted niece from the time she was 12 until she was 16 years of age).

In *Rodriguez v. Williams*, 107 Wash. 2d 381, 729 P.2d 627 (1986), an incest victim sought declaratory judgment that her stepfather's homeowner's policy provided coverage. The relevant exclusionary clause in the policy stated coverage did not apply to injury " 'which is expected or intended by the insured, but this exception does not apply to any act committed by or at the direction of the insured not intended to cause serious bodily injury . . . .' " *Id.* at 382-83, 729 P.2d at 628.

The Washington Supreme Court concluded that intent to injure, while normally a subjective determination under the wording of the policy, would be inferred to the insured in sex abuse cases and that once the intent is inferred, it is unimportant that the injuries inflicted are greater than or different from the injuries that might objectively be expected. The court held:

> [T]he insured intends harm as a matter of law when he commits incest. Applying this test to the subject case, Williams admittedly intended to commit the act of incest

> which caused his stepdaughter's injuries. Therefore, we hold that Williams intended to injure Daylette as a matter of law irrespective of his actual subjective intent. The exclusion in the subject homeowner's policy applies, and the trial court was correct in denying coverage.

Id. at 387-88, 729 P.2d at 630-31. See, also, *PEMCO v. Rash*, 48 Wash. App. 701, 740 P.2d 370 (1987); *Western National Assur. v. Hecker*, 43 Wash. App. 816, 719 P.2d 954 (1986).

In *Roe v. State Farm Fire & Cas. Co.*, 188 Ga. App. 368, 373 S.E.2d 23 (1988), an insurer sued for declaratory judgment regarding its obligation to defend an insured in an action arising out of the insured's sexual molestation of a child. The Georgia Court of Appeals held that regardless of the insured's subjective intent in molesting a young girl over a 3-year period of time, he was presumed to have intended injuries that naturally and unavoidably flowed from his misconduct.

Authorities from other jurisdictions granting declaratory judgment that similar conduct is excluded from coverage under like policies include: *Fire Ins. Exchange v. Abbott*, 204 Cal. App. 3d 1012, 251 Cal. Rptr. 620 (1988); *Allstate Ins. Co. v. Kim W.*, 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984); *Linebaugh v. Berdish*, 144 Mich. App. 750, 376 N.W.2d 400 (1985); and *Illinois Farmers Ins. Co. v. Judith G.*, 379 N.W.2d 638 (Minn. App. 1986).

We agree with the aforementioned authorities and hold that regardless of the actor's subjective intent, an intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.

Since, as a matter of law, van Gorder intended to inflict bodily injury on John Doe, van Gorder's acts and any damage caused thereby are excluded from coverage under his homeowner's policy. State Farm has no obligation to defend any civil suit or pay damages by reason of van Gorder's intentional acts.

There is no genuine issue of fact in this case. The trial court was correct in granting State Farm's motion for summary judgment.

AFFIRMED.

ROBIN JOLEEN AYARS, APPELLANT AND CROSS-APPELLEE, V. RICHARD MICHAEL AYARS, APPELLEE AND CROSS-APPELLANT.
455 N.W.2d 546

Filed May 18, 1990. No. 88-574.

Appeal from the District Court for Saline County, ORVILLE L. COADY, Judge, upon the recommendation of the Appellate Division of the District Court, RIST, BARTU, and GARDEN, District Judges. Affirmed as modified.

Chris Horacek, of Hroch, Schelstraete & Horacek, for appellant.

Michael E. Willet, of Everson, Wullschleger, Sutter, Korslund & Willet, for appellee.

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

PER CURIAM.

Upon consideration of the briefs and the recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, we find that the trial court abused its discretion in awarding appellant an attorney fee, and, accordingly, the judgment is modified to exclude the award of an attorney fee to the appellant, and, as so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

MARILYN F. MELLOR, APPELLANT, V. TIMOTHY G. MELLOR, APPELLEE.
455 N.W.2d 177

Filed May 18, 1990. No. 88-616.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Sally Millett Rau for appellant.

Steven J. Lustgarten and Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

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

PER CURIAM.

Petitioner-appellant wife filed for dissolution of marriage on October 1, 1987. After hearing, a decree of dissolution was entered on June 30, 1988. Petitioner timely appealed. The decree provided for dissolution of the 20-year marriage of the parties, awarded custody of the two minor children of the parties to respondent pursuant to the agreement of the parties (another child was emancipated and attending college), required petitioner to pay child support, did not award alimony to either party, required petitioner to repay her student loans, required respondent to pay certain bills including a portion of the emancipated child's college bills, provided for a distribution of the marital assets, and provided that each party should pay the costs and fees such party had incurred.

In this court, petitioner assigns as error only that the trial court erred in the division of property and in failing to include any portion of respondent's retirement plan in the marital estate divided by the court. We affirm.

We have held that the division of the marital estate is initially left to the discretion of the trial court and will be reviewed by this court de novo on the record and affirmed absent an abuse of discretion. *Seemann v. Seemann,* 225 Neb. 116, 402 N.W.2d 883 (1987).

The evidence shows that during the marriage, petitioner obtained a degree in general studies from the University of Nebraska at Omaha, a 3-year nursing degree from Methodist School of Nursing, and a medical degree from the University of Nebraska Medical Center in June 1988. On July 1, 1988, petitioner was to begin her residency program at the Mayo Clinic. Testimony showed that when petitioner completed her residency her salary would exceed that earned by respondent after 20 years of employment.

Respondent had been employed by an insurance company for the 18 years preceding the dissolution.

Our de novo review shows the marital division of the property was equitable, and it is affirmed. In connection with respondent's pension plan, evidence was adduced showing that as of July 1, 1988, respondent would be entitled to a pension payment of $707.97, beginning October 1, 2012. If respondent retired earlier, at age 55, his pension would be $353.99.

In view of the gross disparate future earning potential of each of the parties, we cannot say the trial court abused its discretion in not awarding petitioner, in this case, any part of respondent's modest retirement plan. As stated in *Rockwood v. Rockwood*, 219 Neb. 21, 23, 360 N.W.2d 497, 499 (1985), "[s]ection 42-366 requires the court to include any pension and retirement plans in the marital estate. It does not require each pension to be divided between the parties . . . ."

The ultimate test for division of property is one of reasonableness. We have reviewed the record de novo and determine the trial court did not abuse its discretion in dividing the marital property as it did.

The judgment is affirmed. Petitioner is ordered to pay to respondent the sum of $500 to be applied to his attorney fees for services in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES MARTIN DINEEN, RESPONDENT.

455 N.W.2d 178

Filed May 18, 1990. No. 89-340.

1. **Disciplinary Proceedings: Due Process.** A lawyer is entitled to due process of law in a disciplinary proceeding.
2. **Disciplinary Proceedings: Due Process: Notice.** Due process in a disciplinary proceeding requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.
3. **Disciplinary Proceedings: Due Process: States: Proof.** Although as a general rule a judicial determination of attorney misconduct in one state is conclusive

proof of guilt and not subject to relitigation in the second state, if the attorney demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the attorney's misconduct cannot be accepted, then the original judicial determination of misconduct need not be accepted as conclusive proof of guilt in the second state.

4. **Disciplinary Proceedings: States.** Even if a judicial determination of misconduct in a state is accepted as conclusive proof of guilt, this does not necessarily mean that the attorney must be disbarred or suspended in a second state. The second state is entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state.

Original action. Judgment entered.

Dennis G. Carlson, Counsel for Discipline, for relator.

Bruce G. Mason, of Ross & Mason, P.C., for respondent.

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

HASTINGS, C.J.

Counsel for Discipline of the Nebraska State Bar Association filed a petition for an order disbarring respondent, James Martin Dineen, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1989). An order to show cause why such motion should not be sustained was entered and served on respondent. An answer to that order was filed by respondent; both the respondent and the relator, the Nebraska State Bar Association, have filed briefs; and the matter has been argued and submitted to the court.

Respondent was admitted to the practice of law in the State of Nebraska on June 22, 1970. Thereafter, respondent engaged in the practice of law in the State of Maine, and on August 4, 1988, by an order issued by one justice of the Supreme Court of Maine, Dineen was disbarred from the practice of law in the State of Maine. That order was affirmed on April 12, 1989, by the Supreme Court of Maine sitting en banc. That order has become final due to the failure of the respondent to perfect an appeal to the Supreme Court of the United States.

Rule 21(A) provides: "Upon receipt by the Court of

appropriate notice that a member has been disbarred or suspended in another jurisdiction, the Court shall enter an order imposing the identical discipline, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction."

The issue on this appeal is whether the court, upon receiving notice of discipline from another state, shall proceed forthwith to impose identical sanctions here, or whether due process requires something further. Respondent alleges in his response to the motion for reciprocal discipline that he was denied due process in the Maine disbarment proceeding, that there was "significant infirmity of proof establishing the misconduct" in the Maine disbarment proceeding, and that even if the Maine decision on misconduct is given conclusive effect, this court must still make an independent determination as to (1) whether such misconduct renders respondent unfit to practice law in Nebraska and (2) what disciplinary action is appropriate to protect the interests of the State of Nebraska.

Research has produced but two Nebraska cases in which this court has dealt with a motion for reciprocal discipline. See, *State ex rel. NSBA v. Gerdes*, 231 Neb. 626, 437 N.W.2d 169 (1989); *State ex rel. NSBA v. Payne*, 226 Neb. 727, 414 N.W.2d 283 (1987). In *Gerdes*, respondent consented to the entry of an order of suspension. In *Payne*, respondent failed to respond to the order to show cause and the court found that there existed no issue of fact or law and ordered respondent disbarred from the practice of law in the State of Nebraska.

A lawyer is entitled to due process of law in a disciplinary proceeding. *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). See, also, *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). This court has held: " 'Due process requires that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.' " *State ex rel. NSBA v. Kirshen, supra* at 455, 441 N.W.2d at 168 (quoting the syllabus of the court from *Kirshen v. Kirshen*, 227 Neb. 479, 418 N.W.2d 558 (1988)).

Respondent is entitled to due process of law before he is disbarred from the practice of law in Nebraska, which includes

an opportunity to be heard. Although respondent had the opportunity to be heard in the Maine disbarment proceeding, that does not satisfy his right to be heard regarding disbarment in Nebraska. However, given that the proposed disbarment of respondent is based on misconduct and disbarment in Maine, the issues upon which respondent is entitled to be heard are more narrow than the issues upon which a respondent in an original disciplinary proceeding is entitled to be heard.

In the context of reciprocal attorney disciplinary proceedings, it is generally held that a judicial determination of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state. However, the judicial determination of misconduct need not be accepted as conclusive proof of guilt if the attorney demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the attorney's misconduct cannot be accepted. Even if the judicial determination of misconduct is accepted as conclusive proof of guilt, this does not necessarily mean that the attorney must be disbarred or suspended in the second state. The second state is entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state. See, *The Florida Bar v. Wilkes*, 179 So. 2d 193 (Fla. 1965); *In re Weiner*, 530 S.W.2d 222 (Mo. 1975); *Kentucky Bar Ass'n v. Signer*, 533 S.W.2d 534 (Ky. 1976); *In re Kesler*, 89 Ill. 2d 151, 433 N.E.2d 643 (1982); *Matter of Sussman*, 128 A.D.2d 574, 513 N.Y.S.2d 4 (1987).

The reasoning of the Florida Supreme Court in *The Florida Bar v. Wilkes, supra*, is persuasive. According to the court, to automatically accept the judgment of the first state and impose the same discipline

> would constitute an abdication of the responsibility imposed on this court to determine for itself, in proceedings conducted by it, or under its direction, the

fitness of those permitted to practice in this state. . . .

. . . .

. . . The basic issue [in disciplinary proceedings] always is whether the misconduct of the accused manifests such an unfitness to practice as to require the imposition of discipline to protect the public interest. [Citations omitted.] In order properly to resolve this issue, this court and its agencies must, in every disciplinary proceeding, whether based upon acts of misconduct already adjudicated in another state or upon acts committed in this state, fully inform themselves concerning the nature of the misconduct and all attendant circumstances. In doing this all available sources which can be properly utilized should be considered, including all evidence properly offered in the Florida proceeding and the record of proceedings in the sister state. Under this view Florida, although accepting the foreign determination of guilt, is left free to determine for itself the fitness of the accused attorney as affected by the acts of misconduct involved. It may accordingly order discipline which is more or less stringent than that awarded by the sister state.

Id. at 196-97.

According to the Missouri Supreme Court:

A disciplinary proceeding involves the relationship between the courts and their officers. The courts of each state create, define, and control this relationship with no necessary reference to the status of its officers in the courts of another sovereign state. The fact that a person is admitted or disbarred to or from the bar of one state does not compel any other state to admit or disbar that person to or from its own bar. Missouri makes its own independent judgment as to the fitness of the members of its bar.

In re Weiner, supra at 224.

The facts established at the hearing in Maine are conclusive, assuming no due process infirmity and sufficiency of the evidence. Respondent concedes as much in his argument.

Therefore, it is ordered by the court that a referee be appointed to conduct an evidentiary hearing and consider the

following: (1) whether respondent was denied due process in the Maine disbarment proceeding as reflected by the record in that proceeding; (2) whether proof of respondent's misconduct may be found in the Maine disbarment proceeding; (3) whether respondent's misconduct renders him unfit to practice law in Nebraska; and (4) whether the discipline imposed in Nebraska should be less severe than that imposed in Maine.

The following guidelines are established for use by the referee: (1) Respondent's claims that he was denied due process in the course of the Maine proceeding and that there is an infirmity of proof establishing the misconduct in the Maine proceeding shall be evaluated solely on the basis of the record of that proceeding; (2) respondent shall bear the burden of proof that he was not afforded due process of law and that there was an infirmity of proof establishing the misconduct in the Maine proceeding; (3) if respondent fails to satisfy his burden of proof, a certified copy of the findings of fact of the Maine proceeding shall constitute conclusive evidence that respondent is guilty of the misconduct charged; (4) the referee shall evaluate respondent's fitness to practice law in Nebraska and what, if any, discipline would be appropriate; and (5) respondent bears the burden of showing that the discipline to be imposed should be less severe than that imposed in Maine.

Judgment is entered accordingly.

JUDGMENT ENTERED.

WHITE, J., not participating.

STATE OF NEBRASKA EX REL. THOMASCENE STORZ, APPELLANT, V. THOMAS STORZ, APPELLEE.

455 N.W.2d 182

Filed May 18, 1990. No. 89-394.

1. **Divorce.** Under the provisions of Neb. Rev. Stat. § 42-372 (Reissue 1988), the marital relationship continues during the 6 months immediately following the entry of the dissolution decree.
2. **Divorce: Child Custody: Child Support: Jurisdiction.** Full and complete general

jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed.

3. **Courts: Jurisdiction.** The parties to an action cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Remanded with direction to dismiss.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Kent F. Jacobs, of Blevens & Jacobs, for appellee.

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

CAPORALE, J.

The State of Nebraska purportedly initiated this action on relation of Thomascene Storz to establish her former husband, defendant Thomas Storz, as the father of her son, Andrew T. Storz, and to collect from defendant support for said child. The mother appeals from the decree awarding custody of the child to his father, asserting, among other things, that the court below lacked jurisdiction. The record establishing that the court below acted without subject matter jurisdiction, we remand with the direction that the cause be dismissed.

While the petition alleges that the mother was receiving aid to dependent children from the State through its Department of Social Services and that she had assigned to that agency her right to support from the father, no evidence was adduced which established either of those assertions. That being so, we treat the suit as one filed by the mother in her own right.

In his answer, the father admitted the assertions in the petition:

> 3. That [the mother] and [he], although divorced in September, 1983, did from December, 1983 to March, 1984, engage in sexual intercourse on a number of occasions.
>
> 4. That as a result of said sexual intercourse [the mother] gave birth to [the child] on the 1st of October, 1984.

5. That the aforementioned [child then resided] with the [mother].

In addition, despite the fact that he also specifically admitted paternity but had not challenged the mother's custody of the child until he was sued for support money, the father sought sole custody of the child and affirmatively alleged that the mother was an unfit parent.

On the morning of March 1, 1988, pursuant to the father's motion requesting temporary custody of the child and apparently because the mother had been evicted from her apartment, the court below granted the father temporary custody of the child. Later that morning, while the mother was in the process of moving, the father appeared at her residence with "two sheriff's officers" and seized physical custody of the child. The mother was apparently unaware of the order changing custody of the child until the father arrived to take him.

On the afternoon of that very same day, the mother appeared in court, testified that she had secured employment and a residence in Ogallala, and requested that the court return the child to her custody. The court below denied this request, this time citing an isolated incident in which the then 3 1/2-year-old child had requested to stay with the father at the latter's place of employment rather than leave with the mother.

Two weeks later, on March 14, 1988, the court below conducted a hearing allowing the mother to show cause to terminate the father's temporary custody of the child. The mother presented evidence that the father had a history of alcohol abuse; that he, prior to gaining custody of the child, had been physically abusive to her and to the child; and that the father had previously been convicted of assaulting her. Despite the father's history of alcoholism and abusiveness, the court below continued its prior order leaving the child in the father's temporary custody, again citing the occasion on which the child had expressed a desire to stay with the father.

On July 25, 1988, the mother filed a motion requesting that the court below "vacate and set aside" its order of temporary custody. At an August 11, 1988, hearing on this motion, the mother introduced, and the court below received into evidence,

a copy of the decree rendered by the district court for Hall County on September 22, 1983, dissolving the marriage between the father and mother. Noting that the decree did not become final until 6 months later, the mother argued the record established that the child was conceived while she and the father were still married. She then argued that because the child was a product of the marriage and because the dissolution decree was entered in Hall County, the custody issue was one to be decided by the district court for Hall County rather than by the court below. The court below overruled this motion, indicating that it acquired jurisdiction over the custody issue as a result of its jurisdiction over the paternity issue.

After conducting a trial to determine which party should have permanent custody of the child, the court below issued a decree which was filed on March 28, 1989, declaring that "[b]oth parties are fit and proper persons to have the care, custody and control of [the child] but it is in his best interest that his care, custody and control be awarded to [the father] subject to visitation by [the mother]."

In addition to the father's admission in his answer that he and the mother engaged in sexual intercourse during the 6 months following the entry of the dissolution decree, the undisputed evidence received by the court below at the hearing to show cause why the father's custody of the child should be terminated revealed that the mother was pregnant with the child in January 1984.

Recalling that the Hall County dissolution decree was rendered on September 22, 1983, the marriage continued for 6 months following that date, until March 22, 1984. See, Neb. Rev. Stat. § 42-372 (Reissue 1988); *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). Consequently, the record establishes that the child was conceived while the father and mother were married.

Because the father and mother were married when the child was conceived, the child is their legitimate son, and he is a product of their marriage. See Neb. Rev. Stat. § 42-377 (Reissue 1988), which states, in part: "Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-379,

shall be legitimate unless otherwise decreed by the court . . . ." See, also, *Alber v. Alber*, 93 Idaho 755, 472 P.2d 321 (1970); *Kuhns v. Olson*, 258 Iowa 1274, 141 N.W.2d 925 (1966).

Mindful that the child is one born of the marriage between the father and mother, we note that Neb. Rev. Stat. § 42-351(1) (Reissue 1988) provides:

> In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorneys' fees.

In *Nemec v. Nemec*, 219 Neb. 891, 892, 367 N.W.2d 705, 706 (1985), this court held that " 'full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested *in the district court in which a petition for dissolution of a marriage is properly filed*.' " (Emphasis supplied.) The *Nemec* court noted that once a dissolution decree is entered, the court entering that decree has continuing jurisdiction with respect to custody issues until the children are of legal age or emancipated, and determined that since no application had been made to transfer the proceeding, the district court correctly dismissed for lack of subject matter jurisdiction the petitioner's application to modify a Dodge County dissolution decree.

It is true that in this case the Hall County decree did not address the custody issue; obviously, it would not have since the child was conceived after the decree was entered. Nevertheless, the existence of a child born of the marriage would have ramifications with respect to the decree, and the court granting the dissolution has continuing jurisdiction.

No application having been made in this case to transfer the Hall County dissolution proceeding, the court below was without subject matter jurisdiction to decide issues related to the custody of the child.

In spite of the rule set forth in *Nemec*, when the court below granted temporary custody of the child to the father, it stated

that it did so pursuant to Neb. Rev. Stat. § 42-357 (Cum. Supp. 1986). Section 42-357 in part addresses temporary custody orders during the pendency of a dissolution proceeding; thus, it would seem that if the court below thought it was amending a dissolution decree that had been rendered in Hall County, it should have realized it was without subject matter jurisdiction to do so.

Later, however, when the mother challenged the jurisdiction of the court below over the case, the court stated that a custody determination was a "prerequisite for determining support" and indicated that its jurisdiction concerning the custody of the child flowed from its jurisdiction over the paternity issue. While the court below was clearly wrong in asserting that determination of custody is a "prerequisite" for determining support, see Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 1988), it also erred in failing to recognize the fact that since the child was conceived during the marriage of the father and mother, it was improper to bring a paternity action rather than an action to amend the dissolution decree in order to secure support from the father.

Sections 43-1401 through 43-1418 provide parties a means to seek support via a paternity action. Section 43-1401 states, in part:

> For the purposes of sections 43-1401 to 43-1413 a child born out of wedlock is one whose parents were not married to each other at the time of its birth; *Provided*, no child shall be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth. . . . When used in said sections the word child shall mean a child under the age of eighteen born out of wedlock.

Because the child was conceived while the father and mother were married and is the product of that marriage, custody and support issues respecting the child must be determined through a modification of the dissolution decree rather than through a paternity action.

In arguing against such a holding, the father contends that because the mother invoked the jurisdiction of the court below, she is now estopped from asserting that said court lacked

jurisdiction respecting custody of the child. This argument ignores the axiomatic rule that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence. See, *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990); *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

The court below being without subject matter jurisdiction, the cause is remanded with the direction that it be dismissed.

REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. LIONEL R. BROWN, APPELLANT.

455 N.W.2d 547

Filed May 18, 1990. No. 89-653.

1. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
2. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
3. **Jury Instructions.** It is the duty of a trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence.
4. **Jury Instructions: Evidence.** A defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support it.
5. **Jury Instructions.** A trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed.
6. **Criminal Law: Self-Defense.** In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and in good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances.
7. **Jury Instructions: Appeal and Error.** Error cannot be predicated upon the failure to give jury instructions absent prejudice to the rights of the defendant.
8. _____: _____. An error made by a trial court in instructing the jury is not prejudicial where the jury's factual findings negate the consequence of such error.

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

Lee A. Larsen, Assistant Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

CAPORALE, J.

Defendant, Lionel R. Brown, appeals his convictions pursuant to verdicts for first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), first degree false imprisonment in violation of Neb. Rev. Stat. § 28-314 (Reissue 1989), and first degree assault in violation of Neb. Rev. Stat. § 28-308 (Reissue 1989). Following an enhancement hearing, the district court found Brown to be a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1989) and therefore determined that he was subject to sentences of not less than 10 nor more than 60 years' imprisonment on each conviction. The district court thereafter sentenced Brown to concurrent terms of imprisonment for not less than 20 nor more than 50 years each on the first degree sexual assault and first degree false imprisonment convictions and to imprisonment for not less than 10 nor more than 30 years on the first degree assault conviction, such sentence to run consecutively to the other two sentences. Brown's operative assignments of error assert the district court erred by (1) refusing to grant his motion to dismiss the charges against him at the close of the State's case in chief and (2) failing to instruct the jury on the issue of self-defense pursuant to Neb. Rev. Stat. § 28-1409 (Reissue 1989). We affirm.

The record as established by the State's case in chief reveals that Brown was acquainted with the victim prior to his commission of the crimes which resulted in his convictions. The victim had cut Brown's hair at the school where she was training to become a beautician, and she had given Brown her telephone number when they again met at a party. Brown later

occasionally provided the victim transportation to such places as a grocery store, a government office, and the victim's place of employment. The victim paid Brown small amounts of money to reimburse him for expenses, e.g., the cost of gasoline associated with such transportation. The victim testified that she did not have a romantic relationship with Brown.

At approximately 7:30 p.m. on December 13, 1988, Brown drove the victim to a bar in Council Bluffs, Iowa, where the victim worked as a go-go dancer. Later that evening, after the victim had worked for about 1 1/2 hours, Brown agreed to give her a ride home. After Brown and the victim left the bar, the victim realized that Brown was not driving in the direction of her home and told him that "he was going the wrong way." Brown then indicated that he "wanted to go by his house and get something." The victim told Brown that she was tired and wanted to go home and to get her daughter from her mother's, and asked Brown to take her home first. Brown responded by telling the victim to "shut up and be quiet." Brown then proceeded to his Bellevue, Nebraska, apartment building.

After arriving at his apartment, Brown "snatched open" the passenger door of his automobile, "kind of grabbed" the victim by the neck and clothing, and "snatched [her] up out of the car." The victim then attempted to push Brown away, stating: " 'Lionel, no, I don't want to go in. I'll sit in the car.' " Brown nevertheless proceeded to take the victim into his apartment. The victim testified that once inside the apartment, she was "screaming, trying to get away, and [Brown] was letting [her] know that [she] wasn't going anywhere and that [she] might as well just . . . take off [her] clothes and have sex with him" so that he could then take her to see her daughter.

The victim testified that Brown removed her clothing and instructed her to remove his pants, telling her to " '[t]ake them off or else.' " The victim complied with Brown's command, and Brown then forced the victim into his bedroom, where he instructed the victim to perform fellatio on him. The victim testified that she obeyed this command "[b]ecause [she] was scared." Brown then told the victim "to sit on top of him," and, against the will of the victim, the two engaged in sexual intercourse.

Thereafter, Brown told the victim that he was going to take her to Florida, and directed her to help pack some luggage. The victim then asked Brown to take her home so that she could be with her daughter, and asked Brown to let her leave his apartment. Regarding Brown's response to her request, the victim testified:

> He was just, you know, he would just say, "Shut up, you're not going nowhere." He said he was going to kill me, either he was going to kill me here or he'd wait until I get to Florida or he'll kill me there, that I'll never see my daughter again.

The victim testified that she later attempted to use the telephone but was unable to get a dial tone before Brown "snatched" the telephone away from her and told her that it was "out of order." The victim also tried to run out of the apartment, but Brown caught her "in the kitchen," and at that point he struck her head and back and began choking her on the kitchen floor. The victim then attempted to strike Brown with an object she had grabbed from the top of his stove but lost the object after struggling with Brown. Brown also kicked the victim and struck her in the eye.

While in Brown's apartment, the victim screamed for help and pounded on the walls to attract attention. Brown responded by telling the victim that no one could hear her so she "might as well just shut up and be calm." The victim testified that at one point she threw an object through a window of the apartment in order to attract attention; this prompted Brown to use his fist to strike the victim's face.

Frederick John Trofholz II, a neighbor who lived in Brown's apartment building, noticed the commotion which was coming from Brown's apartment and testified that he heard a woman scream " '[h]elp me' " and " '[s]ave me.' " Trofholz also testified: "At a couple points she said things to the effect of 'Dear God, Jesus, save me.' " Brandon Eric Terrell, another neighbor who lived in Brown's apartment building, also noticed the commotion and testified that he heard a woman screaming " 'Help me. Somebody please help me.' "

Trofholz eventually dialed 911 to summon police to the apartment building. When Bellevue Police Officer Thomas

Piernicky arrived, he also heard a woman screaming for help. Piernicky knocked on Brown's apartment door, and Brown eventually cracked the door open 2 to 3 inches. Crying and bleeding from the nose, the victim ran up behind Brown and said that she needed help because Brown was going to kill her. Piernicky then wedged his flashlight in the doorway while Brown attempted to close the door. When the victim again screamed for help, Piernicky observed Brown "[backhand the victim] with his fist and hit her in the eye." Piernicky then informed Brown that he was under arrest.

Shortly after Piernicky had arrived at Brown's apartment, Bellevue Police Sgt. Herbert Evers also arrived at the scene. Because of Brown's resistance, Piernicky and Evers had to wrestle Brown to the floor in order to place handcuffs on him. After Piernicky and Evers had wrestled Brown to the floor, the victim ran up and kicked Brown in the groin, and despite the officers' efforts to keep her away from Brown, the victim twice struck Brown in the eye before the police also arrested her for assaulting Brown. The victim was then taken to the hospital to be treated for her injuries.

Dr. Richard Greenberg, a board-certified ophthalmologist who examined the victim's eye injuries, testified that while the victim has 20/20 vision in her right eye, the vision in the left eye is permanently distorted and blurred as a result of scarring underneath the retina. Greenberg testified that such scarring is consistent with an injury caused by a hard blow from a fist. The victim testified that she had "normal" vision in her left eye before being struck by Brown.

While the foregoing represents the evidence presented by the State's case in chief, Brown's testimony describes a different scenario. According to Brown, the victim voluntarily went to his apartment to have sex with him, he used no force, and she was free to leave at any time. Brown testified that he and the victim had engaged in consensual sex and that the two later "got into a deep discussion which turned into an argument" concerning the victim's desire to get some cocaine. Brown further testified that when he refused to get cocaine, the victim became angry and started "yelling" and "screaming," so he started "yelling back at her."

According to Brown, the victim threw a candleholder through a window, breaking the window glass, and Brown then grabbed the victim and tried to prevent her from doing further damage. On direct examination by his trial attorney, Brown provided the following testimony regarding his altercation with the victim:

Q. Did you strike her at some time that night?
A. Yeah, with my elbow.
Q. Had she hit you previously to that?
A. Yes, sir.
. . . .
Q. Why did you physically scuffle?
A. Because I wouldn't get her the.....
Q. Did she strike you first?
A. Yes, she did.
Q. Were you defending yourself and your property?
A. In a way, yes, sir.
Q. Did the police eventually come?
A. Yes, sir.
. . . .
Q. . . . Were you visible to the police?
A. Yes, sir.
Q. Was the back of your head visible to the police?
A. No, sir.
Q. What, if anything, happened when the police were at the front door?
A. I was hit in the head by a picture plaque.
. . . .
Q. Oh, and who hit you in the head?
A. [The victim] did.
. . . .
Q. You got hit in the back of the head?
A. Yes, sir.
Q. Okay. What did you do then?
A. I automatically sent my hand going backward, you know, from where the pain came from.
Q. Did you strike her then?
A. Yes, sir.

During cross-examination, Brown testified that he struck the

victim twice, once with his elbow when they were "scuffling" on the floor after the victim had broken a window and again when the victim struck him in the back of the head after the police arrived. In addition, Brown provided the following testimony:

> Q. It's your testimony today that you were just defending yourself and your property there in the apartment that night; is that correct?
>
> A. I did say that we did have sex, but as far as —
>
> Q. As far as the violence?
>
> A. Right.
>
> Q. You're just defending yourself and defending your apartment; right?
>
> A. The notion of getting cocaine.
>
> Q. I'm sorry?
>
> A. The notion of her getting cocaine.
>
> Q. The notion of her getting cocaine. What's that mean?
>
> A. That is what I was defending. I wasn't about to go out and subject myself to, you know, at that time of night anyway, as far as, you know.

While the record indicates that Brown's trial attorney failed to object to the proposed jury instructions, he apparently did request a self-defense instruction. During the hearing on the motion for a new trial, the State's attorney noted that at a sidebar conference, which for some unexplained reason appears not to have been reported, Brown's trial attorney had requested a self-defense instruction, and the district court judge had denied that request. During the hearing, the judge stated: "Well, it's my duty to instruct in the law that's applicable, but I determined that self-defense wasn't applicable. So I suppose that that's—I think maybe he preserved that error." Later during the hearing, when Brown's counsel (a different attorney from the one representing Brown at trial) suggested that Brown's trial attorney had tendered the requested self-defense instruction, the district court responded:

> No, I can indicate to you there was never a self-defense instruction tendered, never. Okay? I think [the State's attorney is] absolutely right, I think [Brown's trial

attorney] requested a self-defense instruction and he may have requested it even in the instructional conference in chambers. I don't know. But I think [the State's attorney is] absolutely right. I do think he requested it at the sidebar conference.

But so the record's absolutely clear and preserves Mr. Brown's rights, doesn't make any difference when the request is made or even if it was tendered - I don't think it was tendered - I deny it. I just don't think the evidence supported a self-defense instruction, period. So if I'm wrong on that, that's something that he can come back and get a new trial on if the Supreme Court says so.

Brown first alleges that the district court erred in refusing to grant his motion to dismiss the charges against him at the close of the State's case in chief. On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Boppre,* 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Hankins,* 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Pierce,* 231 Neb. 966, 439 N.W.2d 435 (1989). In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Boppre, supra*; *State v. Hankins, supra*; *State v. Diesing*, 231 Neb. 132, 435 N.W.2d 190 (1989).

While Brown's brief only addresses the sufficiency of the State's evidence with respect to the charge of first degree sexual assault, Brown's contention clearly fails with respect to each charge for which he was convicted. A review of the facts presented earlier makes it obvious that the State presented ample evidence to support a conviction on each of the charges against Brown. The jury could reasonably find that Brown overcame the victim by force and sexually penetrated her in violation of the provisions of § 28-319. The jury could also reasonably find that Brown knowingly restrained or abducted

the victim under terrorizing circumstances or under circumstances which exposed her to the risk of serious bodily injury in violation of § 28-314. There was also evidence on the basis of which the jury could reasonably find that Brown intentionally or knowingly caused the victim serious bodily injury in violation of § 28-308.

Brown next alleges that the district court erred in failing to instruct the jury on the issue of self-defense pursuant to § 28-1409.

The State contends that Brown is precluded from raising this issue on appeal because his trial attorney failed to object to the instructions which were given. However, it is the duty of a trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). Furthermore, a defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support it. *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990). Nonetheless, a trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed. *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988).

Self-defense is codified in § 28-1409 as follows:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

As stated in *State v. Graham, supra* at 278-79, 450 N.W.2d at 676:

> In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and in good faith, *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979); (2) the force must be immediately necessary, *State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978); and (3) the force used must be justified under the circumstances, *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984). See, also, NJI 14.33.

Under the evidence in this case, self-defense is not applicable to the charge of first degree sexual assault, nor can we imagine a situation in which forcibly subjecting one to sexual penetration could be described as being immediately necessary for the purpose of protecting oneself against the use of unlawful force by the person so subjected. Moreover, whether self-defense can ever apply to a charge of first degree false imprisonment, it is clear that there is no evidence which makes it applicable to that charge in this case. By claiming that he never held the victim against her will and that she was free to leave at any time, Brown merely denies that he ever imprisoned the victim; such evidence provides no basis for a self-defense instruction. The situation would seem to be otherwise, however, with respect to the first degree assault charge. In that connection there was evidence that before the police arrived, the victim struck Brown in the course of an argument and that it was not until she first struck Brown that he, in an effort to defend himself, struck the victim. Brown further testified that he opened the door when the police arrived and that the victim then struck him in the back of the head with a picture plaque. Brown then, in his words, "automatically sent [his] hand going backward . . . from where the pain came from." While Brown was not entitled to merely launch a retaliatory strike against the victim, he, under § 28-1409, was entitled to use force to protect himself from the victim if the force employed by the victim was unlawful.

Because Brown was entitled to have the jury instructed on his theory of defense if there was any evidence to support it, and because Brown's testimony does represent evidence that he acted in self-defense when he reacted after allegedly being struck by the victim, a self-defense instruction should have been given. However, it must be remembered that in addition to finding Brown guilty of first degree sexual assault and first degree assault, the jury also found him guilty of first degree false imprisonment. In finding Brown guilty of first degree false imprisonment, the jury necessarily found that Brown restrained or abducted the victim. Implicit in that determination is the jury's disbelief in Brown's testimony that the victim was free to leave at any time. Consequently, the jury's verdict compels a conclusion that the victim was being held

against her will and that her use of force was itself lawful action taken in her own self-defense against the unlawful force employed by Brown to falsely imprison her. See § 28-1409. Because the jury's verdict respecting Brown's false imprisonment charge compels a conclusion that the victim's use of force was lawful, and because § 28-1409 only allows a person to use force to protect himself from unlawful force, the jury could not have concluded that Brown was acting in self-defense when he struck the victim. Consequently, Brown was not prejudiced by the district court's failure to instruct the jury on the self-defense issue. Error cannot be predicated upon the failure to give jury instructions absent prejudice to the rights of the defendant. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). An error made by a trial court in instructing the jury is not prejudicial where the jury's factual findings negate the consequence of such error. See, *U.S. v. Klecan*, 859 F.2d 570 (8th Cir. 1988); *State v. Grimes*, 90 S.D. 43, 237 N.W.2d 900 (1976).

The record sustaining neither of Brown's operative assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

455 N.W.2d 749

Filed May 18, 1990. No. 89-738.

1. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
2. _____: _____: _____. Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
3. **Constitutional Law.** Before a court will render a judicial interpretation of

language in a constitutional provision, it must be demonstrated that the questioned language is unclear or ambiguous and, therefore, requires judicial construction of the constitution.

4. **Constitutional Law: Statutes.** Constitutional provisions should receive a broader and more liberal construction than statutory provisions, and constitutions are not subject to the rules of strict construction.

Original action. Judgment for respondent.

Robert M. Spire, Attorney General, and Harold I. Mosher for relator.

Dean G. Kratz and Patrick J. Barrett, of McGrath, North, Mullin & Kratz, for respondent.

Bert L. Overcash and Gary B. Schneider, of Woods & Aitken, for amicus curiae Board of Trustees of the Nebraska State Colleges.

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

PER CURIAM.

This is an original action concerning the alleged unconstitutionality of §§ 6 to 11 of 1989 Neb. Laws, L.B. 247, of the Ninety-first Legislature, First Session, which legislation is now codified as Neb. Rev. Stat. §§ 85-1,118 to 85-1,123 (Supp. 1989).

Neb. Const. art. V, § 2, provides, in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

Four judges of this court are of the opinion that the legislation in question is unconstitutional, while three judges of this court are of the opinion that the legislation is constitutional.

Therefore, since five judges of this court do not hold that §§ 6 to 11 of L.B. 247, that is, §§ 85-1,118 to 85-1,123, are unconstitutional, the aforementioned legislation is constitutional.

The following judges are of the opinion that the questioned legislation is unconstitutional: Boslaugh, Caporale, Grant, and Fahrnbruch, JJ.

The relator, as the Attorney General of the State of

Nebraska, issued a written opinion that §§ 6 to 11 of L.B. 247 of the Ninety-first Legislature, First Session, legislation now codified as §§ 85-1,118 to 85-1,123, are unconstitutional. In substance, the legislation which was the subject of the Attorney General's opinion terminates the existence of Kearney State College as one of the state colleges in Nebraska and incorporates Kearney State College into the system of the University of Nebraska. Relying on the Attorney General's opinion concerning L.B. 247, the members of the Board of Trustees of the Nebraska State Colleges, who are among the state officers required to act under the legislation in question, have refused to implement §§ 6 to 11 of L.B. 247.

Pursuant to Neb. Rev. Stat. § 84-215 (Reissue 1987), the Attorney General brought an action for judicial determination and declaration that §§ 6 to 11 of L.B. 247 are unconstitutional. Respondent is the Secretary of State of Nebraska, whose official duties include support for legislation alleged to be unconstitutional. See § 84-215. Because this is a civil action in which the State is a party, and because this action involves a matter of great public importance, requires a prompt answer, and does not involve any disputed fact, this court granted the Attorney General permission to file an original action in the Supreme Court of the State of Nebraska and prosecute the claim that the legislation is unconstitutional. See, Neb. Const. art. V, § 2; Neb. Rev. Stat. § 24-204 (Reissue 1989).

THE ACT: L.B. 247

L.B. 247 has been enacted by the Legislature and was approved by the Governor on May 23, 1989. Sections 6 to 11 of L.B. 247 generally effect, inter alia, the transfer of Kearney State College to the University of Nebraska system and control by the university's Board of Regents.

Section 6 of L.B. 247 states:

> On July 1, 1991, the existing institution at Kearney known as Kearney State College shall be established as a university and shall be known as the University of Nebraska at Kearney. The University of Nebraska at Kearney shall be under the control and management of

and shall be administered by the Board of Regents of the University of Nebraska.

Section 7(1) of L.B. 247 provides, in part:

> On July 1, 1991, all property rights, titles, assets, contracts, obligations, and choses in action of any kind existing as of June 30, 1991, owned, held, or controlled by Kearney State College or the Board of Trustees of the Nebraska State Colleges for the benefit of Kearney State College shall be transferred to, assumed by, and carried out by the Board of Regents of the University of Nebraska for the operation and benefit of the University of Nebraska at Kearney . . . .

Section 7(1)(c) of L.B. 247 further provides, in part, that "[p]rior to July 1, 1991, the board of trustees and the Board of Regents shall enter into such agreements as they deem necessary and appropriate to carry out the provisions of sections 6 to 11 of this act . . . ."

Section 8 of L.B. 247 prescribes: "The Board of Regents of the University of Nebraska shall have the power to prescribe the standards for the admission of students and to fix student fees, the curriculum, the degrees, and the certificate program for the University of Nebraska at Kearney."

Under § 9 of L.B. 247, "[t]he chief administrative officer of the University of Nebraska at Kearney shall be appointed by the Board of Regents of the University of Nebraska, shall hold office at the pleasure of the board, and shall receive such compensation as the board may prescribe."

Section 10 of L.B. 247 declares: "The provisions of Chapter 85 relating to the Board of Regents of the University of Nebraska shall be applicable to the University of Nebraska at Kearney except as modified or limited."

In part, § 11(1) of L.B. 247 contains the provision that

> [t]here is hereby created the University of Nebraska at Kearney Cash Fund. . . . All money and funds accruing to the fund when appropriated by the Legislature shall be used for the maintenance and operation of the University of Nebraska at Kearney and shall at all times be subject to the orders of the Board of Regents.

Section 11(2) of L.B. 247 provides, in part, that "[t]here is

hereby created the University of Nebraska at Kearney Trust Fund . . . . The fund shall be held and managed in such manner as the Board of Regents shall determine."

CONSTITUTIONAL CHALLENGE AND RESPONSE

Neb. Const. art. VII, § 13, states:

> The general government of the state colleges as now existing, and such other state colleges as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled as designated by the Legislature, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the Commissioner of Education shall be a member ex officio. The duties and powers of the board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

In view of the foregoing provision in the Nebraska Constitution, the Attorney General contends that "the Legislature cannot alter, change[,] remove or transfer the 'general government of the state colleges as now existing, and such other state colleges as may be established by law' from the Board of Trustees of the Nebraska State Colleges," and concludes:

> [S]o much of sections 6 to 11 of L.B. 247 that divest the general government of the existing institution of Kearney known as Kearney State College from the Board of Trustees of the Nebraska State Colleges and vests the general government of that institution in the Board of Regents of the University of Nebraska is in violation of section 13 of Article VII of the Constitution of the State of Nebraska.

Brief for relator at 25.

Among his assertions, the Secretary of State claims: "Legislative action is permitted so long as it does not divest the Trustees of the general government of the State Colleges. L.B.

247 does not divest the College Board of Trustees of the general government of the State Colleges and is thus constitutional." Brief for respondent at 6. Also, the Secretary of State contends that the Nebraska Constitution does not mandate existence of state colleges, which include Kearney State College.

BURDEN AND STANDARDS—ALLEGED UNCONSTITUTIONALITY OF A STATUTE

> "One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 265, 445 N.W.2d 284, 288 (1989). See, also, *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989); *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

State v. LaChapelle, 234 Neb. 458, 460, 451 N.W.2d 689, 690 (1990). Thus, in this case, the Attorney General has the burden to show that §§ 6 to 11 of L.B. 247 are unconstitutional.

We also recognize that before a court will render a judicial interpretation of language in a constitutional provision, it must be demonstrated that the questioned language is unclear or ambiguous and, therefore, requires judicial construction of the constitution. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987); *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959).

Neb. Const. art. VII, § 13, provides that the government of the state colleges, and, thus, Kearney State College, is vested in the Board of Trustees of the Nebraska State Colleges. However, Neb. Const. art. VII, § 13, does not provide a clear answer to the question whether the Board of Trustees' constitutional right to govern the state colleges means that a state college, as an existing educational institution, which includes Kearney State College, must remain in existence as a state college. Thus, rules for interpreting constitutional provisions are applicable in this case.

The intent and understanding of [the] framers [of a

> constitutional amendment] and the people who adopted it as expressed in the instrument is the main inquiry in construing it. . . . The words of a constitutional provision will be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests they are used in a technical sense. The court may not supply any supposed omission, or add words to or take words from the provision as framed. It must be construed as a whole, and no part will be rejected as meaningless or surplusage, if it can be avoided. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by the layman. . . . It is permissible to consider the facts of history in determining the meaning of the language of the Constitution. . . . It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.

(Citations omitted.) *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 340-41, 37 N.W.2d 502, 507 (1949). See, also, *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972).

Furthermore, "[c]onstitutional provisions should receive a broader and more liberal construction than statutory provisions and constitutions are not subject to the rules of strict construction." *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 417-18, 299 N.W.2d 514, 518 (1980). See, also, *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979); *State ex rel. State Railway Commission v. Ramsey, supra*.

Finally, we note that this court's reliance "on other decisions by other courts which in turn relied upon provisions of other constitutions serves little purpose in determining the meaning of our own specific Constitution." *State ex rel. Spire v. Public Emp. Ret. Bd., supra* at 181, 410 N.W.2d at 466.

FACTUAL BACKGROUND

The parties have stipulated that

> [t]he existing institution at Peru known as Peru State College was established as a state normal school in 1867; the existing institution at Kearney known as Kearney State College was established as a state normal school in 1903; the existing institution at Wayne known as Wayne State College was established as a state normal school in 1909; and the existing institution at Chadron known as Chadron State College was established as a state normal school in 1910.

All the aforementioned institutions were created and presently exist by legislative enactment.

Initially, Nebraska's four normal schools were governed by a statutorily created board consisting of seven members, of whom five were appointed by the Governor to a term of 5 years. The State Treasurer and State Superintendent of Public Instruction were also members of the board for the normal schools. See Rev. Stat. § 7057 (1913).

At the 1919-1920 constitutional convention for the State of Nebraska, it was proposed that the statutory board which had been governing the normal schools be given constitutional status. On the 18th day of the convention, Proposal No. 222 was offered to the convention:

> The general government of the state normal schools located at Peru, Kearney, Wayne and Chadron, and such other normal schools as may be established by law, shall be vested, under the direction of the legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, one each for a term of one, two, three, four, five and six years, and thereafter one each for a term of six years, and the State Superintendent of Public Instruction who shall be a member ex-officio. The duties and powers of said board shall be prescribed by law; and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

1 Journal of the Nebraska Constitutional Convention 292

(1919-1920). Proposal No. 222 was referred to the convention's Committee on Education.

On the 39th day of the convention, Fred A. Nye, chairman of the Committee on Education, spoke on Proposal No. 222:

> On behalf of the Committee on Education I desire to state that when this proposal was under consideration it was unanimous before the Committee that the Normal Schools should be recognized in the Constitution in the same manner as are the universities and public schools. We are all aware that both the universities and public schools are based upon Constitutional provisions and that the Normal Schools are based upon legislative provisions. In order to give the normal schools an equal standing with the common schools and universities it was deemed advisable to recognize them in the Constitution for the reason that the normal schools have become one of the three great departments in our educational system. They perform special purposes and special functions and teach the youth of our state so that they may become teachers in the common schools; but that is not the only purpose of the normal schools. The normal schools, also, have a course of study which provides the student who gets out from the high school an opportunity to review the practical subjects that he will get in after life, and these schools also provide a course of study that the boy or girl who never go [sic] to high school and cannot afford to go to the university, may go there and at a nominal price take this course of study which is best suited to them for their after life. A vast amount of money has been spent by the state in building up these normal schools, so that it was the opinion of the Committee that these normal schools, being established as they are, and performing such a useful purpose as they are performing, should be recognized in the Constitution.
>
> In regard to the members of the normal board. We have made the number seven, that is the present number, which is composed of five who are appointed by the Governor and two ex-officio members, being the Superintendent of Public Instruction and the State Treasurer. We dropped

> off the State Treasurer because he has always been merely a figurehead on the board, but we left on the State Superintendent for the reason that the common schools are under the control and management of the State Superintendent, and he looks to the normal schools primarily to furnish the teachers to teach in the common schools. It is very important to have the common schools and the normal schools closely associated and linked together, because the one cannot exist without the other and without one the other cannot successfully progress.
>
> . . . .
>
> THE SECRETARY: There was a Committee amendment which I will read now.
>
> "Your Committee on Education respectfully reports for general file Proposal No. 222 amended as follows, to wit:
>
> "[The amended Proposal No. 222 replaced 'the state normal schools located at Peru, Kearney, Wayne and Chadron,' with the phrase 'the state normal schools, as now existing.']"
>
> MR. NYE: The reason for making the change is simply this, that we drop the location as it was in the original proposal, and simply inserted "The state normal schools as now existing." It was thought advisable to do that rather than to give prominence to the particular location by Constitutional provision.

1 Journal, *supra* at 746-47.

In its amended and final form, Proposal No. 222, passed by the convention, provided:

> The general government of the state normal schools, as now existing, and such other normal schools as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, with the advice and consent of the Senate, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the State Superintendent of Public Instruction shall be a member ex-officio. The duties and

> powers of said board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

2 Journal of the Nebraska Constitutional Convention 2911-12 (1919-1920). As a constitutional amendment, Proposal No. 222 was approved by the voters in a special election on September 21, 1920, and became article VII, § 13, of the Nebraska Constitution.

In 1951, the Legislature passed L.B. 212, which proposed several constitutional amendments relating to creation of a State Department of Education. Regarding Neb. Const. art. VII, § 13, the proposed amendment substituted the phrase "Commissioner of Education" for "State Superintendent of Public Instruction" and the word "Legislature" for "Senate." At the general election in November 1952, voters approved the preceding amendments to article VII, § 13, of the Nebraska Constitution.

In 1967, the Legislature passed L.B. 174, which proposed the following amendment to Neb. Const. art. VII, § 13:

> The general government of the state *colleges* as now existing, and such other *state colleges* as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled *as designated by the Legislature*, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the Commissioner of Education shall be a member ex officio. The duties and powers of the board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

(Proposed amendatory language emphasized.) Thus, L.B. 174 proposed to designate the state's normal schools as "state colleges" and to allow the Legislature to specify the name of the governing body of such colleges.

At the public hearing on the proposed constitutional

amendment pursuant to L.B. 174, the reason for the proposed change was suggested by Dr. Freeman Decker of the State Normal Board:

> The name "normal school" is completely out of date, and has been a thorn in our side for a long time. We have been more concerned the last four or five years, because it makes it difficult to recruit faculty members. Normal school goes back hundreds of years. Historically, state normal schools offered one to two year courses in art of teaching. At present, few state normal schools exist; they become state colleges. We do not specify any given name, but could offer suggestions to the Legislature for a name.
>
> . . . .
>
> . . . When fighting to get faculty members, there are advantages to asking them to teach in teachers colleges.

Committee on Education Hearing, L.B. 174, 77th Leg. 7 (Jan. 30, 1967). The proposed constitutional amendments expressed in L.B. 174 were submitted to Nebraska voters and approved in the November 1968 general election.

Neb. Const. art. VII, § 13, has not been amended since 1968.

Although this court has never faced the precise issue involved in this case, namely, whether the Legislature may change the nature of a state college to a university, previous interpretations in decisions of this court relating to governing boards and commissions are helpful in the present case.

In *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918), this court, construing then-existing article V, § 19A, of the Nebraska Constitution, which provided that the "powers and duties of [the State Railway Commission] shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law," stated:

> While the Constitution authorizes the legislature to provide by law how these powers and duties of the commission shall be exercised, it was clearly not intended that the legislature should confer the general power to regulate rates, service or control generally of common carriers upon some other body or jurisdiction. If the legislature under the Constitution could confer

> jurisdiction upon the courts either to regulate rates or service or to control generally common carriers, it follows that it could confer jurisdiction to do all of the things enumerated in the railway commission statute, and the constitutional provision establishing a railway commission would then become nugatory.

102 Neb. at 494-95, 167 N.W. at 570.

In *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949), this court considered constitutionality of a legislative act which empowered the state's aeronautics department to regulate common carriers which transported by aircraft. At the time of *Ramsey*, Neb. Const. art. IV, § 20, provided:

> The powers and duties of [the State Railway Commission] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

In *Ramsey*, this court found that "[t]he Legislature has no power to divest the State Railway Commission of its constitutional jurisdiction to regulate and control common carriers by air by transferring it to another body or jurisdiction." 151 Neb. at 347, 37 N.W.2d at 510.

In *State v. Kidder*, 173 Neb. 130, 133-34, 112 N.W.2d 759, 761 (1962), this court stated:

> Article VII, section 1, of the Constitution of this state provides: "The general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds. The members shall be appointed by the Governor with such qualifications and for such terms and compensation as the Legislature may provide."
>
> The Board of Educational Lands and Funds has control of and the management of the school lands. See State v. Cooley, 156 Neb. 330, 56 N.W.2d 129.
>
> As early as the case of State ex rel. Crounse v. Bartley,

> 40 Neb. 298, 58 N.W. 966, this court, in referring to the constitutional provision dealing with the management of school lands, said: "By this provision, the power to sell, lease, and manage the educational lands of the state is conferred upon a distinct board . . . . The authority thus conferred upon the board of commissioners, or board of educational lands and funds, as it is usually called, the legislature is powerless to take away."

Vesting general government of the University of Nebraska in the university's Board of Regents was discussed in *Board of Regents v. Exon*, 199 Neb. 146, 256 N.W.2d 330 (1977). As noted in *Exon*, the Legislature had enacted two appropriations bills which "contained numerous statements directing the Board of Regents or employees of the University to take certain actions." *Id.* at 149, 256 N.W.2d at 333. Neb. Const. art. VII, § 10, currently provides, as it did when *Exon* was decided, that "[t]he general government of the University of Nebraska shall, under the direction of the Legislature, be vested in . . . the Board of Regents . . . who shall be elected . . . . Their duties and powers shall be prescribed by law . . . ."

In regard to Neb. Const. art. VII, § 10, we stated:

> We think it is clear that the purpose of the constitutional provision was to remove the University from the plenary control of the Legislature and establish the Board of Regents as an independent body charged with the power and responsibility to manage and operate the University as free from political influence and control as possible.

199 Neb. at 148, 256 N.W.2d at 332.

In *Exon*, this court found that the statutes involved were

> either invalid or not applicable to the Board of Regents and the University because they relate to some act or function of the general government of the University which under the Constitution is vested in the Regents and can not be delegated to some other officer or department by the Legislature,

id. at 153, 256 N.W.2d at 335, and reasoned that

> although the Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of

> Regents and powers and duties that should remain in the Regents cannot be delegated to other officers or agencies.
>
> . . . .
>
> The Legislature can not use an appropriation bill to usurp the powers or duties of the Board of Regents and to give directions to the employees of the University. The general government of the University must remain vested in the Board of Regents. In prescribing the powers and duties of the Regents a legislative act must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed.

Id. at 149, 256 N.W.2d at 333.

We recently recognized in *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989), as we likewise had recognized in *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949), the principle that "[t]he Legislature cannot constitutionally divest the [Public Service Commission] of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers." 233 Neb. at 276, 445 N.W.2d at 294. The act involved in *Northwestern Bell*, 1986 Neb. Laws, L.B. 835 (now codified as Neb. Rev. Stat. §§ 86-801 et seq. (Reissue 1987)), was found to be constitutional, however, because the act was "specific legislation," under Neb. Const. art. IV, § 20, "prescribing the method and manner in which the PSC will exercise its regulatory activities concerning telephone companies." 233 Neb. at 279, 445 N.W.2d at 295. We specifically noted that the act did not "transfer regulatory control to a governmental agency, body of government, or branch of government except the Legislature." *Id.* at 277-78, 445 N.W.2d at 294.

Thus, the Attorney General argues that Kearney State College is one of the "existing" educational institutions specifically identified in Neb. Const. art. VII, § 13, which was previously amended as a result of the constitutional convention of 1919-1920. According to the Attorney General, since the general government of Kearney State College has been

constitutionally vested in the Board of Trustees of the Nebraska State Colleges, the Legislature cannot constitutionally delegate power to govern Kearney State College to another state agency or officer.

From our review of the minutes for the 1919-1920 constitutional convention, it is clear that the delegates to that convention intended that "the Normal Schools [state colleges] should be recognized in the Constitution in the same manner as are the universities and the public schools . . . for the reason that the normal schools have become one of the three great departments in our educational system." Indeed, the former normal schools at Kearney, Chadron, Peru, and Wayne did receive constitutional recognition and status, since the normal schools existed in 1920 at the time of the constitutional convention. Because Neb. Const. art. VII, § 13, as approved by the voters in 1920, referred to "the state normal schools, *as now existing*" (emphasis supplied), the existence of Kearney State College is mandated by the Nebraska Constitution.

Furthermore, the previous decisions of this court support the Attorney General's assertion that the general governance of Kearney State College may not be delegated by the Legislature to the Board of Regents of the University of Nebraska. Respondent argues, however, that L.B. 247 does not affect the Board of Trustees' right to govern the state colleges, since "[t]he Board's basic right of control is left untouched as all such powers of the Board continue to be exercised over State Colleges in Chadron, Wayne, Peru and any other State Colleges which may be established by the Legislature." Brief for respondent at 13. Such an argument is contrary to this court's holding in *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918), because, quite simply, if the Legislature could confer on the Board of Regents of the University of Nebraska the power to govern one state college, the Legislature could transfer *all* state colleges to the university system, and the constitutional provision establishing a Board of Trustees would then become nugatory. See, also, *State ex rel. State Railway Commission v. Ramsey, supra*; *State v. Kidder*, 173 Neb. 130, 112 N.W.2d 759 (1962); *Board of Regents v. Exon*, 199 Neb. 146, 256 N.W.2d 330 (1977) (once

the Constitution grants a board or commission the authority to govern or regulate certain entities, the Legislature may not delegate this authority to another board, commission, agency, or state officer). Moreover, common sense dictates that the Legislature may not accomplish the same unconstitutional delegation by simply changing the classification of Kearney State from "college" to "university."

Both parties in this case also direct our attention to a number of cases from other jurisdictions. However, those cases rely on interpretations of constitutional provisions different from provisions contained in the Nebraska Constitution and, therefore, provide little or no guidance for this case. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987).

The clear intent of the framers of the Nebraska Constitution supports the Attorney General's contention that §§ 6 to 11 of L.B. 247 are unconstitutional.

For the foregoing reasons, we find that §§ 6 to 11 of 1989 Neb. Laws, L.B. 247, of the Ninety-first Legislature, First Session (now codified as Neb. Rev. Stat. §§ 85-1,118 to 85-1,123 (Supp. 1989)), are unconstitutional.

The following judges are of the opinion that the questioned legislation is constitutional: Hastings, C.J., White, and Shanahan, JJ.

SHANAHAN, J., dissenting.

The Nebraska Constitution's clearly expressed content concerning compulsory educational institutions contradicts any conclusion that Kearney State College, or any state college, must exist or continue to exist after legislative establishment in accordance with the Constitution. Yet, through invocation of principles for construing an ambiguous document, notwithstanding the clarity of the Nebraska Constitution regarding state colleges, this court's majority has judicially fashioned a provision for mandatory existence of Kearney State College from Neb. Const. art. VII, § 13, which provides: "The general government of the state colleges as now existing . . . shall be vested [in the Board of Trustees of the Nebraska State Colleges]."

Recognizing that judicial interpretation or construction of a document may be warranted to reach the meaning of an instrument, we have stated: "Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989). See, also, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986).

As will be demonstrated, rather than recourse to principles pertaining to resolution of ambiguity in a document, the majority should have been guided by several fundamental considerations in determining whether a statute withstands a challenge based on the allegation that the Legislature has exceeded its constitutional authority for legislation.

It is axiomatic that the Legislature of this state has vast authority and is limited only by the Nebraska and U.S. Constitutions. *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981). The Nebraska Constitution is, generally, a limitation on legislative power, not a grant of power to the Legislature. *State ex rel. Creighton Univ. v. Smith, supra*. Thus, "the Legislature may legislate upon any subject not inhibited by the Constitution." *Lenstrom v. Thone, supra* at 789, 311 N.W.2d at 888. See, also, *State ex rel. Creighton Univ. v. Smith, supra* at 688, 353 N.W.2d at 271: " 'Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied.' " Hence, a court may declare a statute unconstitutional only when the statute is genuinely repugnant to a controlling constitutional provision.

The Nebraska Constitution does not expressly prohibit the Legislature from enacting a law which changes a state educational institution's classification from a college to a university. Nevertheless, the majority apparently finds that such restriction on legislative power is implicit in Neb. Const. art. VII, § 13, because Kearney State College, formerly a normal school, was one of the educational institutions "now

existing" when the citizens of Nebraska adopted the amendment to Neb. Const. art. VII, § 13, in 1920. While the educational institution at Kearney is unquestionably a state college within Neb. Const. art VII, § 13, the conclusion that a state college must exist until abolition by future constitutional amendment is a quantum leap from mere mention about governance of state colleges in article VII, § 13, of this state's Constitution. To illustrate, suppose the Legislature passed legislation to establish a fifth state college, that is, a new state college in addition to the four current state colleges. The fifth state college would be governed by the Board of Trustees because the new state college is included within the constitutional language "the state colleges as now existing, and such other state colleges as may be established by law . . . ." However, according to the majority, the illustrative new or fifth state college, as a product of legitimate legislative power, would be endowed with constitutionally required and protected existence because the college had been "established by law." As a constitutionally questionable consequence of the majority's view of existence for a state college, the Legislature may properly give, but never take away.

All hypotheticals aside, it is obvious that existence of any state educational institution in Nebraska, with the exception of elementary and secondary schools, is not constitutionally mandated, an inescapable conclusion drawn from Neb. Const. art. VII, § 1:

> The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.

By the word "shall" in Neb. Const. art. VII, § 1, the Legislature is required to establish common schools. A common school is "a free public school now usu. including primary and secondary grades." Webster's Third New International Dictionary, Unabridged 459 (1981). Cf. *State, ex rel. Baldwin, v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922). The word "may" in Neb. Const. art. VII, § 1, allows, but does

not compel, the Legislature to establish other educational institutions beyond the common schools, such as colleges and universities. The Legislature's discretionary power to create necessarily and correspondingly includes the discretionary power to amend, repeal, or abolish. As expressed in *Schumacher v. Rausch*, 190 Kan. 239, 244, 372 P.2d 1005, 1010 (1962): "Generally speaking, that which is purely a creature of the legislature is subject not only to the legislative power to create, but also to the legislative power to modify, dissolve or abolish." See, also, *Miller v. Jones*, 658 S.W.2d 888 (Ky. App. 1983); *Wencke v. City of Indianapolis*, 429 N.E.2d 295 (Ind. App. 1981); *Martin v. State Liq. Auth.*, 43 Misc. 2d 682, 252 N.Y.S.2d 365 (1964); *State ex rel. Bergin v. Washburn*, 224 Minn. 269, 28 N.W.2d 652 (1947). Cf. *State v. Houston*, 94 Neb. 445, 452, 143 N.W. 796, 799 (1913): "[A]n office created by the legislature may be abolished by that body." Thus, it is clear that the Nebraska Constitution does not mandate existence of Kearney State College, although existence of a state college may result from a discretionary exercise of legislative power. Pursuant to Neb. Const. art. VII, § 13, governance of the state colleges, whatever those institutions may be legislatively designated or denominated, must repose in the Board of Trustees of the Nebraska State Colleges. However, L.B. 247 does not alter any aspect of the general governance of the state colleges. Nevertheless, without any explicit constitutional basis and, more importantly, contrary to Neb. Const. art. VII, § 1, this court's majority has decided that the Nebraska Constitution, in its present form, demands existence of state colleges.

Although judicial decisions in other jurisdictions usually supply little assistance to ascertain the meaning of a particular provision in the Nebraska Constitution, *Kanaly v. State By and Through Janklow*, 368 N.W.2d 819 (S.D. 1985), is instructive in view of the substantial similarity of facts and provisions in the South Dakota Constitution. In *Kanaly*, South Dakota's Legislature enacted legislation which authorized closing the University of South Dakota at Springfield (USD/S), transferring control of the school's facilities to the Board of Charities and Corrections, and establishing a minimum security

prison at Springfield in place of the previous educational facility. The plaintiffs, who were South Dakota taxpayers, argued that Senate Bill 221 "violated Article XIV, § 3, of the South Dakota Constitution by transferring control of USD/S from the Board of Regents to the Board of Charities and Corrections." 368 N.W.2d at 822. South Dakota's Constitution, article XIV, § 3, which established the governing board for certain educational institutions in South Dakota, provided:

> The state university, the agricultural college, the school of mines and technology, the normal schools, a school for the deaf, a school for the blind, and all other educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide. The Legislature may increase the number of members to nine.

Thus, S.D. Const. art. XIV, § 3, is similar to Neb. Const. art. VII, § 13, in two important respects: (1) both state constitutions allowed the legislature to determine the duties and powers of the governing board of a state educational institution, and (2) although both constitutional provisions for governance refer to a number of educational institutions, neither provision expressly states that a particular institution must exist.

In response to the plaintiffs' contention in *Kanaly*, the Supreme Court of South Dakota stated:

> This Court has interpreted [S.D. Const. art. XIV, § 3] as creating a constitutional "administrative body charged with the control of all institutions of higher learning . . . ." . . . It does not, however, "establish the Regents as a fourth branch of government independent of any legislative policies." . . . The Regents' control is subject to constitutionally authorized legislative "rules and restrictions." . . . These legislative "rules and restrictions," however, "must stop short of removing all power." . . .
>
> Although the Board of Regents' control over some aspects of South Dakota educational institutions has been described as "vast and subject to little, if any, control" . . .

> the Regents' control does not include the power of the purse . . . does not include the power to change the character of the institutions . . . does not include the power to create or establish schools . . . and does not include the power to determine the educational policy of this state . . . . The legislature has the power to create schools, to fund them as it has the power of the purse, and to establish state educational policy and this necessarily includes the power to close a school if efficiency and economy so direct. It is a legislative rule or restriction of the Regents' control and does not go so far as to remove all power because the Regents maintain their right of basic control over all other educational institutions. As stated above, an institution of higher education is not required by the constitution . . . to exist in Springfield.

(Citations omitted.) 368 N.W.2d at 825-26.

Board of Reg., Okl. A. & M. Col. v. Oklahoma State Reg., 497 P.2d 1062 (Okla. 1972), supplies additional guidance for a decision in the present case. The Oklahoma Legislature enacted legislation which changed Murray State College of Agriculture and Applied Science, formerly governed by the Board of Regents for Oklahoma Agricultural and Mechanical Colleges, to Murray State College of Technology, which, pursuant to the questioned legislation, was governed by a newly established Board of Regents of Murray State College of Technology. The plaintiff contended that the legislation contravened Okla. Const. art. VI, § 31a, which established a "Board of Regents for the Oklahoma Agricultural and Mechanical College and all Agricultural and Mechanical Schools and Colleges maintained in whole or in part by the State" and argued that

> the above Constitutional provision requires that Murray State College be governed by [the Board of Regents for Oklahoma Agricultural and Mechanical Colleges]; that the College has always been and continues to be an Agricultural and Mechanical College within the meaning of the Constitution, notwithstanding Senate Bill 214; and that the Legislature does not have the Constitutional authority to create a new governing board for the College.

497 P.2d at 1065. The plaintiff's argument in *Board of Reg.* is

nearly identical to the Attorney General's argument in the present case before this court, except in the present case the new governing board for the educational institution at Kearney already exists, whereas the governing board in the Oklahoma case was created by the questioned legislation. In rejecting the plaintiff's argument, the Supreme Court of Oklahoma stated:

> There is no language in § 31a, expressing an intent that all Agricultural and Mechanical Colleges which were under the management and control of the State Board of Agriculture when § 31a was adopted, shall be under and must continue to be under the management and control of the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges. . . . We agree with plaintiff that the Legislature may not constitutionally remove the management and control of a School or College that comes within the meaning of § 31a, from the Board of Regents named therein and place its management and control in another Board. However, if the intent of § 31a, was to "freeze-in" such Schools and Colleges to be under the Board of Regents created therein, although such Schools and Colleges at some future date may not fall within the meaning of an Agricultural and Mechanical School or College, language would have been employed expressing such an intent.

497 P.2d at 1066-67. Similarly, if Kearney State exists as a state college, then the Board of Trustees of the Nebraska State Colleges must govern the college. However, there is no language in Neb. Const. art. VII, § 13, that requires that Kearney State shall remain a state college or that the school must exist in any particular form at all.

Consistent with the analysis of the Supreme Court of Oklahoma are this court's expressions that "[c]ourts must apply and must enforce the Constitution as it is written . . . and constitutional provisions are not open to construction as a matter of course" and that "[b]efore construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary." *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 178, 410 N.W.2d 463, 465 (1987).

As parts of a plan for state education, Neb. Const. art. VII,

§ 1, pertaining to common schools which must exist in response to the state Constitution's mandate, is unequivocally compatible with Neb. Const. art. VII, § 13, regarding governance of a state college which, by appropriate legislative choice, may exist or not exist. Consequently, the Nebraska Constitution clearly does not require the existence of a state college at Kearney and, as unambiguously expressed in Neb. Const. art. VII, § 1, leaves existence of all educational institutions beyond common schools to the Legislature's discretion. For that reason, it is both unnecessary and improper to explore the framers' intent in the Nebraska Constitution. Regarding the case now before this court, the language used by the framers of the Constitution speaks for itself: If a state college exists, general government of the state college lies with the constitutionally designated Board of Trustees, but the Nebraska Constitution requires only the existence of common schools and does not require existence of any educational institution beyond common schools. See Neb. Const. art. VII, §§ 1 and 13.

In the absence of a constitutional obligation imposed by the people of Nebraska, requiring the Legislature to continue existence of a state college as an educational institution, the very same people of Nebraska, through their elected representatives exercising legitimately unrestricted legislative power, may appropriately terminate an educational institution which has heretofore existed solely at the discretion of the Legislature. Hence, §§ 6 to 11 of L.B. 247 are constitutional as a proper exercise of legislative power in the State of Nebraska.

WHITE, J., joins in this dissent.

HASTINGS, C.J., dissenting.

I agree with the conclusion reached by Shanahan, J., in his dissenting opinion. The language of Neb. Const. art. VII, § 13, "[t]he general government of the state colleges as now existing," is, in my opinion, simply descriptive of a "state college." There is otherwise no definition of that term.

If that is true, there would seem to be little question but that the Legislature could abolish one or more of the state colleges as now existing. Perhaps the language of L.B. 247 could have been

more affirmative in its abolishment. However, the language "[t]he existing institution at Kearney known as Kearney State College shall be established as a university" would seem to leave no doubt but that the "state college" was being abolished.

Expanding further on the quotation in the dissenting opinion of Shanahan, J., taken from *Kanaly v. State By and Through Janklow*, 368 N.W.2d 819 (S.D. 1985):

> Section 1 of S.B. 221 places the "*Springfield minimum security prison*, formerly [U]niversity of South Dakota at Springfield . . . under the control of the board of charities and corrections." (Emphasis supplied.) Therefore, this language does not place the control of USD/S and its educational programs under the jurisdiction of the Board of Charities and Corrections. . . . Thus, the Board of Regents maintained control until the termination of the educational programs offered at USD/S. Appellants' contentions in opposition are not sustainable due to the express language of the legislative act. The Board of Charities and Corrections was given control of the Springfield minimum-security prison, not USD/S.

368 N.W.2d at 826.

In like manner, the Board of Regents of the University of Nebraska was given control of the University of Nebraska at Kearney, not Kearney State College.

WHITE, J., joins in this dissent.

CONCLUSION

As a result of article V, § 2, of the Nebraska Constitution, §§ 6 to 11 of 1989 Neb. Laws, L.B. 247, of the Ninety-first Legislature, First Session (now codified as Neb. Rev. Stat. §§ 85-1,118 to 85-1,123 (Supp. 1989)), are constitutional.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY D. PRAHIN, APPELLANT.

455 N.W.2d 554

Filed May 18, 1990. No. 89-786.

1. **Arrests: Search and Seizure.** An arrest may not be used as a pretext to search for evidence, at least in situations where law enforcement officers make an arrest as a pretext to conduct a search incident to that arrest.
2. **Arrests: Search and Seizure: Words and Phrases.** A pretextual arrest is one in which the arrest is only a sham or front being used as an excuse for making a search.
3. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the fourth amendment to the U.S. Constitution and by article 1, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen.
4. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
5. **Search and Seizure: Duress.** A consent to search must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
6. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of the consent.
7. **Search and Seizure: Duress.** In examining all the surrounding circumstances to determine if in fact a consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.
8. **Search and Seizure: Proof.** The burden is upon the government to prove that a consent to search was voluntarily given.
9. **Motions to Suppress: Appeal and Error.** Findings of fact reached by the trial court on a motion to suppress will not be overturned on appeal unless those findings are clearly erroneous.
10. **Search and Seizure.** Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of a consent to search, such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given.
11. _____. Although there is no requirement that a person asked to consent to a search be advised that he may refuse to consent, the subject's knowledge of a right to refuse to consent is a factor to be taken into account in determining whether the consent to search is voluntary.
12. **Search and Seizure: Probable Cause: Police Officers and Sheriffs.** Probable cause exists to validate the seizure of an item during a lawful search where facts and circumstances within an officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that certain items may be contraband or evidence of a particular crime.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Sentence vacated, and cause remanded for resentencing.

Kirk E. Naylor, Jr., and Kent E. Florom, Keith County Public Defender, for appellant.

Robert M. Spire, Attorney General, James H. Spears, and Donald Kohtz for appellee.

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

CAPORALE, J.

Defendant-appellant, Timothy D. Prahin, was convicted of speeding, in violation of Neb. Rev. Stat. § 39-662(2)(f) (Reissue 1988), and of possessing a controlled substance (cocaine) with the intent to deliver same, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988). He was thereafter sentenced to imprisonment for a period of from 10 to 20 years. He claims the district court erred in overruling his motion to suppress and in imposing an excessive sentence. We vacate the sentence and remand for resentencing.

On December 1, 1988, Daniel Wilson, a Nebraska State Patrol officer, was traveling eastbound on Interstate 80 in Keith County, Nebraska, when the radar device in his patrol vehicle registered the speed of a large black Lincoln Continental automobile traveling westbound on the Interstate at 76 miles per hour, in violation of the posted speed limit of 65 miles per hour. Wilson turned his patrol vehicle around in pursuit and noticed that the Lincoln bore Tennessee license plates. At 11:50 a.m., Wilson stopped the Lincoln, which was driven by Prahin.

When Wilson asked Prahin for his motor vehicle operator's license and vehicle registration, Prahin produced the vehicle registration and a Michigan identification card. Prahin explained that he had a California operator's license but had lost it and that he now lived in Michigan. The Lincoln was registered to a Frank Green in Tennessee, but a Florida parking sticker was affixed to the windshield.

Wilson informed Prahin that he was stopped for speeding and asked Prahin to accompany him to the patrol vehicle.

Prahin entered the passenger side of the patrol vehicle and, when inside, stated that he had Green's permission to drive the Lincoln but did not know how Green could be contacted. Wilson conducted a check on Prahin and on the Lincoln, discovered no outstanding warrants on either, and confirmed that the Lincoln was registered in Green's name.

After Prahin had been in Wilson's patrol vehicle for about 5 minutes, Wilson issued Prahin a citation for speeding and a violation card for failure to have an operator's license, and returned Prahin's identification card and vehicle registration. Before Prahin left the patrol vehicle, Wilson asked him, " 'Excuse me, by the way, would it be all right [for me] to take a look inside of your vehicle for narcotics, drugs, weapons and/or large amounts of cash.' " Wilson explained that "the interstate system through Keith County was having a large amount of problems with . . . those items going through the county."

When Prahin responded "Yes" to Wilson's request, Wilson showed Prahin a "PERMISSION FOR SEARCH AND SEIZURE" form, confirmed that Prahin could read English, and gave Prahin time to read the form, after which both men signed it. According to Wilson, Prahin understood the form before signing it. The form reads that Prahin "voluntarily authorize[s]" Wilson to search the Lincoln and further authorizes Wilson "to remove from my said . . . motor [vehicle] . . . whatever documents, articles, or other items of property whatsoever, which [he] deem[s] pertinent to [his] investigation . . . ." The final paragraph of the form states:

> I AM GIVING THIS WRITTEN PERMISSION to these Nebraska State Patrol Officers freely and voluntarily, without any threats or promises having been made to me, and after having been informed by these officers that I have the right to refuse to permit this search and seizure, and that any property seized may be used against me in the event of prosecution.

After Prahin had signed the consent form, Wilson stated, " 'Let's go ahead and start searching your vehicle.' " At Wilson's request, Prahin opened the trunk of the Lincoln, which contained a lone traveling bag Prahin acknowledged to

be his. Again at Wilson's request, Prahin removed the bag from the trunk, placed it on the shoulder of the Interstate, and unzipped it halfway, stating that "there was nothing in the traveling bag except for some miscellaneous clothes . . . ." Wilson unzipped the bag the rest of the way, pulled the sides of the bag apart, and observed inside "two separate packages wrapped in a brown paper-like substance with Magic Marker markings on them." On one of the packages was written "3030" and "A-I-R-E," and on the other package was written "114," "P-E-T-A-L-O," and "III." The packages were approximately 8 inches long, 7 inches wide, and 1 1/2 inches thick.

Because Wilson believed, based on the markings, that the packages contained cocaine, he arrested Prahin and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Wilson testified that "[t]he only way that I have ever seen cocaine packaged was in the manner similar to that" and that based on his past training, he was 99.9 percent certain that the packages contained cocaine. Laboratory tests later revealed that the packages did in fact contain cocaine. At trial, the parties stipulated that the amount of cocaine found in the packages "denotes distribution and not personal use."

Wilson admitted that from the moment he stopped Prahin, he intended to try to get Prahin to consent to a search of the Lincoln. He further acknowledged that when he asked to search Prahin's automobile, he was suspicious that Prahin was a "courier of narcotics" or had contraband in his vehicle. Wilson testified that although Prahin was not free to leave from the time of the initial stop of the vehicle until the time the speeding citation was issued, Prahin was free to leave when Wilson asked him to sign the consent form. On the other hand, Prahin testified that he did not believe he was free to leave from the time Wilson asked him to enter the patrol vehicle until the time he was placed under arrest.

Pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1989), Prahin moved to suppress all evidence seized from the Lincoln, including the traveling bag and its contents, on the basis that there was no legal basis for the search. Prahin also objected to the admission of the traveling bag and the two packages of

cocaine at trial on the basis that the items were products of an illegal search and seizure. The district court refused to suppress the evidence.

Prahin argues that he was illegally placed under arrest at the time he entered the patrol vehicle, that his subsequent consent to the search of his vehicle was tainted by that illegal arrest, and, thus, that the cocaine seized from his vehicle should have been suppressed.

The validity of Wilson's search of Prahin's automobile, trunk, and traveling bag depends upon whether Prahin's consent was given voluntarily and absent a preexisting illegality which may be said to have tainted the consent. Wilson did not have a search warrant, and the State does not argue, nor does it appear, that the search was incident to arrest, see *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990) (pursuant to a lawful custodial arrest, law enforcement officers may conduct a warrantless search of the person arrested and of the immediately surrounding area in order to remove any weapons that the arrestee may use to resist arrest or effect an escape and in order to prevent the concealment or destruction of evidence), or that the search was within the permissible scope of an investigatory stop, see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (when an officer possesses a reasonable belief based upon specific and articulable facts that a suspect during an investigation may be armed and presently dangerous to the officer or others, the officer may conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which may be used to assault him).

The first question we encounter is whether a seizure within the meaning of the fourth amendment took place when Prahin was asked to accompany Wilson to the patrol vehicle. We conclude that it did. A person is seized within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), *reh'g denied* 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138; *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (seizure has taken place if circumstances of

encounter with police are so intimidating as to demonstrate that a reasonable person would have believed himself or herself not free to leave); *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988) (seizure occurs when reasonable person believes that his or her freedom of movement has been restrained, either by means of physical force or by a show of authority); *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986); *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984) (primary consideration in making objective determination as to whether seizure has occurred is whether or not the defendant was free to choose between terminating or continuing the encounter with law enforcement officers). Under the circumstances, having just been stopped for speeding, a reasonable person in Prahin's position would have believed that he or she was not free to leave.

In arguing that the seizure of the automobile he was driving was unlawful, thereby tainting his consent to the search, Prahin refers us to *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). Therein, the U.S. Supreme Court affirmed the appellate court's conclusions that the defendant was illegally detained as a pretext to conduct a search of his luggage and that the defendant's consent to the search, obtained during the illegal detention, was tainted by the illegality. Prahin also calls our attention to *U.S. v. Miller*, 821 F.2d 546 (11th Cir. 1987), in which the court determined that the stop of the defendant's vehicle was not a legitimate traffic stop, despite the fact the right wheels of the defendant's vehicle veered over the white painted lane marker, because the officer decided to stop the vehicle and search it for drugs prior to the traffic violation, and therefore concluded that the defendant's consent to the search of his vehicle was the product of the illegal stop.

Prahin first asserts that the seizure was unlawful because Wilson lacked probable cause to seize him. This is not the case. Wilson's radar device registered Prahin's speed at 76 miles per hour in an area of the Interstate where the maximum speed limit was 65 miles per hour. That circumstance provided Wilson with probable cause to stop Prahin for speeding and detain him long enough to issue a citation for that conduct. See *State v. Roach,*

supra (a law enforcement officer has probable cause to arrest without a warrant when the officer has knowledge, based upon information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime). Because Wilson had probable cause to detain Prahin, *Florida v. Royer, supra*, has no application here.

Prahin secondly asserts that his seizure was illegal because the initial stop of his vehicle was merely a pretext to seek his consent to search the vehicle. We have held that an arrest may not be used as a pretext to search for evidence, at least in situations where law enforcement officers make an arrest as a pretext to conduct a search incident to that arrest. *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). A pretextual arrest is one in which the arrest is only a sham or front being used as an excuse for making a search. *Id.* Wilson testified without contradiction that he did not decide to ask Prahin for consent to search the vehicle until after he had stopped Prahin's vehicle, which was after Wilson was aware of the speeding violation. Thus, the situation here differs from that in *U.S. v. Miller, supra*, cited by Prahin, in that in *Miller* the officer testified that he decided to stop the vehicle and search it for drugs prior to the traffic violation. It cannot be said that Prahin's arrest was pretextual.

As shown by the foregoing discussion, Prahin's contention that he was illegally seized at the time he consented to the search and signed the consent form is without merit.

Prahin next contends that even if we conclude that he was not illegally arrested, his consent was not voluntarily given because

> from the moment [Wilson] stopped [Prahin], [Wilson] engaged in a series of subtle but pointed actions designed to subject [Prahin] to [Wilson's] authority. . . . Trooper Wilson, who was driving a marked State Patrol car, and wearing a uniform, including a revolver, obviously knew that the custodial atmosphere was greatly heightened with [Prahin] being ordered out of his car and into [Wilson's] vehicle. Given the obvious fact that [Prahin] did nothing to threaten [Wilson], there was no legitimate reason for [Wilson] to conduct a custodial investigation.

Brief for appellant at 13-14.

The right to be free from an unreasonable search and seizure, as guaranteed by the fourth amendment to the U.S. Constitution and by article 1, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). In order for the consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne. *Schneckloth v. Bustamonte, supra*; *State v. Juhl, supra*. In other words, the consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. See *State v. Juhl, supra*. The determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of the consent. *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987). See, also, *State v. Juhl, supra*. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *Schneckloth v. Bustamonte, supra*. The burden is upon the government to prove that the consent to search was voluntarily given. See *State v. Sutton, supra*. Findings of fact reached by the trial court on a motion to suppress will not be overturned on appeal unless those findings are clearly erroneous. *State v. Eary, ante* p. 254, 454 N.W.2d 685 (1990); *State v. Juhl, supra*.

Prahin urges, as noted above, that because he was in custody at the time he gave his consent, the consent was not voluntary. Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of the consent to search, *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979), such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given. *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), *reh'g denied* 424 U.S. 979, 96 S. Ct. 1488, 47 L. Ed. 2d 750; *State v. Christianson*, 217 Neb.

445, 348 N.W.2d 895 (1984) (upholding lower court's finding that defendant's consent to search while under arrest on unrelated charges was voluntary).

The evidence supports the district court's finding that Prahin voluntarily consented to the search of the automobile. Cf. *State v. Juhl, supra*. In a straightforward manner, Wilson told Prahin what he was searching for and asked if he might search Prahin's automobile for those items. Prahin agreed and signed a consent form in which he was informed that he had the right to refuse consent. See, *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980); *State v. French, supra* (although there is no requirement that a person asked to consent to a search be advised that he may refuse to consent, the subject's knowledge of a right to refuse to consent is a factor to be taken into account in determining whether the consent to search is voluntary). See, also, *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984) (lower court's finding that defendant voluntarily consented to the search upheld in light of fact that record did not reflect any evidence that officers coerced, threatened, or made promises to the defendant and fact that defendant signed consent form which contained an express provision that defendant could deny permission to search). There is no evidence in the record that Wilson overtly or subtly coerced, threatened, or made promises to Prahin in order to induce him to consent to the search. The record shows, rather, that Prahin not only voluntarily consented to the search but also voluntarily participated in the search by opening the trunk to the automobile and removing the traveling bag. See, *State v. Shepardson*, 194 Neb. 673, 235 N.W.2d 218 (1975) (affirmative consent may be established by acts entirely aside from the use of words); *State v. Forney*, 182 Neb. 802, 157 N.W.2d 403 (1968), *cert. denied* 393 U.S. 1044, 89 S. Ct. 640, 21 L. Ed. 2d 593 (1969), *adopting State v. Forney*, 181 Neb. 757, 150 N.W.2d 915 (1967) (in addition to consenting to search, defendant opened his automobile trunk for officer's inspection). Moreover, there is no evidence that in order to obtain Prahin's consent, Wilson took unlawful advantage of the fact that Prahin was seated in the police vehicle. See *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973), *cert. denied* 414 U.S. 841, 94 S. Ct. 96, 38 L. Ed. 2d

77 (in determining whether consent of person placed in police custody is voluntary, the question is: Did the officer use coercive tactics or take unlawful advantage of the arrest situation to obtain the consent?).

Nor did the search of his automobile exceed the scope of Prahin's consent. See *State v. Sutton, supra* (a search made pursuant to a consent may not exceed the scope of the consent). It has been held that police may open closed but unlocked containers within the place to which consent was given, especially if police have indicated that they are searching for a small object which might be concealed in such a container. 3 W. LaFave, Search and Seizure § 8.1(c) (West 1987). See, *United States v. Kapperman*, 764 F.2d 786, 794 (11th Cir. 1985), *reh'g denied* 770 F.2d 1084 (consent to search automobile and remove " 'whatever documents or items of property whatsoever, which they deem pertinent to the investigation,' " authorized police to search unlocked suitcase in automobile, "as documents or other items of property cannot necessarily be expected to be lying loose in an automobile"); *U.S. v. Anderson*, 859 F.2d 1171, 1176 (3d Cir. 1988) (where defendant consented to search of automobile for " 'any letters[,] documents, papers, materials or other property which is pertinent to the investigation,' " police were authorized to look in the trunk and open closed bags); *People v. Mirenda*, 57 N.Y.2d 261, 442 N.E.2d 49, 455 N.Y.S.2d 752 (1982) (consent to search automobile allowed search of attache case within trunk); *U.S. v. Sealey*, 830 F.2d 1028 (9th Cir. 1987) (consent to search premises extended to travel bag, as consent was to search for gun which could have been hidden there).

Finally, it is beyond dispute that Wilson's seizure of the cocaine was legal. It is well established that not everything which is uncovered in a lawful search is thereby subject to lawful seizure. See, *State v. Elkins,* 245 Or. 279, 422 P.2d 250 (1966); 2 W. LaFave, Search and Seizure § 5.2(j) (West 1987). The U.S. Supreme Court has stated that there must "be a nexus . . . between the item to be seized and criminal behavior," that is, "probable cause . . . to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 18 L. Ed. 2d 782

(1967).

Probable cause exists to validate the seizure of an item during a lawful search where facts and circumstances within an officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that certain items may be contraband or evidence of a particular crime. See *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). The probable cause standard does not demand a showing that such a belief is correct or more likely true than false. *Id.*

Thus, irrespective of whether it can be said that Prahin consented to the seizure of the cocaine, Wilson had probable cause to seize the cocaine because the manner of packaging the substance and the markings on the packages provided Wilson, as a trained and experienced police officer, with sufficient information to warrant a reasonable belief that the packages contained cocaine.

The district court properly overruled Prahin's motion to suppress, and, thus, his first assignment of error is without merit.

Because of a plain error relating to the sentence, we do not reach Prahin's second assignment of error, which claims the district court "abused its discretion by imposing excessive sentence of imprisonment . . . ." Brief for appellant at 14.

The district court's sentencing order correctly notes that the matter came on for sentencing on two separate charges: speeding and possessing a controlled substance for distribution. However, in the decretal portion of its order, the district court directs only that Prahin "be, and hereby is, sentenced to the Nebraska Penal and Correctional Complex for a period of not less than ten (10) years nor more than twenty (20) years . . . ." Thus, the sentencing order imposes a combined sentence for the two crimes. It is impossible for this court to review the propriety of a single sentence which has been imposed for two separate offenses. See *Kroger v. State*, 158 Neb. 73, 62 N.W.2d 312 (1954). Accordingly, the sentence imposed is vacated and set aside and the cause remanded for resentencing in accordance with law.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

IN RE INTEREST OF T.E., S.E., AND R.E., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. S.E., APPELLANT.

455 N.W.2d 562

Filed May 18, 1990. Nos. 89-1168, 89-1169.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the children.
3. _____. When a natural parent who suffers from mental deficiency cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay.
4. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
5. **Parental Rights: Evidence: Appeal and Error.** Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Mark S. Trustin, of Trustin, Schweer, Ferraro & Van Robays, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

WHITE, J.

This is an appeal from an order of the Douglas County Separate Juvenile Court terminating appellant's parental rights. We affirm.

On appeal appellant contends, in sum, that the court erred in terminating her parental rights and in denying her motions to

dismiss.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990).

We have reviewed the record de novo and make the following findings of material fact. Appellant is the mother of three children: T.E., born February 17, 1984; S.E., born July 3, 1986; and R.E., born December 19, 1987. Each child apparently has a different biological father. The putative fathers were not made parties to the termination proceedings, and this appeal does not concern their parental rights.

T.E. and S.E. were removed from appellant's care in August 1986 and placed in the temporary custody of the Nebraska Department of Social Services. A petition was filed alleging that appellant could not care for her children due to her mental illness. An adjudication hearing was subsequently held. Appellant admitted the petition's allegations, and the court found the children to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). The court ordered the Department of Social Services to retain temporary custody. The matter was periodically reviewed. The Department of Social Services was ordered to retain custody, and appellant was ordered to adhere to a court-ordered rehabilitation plan.

In January 1988, R.E. was removed from appellant's care and also placed in the temporary custody of the Department of Social Services. A petition was filed alleging that appellant could not care for R.E. because of appellant's mental illness. At a subsequent adjudication hearing appellant admitted the petition's allegations, and the court found that R.E. was within the meaning of § 43-247(3)(a). The court ordered the Department of Social Services to retain temporary custody of R.E. In a later disposition hearing, the Department of Social Services was ordered to retain custody and appellant was ordered to adhere to a court-ordered rehabilitation plan.

On February 8, 1989, the Douglas County Attorney filed separate petitions to terminate appellant's parental rights to her three children. The petitions alleged, under Neb. Rev. Stat. § 43-292(5) (Reissue 1988), that appellant was unable to discharge her parental responsibilities because of mental illness or mental deficiency. The petitions further alleged that

> there are reasonable grounds to believe that such conditions will continue for a prolonged, indeterminate period of time, in that:
>
> A. [The appellant] has been variously diagnosed as suffering from schizophrenia, undifferentiated type, and schizophrenic reaction, paranoid type.
>
> B. In over two years of juvenile court involvement, [the appellant] has remained consistently unable to provide for herself, let alone a small child.
>
> C. The prognosis for [the appellant] is guarded and rather grim; she remains unable to provide for said child well into the foreseeable future.

The hearing on this motion was scheduled for April 19, 1989. On April 11, the county attorney moved for a continuance because a State's witness was unavailable to testify on April 19. The hearing was rescheduled for June 13. On May 30, the court "reluctantly" sustained a motion to continue the June 13 hearing date to some later date. The record does not disclose who moved for the continuance. The hearing was rescheduled for August 10.

On July 28, appellant moved to dismiss the petitions because the hearing scheduled for August 10 was more than 6 months following the filing of the petitions, and such a delay constituted a denial of her constitutional rights as guaranteed by the 5th, 6th, and 14th amendments to the U.S. Constitution and the laws of the State of Nebraska. The court overruled the motions to dismiss.

After a hearing on August 10 and 11, 1989, the trial court found that because of appellant's mental illness or deficiency, and because there were reasonable grounds to believe that such conditions will continue for a prolonged and indeterminate period of time, it was in the best interests of the children that appellant's parental rights be terminated.

On appeal to this court appellant first contends, in sum, that the trial court erred in terminating her parental rights. This court has previously stated that where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the children. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990); *In re Interest of A.M.K.*, 227 Neb. 888, 420 N.W.2d 718 (1988). When a natural parent who suffers from mental deficiency cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay. *In re Interest of M.M., C.M., and D.M., supra*; *In re Interest of Farmer*, 210 Neb. 500, 315 N.W.2d 454 (1982). "A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 410, 451 N.W.2d 275, 278 (1990).

In the present cases, the State called as witnesses two psychiatrists who had previously treated appellant. Both doctors testified at length regarding appellant's mental condition and its effect on her ability to parent. Both doctors diagnosed appellant as having schizophrenia. Dr. Severa, who had treated appellant at the St. Joseph Center for Mental Health for 6 months or more in a 1 1/2-year period, testified that although schizophrenia is treatable, he "didn't see it as very likely that [appellant] would be cured. And I still think her illness will last her whole life, just by my experience with others and by statistics and by her appearance overall." When the county attorney asked Dr. Severa whether, based on a reasonable degree of medical certainty, appellant's illness would continue for a prolonged and undetermined period of time, the doctor replied,

> My opinion would be that it would continue for a long period of time, and may have relapses at periods in time depending on the stress in her life, the back-up she has, the psychiatric treatment she has, the support systems like Ivy House or whoever else is involved, and it would be

> accentuated if she used any illicit drugs, or was subjected to additional stressors like violence in the home.

He concluded that because of her mental illness, appellant would not be able to care for her children.

Dr. Kenney, who was appellant's psychiatrist during a 3 1/2-month stay at the Norfolk Regional Center, testified that

> [t]o recover from this illness, one has to improve to a point where they can enter into some solid, supporting relationships. They have to be able to enter into relationships that will protect them from stress. They have to enter into relationships with people who take on the responsibility of protecting them from the environment. The second thing is that brighter schizophrenics tend to be able to adjust better in the world in such a way as to reduce exhibitions and exacerbations. [The appellant] is limited in intelligence. She tends to be easily exploited and victimized. People enter her life for a reason other than to be supportive of her. The immaturity she displays interferes in her relationships with supportive others that are female. And I just am pessimistic about her ability to make the kind of life-style that would protect her from stress. This is a stress-related illness, it may be genetic in nature, but the ups and downs in it are stress related.

Dr. Kenney further testified that appellant does not have the ability to parent her children and cannot provide for their day-to-day physical, psychological, and emotional needs.

The evidence in the present case establishes by clear and convincing proof that appellant is unable to discharge her parental responsibilities because of mental illness or deficiency and that there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period. The evidence also establishes by clear and convincing proof that termination of appellant's parental rights is in the best interests of the children.

Appellant next argues that "the juvenile court erred in terminating appellant's parental rights by failing to apply fundamentally fair procedures satisfying the requirements of due process required on motions to terminate parental rights." Brief for appellant at 17. The juvenile court admitted into

evidence, over appellant's objections, a probation report and a social services report which contained hearsay statements from various sources regarding appellant's mental and physical condition and the status of appellant's children. Appellant contends the juvenile court violated her due process by receiving these reports when no opportunity for cross-examination existed. She contends that "without the test of cross-examination the reports were unreliable evidence for termination of parental rights." Brief for appellant at 19.

Appellant's contention is without merit. The two reports were admitted into evidence during a review hearing in January 1989. When the State filed the termination petitions in February, it requested the court to take judicial notice of its record in the previous proceedings. At the August termination hearing, the State again requested that the court take notice of its record in the previous proceedings. The court did not respond to either request. The orders entered after the termination hearing tend to indicate that the trial court did not take judicial notice of its record in the previous proceedings. Appellant is in error when she states the trial court used the reports as evidence in the termination proceedings.

In any event, even if we assume the reports were considered as evidence in the termination hearing, and further assume that such consideration violated appellant's due process rights because she was not afforded an opportunity to cross-examine the declarants, there is no error because this court, in its de novo review, did not consider the reports. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 157 (1987): "Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court."

Appellant lastly contends the juvenile court erred in denying her motions to dismiss. Appellant contends the petitions must be dismissed because the evidentiary hearing was not held within 6 months of the filing of the petitions, as required by Neb. Rev. Stat. § 43-278 (Reissue 1988). This same contention was recently considered and rejected in *In re Interest of C.P., ante* p. 276, 455 N.W.2d 138 (1990), and it will not be

reconsidered here. Moreover, appellant has failed to show how she was prejudiced by the delay in the adjudication hearing. This contention is without merit.

The orders of the Douglas County Separate Juvenile Court terminating appellant's parental rights are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROSS T. SHEPHERD, APPELLANT.
455 N.W.2d 566

Filed May 18, 1990. No. 89-1185.

1. **Plea Bargains: Prosecuting Attorneys: Sentences.** If a prosecutor promises not to make a sentence recommendation as a condition for a guilty plea, the State must adhere to that promise.
2. _____: _____: _____. Where a defendant's plea of guilty or nolo contendere is made in reliance on an unfulfilled promise by the prosecutor to make a favorable sentence recommendation or to remain silent as to sentencing, the courts generally permit withdrawal of the plea, even after sentencing.
3. **Plea Bargains: Waiver: Appeal and Error.** Where no objection to a plea bargain violation is made to the sentencing judge, the defendant waives the error, and the issue is not preserved for appellate review.
4. **Appeal and Error.** Error may not be predicated on a ground not preserved by a proper objection.
5. **Trial: Pleas.** A defendant may withdraw a plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
6. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

Max C. Mankin for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

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

PER CURIAM.

This is an appeal from a sentence of 20 months to 5 years' imprisonment for second degree forgery, a Class IV felony punishable by imprisonment for up to 5 years. The defendant contends that the judgment should be reversed because his plea of guilty was based upon a plea agreement which was breached by the prosecutor and that the sentence imposed was excessive.

The defendant appeared with counsel on July 17, 1989, at the arraignment and was fully advised of the nature of the charge against him; the effect of a plea of guilty and the possible penalty; the nature and extent of his constitutional rights, including the right to remain silent and not testify against himself, the right to a jury trial, the right to compulsory process for witnesses on his behalf, and the right to cross-examine the witnesses against him; and of the fact that a plea of guilty waived these rights. The defendant stated that he understood his constitutional rights and that by pleading guilty he waived those rights.

The following factual basis was given for the guilty plea. The defendant found a checkbook at Nate and Christie Miller's residence, where he was staying. He took one blank check and found a canceled check written by Christie Miller. He then traced the signature of Christie Miller from the canceled check onto the blank check and then traced over the signature on the blank check with ink. On June 3, 1989, he cashed the forged check at Chuck's Drive-in without prior approval of Christie Miller.

The plea negotiations stated to the court were that the State agreed to dismiss two counts of procuring alcohol for a minor, to not file three additional felony counts of forgery, to recommend a sentence on another procuring alcohol for a minor charge, and to not make a sentencing recommendation on the charge to which the defendant entered the plea of guilty. The defendant understood the court was not bound by the plea negotiations and could take anything into consideration in sentencing.

The trial court accepted the defendant's plea, found him guilty, and ordered a presentence report. The presentence report shows the defendant has a prior criminal history and was

previously incarcerated. He has been involved with law enforcement officers and the courts since he was 15 years old.

At the sentencing hearing on August 14, 1989, the defendant asked the court to place him on probation or to sentence him to 1 year in the county jail. The State recommended the defendant be sentenced to 20 months to 5 years. When asked by the trial court whether there was any response to the prosecutor's statement, neither the defendant nor his counsel objected.

The trial court then sentenced the defendant to a prison term of 20 months to 5 years, with credit for time served. The court stated that probation was not proper because of the defendant's previous incarceration. The court refused to sentence the defendant to the county jail because there were no activities available for someone held there for an extended period of time.

If a prosecutor promises not to make a sentence recommendation as a condition for a guilty plea, the State must adhere to that promise. *People v. Stripling*, 136 A.D.2d 772, 523 N.Y.S.2d 230 (1988) (citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). Where a defendant's plea of guilty or nolo contendere is made in reliance on an unfulfilled promise by the prosecutor to make a favorable sentence recommendation or to remain silent as to sentencing, the courts generally permit withdrawal of the plea, even after sentencing. See *State v. Krug*, 187 Neb. 551, 192 N.W.2d 163 (1971).

However, the defendant in this case did not object to the prosecutor's recommendation even after the court asked if he cared to respond. In *People v. Stripling, supra*, and *Bishop v. Warden*, 94 Nev. 410, 581 P.2d 4 (1978), it was held that where no objection to a plea bargain violation was made to the sentencing judge, the defendant waived the error, and the issue was not preserved for appellate review. See, also, *State v. Witte*, 308 Minn. 214, 245 N.W.2d 438 (1976).

In *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985), the defendant claimed that psychiatric evaluations were not filed with the court pursuant to statute. When the evaluations were offered at his sentencing hearing, the defendant failed to object to any aspect of the evaluations. This court refused to

review the issue because " '[i]t is fundamental that error may not be predicated on a ground not preserved by a proper objection.' " *Id.* at 663, 371 N.W.2d at 315 (quoting *State v. Bevins*, 198 Neb. 761, 255 N.W.2d 284 (1977)).

In this case, the defendant not only failed to object to the prosecutor's breach of the plea agreement, but did not move in arrest of judgment or to withdraw his plea of guilty in the trial court. A defendant is precluded from obtaining appellate relief from a prosecutor's violation of a plea agreement unless the defendant moves to set aside the plea in the trial court. *People v. Barajas*, 26 Cal. App. 3d 932, 103 Cal. Rptr. 405 (1972).

Courts should allow a defendant to withdraw a plea of guilty or nolo contendere " 'whenever the defendant, *upon a timely motion for withdrawal*, proves that withdrawal is necessary to correct a manifest injustice.' " (Emphasis supplied.) *State v. Goodrich*, 194 Neb. 217, 221, 231 N.W.2d 142, 145 (1975) (quoting ABA Standards Relating to Pleas of Guilty 2.1(a) (1979)). However, the defendant here failed to move to withdraw his plea. He has failed to preserve the issue, and this court is precluded from granting relief on that basis.

An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989); *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989). The defendant's sentence was within the statutorily prescribed limit, and in view of the defendant's record, the trial court did not abuse its discretion in imposing such a sentence.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF DANIEL A. MURRAY, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, V. DANIEL A. MURRAY, APPELLANT.

455 N.W.2d 185

Filed May 18, 1990. No. 89-1229.

1. **Mentally Disordered Sex Offender: Mental Health: Statutes.** Neb. Rev. Stat. § 29-2920 (Reissue 1989) is a special statute relating only to mentally disordered sex offenders who have previously been found to be untreatable and are about to be released from confinement.
2. **Mentally Disordered Sex Offender: Mental Health: Pleadings: Venue.** Under Neb. Rev. Stat. § 29-2920 (Reissue 1989) the petition should be filed in the county in which the underlying criminal charge was prosecuted.
3. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Marjorie A. Records for appellee.

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

BOSLAUGH, J.

The appellant, Daniel A. Murray, was convicted of incest on February 5, 1986, was found to be an untreatable mentally disordered sex offender, and was sentenced to 4 to 7 years' imprisonment. He was scheduled to be released on May 7, 1989.

Pursuant to Neb. Rev. Stat. § 29-2920 (Reissue 1989), the Douglas County Attorney was notified that the appellant's release was pending. That office then filed a petition before the Douglas County Mental Health Board (Board), alleging that the appellant was a mentally ill dangerous person under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987).

During the proceedings before the Board, the appellant filed a "Plea in Abatement," moving that the case be dismissed

because Douglas County was not the correct venue as provided in § 83-1025. Treating the plea as a motion for change of venue, the Board found that petitions filed pursuant to § 29-2920 are properly filed before the board of mental health in the county where the underlying criminal charges were prosecuted. The appellant's motion was overruled.

After a hearing on April 27, 1989, the Board found that the appellant was mentally ill and dangerous and that the least restrictive treatment alternative was inpatient hospitalization. The appellant was ordered committed to the Lincoln Regional Center for treatment of pedophilia. Upon appeal, the commitment order was affirmed by the district court for Douglas County.

The appellant contends the district court erred in affirming the commitment order because the commitment proceeding was improperly held in Douglas County. He claims that any mental health commitment proceeding should have been conducted in Lancaster County because he was incarcerated in Lancaster County at the time the petition was filed.

Section 29-2920 provides that 90 days prior to the release from custody of any mentally disordered sex offender who has previously been adjudged untreatable and sentenced pursuant to Neb. Rev. Stat. § 29-2914 (Reissue 1989), the unit of government having final release authority "shall give notice to the county attorney who prosecuted the underlying criminal charge that the release of such offender is so pending." The statute further provides that "[u]pon receipt of such notice from the releasing authority, the county attorney shall cause mental health commitment proceedings to be commenced on behalf of such offender pursuant to the Nebraska Mental Health Commitment Act."

The appellant relies upon §§ 83-1024 and 83-1025. Section 83-1024 provides:

> Any person believing that any individual is a mentally ill dangerous person may communicate his or her belief to the county attorney. Should the county attorney concur that the individual is a mentally ill dangerous person and that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than a

> mental health board-ordered treatment disposition are available or would suffice to prevent the harm described in section 83-1009, the county attorney shall cause a petition to be drafted and acted upon as provided in this act.

Section 83-1025 provides, in part: "The petition provided for in section 83-1024 shall be filed with the clerk of the district court of any county within the judicial district where the subject is found."

The appellant also relies upon *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988). Adams was in the Lincoln Regional Center in Lancaster County at the time the Morrill County Attorney filed a petition before the Morrill County board of mental health pursuant to the Nebraska Mental Health Commitment Act. Adams was ordered committed to the Hastings Regional Center and argued on appeal that because he was in Lancaster County at the time the petition was filed, the Morrill County board of mental health lacked jurisdiction of proceedings for Adams' commitment.

In *Adams*, we held that § 83-1025 is a venue statute, expressing the correct site for proceedings before a county board of mental health pursuant to the Nebraska Mental Health Commitment Act. However, because Adams had failed to raise any issue concerning venue, we did not determine whether Lancaster County or Morrill County was the correct venue under § 83-1025.

This case is distinguishable from *Adams* because the petition in this case was filed pursuant to § 29-2920, not § 83-1024, and the appellant had been prosecuted and convicted of a sexual offense in Douglas County for which he was imprisoned in Lancaster County.

Section 29-2920 specifically provides that upon being informed of the offender's impending release from custody, the county attorney who prosecuted the underlying criminal charge shall cause mental health commitment proceedings to be commenced against the offender. Section 29-2920 is a special statute relating to mentally disordered sex offenders who have previously been found to be untreatable and have been sentenced and are now about to be released. The statute

specifically provides that notice of the impending release shall be given to the county attorney "who prosecuted the underlying criminal charge" and that that county attorney "shall cause mental health commitment proceedings to be commenced."

Sections 83-1024 and 83-1025 are part of a general statutory scheme which relates to the commitment of mentally ill dangerous persons.

It is a general principle that specific statutory provisions relating to a particular subject control over general provisions. *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981); *Lentz v. Saunders*, 199 Neb. 3, 255 N.W.2d 853 (1977).

Under the facts and circumstances in this case, the proper venue for commitment proceedings was Douglas County, Nebraska. The judgment of the district court is affirmed.

AFFIRMED.

RICK W. MIDDAGH ET AL., APPELLANTS, V. STANAL SOUND LTD., A NEBRASKA CORPORATION, AND STAN MILLER, APPELLEES.

455 N.W.2d 762

Filed May 25, 1990. No. 87-695.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded on the issue of damages.

William G. Dittrick and Barbara E. Person, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

No appearance for appellees.

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

PER CURIAM.

In *Middagh v. Stanal Sound Ltd.*, 234 Neb. 576, 452 N.W.2d 260 (1990), we affirmed the trial court's judgment in part, reversed it in part, and remanded the cause for a determination

of damages as against appellee Stan Miller only.

The bankruptcy petition of Stanal Sound Ltd. now having been dismissed, the automatic stay is dissolved. See, 11 U.S.C. § 362(c) (1988); *In re Ryan*, 100 Bankr. 411 (N.D. Ill. 1989). We may now proceed to a consideration of the remainder of the case.

Miller was at all times the agent of Stanal Sound, and therefore appellants are entitled to the same relief as obtained in this court against Miller. See *Middagh v. Stanal Sound Ltd., supra.*

Therefore, the action is remanded to the trial court to recalculate the payments due from Stanal Sound for the period of November 15, 1984, to November 15, 1987, as prayed by appellants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED ON THE ISSUE OF DAMAGES.

CAPORALE, J., not participating.

ROCK COUNTY, NEBRASKA, APPELLANT, V. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

455 N.W.2d 763

Filed May 25, 1990. No. 88-075.

1. **Counties.** A county possesses only a governmental character and, as such, acts purely as an agent of the State.
2. _____. A county, being a mere instrumentality of the State for the convenient administration of government, is at all times, both as to its powers and its rights, subject to legislative control.
3. **Counties: Property.** The State has the right to direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district.
4. **Constitutional Law: Taxation.** The application of the state constitutional provision prohibiting the State from levying a property tax for state purposes,

Neb. Const. art. VIII, § 1A, hinges on a determination of whether the controlling and predominant purposes of a statute alleged to violate the provision are state purposes or local purposes; in making that determination, the historical and traditional taxing pattern is a factor to be considered.

5. **Constitutional Law: Legislature.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what the Constitution prohibits it from doing directly.
6. **Constitutional Law: Counties.** A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person and cannot invoke against the State the protection of U.S. Const. amend. XIV or of Neb. Const. art. I, §§ 3 and 21.
7. **Counties: Property.** Because a county is not a person and lacks authority to hold property which is not dedicated to a public use, the State may take the county's property without providing compensation.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Richard P. Nelson, of Peterson Nelson Johanns Morris & Holdeman, for appellant.

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

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

CAPORALE, J.

I. INTRODUCTION

In this declaratory judgment action brought pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), plaintiff-appellant, Rock County, sought to have Neb. Rev. Stat. § 68-718 (Reissue 1986), which constitutes a codified portion of 1982 Neb. Laws, L.B. 522, declared unconstitutional and unenforceable. The district court, judging the statute valid, granted summary judgment to the defendants-appellees, State of Nebraska; Robert M. Spire, Attorney General of the State of Nebraska; Kermit McMurry, director of the Nebraska Department of Social Services; and three employees of the Department of Social Services. Rock County appeals, asserting that § 68-718 impermissibly authorizes "the transfer of property purchased solely with county funds out of that county, and for the benefit of others outside that county"; violates Neb. Const. art. VIII, § 1A,

which prohibits the State from levying a property tax for state purposes; and violates the county's due process rights under U.S. Const. amends. V and XIV and Neb. Const. art. I, § 3.

II. FACTS

Prior to the Legislature's enactment of L.B. 522, which became operative July 1, 1983, the state social services system had been administered by the counties under the supervision of the State. Using moneys provided by local property tax revenues, each county contributed to certain of the programs, including having to contribute 20 percent of the moneys necessary for medical assistance, and each county paid certain administrative costs. As a result of the enactment of L.B. 522, the administration of social services programs became the sole responsibility of the State, to be supervised by its Department of Social Services, hereinafter referred to simply as Department. See Neb. Rev. Stat. § 68-717 (Supp. 1989). After the enactment of L.B. 522, although the counties remained responsible for general assistance, they were relieved of many of the costs of administering social services programs, including no longer being required to contribute 20 percent of the moneys necessary for medical assistance. One intent of the Legislature in enacting L.B. 522 was to shift the method of funding the social services programs from the property tax to state sales and income tax revenues. Statement of Intent, Committee on Public Health and Welfare, 87th Leg., 2d Sess. (Mar. 17, 1981).

L.B. 522 also provided, as codified in § 68-718, for the transfer of "[a]ll furniture, equipment, books, files, records, and personnel utilized by the county divisions or boards of public welfare for the administration of public assistance programs" to the Department.

In March 1986, the Department notified Rock County that the Department office located in Bassett, Nebraska, a city within Rock County, was relocating to Ainsworth, Nebraska, a city within Brown County, and that pursuant to § 68-718 the furniture and equipment located in the Bassett office would be transferred to the Ainsworth office. The items of furniture and equipment in question were purchased by property tax moneys collected from residents of Rock County and had been used by

Rock County for conducting the activities of the Rock County division of social services. The Department currently intends that the Ainsworth office will supervise the disbursement of social services moneys to those persons living in Brown, Keya Paha, and Rock Counties.

For two of the items, Rock County has been reimbursed at least in part by the State. The State reimbursed Rock County in the amount of $188 for all or part of the purchase price of an adding machine and $200 for all or part of the purchase price of a self-correcting electric typewriter.

III. ANALYSIS

No defendant having questioned the county's standing to challenge the authority of the Legislature to transfer property from one county to another, we undertake the analysis required by the county's assertions.

1. Authority of Legislature

The county's initial claim is that the Legislature's attempt, pursuant to § 68-718, to transfer its property to the Department without restrictions as to the manner or place of use exceeds the Legislature's authority to control county property. The county urges that property derived solely from the property taxes collected in a particular county must be used solely for the benefit of that county.

The seminal Nebraska case on this subject is *State, ex rel. City of Omaha, v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922). Therein, the city of Omaha brought a mandamus action to compel the county commissioners of Douglas County to furnish office rooms in the county courthouse for the use of Omaha's municipal courts pursuant to a statute requiring such in return for a yearly rental from the city of Omaha. The county commissioners argued that the statute "takes the property of Douglas county and appropriates it to the use of the city of Omaha without due process of law . . . ." *Id.* at 40, 189 N.W. at 641. We upheld the statute against the constitutional challenge, reasoning:

> It must be remembered that a county does not possess the double governmental and private character that cities do. It is governmental only, and in that capacity acts

purely as an agent of the state. The funds raised by taxation in the county are subject to the direction and control of the legislature for public use in that county, and the property of the county, acquired by funds raised through taxation, is property of which the state can direct the management and disposition, so long at least as it acts for the benefit of the public in the taxing district. [Citations omitted.]

. . . A county, "being a mere instrumentality of the state for the convenient administration of government, is at all times, both as to its powers and its rights, subject to legislative control. While it is no doubt true that the legislature has not such transcendent and absolute power over these bodies that it can apply property held by them to private purposes or to public purposes wholly disconnected with the community embraced within their limits, still it is likewise true that a purely public corporation, like a county, cannot acquire any vested interest which will preclude the legislature from directing the application of all its property and rights to the performance of those governmental functions which pertain to the community embraced within the corporation, and for the performance of which the corporation was created. If it were otherwise, counties, instead of being agencies of the state for administering the government, would be petty sovereignties, to impede and defeat the state with claims of local interest and authority." [*Erskine v. Steele County,* 87 F. 630 (C.C.D.N.D. 1898)].

The revenues of the county do not become the property of the county in the sense of private ownership, and the legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. [Citation omitted.] It is true that the legislature could not divert funds raised by one district to the use of another district [citation omitted], since a tax levied for a public purpose must also be levied for the use of the district which is taxed. Should the legislature order that money be raised by one district and paid to another district, to be used for

the sole benefit of that other district, that would be an exaction of money for the benefit of others than those who are taxed and clearly beyond what could be justified as taxation. [Citation omitted.]

The municipal courts of the city of Omaha are a branch of the judicial system of the state. [Citations omitted.] Their function is governmental, and the service they render is a public service. It cannot be said that they serve alone the citizens of Omaha. Though their jurisdiction of the person is limited to the boundaries of Omaha, many persons throughout the county have opportunity to use these courts. . . . No doubt the legislature considered that the service rendered by the municipal courts, in civil cases lightened the work of the district and county courts; also that it would be of benefit to have the several courts accessible in one building.

The legislature, we believe, had the power, in the first instance, had it desired to exercise it, to require the county to raise funds and contribute to the support and maintenance and housing of municipal courts, for these courts render a service and are of benefit to the entire county, being a branch of the general judicial system and a part of the law-enforcing machinery of the state. [Citations omitted.]

The legislature would also have had the right to describe, as a condition to the right of the county to levy a tax, how and in what manner the courthouse should be used for the benefit of the citizens in the county. Surely, if that is true, the legislature still has the power and the authority to direct and control the use and management of this property, to the end of gaining what, in its judgment, will best serve the public needs and be of most general benefit to the public in the district.

We see no reason why it cannot now direct, as it has done by the statute in question, that the municipal courts shall be housed in that building. This is not a diversion of funds or property of the county to the use of persons who have not contributed by taxation to those funds. A large part of the contributions from which the courthouse was

> built was furnished by the city of Omaha. It is simply an apportionment of the use for general benefits and a direction as to how the property, procured by those funds, shall be used to the interest and benefit of the taxpayers in that particular taxing district.

State, ex rel. City of Omaha, v. Board of County Commissioners, 109 Neb. 35, 40-43, 189 N.W. 639, 641-42 (1922). See, also, *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976); *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959) (the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation so a Legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district); *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956) (State has right to direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district); *State ex rel. School Dist. v. Ellis*, 160 Neb. 400, 70 N.W.2d 320 (1955), *appeal on remand* 163 Neb. 86, 77 N.W.2d 809 (1956) (Legislature has power to take funds raised by one governmental subdivision and give them to another governmental subdivision if it is done for the benefit of the public in the taxing district).

We are not persuaded by the county's contention that the State lacks the authority to make this transfer of the county's property. As the foregoing decisions demonstrate, the State has the right to direct the use, management, and disposition of county property so long as it is done for the benefit of the public in the taxing district. By passing L.B. 522, the Legislature consolidated the administration of social services programs, which programs were previously provided by the several counties, under the sole direction of the State and has appropriated the property of the various counties for the use and benefit of all the counties. Regardless of where the property of the various counties is used, all of the counties receive the benefit of the property as used in meeting the social services needs of those who reside within their respective borders. The Legislature has not exceeded its authority.

2. Property Tax

The county next contends that § 68-718 violates Neb. Const. art. VIII, § 1A, which provides: "The state shall be prohibited from levying a property tax for state purposes." The county argues that "the state takeover [of the social services programs] reflected a predominant state interest in administering welfare assistance on the state level rather than the county level." Brief for appellant at 16.

In one of Nebraska's first cases on this subject, *Craig v. Board of Equalization*, 183 Neb. 779, 164 N.W.2d 445 (1969), a taxpayer challenged, as violative of Neb. Const. art. VIII, § 1A, a state statute which required each county to use property tax revenues to pay for the care of its indigent residents in state institutions. Quoting from *State v. Douglas County*, 18 Neb. 601, 26 N.W. 378 (1886), which involved a challenge to a statute which required each county to levy a property tax to pay the expense of maintenance of its own residents in state mental hospitals, we stated:

> "While it is true that the hospital for the insane is . . . a state institution, yet . . . maintenance of the insane is not necessarily a state burden, and therefore it is within the power of the legislature to require that the tax be levied and collected by each county for the purpose of reimbursing the state . . . ."

Craig, supra at 783, 164 N.W.2d at 447. We concluded that the statute was constitutional, reasoning:

> The county has been viewed historically as a limited agency. Funding most, if not all, county functions has served state purposes. State government has remained largely free to supervise local administration of the property tax. Programs of state assistance to local units have been tied to effective, equitable use of the property tax by the local units themselves. Federal, state, and local governments have joined to combat conditions of common concern. [Citations omitted.]
>
> . . . We therefore conclude that a statute requiring a county to levy a property tax for purposes substantially local does not contravene the [constitutional] prohibition, although the statute commingles state and local purposes.

Id. at 783-84, 164 N.W.2d at 448.

In the next case on this subject, *R-R Realty Co. v. Metropolitan Utilities Dist.*, 184 Neb. 237, 166 N.W.2d 746 (1969), a taxpayer again challenged, as violative of Neb. Const. art. VIII, § 1A, a state statute which required the municipality or the county to levy a property tax for purposes of local fire protection. Holding that the statute did not contravene the constitutional provision, we stated:

> Such a tax is no different than many other taxes previously assumed to be strictly local levies for local purposes in which amounts are certified by school districts or other bodies to the local governmental authority required to make the levy.
>
> If we were to accept the reasoning urged by the plaintiff, any property tax for governmental purposes levied by a city or county under legislative directions fixing a maximum amount and a maximum levy would become a tax levy by the state for state purposes. In order for the state Constitution to restrict the plenary power of the Legislature to tax, the language of the restriction must be clear. Craig v. Board of Equalization, 183 Neb. 779, 164 N.W.2d 445.
>
> The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy. Neither should the fact that the tax is for a "governmental" purpose make it automatically for state purposes rather than local.

R-R Realty Co., supra at 240, 166 N.W.2d at 748.

In the case on which the county places major reliance, *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974) (*Tallon I*), the county treasurer of Sheridan County asserted that a state statute, which as part of the "Technical Community College Area Act" required the county to raise funds by a property tax in partial support of the system of technical community colleges, was violative of Neb. Const. art. VIII, § 1A. Prior to the passage of the Technical Community College Area Act, technical

community colleges were local institutions, locally controlled and financed by taxes on property within the local district. As a result of the act's enactment, the colleges were all placed into a statewide system provided for under the act. The act created a State Board of Technical Community Colleges, which was given general supervision and control over the state system of technical community colleges. We determined that "where the State assumes the control and the primary burden of financial support of a statewide system of technical community college areas," the property tax levy is for state purposes in contravention of the constitutional provision prohibiting such. *Tallon I, supra* at 213, 219 N.W.2d at 461. We reasoned as follows:

> Where state and local purposes are commingled in a statutory enactment creating a new, independent, statewide system of technical community college areas, the crucial issue of the use of property tax levies to support the system turns on a determination of whether the controlling and predominant purposes are state purposes or local purposes. The application of the constitutional amendment prohibiting the State from levying a property tax for state purposes hinges on that determination. The question of whether an act of the Legislature pertains to state purposes or local purposes is a judicial question. There is no sure test by which state purposes may be distinguished from local. This court must consider each case as it arises and draw the line of demarcation. [Citation omitted.] The Legislature has the power to provide by statute for the establishment of a new post-secondary educational system which might be either state or local. Viewed from the historical perspective of educational systems previously established in Nebraska, the pattern of the statewide system here more closely fits the pattern of an independent state system such as the state college system or the state university system, than it does the pattern of a traditional local educational system.
>
> Under the act with which we are concerned here, the State has assumed the direct control of major policy decisions which affect the operation of each of the seven

> community college areas, and the statute reflects a purpose to control the operation of all seven areas for the benefit of the residents of the state as a whole. The provisions requiring that the tuition in any technical community college area for any resident of the State of Nebraska shall be the same as for a resident of the particular area is a strong indication of the legislative purpose to benefit residents of the entire state as contrasted to residents of particular local areas. The direct control by the State over capital expenditures, the right to contract for acquisitions and additions, and to control and direct which facilities and training will be available in which area, together with the complete and direct control of the individual budget of each technical community college area, demonstrate the dominance of the State as opposed to the local areas in all major matters of control and operation of the statutory system. It is undoubtedly true that such direct control will result in a more efficient and coordinated operation and avoid expensive and uneconomical duplication of facilities and services. Those particular objectives in themselves reflect the dominance of a purpose to benefit the state as a whole.
>
> . . . To construe the constitutional amendment to prohibit only a direct statewide property tax levy by the State itself would emasculate the amendment and render it virtually meaningless and wholly ineffective.

Id. at 210-12, 219 N.W.2d at 460. We distinguished the statutes considered in *Craig v. Board of Equalization*, 183 Neb. 779, 164 N.W.2d 445 (1969), and *R-R Realty Co. v. Metropolitan Utilities Dist.*, 184 Neb. 237, 166 N.W.2d 746 (1969), because "[b]oth cases reflect a factual situation in which the property tax levy was for purposes substantially and predominantly local." *Tallon I, supra* at 210, 219 N.W.2d at 460.

The Legislature, having repealed the version of the Technical Community College Area Act considered in *Tallon I*, adopted a new version which was challenged in *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 244 N.W.2d 183 (1976) (*Tallon II*). Under the new version, the technical community colleges were no longer dominated by a state board

or subject to a compulsory property tax. Instead, the operation of each respective college was controlled by its area board subject only to guidelines laid down by the Legislature, and each area board was given authority to levy property taxes if desired. We determined that the new scheme was not state dominated and therefore did not violate the constitutional mandate that the State not levy a property tax for state purposes. We stated:

> We are aware of the fact that when [Neb. Const. art. VIII, § 1A,] was adopted in its original and amended form, its purpose was to require the state, after the adoption of sales and income taxes, to leave the property-tax field. No state interest or function could then be financed by means of property taxes, but all traditional state interests and functions must be financed by means other than property taxes. In other words, the state Legislature cannot avoid or circumvent the constitutional mandate by converting the traditional state functions into local functions supported by property taxes. At the time of the adoption of this constitutional provision, it was inherent in its adoption that the state would continue to administer its traditional functions and finance them by means other than a property tax. . . . There is no conflicting tradition relating to state support of technical community colleges. The schools and junior colleges taken over by the technical community colleges were, at least generally, local in nature and supported by local property taxes. Those receiving state aid still were required to have local participation as provided for in the present act.

Tallon II, supra at 606, 244 N.W.2d at 186.

In *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975), we upheld against constitutional challenge a state statute which required the county to pay the costs of furnishing counsel to indigent defendants. We determined that criminal prosecutions were predominantly local in purpose and benefit, and said: "[H]istorically and traditionally the counties have been given the responsibility of paying for the expenses of criminal prosecution. In adopting [Neb. Const. art. VIII,

§ 1A], there is no reason to believe the people intended to disturb the historical method of financing criminal prosecutions." *Kovarik, supra* at 824-25, 224 N.W.2d at 766.

Finally, in *State ex rel. Meyer v. County of Banner*, 196 Neb. 565, 244 N.W.2d 179 (1976), we upheld state statutes which required the county to pay the costs for maintaining county and district courts, for prosecuting state criminal law violations, and for conducting state and national elections. We followed *Kovarik v. County of Banner, supra*, holding that the governmental activities at issue had always been regarded as being substantial functions of the counties, and explained:

> [Neb. Const. art. VIII, § 1A], first adopted in 1954, became effective in its present form in 1966. . . . Prior to 1966, there was no income or sales tax, and the principal tax source for the support of state government was a property tax, imposed by a state levy, separate and distinct from the levies imposed by counties, cities, and other political subdivisions. The amendment became effective with the adoption of an income and sales tax by the State in 1966.
>
> The amendment, by its terms, prohibits only the State from levying a property tax, and then only for state purposes. It does not affect the use of property taxes by a county, city, or other local subdivision. Counties, cities, and other taxing subdivisions of state government have traditionally relied and still rely upon property taxes as their major source of revenue. Historically and currently the governmental activities supported by a county property tax at the time the amendment was adopted were and are serving substantial local purposes. The constitutional amendment was not intended to disturb that tax structure nor effect any change in the use of property taxation by any governmental unit except the State itself.

State ex rel. Meyer, supra at 568-69, 244 N.W.2d at 181.

As reflected in the previously discussed decisions, the application of the constitutional provision prohibiting the State from levying a property tax for state purposes hinges on a determination of whether the controlling and predominant

purposes of a statute alleged to violate the provision are state purposes or local purposes. The more recent cases contemplate that in making the foregoing determination, the historical and traditional taxing pattern is a factor to be considered.

The State asserts that by authorizing the transfer of the county's property to the Department, the State is not directly levying a property tax. As the county articulates, however, the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what the Constitution prohibits it from doing directly. *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987); *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980); *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956).

Nevertheless, the Legislature did not contravene the constitutional prohibition by authorizing the transfer of the county's property. Although the State has assumed responsibility for the administration of social services programs, providing such services to people in need still remains a matter which is of local concern. Certainly, historically, the county has been responsible for certain of the costs of social services programs, including, obviously, the cost of purchasing the furniture and equipment at issue here. Under the ownership of the Department, the county's furniture and equipment will continue to be used for predominantly local purposes.

3. Rights of County

Lastly, the county argues that the transfer of its property to the Department violates its right to due process under U.S. Const. amends. V and XIV and Neb. Const. art. I, § 3, in that the transfer is arbitrary and unreasonable for the reasons it unsuccessfully advanced in the foregoing parts III(1) and (2) of this opinion, and that the transfer constitutes a taking without compensation.

(a) Due Process

U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law. A county, as a creature

and political subdivision of the State, is neither a natural nor an artificial person. See, *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976); *State ex rel. Johnson v. County of Gage*, 154 Neb. 822, 49 N.W.2d 672 (1951); *Speer v. Kratzenstein*, 143 Neb. 310, 12 N.W.2d 360 (1943); *City of Fremont v. Dodge County*, 130 Neb. 856, 266 N.W. 771 (1936); *State, ex rel. City of Omaha, v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922). Accordingly, a county cannot invoke the protection of the 14th amendment against the State. See, *Collier v. Poe*, 732 S.W.2d 332 (Tex. Crim. App. 1987), *appeal dismissed* 484 U.S. 805, 108 S. Ct. 51, 98 L. Ed. 2d 15 (political subdivisions of the state may not challenge the validity of a state statute under the 14th amendment); *Delta Special School Dist. No. 5 v. State Bd. of Educ. for State of Ark.*, 745 F.2d 532 (8th Cir. 1984) (political subdivision of state cannot invoke protection of 14th amendment against state); *Bor. of Pitman v. Skokowski*, 193 N.J. Super. 215, 473 A.2d 100 (1984) (borough lacks standing to invoke protection of 14th amendment against the state); *Mtr Bowen v State Comm.*, 104 A.D.2d 238, 484 N.Y.S.2d 210 (1984) (political subdivision of state cannot claim rights under Constitution against state action); *Ark. State Hospital v. Goslee, Gdn.*, 274 Ark. 168, 623 S.W.2d 513 (1981) (agency or political subdivision of state cannot invoke protection of 14th amendment against state itself); *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978) (a county or municipal corporation, created by the Legislature, does not have standing to invoke the equal protection and due process clauses of state and federal Constitutions in opposition to will of its creator); *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); *Kent County v DSS*, 149 Mich. App. 749, 386 N.W.2d 663 (1986) (local units of government, such as counties, are creatures of the Legislature and, as such, have no due process rights to invoke against the will of their creator); *Santa Monica Community College v. P. E. R. B.*, 112 Cal. App. 3d 684, 169 Cal. Rptr. 460 (1980). The county's assertion that the transfer of property by the Legislature was in violation of the due process required by U.S. Const. amend. XIV and Neb. Const. art. I, § 3, is therefore without merit.

(b) Taking

Neither is there any merit to the county's argument that the Legislature's transfer of the office equipment and other property to the Department constitutes a taking for which the county was not compensated. Whereas Neb. Const. art. I, § 21, provides that the property of no person shall be taken or damaged for a public use without just compensation, the U.S. Constitution prohibits the State from taking private property for public use without providing just compensation. U.S. Const. amends. V and XIV.

Because, as we have established, the county is not a person, it is not within the protections afforded by Neb. Const. art. I, § 21. Neither may the county claim compensation under the federal Constitution. Under Nebraska law a county lacks authority to hold property in a proprietary capacity and may hold only property which is dedicated to a public use. See, *State ex rel. Johnson v. County of Gage, supra*; *State, ex rel. City of Omaha, v. Board of County Commissioners, supra*. The State therefore does not take private property within the meaning of U.S. Const. amend. V when it takes property from the county and is not required to compensate the county.

IV. DECISION

Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990).

This being such a case, the judgment of the district court is affirmed.

AFFIRMED.

NEAL VLASIN, APPELLEE, V. LEN JOHNSON & COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT.

455 N.W.2d 772

Filed May 25, 1990. No. 88-434.

1. **Contracts: Intent.** When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law.
2. **Judgments: Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
3. **Equity: Appeal and Error.** In an appeal from an equity action, the Supreme 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 Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Restrictive Covenants: Employer and Employee.** There are three considerations used 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; and, third, is the restriction 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. _____: _____. 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.
7. _____: _____. A covenant not to compete must not be greater than is reasonably necessary before it will be enforced.
8. _____: _____. As a general rule, a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's accounts or clients with whom the former employee actually did business and has personal contact.
9. **Restrictive Covenants: Courts: Reformation.** It is not the function of courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed in part, and in part reversed and remanded with directions.

J.A. Lane and Tanya L. Dillow, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellant.

George M. Zeilinger, of Zeilinger Law Office, P.C., for appellee.

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

FAHRNBRUCH, J.

The appellant, Len Johnson & Company, Inc. (Johnson), urges this court to reform a covenant not to compete in a management agreement more favorably to its interests than did the district court for Keith County.

Upon a de novo review of the record, we find, as a matter of law, that unreasonable covenants are not enforceable and are not subject to reformation. We affirm the district court in part, reverse in part, and remand with directions.

The basic facts bearing upon the disposition of this matter are not disputed. When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law. *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). Regarding a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990).

In the latter part of 1981, appellee, Neal Vlasin, was hired by the Keller-Schwentker Agency, Inc. (Keller-Schwentker), as an insurance salesman. On December 21, 1985, after being promoted to general manager of the agency's Grant, Nebraska, office, Vlasin entered into a management agreement with Keller-Schwentker. Paragraph 7 of the agreement contained a covenant not to compete that provided:

> If this Management Agreement is terminated for any reason other than termination by EMPLOYER without just cause, the MANAGER shall not enter into the insurance business within a fifty (50) mile radius of the City of Ogallala, Keith County, Nebraska, for a period of

> three (3) years from and after the date of the termination of this agreement; otherwise, this covenant not to compete shall be null and void and of no force and effect.

During the term of his employment, Vlasin was given more responsibility as Keller-Schwentker expanded. At one point, he was assigned 100 percent of the accounts of an agency Keller-Schwentker had purchased. During this same period, Len Johnson was gaining control of Keller-Schwentker, finally attaining total ownership and changing the name of the agency to Len Johnson & Company, Inc., in January 1987.

A number of meetings ensued between Vlasin and Johnson concerning Vlasin's method of compensation, the operation of the Grant office, and Vlasin's duties. On February 15, 1987, Vlasin terminated his employment without notice. On March 11, 1987, Vlasin filed a petition for declaratory judgment asking the district court to declare the rights and duties of the parties under the management agreement and to enjoin Johnson from enforcing the covenant not to compete. On the same date, Vlasin also filed a motion seeking to temporarily enjoin Johnson from enforcing the covenant not to compete. The district court partially sustained Vlasin's motion for temporary injunction, but found that the covenant was too broad in geographic scope and reformed the covenant, effectively barring him from engaging in the insurance business in Perkins County, Nebraska, during the pendency of the matter.

On March 1, 1988, Vlasin filed a third amended petition, in which he alleged that (1) his employment was constructively terminated by Johnson; (2) the covenant not to compete in the management agreement with Johnson was inapplicable, contrary to law, and unenforceable; and (3) Johnson owed him $2,710 in incentive pay and other compensation. Vlasin prayed that the district court declare the rights and duties of the parties under the management agreement, restrain and enjoin Johnson from enforcing the covenant not to compete, and determine the amount of incentive pay he alleged was due.

In its answer, Johnson denied any wrongdoing on its part. In its counterclaim, Johnson asserted that it was damaged when Vlasin allegedly violated the terms of the covenant not to

compete in the management agreement. Johnson asked for judgment against Vlasin in the sum of $158,250. Johnson also prayed that Vlasin be enjoined from entering into the insurance business within a 50-mile radius of Ogallala for a period of 3 years from the date of his termination with Johnson and for such other and further relief as the court deemed just and equitable. As an alternative counterclaim, Johnson, in effect, prayed that should the court find the covenant not to compete was unreasonable and unenforceable, the covenant be reformed.

After a trial, the district court concluded that as evidenced by the covenant not to compete, Johnson had elected its remedy in equity, and denied all its claims for damages. The district court, relying on authority from other jurisdictions, permanently reformed the covenant not to compete and found it reasonable and enforceable as reformed. The court also found that Vlasin had not been constructively discharged from employment and had breached the management agreement by vacating Johnson's office. Vlasin's claim for damages was denied. He has not appealed or cross-appealed that ruling.

Appellant contends the district court erred in holding that it elected its remedy in equity and, therefore, could not collect damages at law, and in denying its claim for damages. Appellant further argues that the district court erred in failing to properly reform the covenant not to compete.

In an appeal from an equity action, the Supreme 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 Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *In re Estate of Widger, ante* p. 179, 454 N.W.2d 493 (1990).

There are three considerations used 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; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.' "

Polly v. Ray D. Hilderman & Co., 225 Neb. 662, 665, 407 N.W.2d 751, 754 (1987) (quoting *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 detrimental to the public, our inquiry will focus on whether the covenant is reasonable in the sense that it is no greater than is reasonably necessary to protect appellant in some legitimate business 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. *Polly v. Ray D. Hilderman & Co., supra.*

> 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.

Boisen v. Petersen Flying Serv., 222 Neb. 239, 245-46, 383 N.W.2d 29, 33 (1986).

The record reflects that Vlasin had substantial personal contact with Johnson's accounts and, consequently, he had the opportunity to appropriate customer goodwill. Thus, Johnson had a legitimate business interest in customer goodwill that it could protect through the use of a proper postemployment covenant not to compete. See *Polly v. Ray D. Hilderman & Co., supra.*

However, the fact that Johnson had a legitimate business interest in customer goodwill does not automatically validate its

postemployment covenant not to compete. A covenant not to compete must not be greater than is reasonably necessary before it will be enforced. *Id.* As a general rule, "a covenant 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." *Id.* at 668, 407 N.W.2d at 756.

Here, the covenant not to compete contained in the management agreement between Vlasin and Johnson unconditionally prohibited Vlasin from entering into the insurance business for 3 years within a 50-mile radius of Ogallala. Without deciding whether any other restriction in the covenant was reasonable or unreasonable, we find that because the covenant attempts to restrict Vlasin from soliciting or working with anyone, rather than just Johnson's clients with whom Vlasin did business and had personal contact, it is greater than is reasonably necessary to protect Johnson's legitimate interest in customer goodwill. Thus, the covenant is unreasonable and unenforceable.

In previous cases of this nature, we have declined, for various reasons, to rewrite a covenant not to compete so as to make it "no greater than is reasonably necessary." See, e.g., *Polly v. Ray D. Hilderman & Co., supra*; *Boisen v. Petersen Flying Serv., supra*; *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). The district court, relying on *Alside, Inc. v. Larson*, 300 Minn. 285, 220 N.W.2d 274 (1974), and *Follmer, Rudzewicz & Co v Kosco*, 420 Mich. 394, 362 N.W.2d 676 (1984), concluded that reformation of the covenant was proper in this matter. These authorities are not persuasive. It is not the function of courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable. The district court erred in reforming the covenant in this case.

Because the covenant not to compete in the Johnson-Vlasin management agreement is unreasonable and unenforceable, any claim by Johnson for damages allegedly arising from Vlasin's breach of the unenforceable covenant must be denied. Since Johnson alleged only damages it claims arose from the breach of the covenant not to compete, we need not consider

Johnson's remaining assignment of error.

Having reviewed the record de novo, we find that the trial court's reformation of the covenant not to compete in the Johnson-Vlasin management agreement should be and hereby is set aside, that the trial court should be and hereby is directed to enter a declaratory judgment finding that the Johnson-Vlasin management agreement's covenant not to compete is unreasonable and unenforceable, and that the trial court's denial of Johnson's claim for monetary damages should be affirmed. For the reasons stated in this opinion, the trial court's denial of the relief prayed for in Johnson's counterclaims is affirmed.

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

HOWELLS ELEVATOR, INC., APPELLEE, V. STANCO FARM SUPPLY CO., INC., APPELLANT.

455 N.W.2d 777

Filed May 25, 1990. No. 88-439.

1. **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 on appeal unless they are clearly wrong.
2. **Judgments: Appeal and Error.** A judgment clearly against the weight of the evidence must be set aside.
3. _____: _____. In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Appeal and Error.** An appellate court has an obligation to reach an independent conclusion on questions of law.
5. **Negligence: Proof.** A plaintiff accused of contributory negligence must prove defendant's negligence and must be free from contributory negligence more than slight in comparison with defendant's negligence.
6. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct

contributes to his or her injuries as a proximate cause.

7. **Property: Damages.** Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
8. **Property: Damages: Proof.** In order to recover the difference in market value of personal property immediately before and immediately after the injury, a plaintiff must prove (1) that the damage to the property is such that it cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred or that the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, (2) the reasonable market value of the property immediately before the occurrence, and (3) the reasonable market value of the property immediately after the occurrence.
9. **Damages: Pleadings: Proof.** Subject to the provisions of Neb. Rev. Stat. § 25-804 (Reissue 1989), damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with direction to dismiss.

Donald D. Schneider, of Simmons & Schneider, P.C., for appellant.

H.E. Hurt, Jr., of Hurt & Gallant, for appellee.

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

CAPORALE, J.

Following a bench trial, plaintiff-appellee, Howells Elevator, Inc., obtained a judgment for damages allegedly caused by the negligence of defendant-appellant, Stanco Farm Supply Co., Inc. Stanco Farm Supply assigns as error, among other things, the district court's findings (1) that Stanco Farm Supply is liable to Howells Elevator and (2) that Howells Elevator proved damages. As the record sustains those assignments of error, we reverse and remand with the direction that the cause be dismissed.

Howells Elevator operates grain elevator and storage

facilities in Howells, Nebraska, and near Dodge, Nebraska, while Stanco Farm Supply hauls grain as part of its business operation. The occurrence which precipitated this action took place on October 13, 1986, in Howells Elevator's 240- by 450-foot grain storage facility near Dodge, when the rear wheels of Stanco Farm Supply's semitrailer truck ran over and damaged one of Howells Elevator's "under-truck" grain conveyors.

An understanding of the case requires a description of the method Howells Elevator then used to unload corn as it arrived at its location near Dodge. Trucks were maneuvered into such a position that a Howells Elevator employee could use a "Bobcat" to place an under-truck grain conveyor under the trailer portion of trucks loaded with corn. The corn was then emptied onto the under-truck conveyor from trapdoors located at the bottom of the hoppers on the floor of the trailer. The under-truck conveyor then moved the corn to another, larger conveyor, which in turn moved the corn to its place of storage.

The operation required that the truck be correctly positioned to facilitate movement of the corn from the under-truck conveyor to the larger conveyor, and such positioning allowed a tolerance of about 2 feet to the north and south and 3 to 4 feet to the east and west. When positioning a truck for unloading, one of Howells Elevator's employees would direct the driver while another of its employees would move the under-truck conveyor under the truck to determine whether the truck was in the proper position for unloading. While positioning a truck required a coordinated effort among the three workmen, the Howells Elevator employee directing the truckdriver did not direct the Bobcat operator; the Bobcat operator simply reacted to the instructions given to the truckdriver and to said driver's actions.

On the date of the occurrence, Howells Elevator's employee David Bartosh was guiding trucks into position to be unloaded, Randall Miller was operating Stanco Farm Supply's corn-filled truck, and Paul Uher, another of Howells Elevator's employees, was operating the Bobcat used to move an under-truck conveyor into position under the hopper of Stanco Farm Supply's truck. In accordance with Howells Elevator's

system, Miller maneuvered Stanco Farm Supply's truck so that it was facing west inside the grain storage building. Because the truck was not properly positioned for unloading, Bartosh directed Miller to reposition it.

The record indicates that Miller, with Bartosh's guidance, made at least three attempts to place Stanco Farm Supply's truck in a proper position for unloading. Bartosh testified that after the second attempt, Miller "got really angry" and "started driving recklessly." Bartosh further testified he determined that Miller was angry "[b]y the way he dumped the clutch out; the truck's smoke would come out, the exhaust; he was driving too fast," and testified that the cab of the truck would "twist from dumping the clutch fast." Uher corroborated what Bartosh had stated, testifying that Miller "was getting angry and reckless" and that Miller was "jerking the clutch and speeding ahead fast, smoke coming out of the exhaust from the accelerator." Contrary to the testimony of Bartosh and Uher, Miller testified that he neither became angry nor drove recklessly. When asked about exhaust coming from Stanco Farm Supply's truck, Miller stated: "It's a diesel; it smokes."

After at least three attempts to position the truck for unloading, it was still not in its proper position. Bartosh then instructed Miller to move the truck forward but did not tell him how far to move forward and did not explain the tolerance or margin within which Miller was required to position his truck. Miller followed Bartosh's command, but after Miller had moved the truck forward about 5 feet, its rear wheels ran over the under-truck conveyor. Bartosh testified that "we tried pulling the conveyer out with the bobcat, but the truck was moving too fast. The truck was moving west and the conveyer was being moved west. The truck caught up with the conveyer and ran over the — on top of the conveyer." Bartosh testified that he yelled " 'hold it' " the instant before the truck wheels hit the conveyor, but Miller "was on it, over it and probably five to ten feet past it before he even got stopped."

Howells Elevator's petition alleged that the damage to its grain conveyor was caused by Stanco Farm Supply's negligent failure to (1) keep a reasonable and proper lookout, (2) keep the truck under reasonable control, (3) operate the truck at a

reasonable and prudent speed, and (4) stop before hitting the conveyor. Stanco Farm Supply's answer denied any negligence on its part and affirmatively alleged that the negligence of Howells Elevator's own employees barred any recovery by Howells Elevator. Stanco Farm Supply further alleged that Howells Elevator was negligent in (1) assuming responsibility for directing Stanco Farm Supply's driver and then failing to exercise due care in the course of doing so, (2) directing the driver to move the truck forward "when such forward movement could not be made safely without endangering the conveyor," (3) failing to warn the driver of the danger of striking or driving over the conveyor, and (4) failing to move the conveyor out of the path of the truck before instructing the driver to move the truck forward.

Stanco Farm Supply's first relevant assignment of error alleges that the district court erred in determining that it was liable for the damages to the grain conveyor in that such damages were the result of Howells Elevator's own actions. In considering this contention, we first note that 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 on appeal unless they are clearly wrong. *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989). However, a judgment clearly against the weight of the evidence must be set aside. *McKenzie v. Ladd Trucking Co.*, 214 Neb. 209, 333 N.W.2d 402 (1983). Further, in reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Oddo v. Speedway Scaffold Co., supra*; *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). However, an appellate court has an obligation to reach an independent conclusion on questions of law. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

We next note that in the face of the defense of contributory negligence and to recover on its claim against Stanco Farm

Supply, Howells Elevator must prove Stanco Farm Supply's negligence and must be free from negligence more than slight in comparison with Stanco Farm Supply's negligence. See, Neb. Rev. Stat. § 25-21,185 (Reissue 1989); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989).

In light of the foregoing precepts, it becomes clear that Howells Elevator in this case committed such negligence as to bar it from recovery. It is undisputed that Howells Elevator's employee Bartosh was responsible for guiding trucks into their proper position and that its employee Uher was responsible for operating the Bobcat which moved its conveyor in and out from under the trucks being unloaded. In addition, Bartosh testified that as far as he knew, Miller had not previously unloaded grain at Howells Elevator's facility near Dodge. Miller later confirmed that such was the case.

In guiding Stanco Farm Supply's truck into position, Bartosh instructed Miller to pull ahead, this despite the fact that Howells Elevator's under-truck conveyor remained in the path of Stanco Farm Supply's truck. Miller then complied with Bartosh's command, and when he did so, the rear wheels of Stanco Farm Supply's truck moved forward 5 feet and struck Howells Elevator's conveyor. The finding compelled by these circumstances is that Bartosh was negligent in commanding Miller to move forward while Howells Elevator's conveyor remained in the path of Stanco Farm Supply's truck or in failing to tell Miller when he was to stop, or that Uher was negligent in waiting too long to move the conveyor. Whichever was the case, such negligence must be attributed to Howells Elevator, is as a matter of law of a degree more than slight relative to any negligence which may have existed on the part of Stanco Farm Supply, and constitutes a proximate contributing cause of the occurrence which damaged the conveyor. Thus, the district court's conclusion that Stanco Farm Supply is liable to Howells

Elevator is clearly wrong.

Howells Elevator's action would fail even if the foregoing were not true, for Howells Elevator, as claimed by Stanco Farm Supply in its second relevant assignment of error, failed to prove damages.

In attempting to prove the amount of the damages which it incurred as a result of the occurrence, Howells Elevator offered into evidence a written estimate of the cost to repair the damaged conveyor; the district court properly sustained Stanco Farm Supply's objection to this document on hearsay grounds. Howells Elevator's vice president, John Mark Wisnieski, then testified that the conveyor was worth $10,000 immediately before the occurrence and that it had a salvage value of only $400 immediately after the occurrence. Howells Elevator presented no evidence that the damaged grain conveyor was not repairable, presented no admissible evidence of the reasonable cost of repairing the grain conveyor, and did not seek compensation for loss of use of the grain conveyor.

At the conclusion of Howells Elevator's case in chief, Stanco Farm Supply moved for dismissal on the ground that Howells Elevator had failed to prove the damages it allegedly incurred as a result of the subject occurrence; the district court improvidently overruled this motion.

> Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.

Chlopek v. Schmall, 224 Neb. 78, 89, 396 N.W.2d 103, 110 (1986).

Furthermore, in *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 328-29, 322 N.W.2d 651, 656-57 (1982), this court stated:

> If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the

> property just before the damages were incurred, less any salvage.
>
> The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage.

While *"L" Investments* involved damage to real property, the language set forth therein is equally applicable to cases involving damage to personal property.

Thus, in order to recover the difference in market value of personal property immediately before and immediately after the injury, a plaintiff must prove (1) that the damage to the property is such that it cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred or that the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, (2) the reasonable market value of the property immediately before the accident, and (3) the reasonable market value of the property immediately after the accident. See, *Wylie v. Czapla*, 168 Neb. 646, 97 N.W.2d 255 (1959), *overruled on other grounds, Chlopek v. Schmall, supra*. See, also, NJI2d 4.20.

Subject to the provisions of Neb. Rev. Stat. § 25-804 (Reissue 1989), damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. *Nebraska Truck Serv. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 331 N.W.2d 266 (1983).

Because Howells Elevator failed to present evidence that its under-truck conveyor could not be restored to its original

condition and also failed to present admissible evidence that the cost of repairing the conveyor would exceed the market value difference, it failed to present a prima facie case on the issue of damages.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

GRANT, J., concurs.

ADAMS BANK & TRUST, APPELLANT, V. EMPIRE FIRE AND MARINE INSURANCE COMPANY, APPELLEE.

455 N.W.2d 569

Filed May 25, 1990. No. 88-455.

1. **Bonds: Motor Vehicles: Fraud.** A motor vehicle dealer's bond protects persons in addition to purchasers against loss resulting from misappropriation of funds belonging to the purchasers.
2. **Banks and Banking: Bonds: Motor Vehicles.** A bank can recover on a motor vehicle dealer's bond if it can prove that it sustained a loss as a result of the dealer's breach of one of the conditions of the bond.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Tanya L. Dillow, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellant.

Terrance O. Waite, of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

BOSLAUGH, J.

The plaintiff, Adams Bank & Trust, brought this action against the defendant, Empire Fire and Marine Insurance

Company, to recover on a motor vehicle dealer's bond issued to Fuller Motor Co., Inc. (Fuller), by the defendant.

Fuller operated an automobile dealership in Ogallala, Nebraska. The plaintiff financed Fuller's used-car operation through a floor plan arrangement. The security agreement between Fuller and the plaintiff provided that Fuller would "deliver to Bank, promptly upon receipt, all proceeds of its inventory received by Borrower (except goods) . . . in the exact form in which they are received . . . ." The plaintiff held the certificates of title for the vehicles financed under this arrangement, and the plaintiff's lien on each vehicle was noted on the certificate of title for the vehicle.

David L. Christensen, an officer of the plaintiff, testified that when the proceeds from the sale of an automobile were turned over to the plaintiff, the dealer's note would be reduced by the amount that had been floor planned, the lien on the certificate of title would be released, and the certificate of title would be delivered to the dealer.

The plaintiff monitored the vehicles which it floor planned through periodic inventory inspections.

In March 1985, the bank suspected that Fuller had sold some vehicles "out of trust"—a failure to pay the indebtedness on a vehicle sold—and called Fuller's line of credit, demanding payment of the debt in full. When payment was not made, the bank applied the balance in Fuller's checking account in the amount of $39,695.96 to the debt on April 10, 1985.

There were six vehicles which had been floor planned for a total of $46,100 that were sold out of trust. The plaintiff did not release the titles to the vehicles until June 6, 1985.

Norman K. Fuller, the owner of Fuller, testified that he had done business exclusively with the plaintiff for 17 years and that it was routine practice for the proceeds from the sales of motor vehicles to be deposited in the dealership account rather than be paid directly to the bank. The plaintiff admitted that it had permitted this course of conduct and that it would occasionally be 5 to 6 weeks between the time that a vehicle was sold and the time that the certificate of title to that vehicle was released.

The trial court found that all funds obtained from the sale of the vehicles in question had been deposited in Fuller's account

with the bank and that there was no evidence that any proceeds from the sales went anywhere other than to the plaintiff.

The bond at issue in this case was obtained pursuant to Neb. Rev. Stat. § 60-1419 (Reissue 1988), which provides:

> Applicants for a motor vehicle dealer's license, trailer dealer's license, or motorcycle dealer's license shall, at the time of making application, furnish a corporate surety bond in the penal sum of . . . twenty-five thousand dollars . . . on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of such license, (2) that the licensed dealer will fully indemnify any person or other dealer by reason of any loss suffered because of (a) the substitution of any motor vehicle or trailer other than the one selected by the purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year model of any motor vehicle or trailer, and (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicles or trailer, and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his or her license and the acts of the Legislature relating thereto. The aggregate liability of the surety shall in no event exceed the penalty of such bond.

The plaintiff claims that Fuller misappropriated funds belonging to purchasers and that it is entitled to recover under § 60-1419(2)(c). The trial court found that the bank had offset all funds in Fuller's account and should not be allowed to claim that the continuing practice of selling vehicles and depositing funds in the account constituted misappropriation. The plaintiff's assignment of error is that the trial court erred in failing to find that the plaintiff was entitled to recover on the bond.

In *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984), we held that a bank can recover on a motor

vehicle dealer's bond if it can prove that it sustained a loss as a result of the dealer's breach of one of the conditions of the bond. In *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959), and *Sterner v. Lehmanowsky*, 173 Neb. 401, 113 N.W.2d 588 (1962), we stated that persons in addition to purchasers of automobiles are protected under the bond against loss resulting from misappropriation of funds belonging to the purchasers.

In the *Havelock Bank* case, the evidence showed that the dealer had sold a car to which the Havelock Bank held title under a floor plan arrangement and deposited the proceeds from the sale in an account in a California bank. When the Havelock Bank requested the proceeds from the sale, the dealer said that another car was to be sold and that the Havelock Bank would be paid after the second car had been sold. The Havelock Bank, however, was never paid for the car.

In this case, the security agreement required Fuller to "deliver to Bank, promptly upon receipt, all proceeds of its inventory received by Borrower . . . in the exact form in which they are received . . . ." Although the proceeds from the sales of the six used vehicles may have been deposited in Fuller's account in the plaintiff bank, there is no evidence that Fuller had requested the certificates of title to the vehicles or in any other way notified the plaintiff that the vehicles had been sold and funds in its account should be applied to satisfy the liens which the plaintiff held on the vehicles so that the certificates of title could be released to Fuller. The balance remaining in Fuller's account on April 10, 1985, was less than the amount of the liens on the six vehicles that had been sold "out of trust" by Fuller. This established that some of the proceeds from the sale of the six vehicles had been misappropriated by Fuller because the proceeds had been applied to something other than payment of the liens on the vehicles.

So far as the evidence in this case shows, Fuller's account in the plaintiff bank was a general account in which funds from the operation of the business were deposited and out of which expenses from the operation of the business were paid. In other words, the evidence does not show, and the defendant does not claim, that only proceeds from the sale of Fuller's used cars on

which the plaintiff had a lien were deposited in the account and that the account was used only to pay to plaintiff the amount of the liens which the plaintiff had on used cars floor planned by Fuller. Thus, the deposit in Fuller's account of the proceeds from the sale of used cars on which the plaintiff had a lien was not a payment of the lien without some notice to the plaintiff by Fuller that the funds should be used for that purpose. Under the facts in this case, the result is the same as if Fuller had deposited the proceeds from the sale of its used vehicles in a bank other than the plaintiff, as was done in the *Havelock Bank* case.

As we said in *Havelock Bank, supra* at 566, 352 N.W.2d at 859:

> Proper use of those funds would have entailed payment to the Bank in order to obtain title for the purchaser. UAS, in violation of the security agreement, failed to do so; thus, the Bank suffered a $14,500 loss by reason of this misappropriation of the purchaser's funds.

In this respect, the evidence in this case is somewhat similar to that in *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 406-07, 390 N.W.2d 487, 490 (1986), in which the dealer had received $24,025 from the sale of four vehicles out of trust,

> but never applied those sale proceeds as a payment of either principal or interest on any of his promissory notes pertaining to the vehicles sold. From October 19 to October 28, the highest balance in the checking account for Arntt's Auto Sales was $23,865.57. Between November 12, 1981, and the end of that year, the highest balance in the checking account of Arntt's Auto Sales was $7,951.44. Arntt used sale proceeds from the four vehicles mentioned above for "business ventures other than the used car business."

The evidence in this case established, as a matter of law, that there was a misapplication by Fuller of funds belonging to purchasers of vehicles.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CHARLES L. ELSON, APPELLEE, V. CHARLES A. POOL AND WILCHAR, INC., A NEBRASKA CORPORATION, APPELLANTS.

455 N.W.2d 783

Filed May 25, 1990. No. 88-547.

1. **Trial: Juries.** When reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury.
2. **Contracts.** The words used in a contract must be given their plain and ordinary meaning, as the ordinary, average, or reasonable person would understand them.
3. **Principal and Agent.** A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.
4. **Contracts.** A contract written in clear and unambiguous language is not subject to construction and must be enforced according to its terms.
5. **Prejudgment Interest.** Prejudgment interest may be recovered only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 1988).

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Walsh, Jr., of Walsh, Fullenkamp & Doyle, for appellants.

No appearance for appellee.

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

BOSLAUGH, J.

The plaintiff, Charles L. Elson, commenced this action against the defendants, Charles A. Pool and Wilchar, Inc., to collect commissions for nine separate sales of residential real estate in Sarpy County, Nebraska. The plaintiff alleged that he had sold the real estate pursuant to a "Broker/Independent Contractor Agreement" between the defendants and himself and that the corporation and Charles A. Pool, personally, owed him the commissions.

In their amended answer, the defendants admitted that the plaintiff had been hired as an independent contractor by the defendant Pool pursuant to the alleged agreement, but denied that the plaintiff had been hired by anyone other than Wilchar,

Inc. They admitted that sales commissions were owed for two homes, 703 Joseph Drive and 400 Summerset Drive, sold by the plaintiff, but denied that any further commissions were owed to the plaintiff.

The defendants further alleged that on or about June 8, 1987, Pool had terminated the agreement between the parties, although he had informed the plaintiff that he would be allowed to close some of the sales that were in process as of June 8, 1987. On June 12, 1987, Pool discovered that the plaintiff had signed the sellers' names on some real estate closing documents for a sale the plaintiff was closing; that the plaintiff's actions constituted a breach of paragraph 6 of the agreement, in which the plaintiff agreed to conduct himself so as to further the best interest of the broker; that Pool then decided not to allow the plaintiff to close any more sales; and that Pool then assigned the responsibility for closing all pending sales to persons other than the plaintiff and paid the listing commissions for those sales to the persons who performed the closings, as provided in the agreement. The defendants further alleged that the agreement was prepared by the plaintiff and another agent.

At the close of all of the evidence, the trial court denied both the plaintiff's and the defendants' motions for directed verdicts; however, the next day, the trial court made "Findings In Law" which granted a directed verdict to the plaintiff as to six of the nine sales of real estate. The trial court found as a matter of law (1) that the contract between the parties was valid; (2) that the plaintiff had breached paragraph 6 of the contract on June 12, 1987, and as a result of the breach the plaintiff was not entitled to recover listing commissions on the sales of 905 Creighton Road, 504 Oakwood Drive, and 805 Wilshire Lane; (3) that the plaintiff was entitled to recover a listing commission for 815 Wilshire; (4) that the plaintiff was entitled to recover commissions for 703 Joseph Drive and 400 Summerset Drive (the two sales on which the defendants admitted commissions were owed); (5) that the defendants were entitled to an offset of $164.07 for expenses under paragraph 3D of the contract; (6) that the plaintiff was entitled to commissions for 9603 South 20th Street, 1309 Offutt Boulevard, and 9505 Briarwood Lane;

and (7) that there was an issue of fact regarding the amount of brokerage commission due the defendants, which should be submitted to the jury for a special verdict.

After receiving the jury's special verdict, the trial court entered judgment against the defendants, jointly and severally, in the amount of $9,272.04, plus prejudgment interest of $362.97. The trial court later reduced the prejudgment interest to $269.44.

The defendants have appealed to this court and have assigned as error the trial court's finding that as a matter of law (1) the plaintiff was entitled to recover listing commissions on the sales of 1309 Offutt Boulevard and 9505 Briarwood Lane, (2) Pool was personally liable to the plaintiff, and (3) the defendants owed prejudgment interest.

"When reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury." *Krance v. Faeh*, 215 Neb. 242, 245, 338 N.W.2d 55, 58 (1983).

Since we consider the trial court's findings of law to be a directed verdict for the plaintiff as to six of the nine real estate sales, we review the evidence in the light most favorable to the defendants. See *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 382 N.W.2d 310 (1986). However, we are obligated to reach an independent conclusion on issues of law. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The record shows that on January 27, 1987, the plaintiff entered into an agreement with "Charles A. Pool, Broker of record, Wilchar Real Estate, Inc., and President, William Charles Homes, hereafter referred to as broker," to work as a real estate sales agent. The plaintiff agreed to sell homes for the broker as an independent contractor on a commission basis.

The sales involved in this appeal were preowned homes. Commission was to be paid on the following basis:

> All commissions will be a percentage of final selling price and will be payable to agents as soon as practicable after closing of the sale.
>
> . . . .
>
> PREOWNED HOMES
>
> | | |
> |---|---|
> | Listing Commission | As agreed |
> | Sales Commission | As agreed |

> All outside broker commissions earned by mentioned agents will be divided equally between the broker and the agent involved.
>
> Listing commissions as stated are based on the assumption that all new construction listings will be jointly and equally shared by the two herein mentioned agents.
>
> Sales commissions will be paid to the principal procuring agent.

The contract could be terminated with 30 days' written notice by either broker or agent. It provided in the event of termination by either party all listings would remain the property of the broker, and "[f]ull sales commissions will be paid at closing on pending sales; however, listing commissions on pending sales will be paid to the agent assigned responsibility for closing."

The plaintiff testified that he and Pool had discussed commissions on preowned homes, that Pool told the plaintiff that Pool wanted only $300 to $400 to cover his company's expenses, and that the plaintiff could keep anything over the company's expenses. Pool testified that he did not agree to that, and that the agreement was that 3.5 percent needed to be charged on preowned homes to satisfy the possibility of the property's being sold by a cooperating broker, plus $300 to satisfy the company's expenses and agent's time, and if the agent was able to get more than that, they would split it in half.

On June 8, 1987, Pool terminated the plaintiff's association with Wilchar. Later, Pool and the plaintiff agreed that the plaintiff would be allowed to close some of the sales on which he had been working.

One of the sales that plaintiff was to close was a home located on 1309 Offutt Boulevard which he had listed. The property was sold by an agent of another real estate company. It sold for $58,900. The listing agreement shows a sales commission of 7 percent, of which the selling broker received half.

The closing was scheduled to be held on June 12, 1987; however, the sellers of the property lived in Florida and would not be in Bellevue until June 13.

Pool went to the closing on June 12 and discovered that the plaintiff, intending to close as scheduled, had signed the sellers'

names and notarized the signatures on some of the closing documents, including the deed, an affidavit, an authorization to pay the agent, and an IRS filing. (The plaintiff admitted this in his testimony at trial.) Pool delayed the closing until he could get the documents in question reissued and signed by the sellers.

According to Pool's testimony, the sale was partially closed on June 12, and the closing was completed by him several days later after the documents were signed and notarized by the sellers, the purchasers received the deed, and the sellers received their proceeds. The plaintiff testified he thought the closing was completed on June 12, although the sellers did not receive the purchase price then and no deed passed on June 12.

After the experience with 1309 Offutt, Pool took over the closing of the property at 9505 Briarwood, which was property the plaintiff had listed but had not sold. The plaintiff admitted that he did not close the sale of 9505 Briarwood, which closed on June 30, 1987.

The words used in a contract must be given their plain and ordinary meaning, as the ordinary, average, or reasonable person would understand them. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988). Read in this manner, the contract provides in the event of termination by either party, listing commissions would be paid to the agent responsible for closing the sale. The evidence shows the plaintiff understood this provision, because he testified that he was only claiming sales commissions, not listing commissions, for the property on which the defendants admitted commissions were owed, because the sales were closed more than 30 days after the plaintiff was terminated.

The evidence is clear that the plaintiff did not close the sale of the property at 9505 Briarwood, and regardless of whether he closed the property at 1309 Offutt, " ' "[a] commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency." ' " *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 350, 389 N.W.2d 560, 565 (1986) (quoting *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975)). The plaintiff's attempt to close the sale of 1309 Offutt with documents on

which he signed the sellers' names and then notarized the sellers' signatures violated the obligations imposed on him by law.

It is well established that a contract written in clear and unambiguous language "is not subject to construction and must be enforced according to its terms." *Barner v. City of Lansing*, 27 Mich. App. 669, 671, 183 N.W.2d 877, 878 (1970). See, also, *Bedrosky, supra*, and cases cited therein.

These rules compel the conclusion, as a matter of law, that the plaintiff was not entitled to listing commissions on the sales of 1309 Offutt and 9505 Briarwood. Furthermore, as a matter of law, Pool was personally liable for any commissions due the plaintiff under the contract, because the contract was between the plaintiff as agent and "Charles A. Pool . . . hereafter referred to as broker" for "the mutual advantage of said broker and said [agent]." The contract was signed by Pool, not on behalf of the corporation, but by Charles A. Pool, broker.

Neb. Rev. Stat. § 45-103.02 (Reissue 1988) provides for prejudgment interest

> from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

Section 45-103.02 applies to all causes of action accruing on or after January 1, 1987. There is nothing in the record to show plaintiff complied with § 45-103.02. Therefore, the award of prejudgment interest was erroneous.

That part of the judgment awarding the plaintiff

prejudgment interest and commissions for the sales of 1309 Offutt and 9505 Briarwood is reversed, that part of the judgment holding Pool to be jointly and severally liable for the commissions owed the plaintiff is affirmed, and the cause is remanded with directions to enter a judgment conforming to this opinion.

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

TERRY LYNN STROH, APPELLANT, V. ARLENE JEANNE STROH, APPELLEE.

455 N.W.2d 787

Filed May 25, 1990. No. 88-702.

Appeal from the District Court for Lincoln County, JOHN P. MURPHY, Judge, upon the recommendation of the Appellate Division of the District Court, FUHRMAN, HOWARD, and MULLEN, District Judges. Affirmed as modified.

Ronald A. Ruff, of Ruff & Florom Attorneys, for appellant.

George E. Clough, of Clough Law Office, for appellee.

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

PER CURIAM.

Based on the briefs and recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, the judgment of the district court is modified as set forth in the recommendation of the Appellate Division of the District Court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BRIAN D. PORTER, APPELLANT.

455 N.W.2d 787

Filed May 25, 1990. No. 89-492.

1. **Criminal Law: Convictions: Confessions: Due Process.** A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession.
2. **Confessions: Evidence.** To be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight.
3. **Motions to Suppress: Pretrial Procedure: Appeal and Error.** In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled.
4. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
5. **Indictments and Informations: Joinder: Trial.** Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. If it appears that a defendant or the State would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints or provide whatever other relief justice requires. Neb. Rev. Stat. § 29-2002 (Reissue 1989).
6. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion.
7. **Trial: Joinder: Indictments and Informations.** If the offenses involved were of the same or similar character, they can be joined in one information, and the trial court can order that they be tried together.
8. **Trial: Joinder: Evidence: Appeal and Error.** Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately.
9. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
10. **Criminal Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.

11. _____: _____: _____. The initial inquiry is whether an identification procedure was suggestive. A determination of suggestiveness is based on the totality of the circumstances. Once it has been determined that a lineup was not suggestive, the due process inquiry into the lineup is at an end.
12. **Trial: Evidence: Appeal and Error.** A trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion.
13. **Robbery: Words and Phrases.** A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.
14. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
15. **Robbery: Evidence: Proof.** Evidence of a robbery victim's injuries and treatment is relevant to prove an element of the crime of robbery, i.e., force and violence.
16. **Rules of Evidence: Words and Phrases.** Unfair prejudice in the context of Neb. Rev. Stat. § 27-403 (Reissue 1989) means a tendency to suggest a decision on an improper basis.
17. **Criminal Law: Right to Counsel: Misdemeanors: Convictions: Impeachment.** The 6th and 14th amendment right to counsel extends only to those misdemeanor prosecutions where the defendant is actually imprisoned. Where no imprisonment is involved, an uncounseled misdemeanor conviction may be used for the purpose of impeachment.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for a new trial.

Michael F. Gutowski for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

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

FAHRNBRUCH, J.

Because a police officer improperly obtained a confession from Brian D. Porter which was used against him at his jury trial, we vacate Porter's sentences and reverse his convictions on two counts of robbery.

On each count, an elderly woman was knocked to the ground and robbed of her purse. Porter was convicted and sentenced to

two 5-year consecutive terms of imprisonment. He was given credit on his sentence for 65 days for the time he had spent in jail.

The cause is remanded to the district court for Douglas County for a new trial on both counts.

Between 8 and 8:30 a.m. on October 16, 1988, an Omaha police sergeant observed a black male, with an object clutched under his shirt, running around the west side of the officer's vehicle. Because of the man's suspicious behavior, the police sergeant began following him. The officer was soon informed by radio that there had been a robbery nearby. Porter was apprehended, arrested, and taken to the Omaha police station. There, Porter was advised of his *Miranda* rights, which he waived. He was interviewed. He denied any connection with the robbery. Porter was lodged in jail.

The next morning, Porter was again advised of his *Miranda* rights, which he again waived. The defendant was then interrogated in the presence of three Omaha police officers. An interrogating police officer informed Porter that if he confessed, it could help him and that it would look better for him. Porter confessed, among others, the two robberies of which he was convicted. After again being apprised of his *Miranda* rights and waiving them, Porter gave a tape-recorded statement to the police, in which he again confessed that he was the perpetrator of the robberies of which he was ultimately convicted.

After a hearing, Porter's pretrial motion to suppress his confessions was overruled. His objection at trial to the admission of his taped confession was also overruled. The jury returned guilty verdicts on the two robbery counts.

At the hearing on Porter's pretrial motion to suppress his confessions, the three Omaha police officers testified that no threats or promises had been made to Porter to induce him to confess. Porter testified that when he was interrogated, he was told by a police officer that "if I cooperated with them [the officers], the judge would be easier on me then." Porter said he was also told by a police officer before his taped confession: "Remember now that I am going to tell the judge that you were cooperating all the way 100% and, like I said, it is going to go

easier on you if you go into court being cooperative rather than being an asshole or a hard ass like this." The trial court obviously believed the officers rather than Porter and overruled the defendant's motion to suppress his oral and taped confessions.

At Porter's jury trial, only two of the officers present at his interrogation testified. The first officer testified without objection that Porter told him that he had grabbed a purse from one victim and that the victim had fallen down. Thereupon, Porter renewed his pretrial objection that his statements were not freely and voluntarily given and were the result of inducements of leniency made by members of the Omaha Police Division to Porter in exchange for his statements. The officer testified that no one in his presence offered Porter anything in exchange for his statement. Again, the trial court overruled Porter's objection.

The next police officer to be called as a witness at Porter's jury trial had earlier testified at the suppression hearing that he was the primary interrogator of Porter. During the pretrial suppression hearing and on direct examination at trial, the officer testified he had not made any promises to Porter to obtain his confessions. At his trial, Porter again renewed his objection to the reception in evidence of his confessions. On cross-examination at trial, the primary interrogator testified that he advised Porter that it could help him if he confessed and that it would look better for him if he did confess. The questions and answers on cross-examination of the officer were as follows:

> Q. You did tell him that it would help him if he would confess, didn't you?
>
> A. It could help him.
>
> Q. You did tell him that?
>
> A. I said that it could help him, yes.
>
> Q. In fact, you mentioned at one point in the tape, "I am sure the judge will take that into consideration"?
>
> A. Yes, sir.
>
> Q. So basically you told him that it could help him if he confessed and if he told you what he did that you would be a lot easier on him?

A. That it would look better for him.

Q. That it would look better for him?

A. Right.

Q. And you were telling him that even before he admitted doing anything on either of these robberies?

A. I was probably telling that all the way through in talking about all of the robberies.

Before a confession given while a defendant is in custody may be admitted into evidence, the State must prove by a preponderance of the evidence that, among other things, (1) the defendant was informed of and waived his or her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and (2) his or her confession was given freely and voluntarily. It is only after the State has met each of these requirements that a confession may be admitted into evidence. See *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

In Porter's case, he was given his *Miranda* rights three times and each time waived them. He has not made an issue on that point on appeal. He does claim, however, that his confessions were involuntary. "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . . ." *Jackson v. Denno*, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). *State v. Hayes*, 229 Neb. 53, 56, 424 N.W.2d 624, 626 (1988), holds that "to be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, *no matter how slight*." (Emphasis supplied.) See, also, *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled. *State v. Davis*, 231 Neb. 878, 438 N.W.2d 772 (1989). As previously stated, Porter did not timely object to testimony of his first verbal confession of a robbery that involved one of the victims herein. He did, however, object to a subsequent tape recording that included a confession of that

same robbery as well as of a robbery that involved another victim. Although the defendant had testified at the suppression hearing that he was promised leniency if he confessed, it was not evident that the trial court was clearly wrong in failing to suppress Porter's confessions until the primary police interrogator admitted on cross-examination at Porter's jury trial that the confessions were obtained by implied promises of leniency. Had these implied promises of leniency been disclosed at the pretrial suppression hearing, assuredly the trial court would have suppressed Porter's confessions for lack of voluntariness.

An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990). Admission of the tape-recorded confessions over Porter's objection was prejudicial and was not harmless error. The tape-recorded confessions bolstered and reinforced the testimony of the defendant's earlier verbal confession of one robbery and played a devastating prejudicial role in convicting him of the second robbery. Under *Jackson v. Denno, supra*, because Porter's convictions were based, at least in part, upon his taped involuntary confessions, Porter was denied due process of law.

Although the cause is being remanded for a new trial, certain other assignments of error raised by the defendant should be considered, since the issues may recur at retrial.

Porter filed a motion to sever the individual counts and to have a separate trial on each. The defendant contends that the trial court abused its discretion in overruling that motion. Porter argues that he was prejudiced by being required to defend two counts of robbery at the same trial.

Neb. Rev. Stat. § 29-2002 (Reissue 1989) provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or

constituting parts of a common scheme or plan.

. . . .

(4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint . . . for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints . . . or provide whatever other relief justice requires.

A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989). If the offenses involved were of the same or similar character, they can be joined in one information, and the trial court can order that they be tried together. *Id.*; *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133. In this case, the assailant, albeit at different times, approached two elderly women within two blocks of one another, knocked them to the ground, snatched their purses, and fled from the scene. Both victims similarly described the robber as a black male of slender or medium build who appeared to be 20 to 30 years of age.

Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately. *Thompson, supra*; *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). Applying the reasoning of *Thompson, supra* and *McGuire, supra*, to this case, evidence of either robbery would have been admissible at a trial of the other robbery to establish method of operation and identity. No prejudicial error on account of the joinder of the two offenses has been shown. Therefore, it cannot be said that the trial court abused its discretion in trying them together.

The victim of one of the robberies of which Porter was convicted viewed a four-man physical lineup on the morning of October 17, 1988. This victim informed a police officer that Porter most closely resembled her assailant but she could not make a positive identification. It was uncontradicted that the police did not suggest or influence the victim's identification. Alleging that the lineup was unduly suggestive, the defendant

filed a pretrial motion to suppress all in-court identification of him as the perpetrator of this particular crime. After a suppression hearing, the motion was overruled. Both at the suppression hearing and at trial, this victim identified Porter as the man who took her purse. Porter asserts that the trial court erred in overruling his motion to suppress this victim's identification testimony.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). In making this determination, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions. *Id.*

An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989). The initial inquiry is whether an identification procedure was suggestive. A determination of suggestiveness is based on the totality of the circumstances. *State v. Garcia, ante* p. 53, 453 N.W.2d 469 (1990). Once it has been determined that a lineup was not suggestive, the due process inquiry into the lineup is at an end. See *Garcia, supra.*

After reviewing the record, based upon the totality of the circumstances, we cannot say that the trial court was clearly wrong in finding that the lineup was not so unnecessarily suggestive and conducive to an irreparably mistaken identification that Porter was denied due process of law. The men participating in the lineup were of the same race. The defendant's dress, height, weight, age, facial features, and hairstyle in no way singled him out from the other three individuals in the lineup.

Over Porter's objection, the victim who viewed the lineup testified regarding her broken arm that resulted from her being robbed. She also related her later treatment at a hospital. Two photographs in which this victim is depicted with her visibly

bruised arm in a sling were received into evidence. The defendant also objected to the other victim's testimony that her side, knee, hip, and shoulder were skinned when she was robbed. The defendant assigns as error the admission of that evidence.

A trial court's ruling on the relevancy of evidence will not be disturbed on appeal unless there has been an abuse of discretion. See *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever. Neb. Rev. Stat. § 28-324 (Reissue 1989). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1989). Evidence of a robbery victim's injuries and treatment is relevant to prove an element of the crime of robbery, i.e., force and violence.

Porter contends that if the evidence was relevant, its relevance was outweighed by its unfair prejudicial effect. Apparently, Porter argues that Neb. Rev. Stat. § 27-403 (Reissue 1989), which bars the use of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," is applicable to this case. This court has held that unfair prejudice in the context of § 27-403 means a tendency to suggest a decision on an improper basis. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). There is nothing to suggest a decision on an improper basis in this case due to the receipt of the evidence regarding the victims' injuries and treatment. The trial court did not abuse its discretion in admitting this evidence.

Porter contends in another assignment of error that the trial court erred in admitting evidence of his prior uncounseled conviction for giving false information. It is apparent from the record that both Porter and the State referred to the defendant's conviction of March 20, 1987. Porter's motion in limine to prevent use of this conviction for impeachment purposes was overruled. At Porter's trial, the State asked him if he had ever

been convicted of a crime of dishonesty or false statement. After the court overruled his objection to the question, Porter answered in the affirmative. The State ended its inquiry.

Neb. Rev. Stat. § 27-609 (Reissue 1989) provides that "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime . . . (b) involved dishonesty or false statement regardless of the punishment."

Porter, relying on *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), argues that use of an uncounseled conviction for impeachment purposes violated his due process rights.

In *Loper*, the U.S. Supreme Court held that the use of convictions constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), to impeach a criminal defendant's credibility deprives him of due process of law. However, later decisions of the U.S. Supreme Court, in *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), have established that the 6th and 14th amendments right to counsel extends only to those misdemeanor prosecutions where the defendant is *actually* imprisoned. Where no imprisonment is involved, an uncounseled misdemeanor conviction may be used for the purpose of impeachment. *Charles v. Foltz*, 741 F.2d 834 (6th Cir. 1984), *cert. denied* 469 U.S. 1193, 105 S. Ct. 970, 83 L. Ed. 2d 973 (1985); *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979). In this instance, Porter was fined $25 for giving false information. Since he was not actually imprisoned, he had no right to counsel. The conviction was therefore constitutionally valid under *Gideon* and could therefore be used to impeach Porter's credibility.

The trial court did not err in admitting, for the purpose of impeachment, Porter's uncounseled conviction for giving false information.

We need not discuss Porter's other assignment of error, which presents issues unlikely to occur upon retrial.

Porter's sentences are vacated, his convictions are reversed,

and the cause is remanded for a new trial on both robbery counts.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. SEAN PHINNEY, APPELLANT.
455 N.W.2d 795

Filed May 25, 1990. No. 89-759.

1. **Criminal Law: Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver of jurisdiction and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).
2. _____: _____: _____: _____. The district court may properly refuse to waive jurisdiction over a criminal proceeding to the juvenile court where the district court complies with provisions of statute and makes a statement of its findings which provides sufficient specificity to permit meaningful review by the Supreme Court.
3. **Pleas: Waiver: Jurisdiction.** Although as a general rule the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, it does not waive defenses that are jurisdictional.
4. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** A request to a court to waive jurisdiction to the juvenile court raises a jurisdictional challenge, and a defendant may appeal an unfavorable ruling even after entering a plea of guilty or tendering a plea of no contest.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Remanded with directions.

Thomas L. Spinar for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr for appellee.

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

HASTINGS, C.J.

Following a conviction for second degree murder upon a plea of no contest and a sentence to a term of imprisonment for 30

years, the defendant, Sean Phinney, a 15-year-old juvenile, appeals from his conviction, his sentence, and an earlier order denying his motion to remove these proceedings to the juvenile court. The denial of removal under Neb. Rev. Stat. § 43-276 (Reissue 1988) constitutes his sole assignment of error.

The defendant was born on August 30, 1973. On January 20, 1989, after a fight with his mother, Linda Phinney, he shot and killed her. He was originally charged with first degree murder and use of a firearm to commit a felony. On March 7, 1989, defendant filed a motion to remove the proceedings to juvenile court.

The motion to remove was denied. Thereafter a plea agreement was entered into between the State and the defendant whereby an amended information charging only second degree murder was filed.

At the hearing on the motion to remove, a written stipulation was entered into between the State and counsel for the defendant. The parties stipulated that the State would be able to call "certain witnesses with whom the defense is familiar," who would testify in essence that (1) on January 20, 1989, Linda Phinney was shot to death in her home in Wilber, Nebraska, (2) the defendant committed the act which caused Linda Phinney's death, and (3) "a letter found at the scene which the State believes to be written by Defendant, would indicate that the Defendant had thought about committing the act of violence for a period of time before the act was committed."

The letter referred to is found as the last page of the presentence investigation report. It states, "Here is how it happen[.] Mom and I had a fight and I went out for a hour came in the house and she was sleeping so I loaded the 22 rifle and went in her room and put the gun to her head and pull the chirger[.]" A police report written by Sgt. G.L. Moss relates that the victim's body was found on the floor of the kitchen.

The defendant called six witnesses. Steven Wallick, a guidance counselor at the school defendant attended, testified that defendant, held back in the eighth grade, was approximately a year behind his age group in maturity. The witness observed that the last couple of days before January 20, 1989, defendant seemed a little more withdrawn.

Two women neighbors, who described themselves as friends of the defendant and his mother, Linda, testified that Sean was upset over the separation of his mother and adoptive father and that he and his mother were constantly fighting with each other, particularly over her habit of spending weekends in Lincoln with her boyfriend. There was also testimony that the defendant seldom got angry and that, if he did, he was never violent.

Defendant's grandmother, who was Linda's mother, testified that she had always had a good relationship with both her daughter and grandson. She expressed the belief that Linda was partly responsible for what had happened because of Linda's going to Lincoln on weekends and neglecting to discuss the matter with Sean.

Sean's adoptive father told about what he described as the "consistent" arguments between the defendant and his mother. He related how Sean had told him that he felt he could not trust his mother. He knew that Linda had slapped or struck Sean on occasions. Mr. Phinney felt from his discussions with Sean that Sean now missed his mother.

The principal witness for the defendant was Dr. John Riedler, a psychiatrist who first met the defendant on January 22, 1989, at St. Joseph Center for Mental Health. He described the defendant at that time as "a very agitated and dysphoric, upset young person, who had great difficulty concentrating. His attention span was very scarred. . . . He was having acute adjustment reactions at that point." Dr. Riedler treated defendant from January 22 to March 7, 1989, when defendant was discharged from the hospital.

Dr. Riedler received information that defendant "was suffering from increasing dysphoria and concentration problems and increasing paranoia and difficulty with his reality and irritation for several months before [the death of his mother]." Dysphoria is a state of emotional pain—an inability to bring oneself to a state of calmness or relaxation. In the months leading up to January 20, 1989, defendant "was becoming more aggravated and more paranoid, and less able to focus his attention, more uncomfortable, more anxious."

In Dr. Riedler's opinion, on January 20, 1989, defendant

was suffering from increasing anxiety, exhibited self anger and feelings of paranoia that mounted and reached a peak in the morning in question, and that he was in a state that would be characterized as something like heat of passion or a very emotional state, but that he was not insane.

Dr. Riedler testified that he felt defendant entered the state he was in when his mother threatened to hit or slap him during the argument they were having. According to Dr. Riedler, it was not until after defendant shot his mother, left the house with the car keys in his hand, and had to make a decision of where to drive that rational thought returned to him. When asked if defendant, during the period of time that he was in the state he was in, was capable of rational thought, Dr. Riedler responded that defendant was capable of it but that he did not think that defendant did so.

Dr. Riedler diagnosed defendant as suffering from dysthymia (a condition of depression; an underlying paranoid style that is always irritable, always a little bit down in the dumps) and major depression with a paranoid psychotic component. He did not feel that defendant's condition was permanent, felt that it could be treated, and felt that defendant needed "quite a bit more treatment." According to Dr. Riedler, defendant is not well socialized, so "he needs to be retrained in his social skills in a very consistent, structured manner" before he could or should return to society. Additionally, due to the underlying dysthymia, when defendant is 17 or 18 he will require some therapy. Defendant will also have to work through his grief. "If he solidifies his character structure, he will definitely have trouble with serious depression and suicidal self-destructiveness. . . . He also needs to settle his score and pay his price."

When asked what environment would be the most appropriate or the best in which to conduct the retraining, Dr. Riedler opined that defendant should be placed in the Youth Development Center-Kearney until he is 19 years old. According to Dr. Riedler, in defendant's present condition his nervous system is wide open and many different things could be programmed into his future actions, and if he is put in with a lot of hardened criminals, "you're likely to get that sort of result."

Additionally, defendant is likely to be abused if he is put in with adult criminals, and "this will further his self-destructiveness. It will sort of like be going in the wrong direction." Dr. Riedler was also of the opinion that placement under the care of the Nebraska Department of Social Services for some kind of protective placement would also be bad because defendant "has unfinished business that he is aware of. He has the work that needs to be done with the structuring of his personality and socialization." Due to the inability of the Department of Social Services to provide what he needs, defendant would be no better off if placed with social services than he would be in the penitentiary. According to Dr. Riedler,

> if you put him in a structured facility of a residential nature, that has structured rules, and expectations, where he could learn to socialize with peers and adult authorities in a healthy manner, and he was put in the same kind of — not just counseling, but therapy to work through the grief and to develop out of the dysthymia, as a condition of his life, he would — he has every possibility of turning into a healthy, well-functioning adult.

In Dr. Riedler's opinion, placement in Kearney is defendant's best chance to be returned to society as a healthy, functioning adult.

Dr. Riedler further stated that if defendant were placed in the penitentiary, "being young and not that big and already suffering from self-destructiveness, and easily becoming paranoid, being in with hardened criminals would go a long way in preventing him from ever working through the difficulties that have put us in the situation of being here in this Court today." Although defendant could be returned as a healthy, productive member of society if he were placed in the penitentiary, it would be much more difficult than if things were done differently. In Dr. Riedler's opinion, it is much more likely that defendant would be returned as a healthy, productive member of society if placed in the development center in Kearney. This is also the opinion of another psychiatrist consulted by Dr. Riedler.

Dr. Riedler felt that if defendant were successfully treated at Kearney, he could be released back into society without posing a

danger to society. Additionally, at Kearney it would not be unusual for defendant to have a board-certified psychiatrist examine him on a periodic basis to see if he were making any progress or if there were some need to reevaluate the situation.

On cross-examination, Dr. Riedler admitted that it is possible that defendant will still have problems after he is 19 years old.

When questioned about the effect knowledge of a note indicating that defendant thought about committing a crime of murder several hours before committing it would have on his opinion, Dr. Riedler testified in essence that it would not change his opinion that defendant actually entered the state of passion, but that it would raise a question about periods of lucidity.

The State called only one witness, Randy Walters of the Saline County sheriff's office. Walters interviewed nine of defendant's teachers. Defendant's football coach told Walters that defendant "was the type of person that if put into a leadership position, he knew that it would be handled."

As to any juvenile (a person under the age of 18, see Neb. Rev. Stat. § 43-245 (Reissue 1988)) who has committed an act which would constitute a felony, the juvenile court shall have concurrent original jurisdiction with the district court. Neb. Rev. Stat. § 43-247 (Reissue 1988). The juvenile may move the district court where the felony is charged to waive jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code. In deciding the motion the district court shall, after considering the evidence and the reasons presented by the parties and the criteria set forth in § 43-276, transfer the case unless a sound basis exists for retaining jurisdiction. See, Neb. Rev. Stat. §§ 43-261 (Reissue 1988) and 29-1816 (Reissue 1989).

The criteria to be considered in deciding upon the motion for transfer to the juvenile court include: (1) the type of treatment the juvenile would be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including his or her conviction of any previous offenses; (6) the sophistication

and maturity of the juvenile and whether he or she has had previous contact with law enforcement agencies and courts; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as may be deemed relevant. § 43-276.

In ruling on a motion for removal, the district court "shall set forth findings for the reason for its decision, which shall not be a final order for the purpose of enabling an appeal." § 43-261.

This court has stated that in deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-276. *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989). The court may properly refuse to waive jurisdiction over a criminal proceeding to the juvenile court where the district court complies with the provisions of statute and makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

In *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), this court addressed the issue of the findings that must accompany a trial court's decision on a motion to transfer to juvenile court. In *Stewart*, the trial court did set forth its reasons for retaining jurisdiction of the case, specifically mentioning five of the factors set forth in Neb. Rev. Stat. § 43-202.01 (Reissue 1978) (the predecessor of § 43-276). The defendant contended that the trial court abused its discretion in not considering all the criteria set out in the statute. This court found the defendant's argument to be without merit.

The court noted that in *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), the Supreme Court, in reviewing a District of Columbia statute which permitted juvenile courts to waive jurisdiction over minors to adult

criminal courts, stated that the juvenile court must accompany its waiver order with the statement of reasons or considerations therefor and that such a statement "must set forth the basis for the order with sufficient specificity to permit meaningful review." 383 U.S. at 561. According to this court:

> The written findings of the trial court in regard to waiver of jurisdiction to the juvenile court refer to five of the eight considerations listed in section 43-202.01, R.S. Supp., 1974. That section requires the *consideration* of the enumerated items, but nowhere does the statute require that the court refer to all eight considerations in its findings. Section 43-202.02, R.S. Supp., 1974, only requires that the court "set forth findings for the reason for its decision." The defendant contends that the trial court did not consider all the items listed in section 43-202.01, R.S. Supp., 1974, because its written order does not refer to all those items.
>
> While it would have been preferable for the trial court to refer to all the considerations set forth in section 43-202.01, R.S. Supp., 1974, in its order, the statute in question does not require the court to do so. In this case, the court did make a separate statement of its findings which appears to comply with the statute and which provides sufficient specificity to permit meaningful review by this court. We conclude that the trial court substantially complied with the statutory scheme set forth above, and that it did not abuse its discretion in concluding from the evidence that a "sound basis exists for retaining this case."

(Emphasis in original.) *State v. Stewart, supra* at 508-09, 250 N.W.2d at 857-58.

In the instant case, the trial court made no written findings. Immediately after arguments at the end of the hearing on defendant's motion to remove to juvenile court, the trial court made the following statement:

> Well, the County Attorney has made that rather a tough sounding statement, and it may be that he would be very pleased if I simply turned it over to the County Court, because for all of us it would remove the problem and we

> would be done with it here in this County.
>
> The facility at Kearney handles juvenile, and I suspect — I don't know today, but I suspect it is overloaded with aggressive male juveniles. I guess there are girls and boys, but I doubt that it is too realistic that — to believe that they can help a lot. At least my experience in the past hasn't exhibited that to me.
>
> In the event that this young man is convicted, and with the help of the committees and volunteers and people who want to help criminals, he probably would be more affected by a probation program than Kearney would be.
>
> But this young man hasn't been convicted yet and this is the kind of problem that a community should face and a community faces these kinds of problems through a local jury.
>
> The factual matters, and the people of this County have got to decide what the facts are.
>
> So it is the decision of the Court to deny the motion of the defendant.

From an analysis of the trial court's statement it is impossible to conclude that the court even considered the criteria set forth in § 43-276. As such, those "findings" fall short of the specificity required in order to permit a meaningful review by this court. We must therefore conclude that the order denying transfer to the juvenile court is irregular for failure to make the required findings. The "findings" made by the trial court are set aside. See *Prigge v. Johns*, 184 Neb. 103, 165 N.W.2d 559 (1969).

However, we must deal with the State's contention that by tendering a plea of no contest the defendant has failed to preserve the issue as to the waiver of jurisdiction to the juvenile court.

It is true that as a general rule the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). See, also, *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989).

However, this court has also said that when a defendant enters a plea of guilty, he or she thereby waives all defenses,

other than those that are jurisdictional. See, *In re Application of Rice, Rice v. Olson*, 144 Neb. 547, 14 N.W.2d 850 (1944), *rev'd on other grounds* 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); *State, ex rel. Gossett, v. O'Grady*, 137 Neb. 824, 291 N.W. 497 (1940).

Defendant argues that the district court erred when it retained jurisdiction over his case. The essence of defendant's argument is that the district court, although it had jurisdiction over his case, should not have retained its jurisdiction but, rather, should have divested itself of jurisdiction in favor of the juvenile court. Defendant therefore raises a jurisdictional challenge that is not waived by his plea of no contest.

The conclusion that a juvenile defendant can appeal the trial court's denial of a motion to transfer to juvenile court even if the defendant pled guilty or no contest is bolstered by the fact that §§ 29-1816 and 43-261 specify that the trial court's decision on the motion to transfer is not a final order for the purpose of appeal. To preclude an appeal from the decision of the trial court denying the motion to waive jurisdiction to the juvenile court because the juvenile defendant pled guilty or no contest would result in a situation where a juvenile defendant would have to forgo the benefits of plea negotiation and proceed to trial in order to appeal the waiver ruling. Thus, we will not preclude such an appeal.

Because the record before this court does not provide an adequate basis for a meaningful review, the district court is directed to review the record made on the motion to transfer to juvenile court and to set forth its findings in the matter as provided by § 43-261. Such findings shall then be certified to this court for further consideration of the appeal. See, *State v. Jurgens, ante* p. 103, 454 N.W.2d 280 (1990); *Black v. United States*, 355 F.2d 104 (D.C. Cir. 1965).

REMANDED WITH DIRECTIONS.