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REPORTS OF CASES

DECIDED BETWEEN

MARCH 19, 1993 and AUGUST 12, 1993

IN THE

Supreme Court of Nebraska

VOLUME CCXLIII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1994

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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DALE E. FAHRNBRUCH, Associate Justice
DAVID J. LANPHIER, Associate Justice

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DURING THE PERIOD OF THESE REPORTS

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

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
		William B. Rist	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett Inbody	Wahoo
		Robert R. Steinke	Columbus
		John C. Whitehead	Columbus

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Larry F. Fugit	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Lyle Winkle	Columbus
		Gary F. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

ATTORNEYS

Admitted Since the Publication of Volume 242

EDWARD G. ALBRIGHT
MARCELITA C. ANDERSON
BRIAN T. BAILEY
JACKIE BARFIELD
BRUCE C. BARNHART
DWAINE L. BIRCH
MICHAEL BOGNER
AMY KNOX BROWN
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No. S-90-1120: **Schroeder v. Schroeder.** Affirmed. White, J.

No. S-91-033: **Timber Lodge Lake Assn. v. Harm.** Affirmed in part, and appeal dismissed as to injunctive relief. Hastings, C.J.

No. S-91-072: **Pearson v. State.** Affirmed. Hastings, C.J.

No. S-91-099: **Gas 'N Shop v. City of Lincoln.** Reversed and remanded with directions. Per Curiam.

No. S-91-213: **Hrbek v. City of Omaha.** Affirmed. White, J.

No. S-91-378: **Hrbek v. City of Omaha.** Affirmed. Shanahan, J.

No. S-91-738: **Prince v. Prince.** Appeal dismissed as moot. Hastings, C.J.

No. S-92-424: **Gas 'N Shop v. City of Lincoln.** Reversed and remanded with directions. Per Curiam.

No. S-92-1099: **State v. Fletcher.** Affirmed. Per Curiam.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-90-297: **Properties Inv. Group v. JBA, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. S-91-215: **Heiting v. Owen.** Stipulation allowed; appeal dismissed.

No. S-91-266: **Fecht v. Quality Processing, Inc.** Appeal dismissed. See Rule 7A(2).

No. S-91-389: **TCLA, Inc. v. Sullivan.** Stipulation allowed; appeal dismissed.

No. S-91-449: **Service Emp. Intl. Union v. Westside Community Sch. Dist. 66.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-91-1198: **National Bank of Commerce v. Kroeger.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-92-550: **State v. Jackson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-92-765: **State v. Meints.** By order of the court, opinion of March 26, 1993, withdrawn; judgment of Nebraska Court of Appeals summarily affirming the judgment of the district court affirmed.

No. S-92-1171: **Major v. Major.** Stipulation allowed; appeal dismissed.

No. S-93-065: **State v. Liebers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-067: **State v. Betke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-589: **State ex rel. NSBA v. Wechsler.** By order of the court, Wechsler suspended from the practice of law in Nebraska until further order of the court.

CUMULATIVE LIST OF CASES ON PETITION FOR FURTHER REVIEW

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

No. A-90-763: **Kaufman v. Countryside Homes of Lincoln**, 2 NCA 60 (1993). Petition of appellant for further review overruled.

No. A-90-947: **Evergreen Farms v. Swedberg & Co.**, 1 NCA 2502 (1992). Petition of appellant for further review overruled.

No. S-90-1000: **Baker's Supermarkets v. Feldman**, 2 NCA 363 (1993). Petition of appellee for further review sustained.

No. A-90-1160: **In re Estate of Krichau**, 1 NCA 2508 (1992). Petition of appellant for further review overruled.

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

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

No. A-90-1242: **Miller v. Kniep**, 2 NCA 470 (1993). Petition of appellant for further review overruled.

No. S-91-061: **Thornburg v. Haecker**, 2 NCA 84 (1993). Petition of appellee for further review sustained.

No. A-91-092: **State v. Christianson**, 2 NCA 223 (1993). Petition of appellant for further review overruled.

No. A-91-101: **Woodward v. Bubak**, 2 NCA 538 (1993). Petition of appellant for further review overruled.

No. S-91-110: **Jarrett v. Eichler**, 2 NCA 621 (1993). Petition of appellants for further review sustained.

No. A-91-168: **Kohout v. Nebraska Dept. of Motor Vehicles**. Petition of appellant for further review overruled.

No. A-91-189: **Smejkal v. Smejkal**, 2 NCA 95 (1993). Petition of appellant for further review overruled.

No. A-91-251: **Manion v. Manion**, 2 NCA 644 (1993). Petition of appellee for further review overruled.

No. A-91-260: **Moore v. County of Scotts Bluff**, 2 NCA 821 (1993). Petition of appellee for further review overruled.

No. A-91-275: **Speedway Motors v. Commissioner of Labor**, 3 NCA 6 (1993). Petition of appellant for further review overruled.

No. A-91-358: **Bishop v. Bishop**, 2 NCA 382 (1993). Petition of appellant for further review overruled.

No. A-91-373: **State v. Shaffer**, 3 NCA 231 (1993). Petition of appellant for further review overruled.

No. S-91-381: **Cockrell v. Garton**, 3 NCA 128 (1993). Petition of appellant for further review sustained.

No. S-91-420: **Drain v. Board of Ed. of Frontier Cty.**, 2 NCA 716 (1993). Petition of appellant for further review sustained.

No. A-91-423: **Ladd v. Empire Life Ins. Co.** Petition of appellant for further review overruled.

No. A-91-477: **Milnes v. Jacobs**, 3 NCA 566 (1993). Petition of appellee for further review overruled.

No. A-91-481: **Monroe v. Ross.** Petition of appellant for further review overruled.

No. A-91-485: **Reams v. Miller**, 3 NCA 12 (1993). Petition of appellant for further review overruled.

No. A-91-559: **Lewis v. Opstein**, 3 NCA 247 (1993). Petition of appellant for further review overruled.

No. A-91-617: **Snell v. O'Halloran, Inc.**, 3 NCA 362 (1993). Petition of appellee for further review overruled.

No. A-91-619: **State v. Gardner**, 2 NCA 233 (1993). Petition of appellant for further review overruled.

No. A-91-658: **State v. Haman**, 2 NCA 542 (1993). Petition of appellant for further review overruled.

No. S-91-664: **State v. Tlamka**, 3 NCA 28 (1993). Petition of appellant for further review sustained, but review is limited to the admissibility of the victim's statement or statements to Officer Lantis.

No. A-91-766: **Stevens v. Stevens**, 3 NCA 402 (1993). Petition of appellee for further review overruled.

No. A-91-827: **State v. Doan**, 2 NCA 310 (1993). Petition of appellee for further review overruled.

No. S-91-837: **State v. Williams**, 2 NCA 160 (1993). Petition of appellee for further review sustained.

No. S-91-847: **Bethesda Found. v. Nebraska Dept. of Soc. Servs.**, 3 NCA 686 (1993). Petition of appellant for further review sustained.

No. A-91-860: **DeCamp v. Omaha World-Herald Co.**, 3 NCA 159 (1993). Petition of appellant for further review overruled.

No. A-91-944: **Adams v. American Cyanamid Co.**, 1 NCA 2193 (1992). Petition of appellant for further review overruled.

No. A-91-944: **Adams v. American Cyanamid Co.**, 1 NCA 2193 (1992). Petition of appellee for further review overruled.

No. A-91-951: **Wright & Souza, Inc. v. DM Properties**, 3 NCA 695 (1993). Petition of appellant for further review overruled.

No. S-91-958: **State v. Rodriguez**, 2 NCA 837 (1993). Petition of appellant for further review sustained.

No. A-91-985: **Thompson v. Koplin**, 3 NCA 419 (1993). Petition of appellant for further review overruled.

No. A-91-1005: **State v. Harker**, 2 NCA 102 (1993). Petition of appellant for further review overruled.

No. A-91-1019: **State v. Kovarik**, 2 NCA 732 (1993). Petition of appellant for further review overruled.

No. A-91-1124: **State v. Lott**, 2 NCA 551 (1993). Petition of appellant for further review overruled.

No. A-91-1133: **State v. Davis**, 2 NCA 411 (1993). Petition of appellant for further review overruled.

No. A-91-1153: **State v. Tillman**, 2 NCA 954 (1993). Petition of appellant for further review overruled.

No. A-91-1158: **Bailey v. Farmers Union Co-op Ins. Co.**, 1 NCA 2589 (1992). Petition of appellant for further review overruled.

No. S-91-1192: **State v. Gatson**, 2 NCA 179 (1993). Petition of appellant for further review sustained.

No. A-91-1193: **State v. Joseph**, 2 NCA 555 (1993). Petition of appellant for further review overruled.

Nos. A-91-1195, A-91-1197: **State v. Christiansen**, 3 NCA 766 (1993). Petition of appellant for further review overruled.

No. A-91-1244: **State v. Spulak**, 2 NCA 559 (1993). Petition

of appellee for further review overruled.

No. S-91-1256: **State v. Gerstner**, 2 NCA 565 (1993). Petition of appellee for further review sustained.

No. A-91-1266: **State v. Behm**, 3 NCA 52 (1993). Petition of appellee for further review overruled.

No. S-92-029: **Lindsay Ins. Agency v. Mead**, 1 NCA 2276 (1992). Petition of appellant for further review sustained.

No. A-92-061: **Hiatt v. Harvard Housing Auth.**, 2 NCA 427 (1993). Petition of appellant for further review overruled.

No. A-92-065: **State v. Zavorka**, 2 NCA 324 (1993). Petition of appellant for further review overruled on the merits.

No. A-92-078: **State v. Banister.** Petition of appellant for further review overruled.

No. S-92-079: **Aken v. Nebraska Methodist Hosp.**, 2 NCA 660 (1993). Petition of appellee for further review sustained.

No. A-92-099: **State v. Davis**, 2 NCA 858 (1993). Petition of appellant for further review overruled.

No. A-92-107: **State v. Shaddy**, 2 NCA 866 (1993). Petition of appellant for further review overruled.

No. S-92-137: **State v. Windels**, 2 NCA 283 (1993). Petition of appellant for further review sustained.

Nos. A-92-145, A-92-146: **State v. Jones**, 2 NCA 439 (1993). Petition of appellant for further review overruled.

No. A-92-149: **State v. Kyle**, 1 NCA 2617 (1992). Petition of appellant for further review overruled.

No. A-92-163: **State v. Hernandez**, 3 NCA 703 (1993). Petition of appellee for further review overruled.

No. A-92-171: **In re Interest of E.E.I. and G.L.I.**, 2 NCA 760 (1993). Petition of appellant for further review overruled.

No. A-92-171: **In re Interest of E.E.I. and G.L.I.**, 2 NCA 760 (1993). Petition of appellee for further review overruled.

No. S-92-183: **State v. Wordekemper**, 3 NCA 256 (1993). Petition of appellant for further review sustained.

No. S-92-190: **Beaman v. Cook Family Foods**, 2 NCA 507 (1993). Petition of appellee for further review sustained.

No. A-92-194: **State v. Maggard**, 2 NCA 584 (1993). Petition of appellee for further review overruled.

No. A-92-205: **State v. Moore**, 2 NCA 873 (1993). Petition of appellant for further review overruled.

No. A-92-212: **Zitterkopf v. Scottsbluff Sash & Door**, 2 NCA 595 (1993). Petition of appellant for further review overruled.

No. A-92-225: **State v. Shelby**, 3 NCA 441 (1993). Petition of appellant for further review overruled.

No. S-92-251: **State v. Beverlin**, 3 NCA 717 (1993). Petition of appellee for further review sustained.

No. A-92-251: **State v. Beverlin**, 3 NCA 717 (1993). Petition of appellant for further review overruled.

No. A-92-262: **State v. Swanson**, 2 NCA 777 (1993). Petition of appellant for further review overruled.

No. A-92-284: **State v. Rehms.** Petition of appellant for further review overruled.

No. A-92-285: **State v. Carroll**, 3 NCA 269 (1993). Petition of appellant for further review overruled.

No. A-92-301: **State v. Sterling**, 2 NCA 976 (1993). Petition of appellant for further review overruled.

No. A-92-314: **State v. Ford**, 2 NCA 895 (1993). Petition of appellant for further review overruled.

No. A-92-377: **State v. Austin**, 3 NCA 301 (1993). Petition of appellee for further review overruled.

No. S-92-382: **State ex rel. Reitz v. Ringer**, 2 NCA 688 (1993). Petition of appellee for further review sustained.

No. A-92-397: **State v. Weaver**, 3 NCA 314 (1993). Petition of appellant for further review overruled.

No. A-92-404: **Ackerman v. Nanfito**, 2 NCA 982 (1993). Petition of appellant for further review overruled.

No. A-92-404: **Ackerman v. Nanfito**, 2 NCA 982 (1993). Petition of appellee for further review overruled.

No. A-92-414: **State v. Dandridge**, 3 NCA 572 (1993). Petition of appellant for further review overruled.

No. A-92-417: **State v. Plymate**, 3 NCA 515 (1993). Petition of appellant for further review overruled.

No. A-92-452: **Eele v. Omaha Steel Castings Co.**, 2 NCA 987 (1993). Petition of appellant for further review overruled.

No. S-92-489: **Anderson v. HMO Nebraska**, 2 NCA 794 (1993). Petition of appellant for further review sustained.

No. S-92-500: **State v. Covarrubias**, 2 NCA 993 (1993). Petition of appellee for further review sustained.

No. A-92-520: **Fowler v. Lester Electric**, 3 NCA 191 (1993). Petition of appellant for further review overruled.

No. A-92-561: **State v. Brhel**, 3 NCA 470 (1993). Petition of appellant for further review overruled.

No. A-92-614: **State v. Rodriguez**, 3 NCA 783 (1993). Petition of appellee for further review overruled.

No. S-92-624: **State v. Mitchell**, 3 NCA 337 (1993). Petition of appellee for further review sustained.

No. A-92-656: **State v. Van Der Wege**. Petition of appellant for further review overruled.

No. A-92-676: **State v. Camomilli**, 3 NCA 481 (1993). Petition of appellant for further review overruled.

No. A-92-697: **Bedel v. Trinova Corp.** Petition of appellant for further review overruled.

No. A-92-715: **In re Interest of Findley**, 3 NCA 95 (1993). Petition of appellant for further review overruled.

No. A-92-749: **State v. Ingram.** Petition of appellant for further review overruled.

No. S-92-765: **State v. Meints**. Petition of appellant for further review sustained.

No. A-92-766: **State v. McMurray.** Petition of appellant for further review overruled.

No. A-92-801: **State v. Schriner.** Petition of appellant for further review overruled.

No. A-92-819: **Brown v. Brown.** Petition of appellee for further review overruled.

No. A-92-829: **State v. Bryant**. Petition of appellant for further review overruled.

No. A-92-843: **State v. Howard**, 3 NCA 216 (1993). Petition of appellee for further review overruled.

No. A-92-846: **State v. Radil**, 3 NCA 105 (1993). Petition of appellant for further review overruled.

No. A-92-849: **Guerrero v. Guerrero.** Petition of appellant for further review overruled.

No. A-92-874: **State v. O'Brien**. Petition of appellant for further review overruled.

No. A-92-876: **State v. Sacco**, 3 NCA 869 (1993). Petition of appellant for further review overruled.

No. A-92-898: **In re Interest of B.J.M. et al.**, 3 NCA 791

(1993). Petition of appellee for further review overruled.

No. A-92-952: **State v. Ziemann.** Petition of appellant for further review overruled.

No. A-92-961: **State v. Herringer.** Petition of appellant for further review overruled.

No. A-92-992: **State v. Edwards.** Petition of appellant for further review overruled.

No. S-92-1102: **State v. Livingston.** Petition of appellant for further review sustained.

No. S-92-1103: **State v. Livingston.** Petition of appellant for further review sustained.

No. A-92-1148: **State v. Aubert.** Petition of appellant for further review overruled.

No. A-92-1149: **State v. Aubert.** Petition of appellant for further review overruled.

No. A-93-108: **In re Application of City of West Point.** Petition of appellant for further review overruled.

No. A-93-112: **Curtis Tel. Co. v. Farrar.** Petition of appellee for further review overruled.

No. A-93-113: **Curtis Tel. Co. v. Zak.** Petition of appellee for further review overruled.

No. A-93-116: **State v. Weyerman**, 3 NCA 563 (1993). Petition of appellant for further review overruled.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JOHN A. FECHT, DIRECTOR, WAREHOUSE DEPARTMENT, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, AND SWANTON COOPERATIVE ELEVATOR, APPELLANT, V. THE BUNNELL CO., INC., APPELLEE.

497 N.W.2d 50

Filed March 19, 1993. No. S-90-506.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.

Appeal from the Nebraska Public Service Commission. Affirmed.

Gregory B. Bartels, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

David E. Pavel, of Brodkey & Pavel, P.C., for appellee Bunnell Co.

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

CAPORALE, J.

Acting upon the complaint of appellee John A. Fecht, director of the Warehouse Department of the Nebraska Public Service Commission, the commission, pursuant to the provisions of the Grain Dealer Act, Neb. Rev. Stat. §§ 75-901 through 75-909 (Reissue 1990), revoked the grain dealer's license held by the defendant-appellee buyer, The Bunnell Co., Inc. This action was taken because of the buyer's failure to pay the appellant seller, Swanton Cooperative Elevator, for corn the latter had sold to the former. Subsequently, the commission denied the seller recourse to the security the buyer had filed, an irrevocable letter of credit. In challenging the denial, the seller asserts, in summary, that the commission erred in determining that it had not been notified in a timely fashion of the buyer's failure to pay. We affirm.

The buyer's president and the seller's manager had known and dealt with each other over a period of 15 years, and they entered into a contract whereunder the seller obligated itself to sell 75,000 bushels of No. 2 yellow corn to the buyer for delivery in January, February, and March 1989. The buyer in turn obligated itself to pay a stated price per bushel.

Delivery of the corn commenced on February 3, 1989, and the seller claims that it demanded payment on March 15, 1989. While the buyer disputes that an actual demand for payment was made on March 15, it agrees that it had ongoing contact with the seller regarding the amount due. At a March 20 meeting called by the buyer, the buyer revealed to the seller that it had suffered financial losses and as a consequence was unable to pay the seller the amount due it.

There then remained between 12,000 and 13,000 bushels to deliver on the contract. Because the buyer could obtain at least a nickel a bushel more for the corn than could the seller, the parties agreed that the buyer would take delivery of and sell the remaining corn and pass the proceeds on to the seller. By March 24, 1989, the seller had delivered all of the 75,000 bushels of corn it had contracted to sell. On June 27, 1989, the buyer paid the seller the proceeds from the sale of the corn the seller had delivered after the March 20 meeting. After giving the buyer credit for that amount, the seller claims a balance due in excess

of the buyer's security.

The buyer remained in contact with the seller regarding the buyer's attempts to revitalize itself and pay the seller; not until December 26, 1989, did the seller send a letter of complaint against the buyer to the commission.

Although in an appeal from the commission this court ordinarily examines the record to determine whether the commission acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary, *In re Application of A Touch of Class Limousine, Inc., ante* p. 33, 497 N.W.2d 71 (1993), and *In re Application of Overland Armored Exp.*, 229 Neb. 524, 428 N.W.2d 166 (1988), the issues presented by the assignments of error in this case are controlled by statute. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court. *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993).

In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Curry v. State ex rel. Stenberg, supra*; *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Curry, supra*; *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *State v. Chambers*, 242 Neb. 124, 493 N.W.2d 328 (1992). Further, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44

(1993); *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993).

Section 75-903 requires all grain dealers doing business in this state to be licensed by the commission and further requires that they file with the commission security in a sum equal to 4 percent of the dealer's grain purchases in the preceding license year, but not less than $25,000, the amount filed in this case, nor more than $100,000.

Section 75-905 provides:

> (1) Except as provided in subsection (2) of this section, no seller shall have recourse to the grain dealer's security unless the seller:
>
> (a) Demands that payment from the grain dealer be made within ten days of the date the grain dealer takes possession of the seller's grain;
>
> (b) Negotiates any negotiable instrument issued as payment for grain by the grain dealer within ten days of its issuance; and
>
> (c) Notifies the commission within ten days of any apparent loss to be covered under the terms of the grain dealer's security.
>
> (2) When grain is delivered to a grain dealer in multiple shipments comprising one contract, the seller shall not have recourse to the grain dealer's security unless the seller notifies the commission within forty-five days of the date of the first shipment of any apparent loss to be covered under the terms of the grain dealer's security.

Whatever else may be said regarding the time limits set forth in subsection (1) of the foregoing statute, subsection (2) unambiguously provides that with respect to a multiple-shipment contract such as the one at hand, a seller wishing to maintain its right to make a claim against a grain dealer's security must structure the agreement so as to allow completion of the contract within time to recognize and notify the commission of any "apparent loss" prior to the expiration of 45 days from the first shipment. One obvious reason for such a time limit is that without it, a contract for large amounts of grain calling for deliveries over several months would routinely produce the potential for claims over the amount of security

required by the act. In any event, for whatever reason, the time requirement is clear.

The uncontradicted evidence is that the seller did not meet that requirement and delayed notice until more than 9 months after the final delivery. The seller argues, however, that the 45-day time limit was tolled or rendered inoperative by virtue of the buyer's failure to provide it with a proper receipt giving notice of that time limit.

Section 75-904 states: "Each grain dealer . . . upon taking possession of grain from a seller shall issue a receipt to the seller . . . . Such receipt shall show . . . (8) the provisions of section 75-905." The regulations of the commission also require that these provisions be shown in 8-point type or larger. 291 Neb. Admin. Code, ch. 8, § 005.11H (1989).

The buyer admits that it did not furnish the seller a receipt which called attention to the provisions of § 75-905. However, while the buyer's failure to give the seller a proper receipt may have invested the commission with a basis for forfeiting the buyer's security and allowing claims in accordance with the provisions of § 75-906, we do not find, nor are we directed to, any language in the act which provides that the failure of a dealer to give a proper receipt renders null and void the time requirements of § 75-905.

Accordingly, the commission correctly determined that the seller had no recourse to the buyer's security; its order is affirmed.

AFFIRMED.

ROBERT L. HOWARD, APPELLANT, V. CITY OF LINCOLN, APPELLEE.
497 N.W.2d 53

Filed March 19, 1993. No. S-90-720.

1. **Constitutional Law: Statutes: Ordinances: Appeal and Error.** The constitutionality of a statute or ordinance is a question of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.

2. **Due Process: Ordinances.** Procedural due process requires that an ordinance supply a person of ordinary intelligence a reasonable opportunity to know what is prohibited and explicit standards for those who apply the ordinance.
3. **Constitutional Law: Ordinances.** Prohibitory ordinances often must speak in somewhat general terms. Mere generality does not render such an ordinance unconstitutionally vague.
4. **Constitutional Law: Governmental Subdivisions: Municipal Corporations.** Neb. Const. art. II, § 1, which distributes state governmental powers to the legislative, judicial, and executive branches, does not apply to the governing bodies of municipalities.
5. **Municipal Corporations: Ordinances: Public Health and Welfare.** Municipalities may, via the police power, protect the public health through ordinances that operate within legislative limits.
6. **Municipal Corporations: Public Health and Welfare: Costs.** A municipality may validly assess the costs of abating health hazards against the property where the hazard lies.
7. **Due Process: Property: Notice.** Due process requires that before being deprived of a significant property interest, a person is entitled to notice and an opportunity to be heard that is appropriate to the nature of the case.
8. **Due Process.** Depending on the importance of the interests involved, the formality and procedure of a hearing may vary.
9. **Due Process: Property.** One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

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

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

WHITE, J.

Robert L. Howard appeals the district court's dismissal of the action he filed after the City of Lincoln (City) cut weeds on his property. Howard sought damages under 42 U.S.C. § 1983 (1988), alleging that the municipal ordinance which authorized the City to cut the weeds was unconstitutional. We affirm.

In June 1988, Howard, a resident of Lincoln, was notified by the City that the vegetation on his property did not comply with the city ordinances governing weed control. Under the

applicable ordinances (Lincoln Mun. Code §§ 8.80.010 to 8.80.060 (1988)), if a landowner did not comply with trimming requirements, the City could remove the weeds itself, assess the costs to the landowner, and impose a criminal penalty for noncompliance. Howard did not comply with the ordinances following the notice.

On July 8, 1988, various city officials met with Howard at his residence, discussing the violations of the ordinances. Howard later received a second letter from the City demanding compliance. Howard again failed to comply.

On July 29, 1988, the City cut the weeds. Howard then received notice of a city council hearing to assess the costs for trimming the weeds. Howard attended the hearing and testified. The city council assessed costs of $52.41 for removal of the weeds.

Howard then filed an action in the district court, alleging that § 8.80.010 was unconstitutional and seeking damages under § 1983. After trial, the court ruled that the ordinance was not unconstitutional, found that Howard had violated the ordinance, and dismissed the action.

Howard alleges that the district court erred in (1) not finding that § 8.80.010 is unconstitutionally vague; (2) not finding that § 8.80.010 unconstitutionally delegates power from one branch of government to another; and (3) not finding that the City denied Howard's due process rights and violated his civil rights, as guaranteed by the U.S. Constitution and § 1983.

Howard's attacks on the constitutionality of the ordinance are not declaratory in nature, nor can they be, for he has failed to serve the Attorney General with a copy of the proceeding, as required by Neb. Rev. Stat. § 25-21,159 (Reissue 1989). We thus address the challenges as they bear on Howard's claim for damages.

Under § 1983, a suit for redress may be brought against a person who, under color of a state statute or ordinance, subjects the complaining party to a deprivation of his or her constitutional rights, privileges, or immunities. Consequently, to recover § 1983 damages from the City, Howard must show that enforcement of the ordinance violated his constitutional rights.

The constitutionality of a statute or ordinance is a question of law. See *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). With regard to questions of law, we are obligated to reach a conclusion independent of the decision reached by the trial court. *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

We also note that when passing on the constitutionality of an ordinance, this court begins with a presumption of validity. Therefore, the burden of demonstrating the constitutional defect rests with the challenger. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991).

Howard first asserts that the city ordinance is vague in that it fails to adequately define which vegetation violates its terms. His argument, however, is less than clear as to how the alleged vagueness violated his rights. Presumably, Howard is alleging that his due process rights were violated because the ordinance enabled the City to cut vegetation that he regarded as useful and then to assess the costs to him.

Section 8.80.010 provides, in relevant part:

> It shall be the duty of every owner of real estate in [Lincoln] to cut and clear, or clear, such real estate, together with one-half (1/2) of the streets and alleys abutting thereon, *of all weeds or worthless vegetation* whenever such *weeds or worthless vegetation* shall extend more than six (6) inches above the ground. Such *weeds or worthless vegetation* shall be cut so as not to extend more than six (6) inches above the ground.

(Emphasis supplied.)

Howard alleges that the ordinance does not define "weeds or worthless vegetation" adequately and that, therefore, the ordinance is unconstitutionally vague. We disagree.

Procedural due process requires that an ordinance supply "(1) a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited' and (2) 'explicit standards for those who apply [it].' " *ABC Books, Inc.*, 238 Neb. at 382, 470 N.W.2d at 764 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Furthermore, when evaluating an ordinance for vagueness, we do not seek mathematical certainty, but, rather, " ' "flexibility and

reasonable breadth . . . ." ' " *ABC Books, Inc.*, 238 Neb. at 382, 470 N.W.2d at 764.

We encountered a situation strikingly similar to the one presently before us in *Greenwood v. City of Lincoln*, 156 Neb. 142, 55 N.W.2d 343 (1952), *overruled in part, Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968). In *Greenwood*, the plaintiffs sued the City of Lincoln for damages after the city cut the vegetation on the plaintiffs' property—including a number of raspberry bushes which were surrounded by tall weeds and grasses. The city had acted pursuant to an ordinance which required landowners to cut and clear all "weeds and worthless vegetation" from their property. *Id.* at 144, 55 N.W.2d at 344.

Although we directed that the plaintiffs' case be dismissed on grounds of sovereign immunity, we addressed the language of the applicable ordinance. In doing so, we repeated the following: " 'The word "weed" has a common, everyday, meaning to the mind of every man. . . . [T]he right of the defendant to grow weeds upon his city lot is subordinate to the right of society that he shall not do so, because he would thereby endanger the health of others. . . .' " *Id.* at 148, 55 N.W.2d at 346 (quoting *City of St. Louis v. Galt*, 179 Mo. 8, 77 S.W. 876 (1903)).

We are similarly convinced today that the language "weeds or worthless vegetation" carries a common enough meaning that it does not violate the constitutional rights of Lincoln's citizenry. As the City correctly points out, if the ordinance listed every type of prohibited vegetation by its scientific name, the ordinance would be extremely confusing to citizens—save, perhaps, horticulturalists. And while enforcement of the ordinance ultra vires would be subject to attack, potential for abuse does not render the ordinance unconstitutionally vague. See Neb. Rev. Stat. § 15-268 (Reissue 1991) (providing the statutory grant of power for the weed ordinance).

The ordinance provides definitions that are not confusing to the average citizen. Thus, any "vagueness" in the language does not work a constitutional violation on Howard. Likewise, the ordinance adequately instructs city officials with regard to their duties. See §§ 8.80.010 and 8.80.020.

Courts in other jurisdictions have also found that ordinances or statutes may, and sometimes must, describe the targets of their prohibition in general terms. See, e.g., *Grayned v. City of Rockford*, 408 U.S. at 108 (holding that an ordinance which prohibited any noise which " 'tends to disturb the peace' " of a school was not unconstitutionally vague); *Hubenthal v. County of Winona*, 751 F.2d 243 (8th Cir. 1984) (holding that an ordinance prohibiting "junkyards" was not unconstitutionally vague); *Lundquist v. City of Milwaukee*, 643 F. Supp. 774 (E.D. Wis. 1986) (holding that an ordinance prohibiting "weeds" over 1 foot in height was not unconstitutionally vague); *Buhler v. Stone*, 533 P.2d 292 (Utah 1975) (noting that legislation often must use general terms when describing certain conditions).

Lincoln's weed ordinance must also speak in somewhat general terms. Mere generality does not render the ordinance unconstitutionally vague. Howard's first assignment of error is without merit.

Howard next argues that the ordinance violates the Nebraska Constitution because it is the result of an improper delegation of authority from the Legislature and because it allows the City to improperly delegate certain powers to its departments. Again we disagree.

We first note that Neb. Const. art. II, § 1, which distributes state governmental powers to the legislative, judicial, and executive branches, does not apply to the governing bodies of municipalities. See *State v. Ure*, 91 Neb. 31, 135 N.W. 224 (1912). We thus concern ourselves only with Howard's argument that the Legislature inappropriately delegated nonlegislative powers to the City.

In his only delegation argument sufficiently clear to address, Howard argues that because § 15-268 empowers the City to assess the costs of cutting the weeds to the landowner, it confers a nonlegislative power on the City, the power to hear assessment proceedings, and therefore violates article II, § 1. Howard's argument is untenable.

While it is true that the Legislature may not constitutionally delegate powers that it does not possess, municipalities clearly may, via the police power, protect the public health through

ordinances that operate within legislative limits. See, *McCrea v. Cunningham*, 202 Neb. 638, 277 N.W.2d 52 (1979); *Whelan v. Daniels*, 94 Neb. 642, 143 N.W. 929 (1913). The control of weeds within the corporate limits of a municipality is an acceptable exercise of this power. *Greenwood v. City of Lincoln*, 156 Neb. 142, 55 N.W.2d 343 (1952), *overruled in part, Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968). Moreover, under the police power, the municipality may validly assess the costs of abating health hazards against the property where the hazard lies. See *Patrick v. City of Omaha*, 1 Neb. (Unoff.) 250, 95 N.W. 477 (1901). See, also, *Paterson v. Fargo Realty Inc.*, 174 N.J. Super. 178, 187, 415 A.2d 1210, 1214 (1980) (stating that there is "no constitutional impediment to making a landowner personally responsible for the reasonable cost of abating hazardous conditions existing on his property").

In *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), we noted that, with regard to legislative delegations to local governing bodies, " ' "[w]here the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority." ' " *Id.* at 476-77, 432 N.W.2d at 230 (quoting *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988)). When viewed in its entirety, § 15-268 adequately provides limitations and standards for the carrying out of the statute's duties.

We first note that under § 15-268, cities of the primary class "*may*" implement the provisions of the section. (Emphasis supplied.) If a city so chooses, the statutory duties are clearly laid out. The city may require removal of "weeds and worthless vegetation," which language, as we have previously discussed, provides sufficiently clear guidance for local officials. The statute also describes the events to take place in the event of noncompliance, including assessing the costs of removal against the property. The statute provides reasonable standards and limitations for cities which choose to enact weed-related ordinances. Thus, the statute does not violate constitutional standards regarding delegations of legislative power and does not violate Howard's constitutional rights.

We finally turn to Howard's argument that the City's actions violated procedural due process, as guaranteed by U.S. Const. amend. XIV and Neb. Const. art. I, § 3. Howard alleges that he was deprived of property—his vegetation and the $52.41 assessment—without being given a fair hearing before each deprivation.

The protections of procedural due process attach when there has been a deprivation of a significant property interest. See *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). If such an interest is shown, due process requires notice and an opportunity to be heard that is " 'appropriate to the nature of the case.' " 401 U.S. at 378. See, also, *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Kirshen v. Kirshen*, 227 Neb. 479, 418 N.W.2d 558 (1988). Assuming, arguendo, that Howard's interest in the weeds was significant enough to invoke due process protections, we address the sufficiency of the process he was afforded.

After a notice demanding compliance was sent, several city officials met with Howard at his home to discuss the vegetation. Among the attendees were Howard, the director of public works, the city weed inspector, and a party who transcribed the discussion. Howard was allowed to state his reasons for noncompliance at the meeting. Six days after the meeting, the city officials notified Howard of their decision, stating that they would cut the weeds. Howard took no action to enjoin the efforts.

Howard argues that he should have been afforded a more formal hearing before the weeds were cut. His contention is without merit. All that is required is a meaningful opportunity to be heard, in a manner appropriate to the case. *Boddie, supra.* Howard received that process.

Depending on the importance of the interests involved, the formality and procedure of the hearing may vary. *Id.* Howard's interest in the weeds simply did not merit a full evidentiary hearing. See *Sobocinski v. City of Williamsport*, 13 Pa. Commw. 425, 319 A.2d 697 (1974). See, also, *Pope v. City of Houston*, 559 S.W.2d 905 (Tex. Civ. App. 1977).

We do not intimate that the City could cut any type of

vegetation without providing a more formal hearing. However, the vegetation that was trimmed more closely resembled a briar patch than a bed of prize roses. As verified by an agronomist holding a Ph.D., 17 forms of vegetation found on Howard's property were described as "weeds" in a text on the subject and apparently grew unchecked and randomly. Although Howard did state that he had eaten the produce of some of the plants, the record is devoid of any evidence that Howard cultivated the vegetation or that it could be ascribed value significant enough to warrant a more formal hearing than Howard received.

At the "pre-cutting" meeting, Howard was asked why he determined that the vegetation had value. Howard's answer failed to import any worth to the vegetation other than as "ground cover." The City relied on the minutes of that meeting in deciding whether to proceed with the cutting. The record indicates that Howard was given sufficient procedural protections before his weeds were cut; due process was not offended. See, *Boddie, supra*; *Goldberg, supra*.

We now turn to the $52.41 assessment. It is clear that the assessment constituted a significant property interest and thus invoked due process protections. In *Kirshen*, 227 Neb. at 481, 418 N.W.2d at 560, we stated: "Due process has been held to require 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."

Howard does not contest the sufficiency of his notice; he received two notices before the weeds were cut and another before the assessment hearing. His arguments therefore focus on the fairness of the assessment hearing. He points out that in 1987 he was found not guilty in a criminal proceeding based on noncompliance with the weed ordinance. Howard reasons that because he was found not guilty after a trial in that action and because the city council hearing resulted in an assessment of costs to him, the city council hearing was not fair. Howard's argument is meritless.

Although Howard was entitled to due process, we need not determine whether the assessment hearing afforded him such process. In *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 166, 313 N.W.2d 271, 275 (1981), we stated:

" 'One cannot be said to be deprived of his property without due process of law *so long as he has recourse to the courts for the protection of his rights. . . .*' " (Emphasis supplied.) (Quoting *Dawson County Irrigation Co. v. McMullen*, 120 Neb. 245, 231 N.W. 840 (1930).) See, also, *Koepp v. Jensen*, 230 Neb. 489, 432 N.W.2d 237 (1988). Howard had such recourse, yet chose not to exercise it.

Under Neb. Rev. Stat. § 15-1201 (Reissue 1991), Howard was entitled to appeal the city council's ruling; he did not. Had he desired a more indepth hearing, such an avenue was available at the district court level. See *id.* He should not be heard to complain now about the inadequacies of the assessment hearing.

Furthermore, Howard received a full hearing when he brought this action for damages. In its order, the district court specifically found that the assessment was not a penalty and was intended only to recoup the costs of cutting the weeds. Nothing in the record causes us to disagree with the court on this point.

The district court correctly found that § 8.80.010 was not unconstitutionally vague and that the ordinance did not result from, or work, an unconstitutional delegation of powers. The court was also correct in finding that the City's actions did not deprive Howard of due process. We affirm the judgment of the district court in all respects.

AFFIRMED.

WENDI KYLE LODDEN, APPELLEE, V. TERRY JOE LODDEN, APPELLANT.

497 N.W.2d 59

Filed March 19, 1993. No. S-90-897.

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

Tom F. Wilson for appellant.

Robert I. Blevens, of Blevens & Jacobs, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., MERRITT, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

In 1990, Wendi Kyle Lodden (wife) requested, on the grounds that there had been a material change in circumstances, and later received, a modification of a 1980 marital dissolution decree for child support for a daughter born of wife's marriage to Terry Joe Lodden (husband).

Under the 1980 decree, wife was awarded custody of the daughter, then 1 year old, and husband was ordered to pay child support in the amount of $200 per month.

On March 9, 1990, wife filed a petition for modification of the decree, seeking an increase in child support. She alleged that a change in circumstances had occurred after the 1980 decree, resulting in an increase in the cost of care, education, maintenance, and support of the daughter. Wife further alleged a change in circumstances by virtue of the economic status of the parties and the adoption of the Nebraska Child Support Guidelines.

At trial, wife testified that she was employed and earned approximately $20,000 per year. She also testified that increased expenses related to raising the daughter included the cost of music and dance lessons, food, clothing, and prescription drugs. Husband testified that he was employed and earned approximately $33,000 per year. He also testified that he paid all of his daughter's medical expenses that were submitted to him and that he had remarried and had adopted his present wife's 10-year-old son. His present wife works as a registered nurse and earns approximately $26,000 per year. Husband offered two child support calculations, one showing the net income and support calculations between him and his former wife, and the second showing calculations regarding him and his present wife for the support of their 10-year-old son.

After considering the evidence, the court found that there had been material changes in the circumstances of the parties and modified the decree to require husband to pay child

support in the amount of $300 per month.

Husband alleges that the district court erred (1) in finding that there had been a material change in the circumstances of the parties when wife failed to present evidence regarding the circumstances of the parties at the time of the 1980 decree or to substantiate the alleged changes in circumstances, and (2) in failing to consider husband's obligation to provide support for the child of his second marriage in determining the proper amount of support under the Nebraska Child Support Guidelines.

> "The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion. *Sanchez v. Sanchez*, 231 Neb. 963, 439 N.W.2d 82 (1989). When the evidence is conflicting in a child support modification hearing, this court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985)."

Lauenstein v. Lauenstein, 241 Neb. 521, 522, 489 N.W.2d 828 (1992) (quoting *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991)).

"The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child." *Schulze v. Schulze*, 238 Neb. 81, 85, 469 N.W.2d 139, 142 (1991) (citing *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986)).

"Modification of child support is an issue entrusted to the discretion of the trial court." *Dobbins v. Dobbins*, 226 Neb. at 467, 411 N.W.2d at 645. Accord *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). "A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree." *Tworek v. Tworek*, 218 Neb. 808, 809, 359 N.W.2d 764, 765 (1984). Accord *Wagner v. Wagner, supra*. "Modification of an award

of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification." *Dobbins v. Dobbins*, 226 Neb. at 467, 411 N.W.2d at 645. Accord *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

In *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984), this court established the rule that

> "[m]aterial change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." See Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982); cf. *Chamberlin v. Chamberlin*, 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980) (modification of alimony on account of a "change of circumstances of a material and substantial nature"). "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. See 24 Am. Jur. 2d *Divorce and Separation* §§ 1082-1088 (1983). Alteration and passage from one condition to another is essential for a material change in circumstances.

Accord, *Schulze v. Schulze, supra*; *Wilson v. Wilson, supra*; *Graber v. Graber, supra*.

However, this court has also held that

> if the changes are of the type that necessarily were in the contemplation of the parties at the time the decree was entered, even though material, such changes do not, of themselves, justify a modification. For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, standing alone, is not sufficient to justify a modification of a decree

of dissolution.

Graber v. Graber, 220 Neb. at 819, 374 N.W.2d at 10.

In *Wagner*, this court limited *Graber*, stating that the anticipated changes must have been specifically noted on the record at the time the decree was entered. See, also, *Schmitt v. Schmitt, supra*. This court further held that "evidence of the increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children." *Wagner v. Wagner*, 224 Neb. at 157, 396 N.W.2d at 283. Accord *Dobbins v. Dobbins, supra*. In the instant case, wife testified regarding the increased costs of raising the daughter, thereby meeting the requirements of *Wagner*.

Even if we were to accept husband's argument that the evidence is insufficient to show a change in circumstances for the parties after the 1980 decree or to substantiate the alleged changes in circumstances, husband's argument that the adoption of the Nebraska Child Support Guidelines is not a material change in circumstances justifying a modification of child support is without merit. In *Schmitt v. Schmitt*, 239 Neb. 632, 637, 477 N.W.2d 563, 566 (1991), this court held that adoption of the Nebraska Child Support Guidelines, effective October 1, 1987, does constitute "a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date." Accord, *Lauenstein v. Lauenstein*, 241 Neb. 521, 489 N.W.2d 828 (1992); *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991).

However, it should be noted that "[i]f the guidelines constitute a material change of circumstances, the guidelines must be used to determine the new support amount." *Schmitt v. Schmitt*, 239 Neb. at 638, 477 N.W.2d at 566. In the present case, child support calculations pursuant to the Supreme Court rules, based on the parties' 1989 income tax returns, were submitted by husband. In addition, husband offered calculations relating to the support of the son of his present wife. Based on these calculations, and assuming that he was entitled to take a deduction for the support of his present wife's son,

husband asserts that his monthly support obligation should be $258 per month.

After the district court's decision in Loddens' case, the Nebraska Child Support Guidelines were amended, so that rather than providing a deduction for "[c]hild support paid for children not of this marriage," they allow a deduction only for "[c]hild support previously ordered for children not of this marriage." Nebraska Child Support Guidelines, worksheet 1, 2(f). Therefore, absent evidence sufficient to rebut the presumption established by the guidelines, the mere fact that husband contributes to the support of his subsequently adopted son will not affect his support obligation with respect to the child of his previous marriage to wife. If we deduct the amount which husband included for support of his son, husband's monthly share of support equals $299.62. The district court ordered husband to pay $300 per month. Thus, although it is not specifically noted in the record, it does appear that the district court applied the guidelines in determining the increase in child support. Moreover, in our de novo review, we can and should apply the child support guidelines when sufficient information is available. See, *Stover v. Stover*, 240 Neb. 391, 482 N.W.2d 244 (1992); *Lauenstein v. Lauenstein, supra.*

Although *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992), might appear to contradict our holding in this case, Loddens' case is readily distinguishable. The decision of a trial court with respect to a modification of child support will be affirmed absent an abuse of discretion. In *Czaplewski*, we held that the trial court did not err when it considered evidence of the father's duty to support the offspring of a subsequent marriage because the child support guidelines are merely a rebuttable presumption, not rules which must be blindly followed regardless of the circumstances of the parties.

In the case at bar, we are faced with the opposite situation: The trial court refused to consider the father's duty to support the son of his subsequent marriage. We are asked to find that this was an abuse of discretion. The guidelines specifically provide for a deduction of the amount of "[c]hild support previously ordered for children not of this marriage." They do not provide for an automatic deduction for the support of

children of subsequent marriages. Although a trial court may consider the individual circumstances of the parent ordered to pay support, it is not required to consider the parent's duty to support subsequent children. In the present case, unlike *Czaplewski*, no evidence was offered at trial which tended to show that the increase in child support for the daughter would create a hardship for husband's new family. Furthermore, under husband's calculations, he would provide more support for the son of his present wife than he would provide for the daughter of his former marriage.

Because we find no abuse of discretion by the trial court, the trial court's judgment, modifying Loddens' 1980 decree, is affirmed.

AFFIRMED.

MERRITT, D.J., concurring.

I concur with the result reached by the majority; however, I am troubled by the manner in which it has attempted to distinguish *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992).

It is true that in *Czaplewski*, the trial court *elected* to consider evidence of the father's duty to support a child from a subsequent marriage, while, in this case, the trial court elected *not* to consider evidence of the father's duty to support a child from a subsequent marriage. The respective trial courts, for whatever reason(s), approached the issue of duty to support children of a subsequent marriage differently. The majority, however, has not addressed the following language found in *Czaplewski*: "In keeping with the spirit of the guidelines, the trial court was correct in factoring into the child support calculations the father's offspring of his subsequent marriage. Therefore, the calculations are correct and shall stand." *Id.* at 631, 483 N.W.2d at 752.

If it was not an abuse of discretion to correctly follow the "spirit of the guidelines" in *Czaplewski*, then, conversely, it must be an abuse of discretion not to correctly follow that spirit in this case. In its holding today, the majority says this is not so. Although the facts of *Czaplewski* and the instant case may be readily distinguishable, the majority's decision in this case is

inconsistent with its holding in *Czaplewski*. Notwithstanding the majority's assertion, *Czaplewski* does not reflect that evidence was offered at trial which tended to show that an additional increase in the amount of child support would create a hardship for the father's new family, nor does *Czaplewski* discuss the amount of the father's child support obligation for the children of his prior marriage vis-a-vis the amount he provided for the child of his subsequent marriage.

It seems to me that the only way to eliminate this inconsistency is to disapprove the preceding language from *Czaplewski* and determine that, in this case, as in *Czaplewski*, the trial court did not abuse its discretion.

NIKOLAUS R. HANSL, APPELLANT, V. CREIGHTON UNIVERSITY, APPELLEE.

497 N.W.2d 63

Filed March 19, 1993. No. S-90-1066.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **New Trial: Evidence.** Newly discovered evidence is not a ground for a new trial when the exercise of due diligence before the trial would have produced it.

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

E. Terry Sibbernsen and, on brief, Steven Lefler and Barbara L. Flick, of Lefler & Flick, for appellant.

Ronald F. Krause and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

FAHRNBRUCH, J.

The district court for Douglas County granted a summary

judgment in favor of Creighton University in Nikolaus R. Hansl's lawsuit against the university for breach of contract and negligence.

Hansl then filed a post-summary-judgment pleading, which was overruled. Hansl has appealed that ruling to this court.

Although Hansl's post-summary-judgment pleading is labeled a "Motion for Reconsideration of Motion for Summary Judgment," we conclude from its content that it is, in fact, a motion for a new trial based upon alleged newly discovered evidence.

We affirm the ruling of the district court.

FACTS

On July 1, 1985, Dr. Nikolaus R. Hansl, a faculty member at Creighton University, entered into a settlement agreement with Creighton, whereby Hansl would resign as a faculty member and employee of the university. In exchange for Hansl's resignation, Creighton agreed, among other things, to provide office and laboratory space for Dr. Hansl for a period of 2 years and to "provide liability, fire and extended insurance coverage on such office facilities and for the benefit of Hansl."

After a 4-month absence, Hansl returned to his office in November 1986 to find that a refrigerator in which he had stored experimental compounds was unplugged and that the compounds were destroyed. In connection with this incident, Hansl sued Creighton on September 15, 1987, for breach of contract and, in a second amended petition, for alleged negligence as well.

On the basis of the pleadings, depositions, and exhibits, the district court entered summary judgment in favor of Creighton on June 28, 1990.

On July 5, 1990, Hansl filed in the district court a post-summary-judgment pleading for new trial, pursuant to Neb. Rev. Stat. § 25-1142 (Reissue 1989), wherein he claimed that there was newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at the hearing on the motion for summary judgment. Hansl's motion was overruled on October 1, 1990, and Hansl timely appealed the overruling of that motion to this court.

STANDARD OF REVIEW

A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

DISCUSSION

The record shows that Hansl's "newly discovered evidence," described as "a package of memos," consisted of several pieces of correspondence between Hansl and various Creighton personnel. Therefore, it is apparent that Hansl had knowledge of these documents prior to the summary judgment hearing. All of the documents were dated between 1976 and 1982, long before Hansl's petition in the present suit was filed.

Hansl has failed to show any reason why he could not have produced this evidence at the summary judgment hearing, had he chosen to do so. Newly discovered evidence is not a ground for a new trial when the exercise of due diligence before the trial would have produced it. See *Miles v. Box Butte County, supra*.

There being no factual basis for Hansl's claim that his "newly discovered evidence" could not have been discovered with the exercise of due diligence before the summary judgment hearing, the district court did not abuse its discretion in denying Hansl's motion for a new trial. The order of the district court is affirmed.

AFFIRMED.

WHITE, J., not participating.

JOHN DAY COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. DOUGLAS COUNTY BOARD OF EQUALIZATION, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

497 N.W.2d 65

Filed March 19, 1993. Nos. S-90-1092, S-90-1093, S-90-1094, S-90-1095, S-90-1096.

1. **Taxation: Valuation: State Equalization Board: Jurisdiction.** The State Board of Equalization and Assessment deals in aggregates, and the State Board has no jurisdiction to rule upon requests for the equalization of individual assessments.
2. **Taxation: Valuation: Counties: Jurisdiction: Statutes.** County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed.
3. **Taxation: Valuation: Counties: Jurisdiction.** Generally, taxpayers may question either the assessed actual value of property, the lack of proportionate and uniform valuation of property, or both issues in a proceeding before a county board of equalization.
4. _____: _____: _____: _____. A county board of equalization is statutorily empowered and authorized to equalize only those assessments of countywide property of which the county has the authority to assess the value.
5. **Taxation: Valuation: State Equalization Board: Jurisdiction.** The authority to equalize the assessments of property among the various counties in the state has been reserved exclusively to the State Board of Equalization and Assessment.
6. **Taxation: Valuation: Counties: Time.** The power of a county board of equalization to rectify the returns of assessors and change the assessments of property which has not been omitted or undervalued has long been statutorily limited to a set number of circumscribed days of each year.
7. **Taxation: Valuation: Counties: Jurisdiction.** County boards of equalization do not have jurisdiction to consider the valuations of centrally assessed property in arriving at the value of a taxpayer's locally assessed personal property within a particular county. By restricting the power of a county board to equalize only those assessments over which it had authority to assess the value, Neb. Rev. Stat. § 77-1503.01 (Reissue 1990) took away the county board's authority to increase or decrease locally assessed property values in relation to other property located within the county whose value is centrally assessed.

Appeals from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Appeals dismissed.

Reed A. Grandgenett, of Gaines, Mullen, Pansing & Hogan, for appellants.

James S. Jansen, Douglas County Attorney, Edwin T. Lowndes, and John E. Huber for appellee.

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

WHITE, J.

The five appellants are Nebraska taxpayers which separately own personal property located within Douglas County. In 1990, appellant taxpayers timely filed protests with the Douglas County Board of Equalization (county board), requesting that their locally assessed personal property be valued at zero for tax purposes, based on the Nebraska Constitution, the U.S. Constitution, and recent rulings by this court regarding the valuation of centrally assessed railroad, pipeline, carline company, and agricultural property. The county board denied the protests, based on its opinion that as a county board, it lacked subject matter jurisdiction to consider centrally assessed property valuations when determining the constitutionality of locally assessed personal property valuations.

On July 6, 1990, appellant taxpayers filed petitions on appeal in the Douglas County District Court. The county board demurred to the petition based on claims of (1) lack of subject matter jurisdiction, (2) a defect of party defendants, and (3) the failure of the petition to state facts sufficient to constitute a cause of action. The district court sustained the demurrers, based on the county board's asserted lack of jurisdiction, and dismissed the petitions. Appellant taxpayers now appeal the district court's dismissal of their petitions, assigning only one error: the court's ruling that the Douglas County Board of Equalization did not have jurisdiction to consider the valuation of centrally assessed property located within Douglas County in determining the constitutionality of the valuation of their property located in Douglas County.

During the time relevant to when the protests were filed in this action, the authority of Nebraska county boards of equalization was governed by Neb. Rev. Stat. § 77-1501 et seq. (Reissue 1990). As stated in § 77-1504:

> The county board of equalization shall fairly and impartially equalize the valuation of individual tracts, lots, or parcels of real and personal property in the county so that all real and personal property is assessed uniformly

> and proportionately. The county board of equalization may consider and correct the assessment of any tract, lot, or parcel of real property or the assessment of any or all items of personal property by raising, after due notice has been given to the owner or agent at his or her last-known address, or by lowering the assessment of such property. No action shall be taken by the county board of equalization pursuant to this section before April 1 nor after May 31 of each year.
>
> For purposes of equalization of the valuation of any protested real or personal property, the county board of equalization shall make its adjustment so that the valuation of the protested property compares to the aggregate level of value of all taxable property in the county.

Additionally, § 77-1503.01 stated that "[f]or purposes of sections 77-1504 and 77-1506.02, parcels or items of property or classes of property shall mean *locally* assessed land, improvements, and personal property. *Any property valued by the Tax Commissioner shall not be subject to equalization by the county board of equalization under sections 77-1504 and 77-1506.02.*" (Emphasis supplied.)

Examples of property subject to valuation by the Tax Commissioner include railroad personal property, see Neb. Rev. Stat. § 77-601 (Reissue 1990), and public service entities, including pipelines, see Neb. Rev. Stat. § 77-801 et seq. (Reissue 1990).

Also at this time, the authority of the State Board of Equalization and Assessment (State Board) was governed by Neb. Rev. Stat. § 77-501 et seq. (Reissue 1990). In particular, § 77-505 required that

> [t]he State Board of Equalization and Assessment shall annually review the abstracts of assessments of real and personal property submitted by the county assessors, examine the valuation of all other property which is valued by the state, and equalize such valuations for tax purposes within the state. For this purpose the board shall meet at the State Capitol as soon as the abstracts of assessments have been submitted by the county assessors.

> The board shall have the power to adjourn from time to time until the equalization process is complete.

Consistent with these statutes and our decision in *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987), appellant taxpayers argue that when a taxpayer protests the taxation of property located in a particular county, the taxpayer's *exclusive* remedy is by protest to a county board of equalization, then an appeal to the district court, and ultimately an appeal to this court. Claiming that the district court erred in determining that § 77-505 vests jurisdiction in the State Board, appellant taxpayers assert that § 77-505 merely specifies the roles of the State Board in dealing with intercounty equalization and with centrally assessed taxpayers. Appellants emphasize that there is nothing in the language of this statutory section which prohibits a county board of equalization from examining or considering the valuation of centrally assessed property located within the county in determining whether the valuations of property located exclusively within the county are uniform, proportionate, and within constitutional limitations. Finally, the appellants maintain that even though § 77-1503.01 prohibits a county board from *equalizing* centrally assessed property, this statute does not prohibit a county board from *considering* the State Board's valuation of centrally assessed property as a basis for comparison of property located exclusively within Douglas County to ensure the constitutional requirements of uniformity and proportionality.

Conversely, the county board argues that the statutory limits on the types of property subject to equalization by the county board in § 77-1503.01 prohibit a county board from equalizing locally assessed property with property assessed by the State. The county board asserts that under § 77-505, the State Board has been granted the sole authority to equalize locally assessed property with property that is valued by the State. Pointing out that the State Board does not meet until after the county boards have completed their duties, the county board emphasizes that it would be hard pressed to equalize locally assessed property with values that have yet to be determined by the State.

In contrast to the appellants' assertions that they are barred from appearing before the State Board, the county board

maintains that appellant taxpayers should have appeared before the State Board to demand equalization under the provisions of § 77-510. Section 77-510 provided that

> [f]rom any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court. Upon demand therefor, the board shall prepare and certify a transcript of its records and proceedings involved in such decision. Notice of intention to obtain a review shall be filed within ten days from the date of the order by the board, and when docketed the cause shall be given precedence by the Supreme Court over all civil cases.

The county board lastly asserts that even if the district court erred in sustaining the demurrers based on its finding that the county board lacked subject matter jurisdiction, the error was harmless because the appellants also failed to state sufficient facts to state a cause of action.

We recently addressed the separate jurisdictional powers of the county and state boards of equalization in *AT&T Information Sys. v. State Bd. of Equal.*, 237 Neb. 591, 467 N.W.2d 55 (1991). In *AT&T Information Sys.*, locally assessed taxpayers requested the State Board to equalize their personal property, but the State Board denied the claims for lack of standing. Although we held that the taxpayers did have standing to appear before the State Board, we found that the State Board did not have jurisdiction to grant the relief sought.

We first noted that

> [a] taxpayer has the right to have his property assessed at actual value. If his property is assessed at a value in excess of its actual value, or in excess of that value at which others are taxed, then the taxpayer has a right to relief. . . . In this regard, locally assessed taxpayers must seek relief from the county board of equalization.

237 Neb. at 595, 467 N.W.2d at 58.

We went on to observe that when the State Board reviews the county abstracts,

> the State Board deals only with the values of the taxable

> property of a county in the aggregate. . . . Thus, locally assessed taxpayers do not have the right under § 77-506 to request that the State Board equalize their individual property, as part of a class or subclass, with a class or subclass of centrally assessed property or similar property in other counties.

237 Neb. at 595-96, 467 N.W.2d at 58.

Pointing out that the taxpayers in *AT&T Information Sys.* had not appeared before the State Board to request adjustment of the *aggregate* value of all taxable property in their counties, but that the taxpayers had instead requested that the valuation of all personal property in the counties be equalized with a particular class or subclass of centrally assessed property, we concluded by stating that

> the State Board deals in aggregates, and . . . the State Board has no jurisdiction to rule upon requests for the equalization of individual assessments. The language of § 77-505 contemplates that centrally assessed property is to be treated in the aggregate when the State Board equalizes valuations "for tax purposes within the state." . . .
>
> . . . .
>
> Although § 77-506 gives the State Board jurisdiction "to increase or decrease the actual valuation of a class or subclass of real or personal property of any county or tax district," that provision does not give the State Board jurisdiction to "pierce" the county abstracts before it at the request of a locally assessed taxpayer to equalize the specific property of all the taxpayers in a cognizable class or subclass in a county with specific classes of similar property throughout the state. In other words, under § 77-505, the State Board does not have jurisdiction to rule upon requests for the equalization of individual assessments . . . .

237 Neb. at 597, 467 N.W.2d at 59.

The decision in *AT&T Information Sys.* makes it clear that appellants, as taxpayers seeking equalization of their individual assessments, are precluded from seeking *individualized* relief from the State Board. However, *AT&T Information Sys.* points

out that appellants could appear before the State Board to request adjustment of the *aggregate* value of all taxable property in Douglas County. The decision in *AT&T Information Sys.* did not, however, indicate whether an "aggregate assessment" from the State Board was the sole remedy available for the taxpayers. Thus the determinative question remaining from *AT&T Information Sys.* relevant to this appeal is this: Can taxpayer owners of locally assessed personal property who seek equalization of the individual assessments on their property in consideration of centrally assessed personal property valuations request relief from a county board, or must they seek relief by way of aggregate adjustments from the State Board?

County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed. *Municipal University of Omaha v. County Board*, 181 Neb. 881, 151 N.W.2d 924 (1967); *State ex rel. City of Omaha v. Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967). Even if appellants' assertion were true that nothing in the statutes governing the authority of county boards of equalization expressly prohibits a county board from "considering" centrally assessed property in assessing the value of locally assessed property, appellants fail to point out any express grant of authority that would permit such an act.

Generally, taxpayers may question either the assessed actual value of property, the lack of proportionate and uniform valuation of property, or both issues in a proceeding before a county board of equalization. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988). However, the parcels or items of property or classes of property that a county board may consider or of which it may correct the assessment, as provided by § 77-1504, is limited by the language of § 77-1503.01 to *locally assessed* land, improvements, and personal property. Stated otherwise, a county board of equalization is statutorily empowered and authorized to equalize only those assessments of countywide property of which the county has the authority to assess the value. §§ 77-1503.01 and 77-1504. The authority to equalize the

assessments of property among the various counties in the state has been reserved exclusively to the State Board. § 77-505.

The power of a county board of equalization to rectify the returns of assessors and change the assessments of property which has not been omitted or undervalued has long been statutorily limited to a set number of circumscribed days of each year. *Peter Kiewit Sons' Co. v. County of Douglas*, 161 Neb. 93, 72 N.W.2d 415 (1955); *Fromkin v. State*, 158 Neb. 377, 63 N.W.2d 332 (1954); *Farmers Co-operative Creamery & Supply Co. v. McDonald*, 100 Neb. 33, 158 N.W. 369 (1916); *Sumner & Co. v. Colfax County*, 14 Neb. 524, 16 N.W. 756 (1883); §§ 77-1502, 77-1504, and 77-1514. After the county abstracts of assessments are finalized, they are submitted to the State Board for review and equalization in relation to other county- and State-assessed valuations. §§ 77-505, 77-506.01, and 77-507.01. If a county board were to "consider" centrally assessed property valuations in relation to locally assessed property, as contemplated by the appellant taxpayers, it would alter the intracounty-to-statewide progressive nature of Nebraska's equalization process. Either the centrally assessed valuations to be "considered" would need to be previous years' values, which would defeat the purpose of assessing present values, or the county board would need to anticipate the valuations yet to be centrally assessed by the State. Recognizing that the requested relief appellants seek would create an anachronism in the respective functions of the county and state boards of equalization, we hold that Nebraska's statutory scheme of equalization does not confer such jurisdiction on the county board.

Citing our decision in *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987), appellants contend that a county board of equalization may properly consider the values of similarly situated property from outside the county in valuing property located within the county. Appellant taxpayers' reliance on our decision in *Banner County, supra*, is misplaced. The controversy in *Banner County* surrounded the valuation of irrigated cropland for 1986. At issue was whether the county board improperly considered the values of land in adjoining counties, as set forth in the 1986 Nebraska

Agricultural Land Valuation Manual, when it adjusted the values of irrigated land in Banner County to achieve intracounty equalization. The Nebraska Department of Revenue compiled the land manual figures to reflect valuations for all agricultural land in Nebraska for the year 1986. These figures were made available to the county boards prior to the time adjustments were to be reported to the State Board for the 1986 year. Nothing in the valuation procedure utilized by the county board in *Banner County* required the county board to attempt to equalize property values in consideration of either previous years' valuations or current centrally assessed property valuations. Therefore, the actions of the county board in *Banner County* are irrelevant to the circumstances on this appeal and are not dispositive of the issues before us.

We hold that the county board did not have jurisdiction to consider the valuations of centrally assessed property in arriving at the value of appellant taxpayers' locally assessed personal property within Douglas County. By restricting the power of a county board to equalize only those assessments over which it had authority to assess the value, § 77-1503.01 took away the county board's authority to increase or decrease locally assessed property values in relation to other property located within the county whose value is centrally assessed. Furthermore, Nebraska's scheme of assessments and equalization contemplates concurrent valuations by each county within a specific timeframe. These valuations are then submitted by the county assessors to the State Board, which proceeds to collectively equalize the aggregate values of statewide taxable property. The grant of authority to a county board contemplated by the appellants would distort this plan and lead to disjointed intracounty and intercounty assessments by both county and state boards of equalization.

In conclusion, § 77-1504 does not confer jurisdiction on the county board to decrease the challenged assessed personal property values as requested. Consequently, neither the district court nor this court acquired jurisdiction over the matter, so the appeals must be dismissed.

APPEALS DISMISSED.

IN RE APPLICATION OF A TOUCH OF CLASS LIMOUSINE, INC. A TOUCH OF CLASS LIMOUSINE, INC., APPELLANT, V. OLD MARKET LIMOUSINE SERVICE, INC., ET AL., APPELLEES.

497 N.W.2d 71

Filed March 19, 1993. No. S-91-682.

1. **Public Service Commission: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commission: Motor Carriers.** The performance of unlawful services does not necessarily render an applicant unfit to receive a certificate from the Nebraska Public Service Commission to transport passengers, at least where the record shows that there was no willful and intentional violation.

Appeal from the Nebraska Public Service Commission. Affirmed.

James C. Webering for appellant.

Marshall D. Becker for appellees.

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

WHITE, J.

On November 1, 1990, A Touch of Class Limousine, Inc., filed an application with the Nebraska Public Service Commission seeking to transport passengers and their baggage by limousine in intrastate commerce between points in Douglas, Sarpy, and Otoe Counties over irregular routes. The application was later amended to exclude from the requested authority the transportation of railroad train crews and their baggage.

Protests directed at the restricted authority were filed by Old Market Limousine Service, Inc.; Star Limousine, Inc.; and Skip Citta Investments, Inc., doing business as Private Coach Limousine Service, as well as Checker Cab Company, Yellow Cab Company, and Happy Cab. Prior to the hearing, the three cab companies withdrew their protests. They took no further part in the proceedings and are not parties to this appeal.

In its order denying the application, the commission found

as follows: (1) Applicant is not fit, willing, and able to properly perform the service proposed and conform with the statutes and rules of the commission thereunder; (2) the service proposed will not be required by present or future public convenience or necessity; (3) the application should be denied; and (4) based on its admission of operating after having been notified to cease and the evidence that it continued to operate while the application was pending, A Touch of Class Limousine, Inc., should be ordered to cease and desist from operating in Nebraska intrastate commerce without a certificate of public convenience and necessity. A Touch of Class Limousine, Inc., appeals.

The applicant assigns four errors. Its first two assignments of error, combined, state that the commission erred in failing to require protestants to furnish documents and to answer interrogatories directed to the protestants' financial condition and profitability, in failing to impose sanctions, and in failing to strike certain testimony of protestants. Next, it alleges the commission erred in finding that the proposed service would not serve the public need and convenience. Last, it alleges the commission erred in finding that applicant was unfit to provide the service.

We will discuss the last assignment of error first, and as the commission finding and order must be affirmed, discussion of the remaining assignments is not necessary.

Neb. Rev. Stat. § 75-311 (Reissue 1990) states in part that

> [a] permit shall be issued to any qualified applicant therefor, authorizing in whole or in part the operations covered by the application, if it appears after notice and hearing from the application or from any hearing held thereon *that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of sections 75-301 to 75-322.04 and the lawful requirements, rules, and regulations of the commission thereunder* and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest by providing services designed to meet the distinct needs of each individual customer or a specifically designated class

> of customers as defined in subdivision (11) of section 75-302. Otherwise, such application shall be denied.

(Emphasis supplied.)

> "On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made."

Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc., 203 Neb. 356, 363, 278 N.W.2d 762, 767 (1979). Accord *Herman Brothers, Inc. v. Hennis Freight Lines, Inc.*, 192 Neb. 258, 220 N.W.2d 230 (1974).

Applicant, A Touch of Class Limousine, Inc., is an Iowa corporation and commenced operations in Iowa, as well as intrastate operations to and from points in Nebraska, approximately 7 1/2 years prior to the hearing. The management became aware in May 1990 that a certificate was necessary to legitimize intrastate operations in this state. The applicant did not cease operation. The notice of the illegal operation came from a letter from the commission. Shortly after the receipt of the letter, a commission inspector on a personal visit informed applicant's principals that it could not operate without a certificate of authority. A letter from the enforcement branch in December stated that the applicant was operating illegally and warned the applicant that "illegal operations reflect upon the fitness of a carrier when its application is considered." The applicant did not discontinue the service, and was shown to be operating as late as the day before the hearing on March 7, 1991.

In *Groenewold v. Building Movers, Inc.*, 197 Neb. 187, 194, 247 N.W.2d 629, 633 (1976), we said:

> We do not think that the performing of unlawful services necessarily renders an applicant unfit to receive a certificate at least where, as here, the record shows and the commission has found that there was no willful and intentional violation. Accordingly we cannot find that the action of the commission was unreasonable and arbitrary.

It is the position of the commission that the willful action of

the applicant in continuing service after at least three warnings of illegal operation establishes that the applicant is unfit to hold a certificate of convenience and necessity. We are unable to say that the action of the commission was arbitrary or capricious. Therefore, the decision of the commission is affirmed.

AFFIRMED.

NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. FRANCIS L. STASTNY ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, THE HARTFORD ACCIDENT AND INDEMNITY COMPANY AND STATE OF NEBRASKA, DEPARTMENT OF BANKING, THIRD-PARTY DEFENDANTS, APPELLEES, AND FIRST STATE BANK OF DWIGHT, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

497 N.W.2d 657

Filed March 26, 1993. No. S-89-1420.

1. **Actions: Parties: Standing.** In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
2. **Jury Instructions.** When it becomes necessary for the court to give further instruction to the jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
3. _____. A party's right to a fair trial may be substantially impaired by jury instructions that contain incorrect information, suggest an improper shift of the burden of proof, misstate the law upon a vital issue, improperly single out or give undue prominence to particular evidence or facts, contain inconsistencies, or confuse or mislead the jury.
4. **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 pleadings and evidence, there is no prejudicial error necessitating a reversal.
5. _____: _____. The refusal to give proper requested instructions, which are not covered by other instructions which are given, is error.

6. **Jury Instructions.** Notwithstanding an absence of a request for a specific instruction, a trial court must instruct the jury on material or relevant issues presented by the pleadings and supported by the evidence.
7. **Contracts.** When a contract is ambiguous, the court may consider all facts and circumstances leading up to the contract's execution, the nature and situation of the subject matter, and the apparent purpose of the contract.
8. **Contracts: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
9. **Trial: Witnesses.** It is within the discretion of the trial court to permit subsequent examination of a witness after direct and cross-examination.
10. **Trial: Expert Witnesses.** Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
11. _____: _____. Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language.
12. **Contracts: Intent: Expert Witnesses.** When a contract term is not defined in the parties' contract, and the parties dispute the intended meaning of the term, an expert witness may properly testify as to the expert's interpretation of the contract language.
13. **Directed Verdict.** The party against whom a judgment is sought under a directed verdict is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference as reasonably deducible 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.
14. _____. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed and remanded for a new trial.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Thomas M. Locher and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee First State Bank of Dwight.

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

WHITE, J.

In December 1982, the Dwight Cooperative Credit Association (Association), facing insolvency, merged with the Farmer's State Bank of Dwight, now known as the First State Bank of Dwight (Bank), the third-party codefendant and sole appellee involved in this appeal. To keep the Association operating during 1982, the Nebraska Depository Institution Guaranty Corporation (NDIGC) had deposited a total of $210,000 in a correspondent bank to the credit of the Association. The $210,000 was made available through two promissory notes signed by the third-party plaintiffs-appellants.

The appellants are 12 individuals who were formerly directors, officers, or members of the supervisory committee, membership committee, or the loan committee of the Association. Originally, Raymond Sisel was a third-party plaintiff to this action, but he passed away while the case was at trial and the action was not revived as to him.

After the merger between the Association and the Bank, the promissory notes were not repaid. The NDIGC filed suit against appellants as makers of the notes. Appellants in turn filed third-party claims against (1) the Bank, based on a breach of the merger agreement; (2) the Hartford Accident and Indemnity Company, as the insurer of a fidelity bond on an employee who had embezzled from the Association; and (3) the State of Nebraska, Department of Banking (department), as receiver of the Association's assets and as successor in interest for the NDIGC. The third-party suit against the Bank was severed from the other actions, and a compromise and settlement was reached among the other parties in February 1986. As part of the compromise and settlement, appellants agreed to pay $90,000 in full and complete satisfaction of all sums due to the NDIGC arising from the execution of the two promissory notes. As a result of the settlement, both the department and the Hartford Accident and Indemnity Company were either released from or satisfied all claims asserted by appellants. Consequently, the NDIGC, the Hartford Accident and Indemnity Company, and the department were dismissed as parties to the suit. Appellants

then sought to recover the $90,000 as damages arising from their claim against the Bank. This claim was based on the Bank's alleged breach of a promise in the merger agreement to assume appellants' liability arising from the notes.

After a jury trial, the appellants' breach of contract action against the Bank was dismissed. Appellants now appeal the dismissal of their action. The Bank cross-appeals, asserting that it was error for the lower court to overrule the Bank's motion for a directed verdict.

A brief review of the function and organization of the Association, as distinguished from a traditional bank, is in order. The Nebraska Department of Banking approved the articles of association for the Association in June 1934. The Association was capitalized by a $10 membership fee from each depositor or borrower in addition to an "open share" account that was made up of 10 percent of all members' deposits. Withdrawal from these open share accounts could be restricted by either the Association's board of directors or by an order of the department to protect the interests of the other shareholders.

Amended bylaws approved in 1945 provided, in pertinent part, that "losses incurred by the association should be charged to the guaranty fund, after the board of directors and the supervisory committee jointly determine that a loan or account is uncollectible and that a loss has been incurred, or if so ordered by the department of banking" (article XVI, § 2), and that "[t]here shall be no liability of the members for the debts and obligations of the association" (article XVIII, § I).

Department regulations prohibited cooperative credit associations from carrying overdrafts on depositors' accounts. Therefore, under the recommendation of the department, a depository account was set up in the mid-1970's. This account was funded by a note given by the Association's directors to permit the Association to cover occasional overdrafts arising in the normal course of business. This liability account was known as the "D H Special Account" and commonly referred to as the "director's account." The liability was carried on the Association books as a demand deposit account but did not appear on the Association's daily financial statement.

The events leading up to the present lawsuit generally cover a period of 12 months beginning in December 1981. At that time, depositors at the Association complained to the department that they were not receiving their monthly statements. In late January or early February 1982, the department undertook an examination of the Association's records and uncovered a system of embezzlement by an employee of the Association, Susan Urbanek. Urbanek, who is not a party to this action, acted as a combined assistant secretary-treasurer, teller, and bookkeeper.

To conceal her embezzlement, Urbanek removed the records of all depositors with overdrafts to her home. In addition to the fact that there were missing and presumably embezzled funds, the department uncovered hidden overdrafts in customers' accounts, along with manipulated books and records.

After the discovery, appellants met with officials from both the department and the NDIGC. It was determined that the Association could remain in operation if the NDIGC would transfer $120,000 to the National Bank of Commerce (NBC), the Association's correspondent bank in Lincoln, to the credit of the Association, in exchange for promissory notes made payable to the NDIGC. These notes stated that the directors and their spouses, as well as every party who signed the note, jointly and severally promised to pay the note on demand. None of the directors' spouses in fact signed the notes; however, various officers and committeemen had signed the note, in addition to the directors. No corresponding instrument was ever drawn up to establish whether the money was intended as a loan, a capital contribution, a deposit, an investment in return for stock, or a similar agreement between the appellants and the Association. An entry was made on the Association's daily financial statement to reflect the $120,000 as a positive balance in a "director's account."

In June 1982, the appellants signed another note payable to the NDIGC for $90,000 to cover further overdrafts that had surfaced. This money was again deposited in NBC to the credit of the Association and was reflected as an addition to the "director's account."

In December of that year, the department drew up a

statement of assets and liabilities, referred to as exhibit A by the parties and again at trial. This statement reflected the financial condition of the Association as of December 10, 1982. On this statement, an "overdrawn deposit account" in the amount of $128,197.83 appeared as an asset. The "director's account" was reported to have a balance of $142,115.98. On December 16 or 17, 1982, the department declared the "overdrawn deposit account" to be a worthless asset and charged the account against the $142,115.98 amount in the director's account.

On December 20, 1982, the department director informed the appellants that the Association needed an additional $200,000. The appellants refused to sign another promissory note. The department director then stated that he had a buyer for the Association, Kermit Wagner. Counsel for the appellants realized he had a conflict of interest between the potential buyer and appellants, and withdrew his representation at the meeting.

Later that evening the appellants met with Wagner. The following day they obtained new counsel and on December 22, 1982, the parties, in addition to the NDIGC and the department, began negotiating the merger of the Association with what is now known as the Bank. Negotiations concluded on December 23, 1982, and were reduced to writing in a "Memorandum of Agreement to Merge" (merger agreement), signed by the secretary-treasurer of the Association, appellant David Hotovy, by the Bank's president, Kermit Wagner, and by Paul Amen of the department. The statement of assets and liabilities, dated December 10, 1982, was referenced and attached to the merger agreement.

Pertinent provisions in the merger agreement stated that the parties agreed to the following:

> 1. Association represents that the Statement of Assets and Liabilities prepared by the Nebraska Department of Banking and Finance and attached hereto as Exhibit "A" appears to be a true and correct compilation of the assets and liabilities of Association.
>
> 2. Association hereby represents that there are no other liabilities known to the Association other than those represented on Exhibit "A" and ordinary operating expenses paid or incurred subsequent to the date thereof.

> 3. Association herewith transfers all of the assets and liabilities set forth in Exhibit "A" except the sum of $14,511.98 cash, which shall be held by the Nebraska Department of Banking and Finance.
>
> . . . .
>
> 6. Bank hereby assumes and agrees to pay all liabilities set forth in Exhibit "A", including "Share Accounts", shown thereon.
>
> . . . .
>
> 8. Bank and the Association hereby acknowledge that there are assets of the Association that are not being transferred as a part of this Memorandum of Agreement and which are not shown on Exhibit "A", which assets shall be held for collection by the Nebraska Department of Banking and Finance.
>
> 9. Bank hereby represents and agrees that it will use reasonable efforts in the ordinary course of its banking business to collect on any assets held by the Association after the merger in the possession of the Nebraska Department of Banking and Finance and owing to the Association at date hereof.

Subsequently, the NDIGC sued appellants for payment of the promissory notes. Appellants filed third-party petitions against the Bank, the department, and the Hartford Accident and Indemnity Company (Hartford), the insurer of the fidelity bond against Susan Urbanek. As previously noted, the third-party suit against the Bank was severed from the other actions, and compromise and settlement agreements were reached among the other parties in February 1986. Under these agreements, the NDIGC received $90,000 from appellants, $75,000 plus $25,000 in interest from Hartford on the fidelity bond, and $22,000 from the department (representing the $14,511.98 cash mentioned in paragraph 3 of the merger agreement, the appellant's membership, and open shares and some collected overdrafts). The department assigned to the appellants the uncollected overdrafts from the Association and the anticipated restitution from Urbanek. Appellants continued to pursue their action against the Bank seeking to recover the $90,000 settlement amount as damages.

At trial, the appellants argued that the "director's account" was a liability of the Association which the Bank should have assumed in accordance with paragraph 6 of the merger agreement. This argument was based on the appellants' subjective beliefs, the asserted representations given by the NDIGC and the department, the Association's previous treatment of the "D. H. Special Account" as a liability, and the option of experts that the unique capital structure of a credit association could not reflect any ownership equity from a "capital injection." The appellants further argued that, in accordance with paragraph 3 of the merger agreement, the Bank should have assumed responsibility for the "overdrawn deposit account" in the amount of $128,197.83, which appeared as an asset on the attached statement of assets and liabilities dated December 10, 1992, instead of treating it as a chargeoff against the "director's account."

Conversely, the Bank argued that the "director's account" was a capital injection required by the State banking department, and not a liability. The Bank further maintained that the account was depleted when the department charged off the "overdrawn deposit account" against the "director's account" on December 17, 1982, due to the insolvency of the Association, and that this was reflected in the $14,511.98 reference in paragraph 3 of the merger agreement.

Finding the merger agreement ambiguous, the district court submitted the case to the jury. The jury heard testimony from 26 different witnesses over a 3-week period before the parties rested. During the jury's deliberations, it sent out the following question for the court:

> Must me [sic] judge solely on the basis of wheather [sic] the Directors Account is correctly or incorrectly placed in the Capital Section.
>
> Can we decide on the basis that the contract was misrepresented to the Directors of the Coop at the time of signing, in that Exhibit A, of Memo to Merge still shows the written off loans & overdrafts as assets.

The trial court responded with jury instruction No. 12, which stated:

> Your question submitted to the Court indicates doubt

> and dispute with regard to the meaning of "Director's Account." You are instructed that you should consider all facts and circumstances leading up to and attending the execution of Exhibit 1; and consider the relationship of the parties, the nature and situation of the subject matter of the agreement and the purpose of making the contract.
>
> The law provides: When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

The jury found in favor of the Bank and against the appellant. Subsequently, appellants brought this appeal, asserting 18 assignments of error. These asserted errors challenge the district court's decision to give or refuse certain jury instructions, to receive the testimony of various witnesses over appellants' objection, and to deny appellants' request for redirect of a witness. The Bank cross-appeals, asserting that the court erred by failing to sustain its motion for a directed verdict.

We first note that the interest of the third-party plaintiff, Raymond J. Sisel, who died after commencement of the trial but prior to judgment, was not revived in the lower court. We find nothing in the record before us to indicate that the appellants or the personal representative of Sisel's estate have sought to assert Sisel's interest in the suit. The appellee does not claim error in proceeding with the case without revivor or substitution. The court clearly acknowledged the death of Sisel in the record in the presence of both parties and their respective counsel. Therefore, we proceed under the assumption that all the parties agree that the action properly progressed under Neb. Rev. Stat. § 25-1403 (Reissue 1989), which allows an action to proceed when one of several plaintiffs dies, if the right of action survives to the remaining parties.

From the outset the parties do not dispute, and we are in agreement with the trial court, that the merger agreement and the statement of assets and liabilities, when construed together, are ambiguous. Among the multiple ambiguities, we note that the contract does not define the term "director's account." The meaning of this term is not known under generally accepted

accounting practices, nor is the meaning ascertainable from the contents of the documents. We also observe that the statement of assets and liabilities does not clearly specify what is a liability and what is a capital account under the right-hand column marked as a whole as "liabilities." Furthermore, paragraph 3 of the merger agreement is obscure in that it refers to the transfer of all assets and liabilities to the Bank except for $14,511.98, without explaining which account this transfer is to be excepted from and without an obvious corresponding amount in any accounts appearing on the attached statement of assets and liabilities.

Appellants' first assignment of error, addressed as the fifth argument in the brief, relates to jury instruction No. 2. This jury instruction assigned the appellants the burden of proving, among other things, that "the plaintiffs [appellants] are entitled to enforce the Memorandum of Agreement, Exhibit 1." Appellants maintain that this instruction was erroneous because it involved the issue of whether a party is the real party in interest, a question of law for the court that should not be submitted to the jury.

We find appellants' interpretation of this instruction untenable. Whether a party is entitled to enforce a contract and whether a party is a real party in interest are not synonymous inquiries. In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. See *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979). The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* However, a reasonable interpretation of the jury instruction in question, when read as a whole with the remainder of the jury instructions, was that it asked for a determination of whether appellants could ultimately *enforce* their rights or interests in the contract against the appellee, an issue properly left to the province of the jury when a contract is ambiguous.

Appellants next argue that the court erred by giving, on its

own motion, jury instruction No. 12, in response to the jury's question because the instruction (1) is an incomplete quotation of the rule announced in *Younker Brothers, Inc. v. Westroads, Inc.*, 196 Neb. 168, 241 N.W.2d 679 (1976); (2) is confusing and misleading; and (3) does not respond to the jury's question in that it places disproportionate emphasis on one term of the contract in exhibit 1, that is "director's account," without addressing the jury's inquiry about other representations in exhibit A, the statement of assets and liabilities. In response, the Bank argues in part that appellants failed to properly preserve the issue for appeal.

Under Neb. Rev. Stat. § 25-1116 (Reissue 1989), if a jury has retired for deliberation and desires information as to

> any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

When it becomes necessary for the court to give further instruction to the jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982); *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). The record in this case reveals that the court contacted counsel for the parties by telephone before further instructing the jury. Appellants' counsel asserted at the subsequent hearing on appellants' motion for new trial that he had objected to jury instruction No. 12 in his telephone discussions with the trial court. The trial court's recollection of the two-person conversation was uncertain of appellants' objection, and no record of counsel's objections or consent is available for our review.

Obtaining consent of counsel over the telephone, before giving additional jury instructions outside the presence of the parties or counsel, is potentially troublesome. As illustrated by this case, the failure to obtain the consent of counsel in open court deprived appellants of the opportunity to make and

preserve a proper record of their objections to the written jury instructions. To hold that the appellants waived their objections to the jury instruction in light of the ambiguous nature of the record before us would further discount a substantial right of the appellants. Therefore, we reject the Bank's assertion that appellants failed to timely object to the jury instruction.

A party's right to a fair trial may be substantially impaired by jury instructions that contain incorrect information, suggest an improper shift of the burden of proof, misstate the law upon a vital issue, improperly single out or give undue prominence to particular evidence or facts, contain inconsistencies, or confuse or mislead the jury. See, generally, *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987) (holding that instructions which misstate the issues or defenses and have a tendency to mislead the jury are erroneous); *Juniata Feedyards v. Nuss*, 216 Neb. 29, 342 N.W.2d 1 (1983) (noting that conflicting instructions are generally erroneous and prejudicial); *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 253 N.W.2d 310 (1977) (finding that confusing and inconsistent instructions which concern the burden of proof constitute reversible error); *Knihal v. State*, 150 Neb. 771, 36 N.W.2d 109 (1949) (holding that it is reversible error for the court's charge to the jury to give undue prominence to a portion of the testimony by special reference thereto); *Kleutsch v. Security Mutual Life Ins. Co.*, 72 Neb. 75, 100 N.W. 139 (1904) (holding that it is error for an instruction to single out a particular part of the evidence and express an opinion as to its weight, strength, or probative force).

Jury instruction No. 12 failed to fully address the question proposed by the jury. By partially confronting the jury's inquiry, the court inadvertently emphasized and directed the jury to consider evidence and factual issues relating to the "director's account" in exhibit 1, the merger agreement, while minimizing the express concerns of the jury regarding the equally important attached exhibit A, the statement of assets and liabilities. Jury instruction No. 12 was therefore misleading, confusing, and unduly suggestive of an outcome to the prejudice of the appellants, which requires a reversal and remand for a new trial. Recognizing that the remaining asserted

errors will likely arise again if a new trial is pursued, in the interest of judicial economy we will address the remainder of the parties' claims.

Appellants also allege that the court erred when it refused to give (1) an instruction to determine the intent of the parties when the memorandum of agreement to merge was executed; (2) an instruction about the applicable rules of construction by which the intention of the parties to a written instrument may be discovered; and (3) appellants' instructions numbered 2, 4, 5, 8, and 13, which generally related to the construction and interpretation of the meaning of a contract and its attached documents, as well as the proper measure of damages.

"All jury instructions given must be read together, and if, taken as whole, they correctly state the law, are not misleading, and adequately cover the issues supported by pleadings and evidence, there is no prejudicial error necessitating a reversal." *McClymont v. Morgan*, 238 Neb. 390, 394, 470 N.W.2d 768, 772 (1991). However, the refusal to give proper requested instructions, which are not covered by other instructions which are given, is error. *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976). Notwithstanding an absence of a request for a specific instruction, a trial court must instruct the jury on material or relevant issues presented by the pleadings and supported by the evidence. *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988).

The jury instructions that were given addressed a statement of the case, plaintiff's assertions and defendant's denial, burden of proof, effect of findings, and general civil instructions on duties of the jury, statements of counsel, rulings by the court on evidence, jury deliberations, expert witnesses, and the status of a corporate defendant and its agents. At the pretrial conference, both parties to this appeal had requested and offered, but were refused, instructions relating to the construction and interpretation of a contract. In consideration of the court's finding that the written contract was ambiguous as a matter of law, we hold that the court erred in refusing to instruct the jury on the construction and interpretation of an ambiguous contract in consideration of the parties' intentions at the time the contract was executed.

The appellants' next assignments of error revolve around the testimony of two certified public accountants employed by the Bank. The first witness, Mike Lieck, was a Bank employee who had assisted in the merger with the Association and had negotiated with the NDIGC for a separate agreement guaranteeing that the Association's assets would equal its liabilities. To establish that all preconditions had been met, appellants had introduced the NDIGC separate agreement, exhibit 12, as part of the merger agreement because it was referred to in the merger agreement as a condition precedent to the Bank's duty to perform. Later in the trial Lieck gave testimony, over appellants' objections, as to why the negotiations with the NDIGC, at which the appellants were not present, were important to the Bank and whether the Bank considered the "director's account" to be a liability.

The second witness was Frank Connealy, another Bank employee, who assisted with the negotiations with the NDIGC. Connealy was allowed to testify, over appellants' objections, to the weakness of the Association's loan portfolio in relation to the guarantee negotiation with the NDIGC, on how the NDIGC agreement, exhibit 12, was related to the merger agreement, and what the NDIGC was required to do based upon the witness' understanding.

The appellants allege that the court erred in receiving the witnesses' testimony because it (1) included improper mental impressions, conclusions, and opinions as to what the witnesses thought the contract meant; (2) involved negotiations for a separate agreement between the Bank and the NDIGC; (3) related to how the Bank and the NDIGC performed an agreement to which appellants were not a party; and (4) allowed Lieck, who was not named in answers to interrogatories as an expert, to testify to his opinion that the "director's account" was capital of the Association and not a liability.

Conversely, the Bank argues that the testimony in question was properly admissible in that the negotiations with the NDIGC and the witnesses' understanding of the term "director's account" concerned facts and circumstances leading up to and attending the execution of the merger agreement and were offered to assist in the interpretation of the ambiguous

merger agreement. The Bank also counters that Lieck's testimony was not offered as expert testimony, but for the purpose of ascertaining the intention of a party to the merger agreement.

When a contract is ambiguous, the court may consider all facts and circumstances leading up to the contract's execution, the nature and situation of the subject matter, and the apparent purpose of the contract. *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988). The testimony of the two witnesses relating to the NDIGC contract was admissible to show facts and circumstances leading up to the execution of the merger agreement, relevant to the Bank's purpose in including a clause in the merger agreement relating to the NDIGC, and permissible parol evidence to aid the jury in the interpretation of an ambiguous contract.

The employee witnesses' opinions as to the intended meaning of the term "director's account" were also admissible. "In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party." *Quinn v. Godfather's Investments*, 213 Neb. 665, 668-69, 330 N.W.2d 921, 924 (1983). The NDIGC negotiations were contemporaneous with the merger agreement. These negotiations were relevant to the Bank's understanding of the "director's account" in that the Bank necessarily had to determine the value of the Association's assets in comparison to its liabilities in order to arrive at a guarantee amount against the outstanding loans. Therefore, Lieck's understanding that the "director's account" was not a liability was admissible as evidence of a contemporaneous understanding and as parol evidence of the understanding of a party to aid in the construction of an ambiguous contract.

Appellants further allege that it was reversible error for the court to (1) allow the appellants' own witness, Richard Wible, to give an expert opinion he was not qualified for; (2) allow Wible to render an opinion on cross-examination regarding a subject that appellants did not examine on direct; and (3) refuse

to allow appellants to reexamine their own witness, Richard Wible, regarding a subject introduced by appellee on re-cross-examination. We find that the record does not support the first two assertions, while the third asserted error was within the authority of the trial court and will not be disturbed on appeal absent an abuse of discretion.

Wible, an employee of the Association's correspondent bank who had assisted in reconciling the Association records after the overdraft and embezzlement problems surfaced, was extensively questioned by appellants' counsel on direct examination. On redirect, appellants' counsel further questioned Wible about the appearance of the "director's account" on the Association's records. The complained-of testimony on re-cross-examination asked for Wible's opinion as to the nature of the "director's account," as either a liability or a capital account, in relation to Wible's participation in offsetting entries during the review of the Association's records.

It is within the discretion of the trial court to permit subsequent examination of a witness after direct and cross-examination. Considering that appellants introduced the subject of the "director's account" into evidence on redirect examination, the Bank's further inquiry on recross did not introduce a matter foreign to redirect or seek Wible's opinion as an expert. In light of the subject matter of the testimony and the cumulative record before us, we cannot say the trial court abused its discretion in permitting the Bank to further inquire about the witness' direct involvement with the account on recross, and then refuse the appellants further reexamination of the witness.

Appellants' final arguments assert that the court erred by permitting a witness to testify to custom and practice in the banking industry with no foundation and without those matters having been pled, and to testify to prior transactions which did not involve either party to this case.

These assertions relate to the testimony of Janet Labenz, an expert witness called by the Bank. Labenz, a certified public accountant specializing in financial institutions, had experience with four other mergers involving cooperatives and banks. Labenz gave her opinion that the "director's account" was not a

liability of the Association. Over objection, Labenz was allowed to testify that it was not significant to her interpretation of the disputed term that the statement of assets and liabilities dated December 10, 1982, was attached to the merger agreement on December 23, 1982, because

> [i]n the — the acquisitions in which I've participated, it's been the usual practice that some sort of balance sheet has to be looked at to discuss the terms of the negotiation. It's irrelevant what particular date is used in looking at that sample because the actual agreement isn't effective until some subsequent day, in this case, December 24th.
>
> . . . .
>
> I've worked on acquisitions of co-ops by banks and also the conversion of co-ops into banks and in those situations we would typically work with whatever balance sheet was available from the most recent information. So it would not be unusual to look at a balance sheet that was maybe prepared a week or two before the actual closing of the transaction.

Appellants argue that since the Bank failed to plead or allege a special custom as a defense it cannot rely on this testimony. Appellants further maintain that the Bank failed to prove that the appellants, as agents of the Association, had knowledge of the special custom and contracted in reference to it because the witness had no foundation from which to assume that the appellants had knowledge of such a custom or contracted with reference thereto. Therefore, the appellants assert, the testimony was inadmissible because it was evidence of irrelevant transactions neither connected to the transaction before the court nor involved even one of the parties to the suit.

In reply, the Bank argues that the testimony was admissible as that of an expert opinion to assist the trier of fact in understanding the merger agreement and the practices and methods that may have been utilized by the parties in executing the merger agreement. The Bank also contends that Labenz' testimony relating to the "director's account" was based on her experience as a C.P.A., and that the testimony regarding her experience with other mergers went to the weight of her testimony and not to its admissibility.

Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978).

Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language. *Roca v. Republic Nat. Bank of Miami*, 512 So. 2d 1044 (Fla. App. 1987), *rev'd on other grounds* 534 So. 2d 736 (Fla. App. 1988). When a contract term is not defined in the parties' contract and the parties dispute the intended meaning of the term, an expert witness may properly testify as to the expert's interpretation of the contract language. *Buford v. Wilmington Trust Co.*, 841 F.2d 51 (3d Cir. 1988).

The admission of expert testimony relating to the expert's basis for the interpretation of the term "director's account," as used in the statement of assets and liabilities, was not manifestly erroneous. Although not a generally accepted accounting practice, the term took on a specialized usage and meaning in light of the events surrounding the months before the execution of the merger agreement. When viewed as a whole, the contract is ambiguous; therefore, expert accounting testimony was required to explain the accounting interpretation of the term. Considering that the statement of assets and liabilities and the merger agreement were dated differently, and the opening balance sheet of the Bank attributed a different amount to the "director's account" than appeared on the statement of assets and liabilities, the witness' testimony was relevant and admissible to resolve this inconsistency as it related to her interpretation of the disputed account.

Both parties presented expert testimony which offered the jury differing views of the term "director's account." Recognizing that the admission of evidence is largely left to the discretion of the trial court, under the circumstances presented

we find that the trial court did not abuse its discretion in admitting this testimony.

The Bank asserts in its cross-appeal that the court should have granted the Bank's motion for a directed verdict at the close of the evidence. The Bank first argues that appellants failed to offer evidence of an express or implied contract to establish that the money in the "director's account" was a liability, such as a deposit or a loan, which the Bank was obliged to assume as part of the merger agreement. Second, the Bank claims that appellants, who were not parties to the execution of the merger agreement or assignees of the Association, failed to establish a contractual basis obliging the Bank to pay any amounts in the "director's account" to them as the beneficiaries of that account.

The party against whom a judgment is sought under a directed verdict is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference as reasonably deducible from the evidence. *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991). 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. *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991). "A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom." *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 284, 436 N.W.2d 146, 149 (1989).

The testimony and evidence presented at trial revolved around the sharply disputed issue of whether the "director's account" was a liability or capital account of the Association. Appellants testified to their belief that the money in the "director's account" was a loan or other liability which would be repaid to them. Appellants presented evidence that the former "D H Special Account," which had been treated as a liability owed to the directors since the 1970's, was also known as the "director's account." Expert witnesses for the appellants testified that in their opinion, the "director's account" could only be a liability due to the unique capital structure of a cooperative credit association. Testimony adduced at trial

showed that the money received from the NDIGC on the promissory notes signed by appellants was simultaneously deposited to the credit of the Association and recorded as an entry in the "director's account." The settlement and compromise agreement between the NDIGC, the department, and appellants demonstrated that appellants had in fact been given credit on their notes payable from assets of the Association, such as the remainder of the "director's account" and the money recovered from the fidelity bond.

This evidence and all proper inferences which can reasonably be deduced therefrom are not insufficient as a matter of law so as to justify a directed verdict for the Bank. Appellants presented sufficient evidence to support their theory that the money in the "director's account" was a liability owed to appellants in which appellants had an identifiable right or interest. Where, as here, the evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, it was proper for the trial court to overrule the Bank's motion for a directed verdict.

In sum, based on our findings that the court erred in giving jury instruction No. 12 and in refusing to give requested relevant jury instructions that were not covered by the instructions given, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE, J., not participating.

SOUTHWEST TRINITY CONSTRUCTORS, INC., APPELLANT AND CROSS-APPELLEE, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

497 N.W.2d 366

Filed March 26, 1993. No. S-90-566.

1. **Pleadings: Election of Remedies.** A party may not plead alternative theories of recovery which are inconsistent in the sense that the party cannot logically choose one theory without renouncing the other.

2. _____: _____. A party pleading inconsistent theories of recovery may be required to elect between them.
3. **Actions: Equity.** A suit in equity will not lie when the plaintiff has a plain and adequate remedy at law.

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

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

P. Shawn McCann and William H. Selde, of Sodoro, Daly & Sodoro, for appellee.

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

BOSLAUGH, J.

This action arose out of a dispute concerning a contract for the construction of an electric transmission line in Texas.

The plaintiff, Southwest Trinity Constructors, Inc., is a South Dakota corporation and is a subcontractor that agreed with the prime contractor, Transpower Constructors, a subsidiary of the Commonwealth Companies of Lincoln, Nebraska, to construct the foundations for the towers carrying the line. Central Power and Light Company is the owner that entered into the contract with Transpower for construction of the line. The prime contract was for $870,277. The subcontract was for $469,863. The contract authorized Central Power to require Transpower to furnish performance bonds to Central Power guaranteeing faithful performance of the work and the payment of the contractor's obligations arising in connection with the work. The defendant, St. Paul Fire & Marine Insurance Company, is the surety on the performance bonds furnished to Central Power by Transpower, the prime contractor.

A year before the contract involved in this case was signed, the defendant insurance company was concerned about the financial stability of Commonwealth, as the defendant had written a number of performance bonds and payment bonds for Commonwealth. Because of its concerns, the defendant agreed to guarantee a $12-million line of credit offered by

the First National Bank of St. Paul, Minnesota, to Commonwealth.

In order to secure the guarantee, a lockbox account was established at the bank. Payments to Transpower and Commonwealth were received by the bank and deposited in the lockbox account. Approximately $7.8 million passed through the lockbox account each month. Employees of the defendant reviewed requests received from Commonwealth to transfer funds from the lockbox account to general Commonwealth accounts and determined whether the requests should be approved. The defendant's policy for approval of those transfers was to see that the funds were requested for payments on bonded jobs, to pay for general overhead expenses of Commonwealth, or for payments to repay the line of credit.

From November 1985 to June 26, 1987, the bank, the defendant, and Commonwealth functioned under the lockbox agreement. The payments due Transpower under its contract with Central Power were made to the lockbox account.

On June 26, 1987, Commonwealth acknowledged to the defendant that it was insolvent and unable to continue operations. The defendant then assumed the remaining obligations for bonded jobs from that time forward. It also took the money then in the lockbox account totaling $277,775.63.

The plaintiff completed its work for Transpower by December 1986, except for some incidental cleanup work, which was completed by April 1987. The plaintiff submitted its final invoice, for $87,094.09, to Transpower on April 16, 1987.

On July 2, 1987, the plaintiff presented a claim to the defendant. The defendant denied the plaintiff's claim because the plaintiff did not present a sworn statement and because the invoice was not sent to the defendant within the time limit required by the bond, which was a statutory payment bond under Texas law.

This action was commenced on March 28, 1988. The petition alleged that the defendant was indebted to the plaintiff upon a variety of legal and equitable theories including a contractual obligation on the bond, unjust enrichment and subrogation in failing to pay the plaintiff from funds received from Central

Power, and theories of negligence and conversion.

On September 11, 1989, the plaintiff filed an amended petition, to which the defendant filed a demurrer. On January 22, 1990, the trial court sustained the demurrer and ordered the plaintiff to elect between its legal or equitable theories of recovery. On February 9, 1990, the plaintiff filed its second amended petition, in which it elected to proceed upon its equitable theories of recovery.

On May 25, 1990, the trial court found that the plaintiff was not entitled to recover under its equitable theories because the plaintiff had an adequate legal remedy in the nature of a suit upon the performance bond which was an adequate remedy at law. The petition was dismissed, and the plaintiff appeals from that judgment.

The plaintiff's principal assignments of error all relate to the order of January 22, 1990, which required the plaintiff to elect between its legal or equitable theories of recovery. The plaintiff argues that the remedies were not inconsistent.

A party may not plead alternative theories of recovery which are inconsistent in the sense that the party cannot logically choose one theory without renouncing the other, and a party pleading inconsistent theories of recovery may be required to elect between them. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

The two remedies involved in this case were inconsistent because in order to recover on the equitable theory, the plaintiff was required to prove that it had no adequate remedy at law. See, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). "A suit in equity will not lie when the plaintiff has a plain and adequate remedy at law." *Ganser v. County of Lancaster*, 215 Neb. 313, 317, 338 N.W.2d 609, 611 (1983). Proof that would enable the plaintiff to recover on the performance bonds would establish that the plaintiff had an adequate remedy at law, thus defeating its equitable cause of action. For that reason, it was not error to require the plaintiff to elect between the legal or equitable theories of recovery.

"[W]here a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy

must be exhausted before equity may be resorted to." *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 38, 302 N.W.2d 655, 660 (1981).

It is unnecessary to consider the plaintiff's other assignments of error. The defendant cross-appeals from that part of the trial court's May 25, 1990, order which denied its request for attorney fees. The defendant argues that the trial court erred in refusing to grant its request for attorney fees because under Texas law, if a claim under a statutory payment bond is invalid or unenforceable, the surety under the bond is entitled to recover all reasonable costs of defending the claim, including attorney fees. Tex. Prop. Code Ann. § 53.156(b) (West 1984).

The trial court required the plaintiff to elect between its legal or equitable theories. The plaintiff elected to pursue its equitable remedies, and the defendant was not required to defend the plaintiff's claim under the statutory payment bond.

In denying the defendant's request for attorney fees, the trial court found that the case was tried as a claim in equity and that Nebraska's substantive laws of equity applied. The trial court also found that the evidence in the case demonstrated substantial litigable issues under the facts and the law and that the claim was not spurious, frivolous, or made in bad faith.

In its brief, the defendant bases its request for attorney fees entirely on Texas law; however, as the trial court correctly found, this equitable claim is based on Nebraska law.

Generally, costs and expenses of litigation, including attorney fees, may not be recovered unless provided for by statute or as a uniform course of procedure. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

Neb. Rev. Stat. § 25-824 (Reissue 1989) requires the trial court to order attorney fees against any party that has brought or defended a civil action that alleges a claim or defense which is determined to be frivolous or made in bad faith.

We agree with the trial court's findings that the plaintiff's claim was not spurious, frivolous, or made in bad faith.

The defendant's cross-appeal is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

SUSAN L. GIESE, APPELLEE AND CROSS-APPELLANT, V. DANIEL J. GIESE, APPELLANT AND CROSS-APPELLEE.

497 N.W.2d 369

Filed March 26, 1993. No. S-90-881.

1. **Judgments: Waiver: Affidavits: Records: Appeal and Error.** In order to establish whether a party has so dealt with a judgment or other order appealed from as to have waived any right to review, it is permissible to present affidavits foreign to the record thereto.
2. **Divorce: Judgments: Waiver: Appeal and Error.** In a dissolution of marriage action, one who accepts any part of a judgment in her or his favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved.
3. **Judgments: Appeal and Error.** If the outcome of an appeal could have no effect on an appellant's right to the benefit accepted, its acceptance does not preclude the appeal. There is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a right which existed prior to the judgment and which, though recognized or confirmed by the judgment, is not merged in it.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Hall County, WILLIAM H. RILEY, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with direction.

David T. Schroeder, of Kelly & Schroeder, for appellant.

Warren S. Zweiback and Patrick M. Flood, of Zweiback, Hotz & Lamberty, P.C., for appellee.

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

FAHRNBRUCH, J.

Susan L. Giese seeks further review of a decision of the Nebraska Court of Appeals reducing the cash award she received from Daniel J. Giese in their dissolution of marriage decree. See *Giese v. Giese*, 1 NCA 1485 (1992).

Part of that cash award was in lieu of Susan's interest in the family business, which was awarded to Daniel. The remainder of the cash award to Susan represented the value of her contribution to the reduction of Daniel's premarital debt.

In seeking further review in the Supreme Court, Susan raises the single issue of whether Daniel waived his right to appeal the judgment of the district court for Hall County by his acceptance of the family's cleaning business, which he treated as his own property after the dissolution of marriage decree was entered. We reverse the decision of the Court of Appeals in that regard and affirm the terms of the cash award Susan received in the dissolution decree entered by the district court.

On her cross-appeal in the Court of Appeals, the amount of child support and child-care expense Susan was awarded in the district court was increased to $813 per month. Since neither party asked for further review of that award, the Court of Appeals' decision in that regard as well as other terms of the dissolution decree not changed by the Court of Appeals are affirmed.

FACTS

The facts material to this appeal are as follows:

Daniel and Susan Giese were married February 15, 1979. Their marriage was dissolved August 8, 1990.

The district court ordered the family home, a lot owned by the couple, and jointly held stocks and securities to be sold and the proceeds divided equally. The home was on the market, but had not been sold at the time of the appeal. Other property of the parties and associated costs of the divorce were also allocated by the court.

Daniel was awarded a 1989 Dodge Caravan automobile and Ideal Cleaners, the family business, which was valued at $150,000 and which he and Susan had operated. Susan was awarded two automobiles, valued together at $8,000, and a monetary award of $123,000. The $123,000 monetary award represented $56,000 as the value of Susan's contribution to the reduction of Daniel's premarital debt in a construction business he owned and $67,000 as her interest in Ideal Cleaners minus the value of the two automobiles. Daniel was ordered to pay the judgment in 60 monthly payments of $2,050 principal, plus interest at 9.09 percent per annum on the unpaid principal balance. Susan was awarded child support from Daniel for one minor child in her custody. Other debts, costs, and attorney fees

were allocated by the court.

On August 29, 1990, Daniel timely appealed to this court, alleging, inter alia, that the trial court erred in finding that the parties, through their joint efforts, had reduced Daniel's premarital debt by $108,000 and that the property division was excessive to the extent that the court awarded Susan $56,000 for her share in that debt reduction.

On December 28, 1990, Susan moved for summary dismissal of Daniel's appeal on the basis that he had already accepted the benefit of the judgment in his favor and therefore had waived his right to appeal. Susan submitted an affidavit setting forth the benefits of the property settlement which Daniel had accepted and stating that "[Daniel] owns all of the outstanding common stock of Ideal Cleaners of Grand Island, Inc. (previously owned jointly by the parties) and [Daniel] is presently operating Ideal Cleaners of Grand Island, Inc."

On January 8, 1991, Daniel filed an objection to Susan's motion to dismiss the appeal, and in his accompanying memorandum, he objected to the court's consideration of Susan's affidavit, but requested the court to consider his own affidavit if the court considered Susan's affidavit. In his memorandum, Daniel denied that he had received any benefit from the dissolution decree or that he had done anything to attempt judicial enforcement of the decree. He alleged that anything done after the decree was for the benefit of Susan, and not himself.

In an accompanying affidavit, Daniel denied that, as to Ideal Cleaners, either party had done anything with respect to ownership transfers of stock or the sale and execution of stock certificates. Daniel further stated in his affidavit that the real estate upon which the business was operated, and which was awarded to him in the divorce decree, remained in both his and Susan's names and that he had done nothing to enforce the divorce decree with respect to that property.

This court overruled Susan's motion for summary dismissal on January 17, 1991, and the case was subsequently assigned to the Court of Appeals' docket.

On June 17, 1992, Susan again moved for summary dismissal, this time in the Court of Appeals. She submitted a

second affidavit, in which she declared that Daniel was awarded all of the common stock of Ideal Cleaners, the primary asset of the parties. Susan further stated that Daniel had closed his own personal checking account and had been paying personal debts and expenditures from Ideal Cleaners' assets. According to Susan's affidavit, these expenditures consisted of payment of a premarital debt exceeding $24,000; property division, child support, and other court-ordered payments exceeding $26,000; and personal expenses, including vacations and trips, exceeding $50,000.

Daniel again opposed Susan's motion for summary dismissal, and he resubmitted the documents, including his affidavit, which had been submitted in opposition to Susan's first motion for summary dismissal.

The only other evidence as to whether Daniel had accepted the benefits of the decree was adduced at a contempt, garnishment, and garnishee liability hearing, held on February 6, 1991, in the district court, and at Daniel's deposition 1 day prior to that hearing.

Both in Daniel's deposition and at the hearing, Daniel admitted that there were no stock certificates, nor was there a stock register, for Ideal Cleaners. He testified that, in fact, the only evidence of stock ownership consisted of a stock purchase agreement conveying the stock of the business to Daniel and Susan on August 31, 1984, and the divorce decree, which awarded the parties' interest in Ideal Cleaners to Daniel.

In his deposition, Daniel testified that he no longer maintained a personal checking account. At the contempt hearing, Daniel testified that he did have a personal bank account, but that he did not use the account anymore because Susan's attorney had put a garnishment on it, and that he did not have any money in the account. He conceded in his deposition and at the court hearing that he paid his court-ordered obligations as well as his personal expenses with checks drawn on Ideal Cleaners' account. At the contempt hearing, Daniel stated that Ideal Cleaners' bank account "is just a bank account . . . . It's not corporate assets. Corporate assets become my personal responsibility as soon as they are entered in in a Subchapter S corporation" and that "I can use

those funds from a personal basis or I can use them as a corporate-expense basis."

The Court of Appeals considered the merits of Daniel's appeal after holding that Daniel's actions "[did] not equate with the simultaneous appeal from a money judgment and the acceptance of all or part of the money from the judgment" and that therefore, Daniel had not waived his right to appeal. *Giese v. Giese*, 1 NCA 1485, 1489 (1992). The Court of Appeals agreed with Daniel that the district court erroneously found that Susan had participated in the reduction of Daniel's premarital debt from $132,000 to $24,000.

We granted Susan's petition for further review solely to determine whether Daniel had accepted the benefit of the dissolution decree, thereby waiving his right to appeal the property division.

PROOF OF FACTS BY AFFIDAVIT

Before we reach the merits of Susan's appeal to this court, it is necessary to address Daniel's objection to Susan's use of affidavits to prove certain facts at issue in the appeal. This court has held that in order to establish whether a party has so dealt with a judgment or other order appealed from as to have waived any right to review, it is permissible to present affidavits foreign to the record thereto. See *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948). Therefore, both Susan's and Daniel's affidavits have been duly considered by this court.

ACCEPTANCE OF BENEFITS OF THE DECREE

Susan claims that Daniel waived his right to appeal because he accepted (1) proceeds from the liquidation of joint assets; (2) certain property awarded him by the dissolution decree; and (3) the district court's award of Ideal Cleaners, the family business, and treated its assets as his own. Daniel agrees that one who accepts a money judgment is precluded from appealing, but he contends that this rule does not apply to one who accepts a judgment of property. The Court of Appeals agreed with Daniel.

There appears to be no Nebraska case which directly addresses the issue raised by this appeal in the context of a property judgment rather than a money judgment. However,

the rule in Nebraska as to money judgments is clear.

We most recently considered this issue in *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992). In that case, the district court ordered the husband to pay the wife $56,000 to equalize the property distribution. The husband paid this amount into the court, and the wife accepted the money, but then appealed the court's refusal to award her alimony. We held that by accepting the $56,000, the wife had waived her right to appeal from the judgment. The court reviewed prior case law and stated the general rule that "in a dissolution of marriage action, *one who accepts any part of a judgment in her or his favor* forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved." (Emphasis supplied.) *Id.* at 860, 485 N.W.2d at 576.

The court recognized an exception to this general rule in *Kassebaum v. Kassebaum*, 178 Neb. 812, 815, 135 N.W.2d 704, 706 (1965):

> "If the outcome of [an] appeal could have no effect on [an] appellant's right to the benefit accepted, its acceptance does not preclude the appeal. There is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a *right which existed prior to the judgment* and which, though recognized or confirmed by the judgment, is not merged in it."

(Emphasis supplied.)

In *Kassebaum*, the husband had paid court costs, attorney fees, and all child support required by the decree. In the court-ordered property division, he received a pickup truck, an automobile, farm property, equity in a real estate contract, and a joint savings account with a balance of $511.54. This was approximately half the property. The husband appealed on the ground that the property division was inequitable, and the wife moved for dismissal of the appeal on the basis that the husband had accepted the benefit of the judgment by paying the costs, fees, and child support and by withdrawing $200 from the former joint savings account after entry of the decree.

The court held that payment of costs, fees, and child support did not deprive the husband of his right of appeal, as these were

not voluntary payments. They were made pursuant to court order, and the husband could have been held in contempt for failing to make the payments. The court further noted that cases which follow the general rule that acceptance of benefits waives the right of appeal "*generally* involve the acceptance of money deposited or paid into court." (Emphasis supplied.) *Id.* at 814, 135 N.W.2d at 705.

The only act in *Kassebaum* which might have constituted acceptance of the benefit of the judgment was the husband's withdrawal of $200 from the savings account. The court held that it did not, because this was less than half the money in the account, and the husband would have been entitled to half the money in the account. In *Shiers*, the court commented that *Kassebaum* also could have been decided on the basis that the husband "had accepted no benefit conferred upon him, but, rather, had merely discharged, pending the outcome of the appeal, the obligations imposed upon him." 240 Neb. at 859, 485 N.W.2d at 576.

In the case under consideration, Daniel's alleged acceptance of the benefits of the decree must be examined in light of the above rules. The court-ordered sale of joint assets such as the family home, the stocks and bonds, and the lot and the equal division of the proceeds did not confer any right which did not exist in each party prior to the judgment, and they are permitted by *Kassebaum*. As a joint owner, Daniel was entitled to half of these assets prior to the judgment. The court in *Kassebaum* held that payment of child support and other costs pursuant to court order does not deprive a party of the right to appeal. As we noted of the husband in that case, Daniel would have been subject to contempt proceedings for failure to comply with court-ordered payments.

Daniel's acceptance of Ideal Cleaners, however, does not fall within the *Kassebaum* exception. The cleaning business was a joint asset of the parties during the marriage, and Daniel received this entire asset. Susan's claim in her affidavit that Daniel has used the funds of the cleaning business since the time of the decree to pay his $24,239.64 premarital debt to First National Bank in Kearney, as well as to pay personal debts and expenditures in excess of $50,000, is uncontroverted by Daniel.

He has admitted on separate occasions that either he has no personal checking account or his personal account has no funds in it and that he pays his expenses from Ideal Cleaners' account. Daniel could have requested the district court to appoint a receiver, perhaps even himself as trustee, to oversee the operation of Ideal Cleaners during the pendency of an appeal, but instead he took complete control of the business and engaged in acts which clearly indicate that he considered Ideal Cleaners to be his sole personal asset.

Although Daniel states in his affidavit that "nothing has been done by [Daniel] or [Susan] with respect to ownership transfers of stock or the sale and execution of stock certificates," we are puzzled as to what more Daniel believes can be done in this regard. He concedes that there are no stock certificates for Ideal Cleaners and that he has been awarded 100 percent of the interest in Ideal Cleaners by the dissolution decree.

Daniel also states in his affidavit that the real estate upon which Ideal Cleaners is located, and which was awarded to him in the decree, is still in the names of both himself and Susan and that he has done nothing to enforce the decree with respect to that property. Susan has not disputed this. However, even assuming that the real estate upon which Ideal Cleaners is located is still titled in the names of both Daniel and Susan, the fact that Daniel has not yet received the *entire* benefit of the judgment does not preclude application of the doctrine of waiver. The rule enunciated in *Shiers* does not require acceptance of *all* of the judgment before one forfeits the right of appeal. The acceptance of *any part* of a judgment is sufficient.

By way of analogy, Susan was awarded $67,000 and two automobiles with a combined worth of $8,000 *in lieu of* her $75,000 interest in Ideal Cleaners. The court ordered Daniel to make payments to Susan over a period of 60 months, so Susan has not yet received the total property granted to her in the dissolution decree. Nonetheless, under *Shiers*, Susan waived her right to appeal the property division by accepting payments toward the judgment awarded her.

There appears to be no good reason why the same rule of law should not apply to Daniel, even though he urges otherwise,

simply because he has received the benefit of a business rather than a cash settlement. Although we stated in *Kassebaum* that this rule *generally* applies to acceptance of a money judgment paid into court, that statement is no more than an observation, and it is not the law. Accordingly, we hold that by accepting the award of Ideal Cleaners and treating its assets as his own, Daniel accepted the benefit of the property awarded him in the dissolution judgment and forfeited his right to appeal that judgment.

CONCLUSION

Daniel's acceptance of the cleaning business and his subsequent use of the business assets as his own seem to clearly indicate that Daniel has received and accepted at least part of the benefit of the property awarded him in the dissolution decree. We therefore reverse the decision of the Nebraska Court of Appeals to reduce Susan's cash award and remand the cause to that court with direction to dismiss Daniel's appeal. We affirm the Court of Appeals' decision to increase Daniel's child support and child-care expense obligation to $813 per month.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

STRATBUCKER CHILDREN'S TRUST, DORIS STRATBUCKER, TRUSTEE, APPELLEE AND CROSS-APPELLANT, V. ZONING BOARD OF APPEALS ET AL., APPELLANTS AND CROSS-APPELLEES.

497 N.W.2d 671

Filed March 26, 1993. No. S-90-949.

1. **Zoning: Appeal and Error.** A district court may disturb a decision of the zoning board of appeals only if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
2. _____: _____. An appellate court reviews the decision of the district court and, irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of the zoning board of appeals, the

district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.

3. **Zoning: Courts.** A district court cannot properly order a zoning board of appeals to issue building permits, as Neb. Rev. Stat. § 14-419 (Reissue 1991) provides that issuance of those permits is the province of a city council.
4. **Zoning: Courts: Appeal and Error.** Under Neb. Rev. Stat. § 14-414 (Reissue 1991), a district court may reverse, modify, or affirm a decision brought up for review from the zoning board of appeals.
5. **Zoning.** A zoning board of appeals, which is neither a court nor a legislature, is a governmental authority that affects the rights of private parties through adjudication or rulemaking. As such, it functions primarily as an administrative agency.
6. **Administrative Law.** Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.
7. **Zoning: Waiver.** A conditional zoning waiver is analogous to a certificate of occupancy. Thus, when the holder of the waiver incurs substantial expenses and commitments in good faith reliance on the waiver, it cannot be arbitrarily revoked.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, PAUL J. HICKMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Herbert M. Fitle, Omaha City Attorney, and Alan M. Thelen for appellants.

James E. Lang, of Laughlin, Peterson & Lang, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., MERRITT, D.J., and COLWELL, D.J., Retired.

WHITE, J.

Stratbucker Children's Trust (Stratbucker) appeals the Nebraska Court of Appeals' decision that partially affirmed and partially reversed the district court's rulings on the extension of a zoning waiver. Stratbucker contests the appellate court's holdings that (1) the district court did not abuse its discretion by failing to extend Stratbucker's zoning waiver for an indefinite period; and (2) the district court improperly ordered appellant Omaha Zoning Board of Appeals (the board)

to reissue several revoked permits to Stratbucker. We affirm the judgment of the Court of Appeals in part, and in part reverse and remand.

On August 25, 1988, the board granted Stratbucker a conditional zoning waiver that allowed Stratbucker to operate a farmer's market in an otherwise residential area of Omaha. The board conditioned the waiver on compliance with several requirements, including specified operating hours, limits on sign dimensions, compliance with the terms of an agreement with Omaha Planning Director S.P. Benson, and that "this waiver be conditioned on a one year review basis."

On August 24, 1989, the board refused to continue the conditional waiver. Stratbucker appealed to the Douglas County District Court, which found in its July 16, 1990, order that the board had failed to give Stratbucker a fair and complete hearing. The court, taking additional evidence pursuant to Neb. Rev. Stat. § 14-414 (Reissue 1991), found that Stratbucker had in fact complied with the conditions of the waiver. In particular, the court found (1) that Stratbucker had expended substantial amounts of money in attempting to comply with the waiver; and (2) that a December 14, 1988, report by Omaha's chief building inspector indicated that Stratbucker had complied with the terms of the Stratbucker-Benson agreement. The court therefore reversed the board's August 24, 1989, ruling and extended the conditional waiver *until August 25, 1991*, conditioned on two other matters.

In the interim between the filing of Stratbucker's appeal to the district court and the court's July 16, 1990, order, the city of Omaha revoked three building permits and a sign permit held by Stratbucker. On September 7, 1990, the district court ordered the board to reissue the sign permit and two of the building permits to Stratbucker (hereinafter referred to as the "permits"). The board then appealed to the Court of Appeals.

The board argued to the Court of Appeals that the district court had erred by extending the conditional waiver and by ordering that the permits be reissued. Stratbucker cross-appealed, arguing that although the district court had correctly extended the zoning waiver, it had acted arbitrarily by extending the waiver only until August 25, 1991.

The Court of Appeals, in an opinion filed on August 11, 1992, first held that the board's argument regarding extension of the waiver was moot because the extension period had since passed. *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 1 NCA 1108 (1992). The court then held that the district court had incorrectly ordered reissuance of the permits, reasoning that the permit issue was beyond the scope of the decision appealed to the district court. Finally, in dismissing the cross-appeal, the Court of Appeals held that the district court had not abused its discretion by extending the waiver for only a finite period.

Stratbucker then petitioned this court to further review the decision of the Court of Appeals. Restated, Stratbucker alleges that the Court of Appeals erred by (1) failing to find that the district court abused its discretion by arbitrarily extending the waiver for only 13 months; and (2) reversing the district court's order that directed the board to reissue the permits.

Recently, in *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), we addressed the standards of review for district courts and appellate courts with regard to the decision of a city board of adjustment. In *Bowman*, we stated at 210-11, 482 N.W.2d at 544:

> [A] district court may disturb a decision of such a board [of adjustment] only if . . . the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
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> . . . [A]n appellate court reviews the decision of the district court and . . . irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of the board of adjustment, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.

(Citations omitted.) Accord *Barrett v. City of Bellevue*, 242

Neb. 548, 495 N.W.2d 646 (1993).

Although the zoning board of appeals is created pursuant to a different statute than is a board of adjustment, the portions of the statutes relating to the standard of review are virtually identical. See Neb. Rev. Stat. §§ 14-408, 14-413, 14-414, 19-908, and 19-912 (Reissue 1991). As a result, our analysis in *Bowman* concerning the applicable standards for review of a decision of a board of adjustment also applies to the review of a decision from the zoning board of appeals. Cf. *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989). We thus apply those standards to the decisions we now review.

We first address Stratbucker's contention that the Court of Appeals erred when it reversed the district court's order that the board reissue the revoked permits. The Court of Appeals correctly noted that the city council is given the power to issue building permits. Neb. Rev. Stat. § 14-419 (Reissue 1991). However, nothing in the statutes implies that the board has a similar power. The board *is* given express power to issue special permits, but only to the State, political subdivisions, and public utilities. Neb. Rev. Stat. § 14-412 (Reissue 1991).

The board has authority to hear and decide *appeals* from, and *review* decisions or orders of, administrative officials. It also hears and decides matters referred to it by ordinance. Neb. Rev. Stat. § 14-409 (Reissue 1991). The reissuance of the permits was never appealed to the board, nor was it required by ordinance. Instead, the permit issue came to the board via the district court—eliminating the "appeal and review" inherent in the board's nature. The proper entity to issue the building permits was the city of Omaha. See § 14-419. However, the city was not made a party to this action.

Moreover, the permit issue was not raised in Stratbucker's amended petition to the district court. Rather, it was raised in a separate motion. Section 14-414 states that the district court may reverse, modify, or affirm "the decision brought up for review." The permit issue was not brought up for review from the board. Hence, the district court had no authority to deal with the permit issue.

The district court made an error of law by ordering the board to reissue the revoked permits. The Court of Appeals correctly

reversed the district court's judgment on this issue. Stratbucker's first assignment of error is without merit.

With regard to the conditional waiver, Stratbucker argues that instead of a 13-month extension, the extension should have been indefinite—continuing until the conditions of the waiver are violated. We first must determine the meaning of the relevant language from the waiver.

Stratbucker's conditional waiver provides, in pertinent part: "Approval to operate a farmer's market . . . on the following conditions . . . that this waiver be conditioned on a one year review basis . . . ." Stratbucker contends that the waiver provided for a one-time review which, if satisfied, would cause the waiver to remain in effect as long as the Trust complied with the waiver's conditions. The board, on the other hand, argues that the waiver provides for annual reviews. Under an "annual review" interpretation, if the reviewing panel found Stratbucker to be in compliance with the waiver's conditions, then the waiver would be extended only until the following year's review.

Because the language of the waiver lends itself to two plausible constructions, each with differing legal ramifications, we must construe the waiver to determine its meaning. The board, which is neither a court nor a legislature, is a governmental authority that affects the rights of private parties through adjudication or rulemaking. As such, it functions primarily as an administrative agency. See *Bowman, supra* (citing 1 Kenneth C. Davis, Administrative Law Treatise § 1:2 at 9 (2d ed. 1978)). See, also, *Florentine v. Town of Darien*, 142 Conn. 415, 115 A.2d 328 (1955) (holding that a zoning board with the power to apply zoning regulations is primarily an administrative agency).

Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute. See, *Texas Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41 (Tex. 1970), *appeal dismissed* 400 U.S. 986, 91 S. Ct. 459, 27 L. Ed. 2d 435 (1971); *Texas Bankers Ass'n v. Government Emp. Credit U.*, 625 S.W.2d 338 (Tex. Civ. App. 1981); 73A C.J.S. *Public Administrative Law and Procedure* § 149 (1983). We therefore apply our rules of statutory construction to the language of the

waiver.

The interpretation of a statute (or zoning waiver) is a question of law, and we are therefore obligated to reach a conclusion independent of the decision reached by the trial court. *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993); *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). In interpreting the language of the waiver, we must determine and give effect to the purpose and intent of the zoning board of appeals, as may be gleaned from the entire language of the waiver when considered in its plain, ordinary, and popular sense. Cf., *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). In reaching our determination, we look to the objects to be accomplished by the waiver, the evils sought to be remedied, or the purposes the waiver will serve, and construe the waiver in a reasonable manner that will best effectuate its purpose. Cf. *NC+ Hybrids, supra.*

Furthermore, when construing a waiver, we must give effect, if possible, to all parts of the waiver. Whenever possible no word, sentence, or clause will be rejected as meaningless, and nothing plain, direct, and unambiguous will be ignored. Cf. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *NC+ Hybrids, supra.* We now turn to the language at issue.

When viewed in the context of the entire waiver, the "one year review" language clearly indicates an annual review. The relevant language of the waiver provides:

> Approval to operate a farmer's market . . . *on the following conditions*: That the operation be conducted from April 1st to December 31st only, and during the hours of 8:00 a.m. to sundown during the summer months and to 8:00 P.M. [sic] during the Spring and Fall of the year; that the directional sign on the property be no larger than 4 x 4 ft. . . . ; that the roof sign be no larger than 3 x 16 ft.; *that this waiver be conditioned on a one year review basis*; that the agreement signed between S. P. Benson and the applicant . . . be complied with; [and] that the parking lot may remain unpaved . . . .

(Emphasis supplied.)

Stratbucker acknowledges in its brief that the waiver's existence is conditioned on continued compliance with its terms. Brief for appellee at 4. Viewed with this realization in mind, the language of the waiver indicates that the "one year review" is simply one of a number of conditions that must be satisfied for the waiver to continue.

The "review" language is part of a list of items delineated as conditions. Under Stratbucker's characterization, after the first year of the waiver the review requirement effectively "disappears" from the list, while the other conditions remain in effect. Stratbucker's characterization treats the review condition as a one-time requirement, while the remainder of the list indicates a continual duty of compliance. That characterization reads a distinction into the series not warranted by the language of the waiver; we will not read any such distinction into the waiver.

Moreover, the inclusion of the word "basis" in the review clause indicates that a satisfactory review is simply one more factor that must be met for the waiver to continue. If the "one year review" language had not been followed by the word "basis," or if the review clause had preceded the introduction of the listed "conditions," Stratbucker's construction of the waiver would be more persuasive. Such is not the case, however. We determine that the conditions listed in the waiver, including the condition of review, are recurrent.

However, in addition to indicating that the conditions are recurrent, the language of the waiver also indicates that, depending on the actions of Stratbucker and the board, the waiver could be extended. Nothing in the waiver itself limits its period to only 1 year. Furthermore, the annual nature of the reviews anticipates future extensions.

We now turn to the district court's factual findings as affecting the extension of the waiver. The district court found that the board did not give Stratbucker a fair and complete hearing. The court thus took additional evidence and provided the "review" to which Stratbucker was entitled under the waiver. At trial, the district court determined that Stratbucker had complied with the terms of the waiver and reversed the board's refusal to extend the waiver.

As stated previously, we are to decide whether the district court abused its discretion or made an error of law when reviewing the board's decision. Cf., *Barrett, supra*; *Bowman, supra*. Where competent evidence supports the district court's factual findings, this court will not substitute its own factual findings for those of the district court. Cf., *Barrett, supra*; *Bowman, supra*. After reviewing the record, we find that the evidence supports the district court's findings that Stratbucker complied with the terms of the waiver. In particular we note, as did the district court, that Omaha's chief building inspector found Stratbucker to be in compliance with the terms of the waiver. Moreover, Stratbucker's certificate of occupancy, issued 20 days before the 1989 board meeting, stated that the market premises were "found to comply with all the applicable provisions of the Omaha Municipal Code." The record does not indicate that the district court erred or abused its discretion when it reversed the board's refusal to extend the waiver.

We thus come to the critical question: Did the district court err by extending the waiver only until August 25, 1991? We find that it did.

Although the district court extended the conditional waiver for an additional 13 months, the court made no provision for what would occur at the end of that period. As such, the waiver simply terminated on August 25, 1991, without the possibility of another extension. Stratbucker argues that although the district court correctly extended the waiver, the 13-month time limit had no logical basis and was therefore arbitrary. We agree.

Stratbucker cites *A.C. Nelsen Enterprises, Inc. v. Cook*, 188 Neb. 184, 195 N.W.2d 759 (1972), as support that the extension should not be terminated in an arbitrary fashion. *A.C. Nelsen Enterprises, Inc.* held that when the holder of a certificate of occupancy incurs substantial expenses and commitments in good faith reliance on the certificate, the certificate cannot be arbitrarily revoked. Stratbucker argues that because the district court found that Stratbucker had incurred substantial expenses while complying with the waiver conditions, the board's arbitrary time limitation on the waiver was invalid.

The Court of Appeals, adopting the board's argument, determined that Stratbucker was relying solely on its own

20-day certificate of occupancy when it expended the sums. See *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 1 NCA 1108 (1992). The Court of Appeals reasoned that because the certificate was clearly temporary in nature—extending only until the time of the year-end review—it should not have been relied on for Stratbucker's expenditures. However, the certificate of occupancy was not the only basis for Stratbucker's reliance.

In addition to its certificate of occupancy, Stratbucker asserts that it also relied on the conditional waiver itself. The waiver is analogous to the certificate of occupancy in *A.C. Nelsen Enterprises, Inc.*, and good faith reliance on the waiver therefore precludes its arbitrary revocation. See *Nuckles v. Allen*, 250 S.C. 123, 156 S.E.2d 633 (1967) (citing *Willis v. Town of Woodruff*, 200 S.C. 266, 20 S.E.2d 699 (1942)).

Because the waiver was conditioned on compliance with its terms, including 1-year reviews, Stratbucker could not reasonably expect that substantial expenditures alone would guaranty the continued existence of the waiver. However, Stratbucker *was* justified in believing that if it made expenditures in a good faith attempt to comply with the waiver, it would at least be given the opportunity to show compliance—and thereby perhaps receive another extension. See, *A.C. Nelsen Enterprises, Inc., supra*; *Nuckles, supra*.

The conditional waiver provided for yearly reviews to determine compliance with its terms. The district court determined that Stratbucker had, in fact, complied with those terms during the first year of the waiver. The district court thus was justified in extending the waiver for an additional year. However, the district court and Court of Appeals erred by allowing the waiver to terminate by the mere expiration of that 1-year period. Because Stratbucker expended substantial sums in good faith reliance on the waiver, the waiver could not be arbitrarily revoked. See *A.C. Nelsen Enterprises, Inc., supra*. Pursuant to the terms of the waiver, Stratbucker should have been provided a review at the end of the extension period to determine whether another extension should have been granted.

We affirm the Court of Appeals' reversal of the district

court's judgment on the question of permit reissuance. However, we reverse the Court of Appeals' ruling that the district court did not err by extending the conditional waiver only until August 25, 1991. We therefore remand the cause from the cross-appeal to the Court of Appeals with directions to remand to the district court for proceedings not inconsistent with this opinion.

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

LANPHIER, J., not participating.

DUANE L. STACK, APPELLANT AND CROSS-APPELLEE, V. JAMES M. SOBCZAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF RAMONA L. SOBCZAK, DECEASED, APPELLEE AND CROSS-APPELLANT.

497 N.W.2d 374

Filed March 26, 1993. No. S-90-1028.

1. **Appeal and Error.** When reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings.
2. **Negligence.** The Nebraska Supreme Court has refused to adopt a rule that contributory negligence of more than a certain percentage will bar recovery as a matter of law.
3. **Negligence: Judgments.** When the record clearly indicates that a jury has found a plaintiff to have been guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery, it is proper for the trial judge to sustain a motion for judgment notwithstanding a favorable plaintiff's verdict. This rule is limited to the facts and law as they existed at the time the case was tried.

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

Nicholas J. Lamme, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

Donald D. Schneider, P.C., for appellee.

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

FAHRNBRUCH, J.

In this motorcycle-automobile collision case, the jury specifically found that the accident was proximately caused by

the combined negligence of the operator of each vehicle. The jury attributed 40 percent of the combined negligence to the plaintiff motorcycle operator, Duane L. Stack, and 60 percent to the automobile operator, Ramona L. Sobczak.

The jury also made a special finding that "in comparing the negligence of Duane Stack and Ramona Sobczak . . . Duane Stack was guilty of slight negligence and . . . the negligence of Ramona Sobczak was gross in comparison."

Because it is self-evident from the jury's special findings that the jury found each vehicle operator negligent in a degree more than slight as compared to the other vehicle operator's negligence and to a degree sufficient to defeat any right of recovery by either operator, we affirm the judgment of the district court for Dodge County in granting the motion of the personal representative of Sobczak's estate for judgment notwithstanding the verdict and in dismissing the case.

The accident involved here occurred on U.S. Highway 30 in Fremont when an eastbound motorcycle being operated by Stack collided with an automobile making a left turn from a westbound lane into the parking lot of a Payless shoe store. The automobile was operated by Sobczak, who later died of causes not related to the accident. Stack sued the personal representative of Sobczak's estate for his damages allegedly resulting from the accident. The personal representative received an assignment from Sobczak's husband and filed a counterclaim for damage to the Sobczak automobile and for alleged medical expenses for Sobczak's two children, who were riding in the Sobczak automobile.

The trial of the case was bifurcated. Only the issue of liability was submitted to the jury. In addition to finding that 40 percent of the negligence was attributable to Stack and 60 percent to Sobczak, the jury further answered "no" to each of the following questions: (1) Was the negligence of Stack, when compared with the negligence of Sobczak, more than slight? and (2) was the negligence of Sobczak, when compared to the negligence of Stack, less than gross? Finally, the jury found that "in comparing the negligence of Duane Stack and Ramona Sobczak . . . Duane Stack was guilty of slight negligence and . . . the negligence of Ramona Sobczak was gross in comparison."

As previously stated, the trial court granted the personal representative's motion for judgment notwithstanding the verdict, holding that "a finding of negligence of 40 percent is as a matter of law a finding that [Stack] was guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery herein." The trial court dismissed the case. Costs were taxed to Stack. He appealed to this court, and Sobczak's personal representative cross-appealed.

In his appeal, Stack claims that the trial court erred in (1) sustaining the motion for judgment notwithstanding the verdict filed by Sobczak's personal representative and (2) ruling that the jury's finding of Stack's negligence of 40 percent is, as a matter of law, a finding that Stack was guilty of more than slight negligence and in such a degree as to defeat his recovery.

When reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings. *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

This court has refused to adopt a rule that contributory negligence of more than a certain percentage will bar recovery as a matter of law. See, *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980); *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977). However, when it was self-evident that a jury had reduced the amount of a plaintiff's recovery to the extent of 45 percent, this court held that such a reduction "clearly indicates the jury found decedent to have been guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery herein." *Guerin v. Forburger*, 161 Neb. 824, 840, 74 N.W.2d 870, 880 (1956). In the case at bar, it is self-evident that the jury found the operator of each vehicle guilty of more than slight negligence and to a degree sufficient to defeat any right of recovery. Therefore, we hold that when the record clearly indicates that a jury has found a claimant to have been guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery, it is proper for the trial judge to sustain a motion for judgment notwithstanding a favorable plaintiff's verdict. This rule is limited to the facts and law as they existed at the time this case was tried.

The trial court was correct in granting the motion for judgment notwithstanding the verdict filed by Sobczak's personal representative and in dismissing the case. The personal representative's assignments of error on his cross-appeal were pled in the alternative, and the personal representative requested that they be considered only in the event that Stack's appeal was sustained by this court. Since we do not sustain Stack's appeal, it is not necessary to discuss the personal representative's cross-appeal.

AFFIRMED.

WHITE, J., dissenting.

This case demonstrates that the use of a special verdict form in negligence cases will, as often as not, produce answers to special verdict questions inconsistent with the results as announced by the jury. The majority has seized on one wing of the inconsistencies, that of finding that the plaintiff was negligent and that the negligence was proximately responsible for 40 percent of the damages sustained. The majority ignored the answer to the other question, in which the jury specifically found that the plaintiff's negligence was slight in comparison to the defendant's negligence, which was gross.

In doing so, it relies on the case of *Guerin v. Forburger*, 161 Neb. 824, 74 N.W.2d 870 (1956), in which the court makes a gratuitous observation that since the damage to the automobile was in the amount of $1,250 and the jury returned a verdict of $687.50, 45 percent was more than slight as a matter of law. In that case there was no special verdict. Inherent in the verdict was a finding that the negligence of the plaintiff was slight in comparison to the defendant's negligence.

In subsequent cases this court rejected the automatic rule, stating that

> "[a] comparison of the negligence of the two parties involved in an accident cannot be easily translated into a mathematical ratio. This court has never adopted a rule that contributory negligence of more than a certain percent will bar recovery as a matter of law. *The statute does not contemplate such a rule and we do not believe that the adoption of such a rule would further the*

administration of justice."

(Emphasis supplied.) *Nickal v. Phinney*, 207 Neb. 281, 283, 298 N.W.2d 360, 362 (1980), quoting *Burney v. Ehlers*, 185 Neb. 51, 173 N.W.2d 398 (1970). It should also be noted that in *Nickal v. Phinney* the basis for the court's decision in *Guerin v. Forburger* was removed when, in response to an attempt to question the holding in *Cullinane v. Milder Oil Co.*, 174 Neb. 162, 116 N.W.2d 25 (1962), the court stated that

> this court pointed out that the jury was not obliged to accept the undisputed testimony of the plaintiff or his doctor to the full extent of the damages claimed and that the determination of the amount of the damages after application of a comparative negligence instruction is for the jury.

Nickal v. Phinney, 207 Neb. at 283, 298 N.W.2d at 362.

The basis for the *Guerin v. Forburger* rule has been destroyed. The proposition that there is a level at which negligence is more than slight as a matter of law has never been the law in this state, and if it ever had been, it died in the next case in which this court considered the percentage argument.

In my view, the trial court's decision should have been reversed and the verdict reinstated or, in the alternative if that were unacceptable, returned to the district court for retrial in view of the inconsistencies in the special verdict form.

SHANAHAN and LANPHIER, JJ., join in this dissent.

McDONALD'S EXECUTIVE OFFICES, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

497 N.W.2d 377

Filed March 26, 1993. No. S-90-1073.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the determination made by the lower court.

2. **Annexation: Ordinances.** Under 316 Neb. Admin. Code, ch. 9, § 004.01 (1983), a map that depicts an annexed area and is attached to a certified copy of the annexation ordinance is required to be certified separately.
3. **Taxation.** The filing of the "Nebraska and City Sales and Use Tax Return" form without an entry of any kind on the lines dealing with use taxes constitutes the failure to file a use tax return.

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

Don Stenberg, Attorney General, and David Edward Cygan for appellant.

Thomas J. Culhane and Samuel E. Clark, of Erickson & Sederstrom, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Through various entities, the sole proprietorship petitioner-appellee, McDonald's Executive Offices, operates a number of restaurants, including one located within an area of Omaha that was annexed subsequent to the restaurant's establishment. Determining that the proprietorship had failed to pay certain city sales and state consumer's use taxes attributable to the operation of the annexed restaurant, the respondent-appellant, Nebraska Department of Revenue, notified the proprietorship that its sales and use tax payments were deficient. Following a hearing upon the proprietorship's request for a redetermination, the Tax Commissioner sustained the department's deficiency determination.

On further appeal by the proprietorship, the district court reversed the department's determination with regard to the city sales taxes, but affirmed the department's determination with respect to the use taxes. In this court, the department claims the district court erred in ruling that the failure of the city to have separately certified the map attached to the certified copy of the annexation ordinance it provided to the department precludes collection of the sales taxes at issue. The proprietorship has in turn cross-appealed, asserting the district court erred in

decreeing that a 5-year, rather than a 3-year, period of limitations applies to the use tax deficiency.

We affirm.

II. SCOPES OF REVIEW

Neb. Rev. Stat. § 77-27,127 (Reissue 1990) specifies that final actions of the Tax Commissioner are to be reviewed under the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992). *PMD Investment Co. v. State*, 216 Neb. 553, 345 N.W.2d 815 (1984). See, also, *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). Inasmuch as the petition instituting these review proceedings was filed in the district court prior to the effective date of the amendments effected by 1989 Neb. Laws, L.B. 213, we review the factual questions involved de novo on the record. See *Interstate Printing Co. v. Department of Revenue, supra.*

However, this matter also involves questions of statutory interpretation, which are matters of law in connection with which we have the obligation to reach an independent, correct conclusion irrespective of the determination made by the lower court. See, *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993). See, also, *Stack v. Sobczak, ante* p. 78, 497 N.W.2d 374 (1993).

III. STATE'S APPEAL

1. Facts

The proprietorship has operated the restaurant since 1978 in an area which was annexed by the city through an ordinance which became effective on July 22, 1982. On that same date, the department received from the city a certified copy of the ordinance annexing the restaurant, to which copy was attached, and by reference made a part thereof, a $6^3/_8$- by $7^3/_{16}$-inch map depicting a part of the city and delineating, without further explanation, the "Existing City Limits" and a "Study Area." The city also supplied the department with a "Listing of Businesses In Annexation," which included the restaurant.

The proprietorship claims it had no knowledge of the

annexation until a 1986 audit by the department and therefore had not collected from its customers or paid to the department the city sales tax. As a result of the audit, the department determined that the proprietorship had underpaid its taxes, and accordingly, on September 30, 1986, the department sent the proprietorship a "Notice of Deficiency Determination."

2. ANALYSIS

The proprietorship's position that the failure of the city to have provided the department with a separately certified map of the annexed area in which its restaurant is located rests upon language found in Neb. Rev. Stat. § 77-27,143(1) (Reissue 1990) and 316 Neb. Admin. Code, ch. 9, § 004.01 (1983). Section 77-27,143(1) provides in part:

> The administration of all sales and use taxes adopted under the Local Option Revenue Act shall be by the Tax Commissioner who may prescribe forms and adopt and promulgate reasonable rules and regulations in conformity with the act for the making of returns and for the ascertainment, assessment, and collection of taxes imposed under such act. The incorporated municipality shall furnish a certified copy of the adopting or repealing ordinance to the Tax Commissioner in accordance with such rules and regulations as he or she may adopt and promulgate.

The regulation, § 004.01, adopted pursuant to the foregoing statutory authority, reads in part:

> If any city in which a local sales and use tax has been imposed shall thereafter change or alter its boundaries in any manner, such city shall forward to the State Tax Commissioner by certified or registered mail a certified copy of the ordinance making such changes. Such ordinance shall reflect the effective date thereof, determined by statutory authority applicable to the class of city adopting a local option sales and use tax ordinance, and shall be accompanied by a certified map of the city clearly showing the territory added thereto or detached therefrom. The ordinance required to be furnished the Tax Commissioner shall also be accompanied by a list of all

licensed retailers within the annexed or detached territory.

In effect, the department argues that since the map was attached to a certified copy of the ordinance, the map itself had been certified. It may be that in some circumstances, attachments to certified documents may be considered to have been certified. See, e.g., *State v. Wallace*, 240 Neb. 865, 484 N.W.2d 477 (1992) (authentication of annexed papers constituted authentication of all papers stapled together). But in this instance, the department's position overlooks the plain language of its own regulation, which clearly requires a separately certified map, and for good reason, as this case illustrates.

The copy of the ordinance supplied the department was certified as being "a true and correct copy of the original document now on file in the City Clerk's office." Although it is true that the ordinance declares that "[a] map of the area is attached hereto, marked 'Exhibit A', and by this reference made a part of this Ordinance," the ordinance also proclaims that while the land annexed is marked on the map, the map is supplied "for convenience and, in case of discrepancy, the description" of the annexed land contained in the ordinance shall control. Moreover, whereas the ordinance describes the land annexed with reference to section, range, and township, the map makes no such references.

In addition, as a result of the failure of the map to define the meaning of the legend "Study Area" and of its failure to correlate the description of the annexed area to the description used in the ordinance, it cannot be said that the map "clearly" defines the annexed area, as the regulation requires.

Thus, the district court correctly determined that the department may not collect the sales taxes at issue.

IV. PROPRIETORSHIP'S CROSS-APPEAL

1. FACTS

The department has devised and distributes a "Nebraska and City Sales and Use Tax Return" form which, as its name implies, combines the reporting of sales taxes with the reporting of use taxes. In accordance with the department's policy of treating forms filed with no information supplied to questions

relating to use taxes as the failure to file a return with respect to such taxes, the back of the form contains the following instructions:

> This return provides for the reporting of both sales and use tax. The entries for each tax remain separate. If the retailer intends to file a return for both taxes, a word, statement, number or figure must be entered on the appropriate lines of the return. Failure to do so will extend the statute of limitations for audit and collection purposes to five years.

During the period in question, from October 1, 1980, through July 31, 1983, the proprietorship left blank on all the forms it filed the lines entitled "Nebraska consumer's use tax," "City Consumer's Use Tax," and "Total Nebraska and city consumer's use tax." On most of the forms the last entry made was on the line for sales tax due, and with few exceptions no entry was made on the line entitled "Total Nebraska and city sales and use tax due." When an entry was made on this line, the entry read the same as did the sales tax due figure.

The proprietorship realized that a consumer's use tax would be due on certain items purchased for use in its business on which sales taxes had not been collected, but incorrectly assumed that its accounting system provided for the reporting of the use tax. It did not become aware of the fact that it had not properly accounted for such taxes during the period in question until the audit discussed in part III(1) above.

Neb. Rev. Stat. § 77-2709(5)(c) (Reissue 1990) reads:

> Every notice of a deficiency determination shall be personally served or mailed within three years after the last day of the calendar month following the period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires the later. In the case of failure to make a return, every notice of determination shall be mailed or personally served within five years after the last day of the calendar month following the period for which the amount is proposed to be determined.

Neb. Rev. Stat. § 77-2708(1)(b)(i) (Reissue 1990) provides:

> [A] return for such period, along with all taxes due, shall

> be filed with the Tax Commissioner in such form and content as the Tax Commissioner may prescribe and containing such information as the Tax Commissioner deems necessary for the proper administration of the Nebraska Revenue Act of 1967. . . . The Tax Commissioner shall by rule and regulation require reports and tax payments from sellers, retailers, or purchasers . . . .

The department's position is that the proprietorship's failure on the forms it filed to put anything on the lines relating to the consumer's use tax constituted a failure to file a consumer's use tax return during the period in question. Thus, it argues, its September 30, 1986, deficiency notice, as extended by agreement of the parties, reaches back 5 years, thereby covering the entire period in question. The proprietorship, on the other hand, urges that as § 77-2708 permits and the department devised a combined form for reporting both sales and use taxes, and as the proprietorship filed such forms during the period in question, it cannot be said that the proprietorship failed to file use tax returns. Thus, the proprietorship claims the department's deficiency notice reaches back to cover only 3 of the 5 years in question.

2. Analysis

The proprietorship calls our attention to the following language in *Zellerbach Co. v. Helvering*, 293 U.S. 172, 180, 55 S. Ct. 127, 79 L. Ed. 264 (1934): "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such [citation omitted], and evinces an honest and genuine endeavor to satisfy the law." It also calls our attention to the following quotation from *Neptune Mut. Ass'n, Ltd. of Bermuda v. U.S.*, 862 F.2d 1546, 1555 (Fed. Cir. 1988): "The policy behind the 'no return' proviso which removes the effect of the statute of limitations is that it is unreasonable to expect the government to be diligent in its efforts to collect unpaid taxes if the facts giving rise to the tax liability are not disclosed."

However, it should be noted that in holding that the adequacy of the return presented questions of fact making summary judgment inappropriate, the *Neptune Mut. Ass'n,*

Ltd. of Bermuda court also wrote:

> In keeping with [the policy quoted above], the law holds that if a taxpayer files an incorrect return, but the return sets forth all of the data necessary to compute the taxes owed, the statute of limitations begins to run. *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 309-10, 60 S.Ct. 566, 568-69, 84 L.Ed. 770 (1939) . . . .
>
> The government relies on *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 64 S.Ct. 511, 88 L.Ed. 684 (1944), for the proposition that the law requires Neptune to file the correct tax return form before the statute of limitations starts running. In the *Lane-Wells* decision, the taxpayer stated on its corporate tax return that it was not a personal holding company, and it did not file a personal holding company tax return. In fact, the taxpayer was a personal holding company and its statement to the contrary was an error made in good faith.
>
> In distinguishing the taxpayer in *Lane-Wells* from the one in *Germantown*, the Court explained that the *Germantown* taxpayer filed a return containing all of the data from which the unpaid tax could be computed and assessed. *Lane-Wells*, 321 U.S. at 222, 64 S.Ct. at 513. In contrast, the *Lane-Wells* taxpayer was liable for two taxes, was under an obligation to file two returns, and filed only a single return which did not contain adequate information from which to compute all taxes owed. *Lane-Wells*, 321 U.S. at 223, 64 S.Ct. at 513.
>
> Neptune suggests that the *Lane-Wells* decision applies only to taxpayers liable for two separate taxes required to be reported on two separate returns. We disagree. The controlling question is whether the IRS was apprised of adequate information from which to compute the taxes owed.

862 F.2d at 1555.

Two state courts have dealt with the application of statutes of limitations in the context of a combined sales tax and consumer's use tax return. In the first, *Whitmore Oxygen Co. v. State Tax Comm.*, 114 Utah 1, 11-12, 196 P.2d 976, 982 (1948), the court held against the taxpayer:

> [The taxpayer] may not claim it has been confused concerning how to file for it has never attempted to file a return for the use *or* the purchase of the cylinders. The instant case is not a case of an erroneous filing—it is rather a case of no filing at all.
>
> . . . The fact that the Tax Commission has made it possible to make a return for both sales and use tax on the same form, does not do away with the necessity of furnishing information as to both taxes. The form is so designed that the entries for each tax are severable and if the taxpayer intends to claim a return for both taxes some words or figures should be entered in both divisions of the form.

(Emphasis in original.)

In the second, *People v. Universal Film Exchanges*, 34 Cal. 2d 649, 213 P.2d 697 (1950), the parties stipulated that at the time in question, it had been the practice of the taxing authority to treat the filing of the combined sales and use tax form as the filing of both a sales and a use tax return, even if the lines relating to the use tax were left blank. Because of that practice, which was later changed, the taxing authority had not informed the taxpayer that its return was insufficient.

In holding that the returns filed by the taxpayer were sufficient to start the running of the statute of limitations, notwithstanding that the taxpayer had failed to make any entries on the lines related to use taxes, the *Universal Film Exchanges* court stated:

> In short, there was no failure here on the part of appellant to comply with the requirements of the law in filling out its consolidated return on the form furnished it for that purpose, and a return so completed was accordingly treated by the board for many years, including the time in question, as referable to both sales and use tax computations. It does not appear in the contrarily decided Utah case above noted (*Whitmore Oxygen Co. v. Utah State Tax Commission*, [114 Utah 1, 196 P.2d 976 (1948)]) that such administrative practice there prevailed. As the problem here presents itself, the rationale of the dissent rather than that of the majority opinion in the Utah case

> constitutes, in our judgment, the better-considered view as to the sufficiency of such return as that filed by appellant to start the running of the statute of limitations as to *both* tax reports.

(Emphasis in original.) 34 Cal. 2d at 658-59, 213 P.2d at 703.

The case at hand is not analogous to the one presented in *Universal Film Exchanges*, for here the policy of the department was to treat a form with blanks on lines referring to the consumer's use tax as the failure to file a return with respect to such tax, and filers were instructed to that effect. Rather, the situation presented is analogous to that confronting the Utah court in *Whitmore Oxygen Co.* and comes within the situation described in *Neptune Mut. Ass'n, Ltd. of Bermuda*. That is, the department here was not given adequate information from which to compute the consumer's use tax owed. The information the proprietorship supplied on the form as to its gross sales and services was useful only in calculating the sales tax owed.

Accordingly, the district court was correct in determining that the 5-year period of limitations applied.

V. JUDGMENT

Inasmuch as the record sustains neither the department's assignment of error nor the proprietorship's assignment of error on cross-appeal, the judgment of the district court is, as first noted in part I above, affirmed.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

VIKING BROADCASTING CORPORATION, A UTAH CORPORATION, APPELLANT, V. SNELL PUBLISHING CO., INC., A NEBRASKA CORPORATION, APPELLEE.

497 N.W.2d 383

Filed March 26, 1993. No. S-90-1193.

1. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Contracts: Intent.** Intent in the realm of contract law is to be viewed objectively, not subjectively.
3. **Contracts.** In order to establish an express contract, there must be a definite proposal and an unconditional and absolute acceptance thereof.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Jerry J. Grossart and Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

Douglas Pauley, of Conway, Connolly & Pauley, P.C., for appellee.

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

CAPORALE, J.

The plaintiff-appellant, Viking Broadcasting Corporation, a Utah corporation, seeks to force the defendant-appellee, Snell Publishing Co., Inc., a Nebraska corporation, to merge itself into Viking. The district court sustained Snell's motion for summary judgment, and Viking here asserts that the court erred in so doing. We affirm.

Viking's suit rests on a typed 1¾-page "Letter of Intent" it prepared and the parties signed on or about April 27, 1988. The document, on Viking letterhead and addressed to Snell, reads:

> This letter, when executed by yourselves in the space provided below, will form our Letter of Intent with respect to the proposed merger of [Snell] into [Viking] or a corporation formed by Viking for the purpose of entering into the transaction.

1. Merger. With your consent, an Agreement and Plan of Merger will be entered into whereby Snell will be merged into the Viking subsidiary. As part of the merger, the Viking subsidiary will accede to all of the assets and assume all of the liabilities of Snell as of the date of the merger. Certain assets, such as the lemon grove and other rental property located in Hastings, Nebraska, will be spun off prior to the merger and will not be transferred to Viking.

2. Consideration. As consideration for the acquisition of Snell, the Snell shareholders shall receive, at the Closing:

a. Three Million Dollars ($3,000,000) in cash or certified funds;

b. Ten Million (10,000,000) shares of Viking common stock.

The common stock transferable hereby will be "restricted" stock, bearing a legend restricting transfer. However, we will grant you the right to have your stock registered at such time Viking registers its stock in a general registration of its securities with the Securities and Exchange Commission. If no such registration occurs within 2 years after the Closing, you shall have the one-time right, for a period of one year, to demand that Viking register your shares at Viking's expense.

3. Adjustment of Shares. In the event that one year after the Closing or at the time Viking registers its shares with the SEC, whichever shall first occur, the market value of the aforesaid 10,000,000 shares is less than $8,000,000, you shall be entitled to receive additional Viking shares so as to bring the total value of your shareholdings to $8,000,000, but any additional shares will be transferred only if you grant irrevocable voting proxies therein to Randel Boesen.

4. Covenant not to Compete. At Closing, Viking will enter into a covenant not to compete with Robert Snell and Nancy Swickard, where under [sic] they will agree not to compete with the business of Viking for a period of 5 years, for a consideration of $200,000 per year.

5. Indemnification Regarding Litigation. The present shareholders of Snell will agree to indemnify and hold Viking harmless with respect to any present litigation, including Earl Taylor v. Snell Publishing. Amounts payable to Robert Snell and Nancy Swickard under the covenant not to compete and consulting contract will act as partial security for the indemnification.

6. Due Diligence. Viking shall have the opportunity to conduct a thorough due diligence investigation. Any information gained during the due diligence investigation must be kept in strict confidence, in the event the merger is not consummated. Each party agrees not to disclose the pendency of the merger until the merger is consummated, or deal in the stock of Viking.

If the foregoing meets with your approval, please sign this letter in the space provided below. The offer contained in this letter is open until May 2, 1988, and the Closing of the merger must be consummated not later than July 31, 1988.

Viking contends that summary judgment was inappropriate because there are genuine issues of material fact concerning whether there was a meeting of the minds as to the parties' intent to enter into a merger contract as reflected in the April 27 letter. Viking is, of course, correct in asserting that summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1933). The controlling question is whether there exist in this case genuine issues as to material facts or as to the ultimate inferences which may be drawn from them, as Viking contends, or whether, as Snell contends and the district court impliedly found, there are no factual issues and Snell is entitled to judgment as a matter of law.

The nature of the controversy before us has been aptly described by the U.S. Court of Appeals for the Seventh Circuit as follows:

> We have a pattern common in commercial life. Two firms reach concord on the general terms of their transaction. They sign a document, captioned "agreement in principle" or "letter of intent", memorializing these terms but anticipating further negotiations and decisions—an appraisal of the assets, the clearing of a title, the list is endless. One of these terms proves divisive, and the deal collapses. The party that perceives itself the loser then claims that the preliminary document has legal force independent of the definitive contract.

Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc., 870 F.2d 423, 424 (7th Cir. 1989). Having thus defined the nature of the controversy, the threshold task is to determine if the issue as to whether the April 27 document constitutes an enforceable contract is one of law or one of fact.

As might be expected, the decisions on this point are by no means harmonious. In *Opdyke Investment v Norris Grain*, 413 Mich. 354, 320 N.W.2d 836 (1982), litigation arose over the effect of a letter of intent to build a sports arena. The Supreme Court of Michigan reversed the trial court's grant of the defendants' motion for accelerated judgment. The court noted that "[w]hether the parties intend to be bound only by a formally written and executed final document is a question of fact, not a question of law; in most cases the question is properly left to the jury." *Opdyke Investment*, 413 Mich. at 360, 320 N.W.2d at 838. The court further wrote:

> The trial court and the Court of Appeals majority carefully scrutinized the March 11 letter in order to ascertain the parties' intent. We eschew that approach, in part to emphasize that such a factual inquiry should have been made only by a trial court factfinder after consideration of all of the relevant evidence to be produced at trial on the point.

Opdyke Investment, 413 Mich. at 362, 320 N.W.2d at 839.

A similar result was reached in *Arnold Palmer Golf Co. v. Fuqua Industries, Inc.*, 541 F.2d 584 (6th Cir. 1976). In that case, several months of negotiations seeking to establish a business relationship between the parties culminated in the drafting of a detailed six-page memorandum of intent, which

included a paragraph contemplating the subsequent preparation of a definitive agreement. The district court granted Fuqua's motion for summary judgment. The court of appeals reversed, holding that "the question whether the parties intended a contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve." *Arnold Palmer Golf Co.*, 541 F.2d at 588.

For other cases holding that the determination of whether a contract exists is a question of fact, see, e.g., *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971); *Mid-Continent Telephone Corp. v. Home Telephone Co.*, 319 F. Supp. 1176 (N.D. Miss. 1970); and *Itek Corporation v. Chicago Aerial Industries, Inc.*, 248 A.2d 625 (Del. 1968).

Although one can point to factual distinctions between at least some of the aforecited cases and the one before us—e.g., in *Opdyke Investment*, the letter was lengthy and detailed, and in *Arnold Palmer Golf Co.*, not only was the memorandum detailed, but the party claiming it to be nonbinding had issued a prior contrary press release—the fact is that *Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc., supra*, provides the better analysis. Therein, Empro showed interest in purchasing the assets of Ball-Co. After preliminary negotiations, Empro sent Ball-Co a three-page letter of intent to purchase the latter's assets. The letter stated " '[t]he general terms and conditions of such proposal (which will be subject to and incorporated in a formal, definitive Asset Purchase Agreement signed by both parties).' " *Empro Mfg. Co., Inc.*, 870 F.2d at 424. Moreover, the letter stated that " 'Empro's purchase shall be subject to the satisfaction of certain conditions precedent to closing including, but not limited to' " the definitive Asset Purchase Agreement and, inter alia, " '[t]he approval of the shareholders and board of directors of Empro.' " *Id.* The parties signed the letter of intent, and negotiations continued until the contentious issue of a security interest in Empro's land caused Ball-Co to abandon the deal. Empro's suit was dismissed by the district court for the failure to state a claim.

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. On the issue of whether the

determination of the legal force of the letter was an issue of law or fact, the *Empro Mfg. Co., Inc.* court wrote:

> Empro insists on appeal that the binding effect of a document depends on the parties' intent, which means that the case may not be dismissed—for Empro says that the parties intended to be bound, a factual issue. Empro treats "intent to be bound" as a matter of the parties' states of mind, but if intent were wholly subjective there would be no parol evidence rule, no contract case could be decided without a jury trial, and no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business. Contract law gives effect to the parties' wishes, but they must express these openly. Put differently, "intent" in contract law is objective rather than subjective
> . . . .

Empro Mfg. Co., Inc., 870 F.2d at 424-25. See, also, *Knight v. Sharif*, 875 F.2d 516 (5th Cir. 1989); *Hill v. McGregor Mfg. Corp.*, 23 Mich. App. 342, 178 N.W.2d 553 (1970).

In keeping with our rules that intent in the realm of contract law is to be viewed objectively, not subjectively, see *Professional Serv. Indus. v. J.P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992), and *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985), and that in order to establish an express contract there must be a definite proposal and an unconditional and absolute acceptance thereof, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991), we conclude that here the April 27 letter of intent was so cursory, indefinite, and conditional as to fail as a matter of law to establish an objective intent on the part of the parties to be bound thereby. Not only is the document, which involves a $14-million transaction, sketchy, it recites in numbered paragraph 1 that it is with Snell's consent that an agreement and plan of merger would be entered into; it declares in the same paragraph that certain Snell assets, only some of which are specified, would not be included in the transaction; and further, it acknowledges in numbered paragraph 6 that the merger might not be consummated.

Under those circumstances, there can be no factual issues,

and Snell is indeed entitled to judgment as a matter of law. Thus, the judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

24TH AND DODGE LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. COMMERCIAL NATIONAL BANK OF CHICAGO, A FEDERALLY CHARTERED BANK, APPELLEE.

497 N.W.2d 386

Filed March 26, 1993. No. S-91-005.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdiction issue.
2. **Actions: Jurisdiction.** Under Neb. Rev. Stat. § 25-536 (Reissue 1989), a court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's transacting any business in this state.
3. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether a statutory standard of the long-arm statute is satisfied and, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Due Process: Jurisdiction.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.
5. **Due Process: Jurisdiction: States.** In order to subject an out-of-state defendant to personal jurisdiction in the forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
6. _____: _____: _____. A defendant has established minimum contacts sufficient to satisfy due process if the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.
7. **Jurisdiction: States.** The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

8. _____: _____. Jurisdiction over an out-of-state defendant is proper when the defendant's contacts with the forum state proximately result from actions by the defendant himself that create a substantial connection with the forum state.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

James D. Sherrets, of Sherrets Smith & Gardner, P.C., for appellant.

Bryan S. Mick, of Betterman & Katelman, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

BOSLAUGH, J.

The plaintiff, 24th and Dodge Limited Partnership, a Nebraska limited partnership with its principal place of business in Omaha, Nebraska, appeals from the order of the district court sustaining the special appearance of the defendant, Commercial National Bank of Chicago, and dismissing the plaintiff's petition.

On June 27, 1989, Commercial Security Mortgage Co., a commercial mortgage broker, acting on behalf of the plaintiff, contacted the defendant.

This initial solicitation by the plaintiff's mortgage broker resulted in subsequent telephone conversations and other correspondence between the parties concerning the availability of a mortgage loan to be secured by a pledge of an office building located at 2223 Dodge Street in Omaha.

On October 2, 1989, the plaintiff submitted a mortgage loan application with a $12,000 application fee to the defendant. The application fee was nonrefundable if the defendant issued a letter of commitment.

On October 9, 1989, the defendant sent its commercial loan officer, Diane Shomo, to Omaha to inspect the property and discuss the loan with the plaintiff.

On November 14, 1989, the defendant issued a letter of commitment which contained additional terms not previously agreed to by the plaintiff, but which the plaintiff conditionally accepted on November 24.

The parties never agreed to the modifications the plaintiff made to the original commitment letter. The plaintiff requested the return of the $12,000 application fee, but the defendant refused to refund the application fee. The plaintiff then filed this action in Nebraska to recover the fee.

The defendant is not a resident of Nebraska and does not own real property in this state. Prior to negotiating with the plaintiff for the loan, the defendant had never conducted any business in Nebraska.

The plaintiff assigns as error the finding of the district court that it could not properly obtain personal jurisdiction over the defendant under Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1989), because the defendant did not establish minimum contacts with the State of Nebraska such that the exercise of personal jurisdiction over the defendant would be fair and reasonable under the Due Process Clause.

Because this jurisdictional question does not involve a factual dispute, its determination is a question of law, and this court is required to reach a conclusion independent from the district court's decision. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

Section 25-536 provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether a statutory standard of the long-arm statute is satisfied and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Williams, supra.*

In this case, the defendant transacted business in this state through telephone and other correspondence and also sent its agent to Nebraska to conduct business on its behalf. The purpose of these negotiations was to reach an agreement regarding a loan by the defendant to the plaintiff of a substantial amount of money to finance the purchase of a building in Omaha, Nebraska. Since subsections (a) and (b) of § 25-536(1) apply to the defendant's conduct in this case, the first requisite for the district court's exercise of personal jurisdiction over the defendant has been satisfied.

Next, we must consider whether sufficient minimum contacts exist between the defendant and this state so as to authorize this state to exert personal jurisdiction over the defendant without offending due process.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In order to subject an out-of-state defendant to personal jurisdiction in the forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend " 'traditional notions of fair play and substantial justice.' " *Id.*, 326 U.S. at 316.

The benchmark for establishing whether a defendant has established minimum contacts sufficient to satisfy due process

is whether " 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Burger King Corp.*, 471 U.S. at 474, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Burger King Corp., 471 U.S. at 474-75, quoting *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), the Supreme Court found jurisdiction over an out-of-state defendant is proper when "the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." (Emphasis omitted.) *Burger King Corp.*, 471 U.S. at 475.

The *McGee* case involved an action in California by the beneficiary of a life insurance policy against an insurance company which was located in Texas. The U.S. Supreme Court held that due process was satisfied because the suit was based on a contract which had substantial connection with California. In the *McGee* case, the insurance company had never had an office or agent in California, and it had never solicited or done any insurance business in California apart from the policy involved in the lawsuit. However, "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.*, 355 U.S. at 223.

In the present case, although the defendant is not a resident of Nebraska, does not own real property in this state, and prior to negotiating with the plaintiff for the loan, had never conducted any business in Nebraska, the loan application was

delivered in Nebraska; the application fee, which is the subject of the underlying cause of action, was mailed from this state; the plaintiff is a Nebraska corporation; and the building which was to be used as security for the loan is located in Nebraska. The defendant is an " 'experienced and sophisticated' " business, and " 'at no time' did [it] 'act under economic duress or disadvantage imposed by' " the plaintiff. *Burger King Corp.*, 471 U.S. at 484.

We think it cannot be said that the defendant in this case failed to establish minimum contacts in Nebraska sufficient to satisfy due process. The defendant's conduct and connection with the State of Nebraska are such that it reasonably should have anticipated being haled into court here over the plaintiff's cause of action for the return of its loan application fee.

The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. SCOTT FRIZZELL, APPELLANT.
497 N.W.2d 391

Filed March 26, 1993. No. S-91-043.

1. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989), applies only where the prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already resolved.

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

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

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

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

FAHRNBRUCH, J.

Scott Frizzell appeals an order of the district court for Hall County denying his motion for jail time credit. We affirm the district court's ruling.

On August 18, 1986, Frizzell pled guilty to second degree murder and second degree arson. At the time, the penalty for second degree murder was not less than 10 years nor more than life imprisonment. Neb. Rev. Stat. §§ 28-304 (Reissue 1989) and 28-105 (Reissue 1985). The penalty for second degree arson was not less than 1 nor more than 20 years of imprisonment, up to a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-503 (Reissue 1989).

On September 22, 1986, Frizzell was sentenced to 25 years of imprisonment on the murder charge and to not less than 6 nor more than 20 years of imprisonment on the arson charge, the sentences to be served concurrently. The court granted credit for jail time served between Frizzell's guilty plea and his sentencing, a total of 34 days.

On September 11, 1989, Frizzell filed a motion for an order nunc pro tunc, asking the court to credit him with 260 days of jail time served between the time of his arrest and his guilty plea. The court denied his motion on October 30.

Frizzell filed a petition for jail time credit on June 22, 1990, in which he requested that the district court grant 260 days of jail time credit and 84 days of good time served while he was in custody at the Hall County Detention Center. The court denied the motion, finding that (1) Frizzell's previous motion for an order nunc pro tunc for jail time credit had been overruled by the court and that (2) Frizzell's petition was a motion for postconviction relief in which he had failed to prove facts sufficient to show that he was entitled to postconviction relief.

In this court, Frizzell has assigned as error the denial of his motion for jail time credit and for good time credit. At oral argument before this court, Frizzell withdrew the issue of good

time credit.

Claiming a denial of equal protection under the U.S. Constitution, the prisoner in *State v. Keever*, 234 Neb. 289, 450 N.W.2d 682 (1990), filed in the district court a "Motion for an Order Nunc Pro Tunc Crediting Time in Custody Prior to Sentencing." The prisoner appealed the denial of his motion to this court. In affirming the decision of the district court, this court stated that

> the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989) . . . applies only where the prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable. . . . Furthermore, a motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already resolved.

(Citations omitted.) 234 Neb. at 290, 450 N.W.2d at 684.

Even if Frizzell's motion is not treated as a motion for postconviction relief, his argument is without merit. At the time of Frizzell's sentencing, Neb. Rev. Stat. § 83-1,106(1) (Reissue 1987) provided that

> [c]redit against the maximum term and any minimum term *may be given* to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

(Emphasis supplied.) The above-emphasized language has since been changed from "may be given" to "shall be given." See § 83-1,106(1) (Cum. Supp. 1992). This change to mandatory language in the statute took place after Frizzell was sentenced and does not apply retrospectively. See, *State v. Keever, supra*; *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989).

Even considering all of the jail time Frizzell served, the sentences imposed upon him were within the statutory maximums. The trial judge explicitly considered Frizzell's jail

time and granted him 34 days of credit.

The district court did not err in refusing Frizzell's motion for jail time credit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. RUSSELL, APPELLANT.

497 N.W.2d 393

Filed March 26, 1993. No. S-92-479.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. _____: _____. An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt.
3. **Convictions: Circumstantial Evidence.** Circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
4. **Intent: Words and Phrases.** The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident.
5. **Intent: Weapons.** An intent to kill may be inferred from the deliberate use of a deadly weapon in a manner reasonably likely to cause death.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

C.M. Radosevich for appellant.

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

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

BOSLAUGH, J.

After a bench trial, the defendant, Edward A. Russell, was convicted of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), and use of a weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). Russell was sentenced to life imprisonment on the murder conviction and to a 15-month term of imprisonment on the weapon conviction, with 283 days' credit given for time served. On appeal to this court, the defendant's sole assignment of error is that the evidence was insufficient to support his conviction of first degree murder.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993); *State v. Alcorn*, 240 Neb. 400, 481 N.W.2d 921 (1992).

An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt. *State v. Smith*, 242 Neb. 202, 494 N.W.2d 126 (1993).

The defendant spent the morning of July 26, 1991, in the company of Curtis, Spencer, and Gary Valentine. The group, which spent the morning drinking alcoholic beverages and socializing, eventually moved to an area outside of an apartment house located near the intersection of 19th Avenue and Jones Street in Omaha, Nebraska. After a verbal dispute of some kind, the defendant was beaten by Spencer and Gary Valentine. The defendant claims that he lost his watch and gold chain in the incident. Later, the defendant returned to the scene of the incident with two other people. The defendant had a five-shot .32-caliber revolver mounted on a .38-caliber frame with him at the time. The defendant told the police that it was his intention to go back to the area where he had been beaten in

order to retrieve his watch and chain.

When the defendant returned, Michael White, Rudy Rucker, and the victim, Gregory George, were seated under a tree in a grassy area between the street and apartment building near the location of the earlier altercation. White sat on a box facing east, with his back toward 19th Avenue. Rucker was seated on a chair to White's left, looking south toward Jones Street. George was sitting on a bucket directly across from White, facing west toward 19th Avenue.

White testified that the three men noticed a Cadillac head down 19th Street, turn onto Jones Street, and move toward their location. After turning onto Jones Street, the car slowed down considerably. White testified that he became concerned and jumped up to hide behind a tree. White testified that he saw the defendant jump out of the backseat of the Cadillac with a gun in his right hand. White testified that when the defendant got out of the car, White saw George turn to go toward the corner of the building near a passageway between the buildings and saw Rucker scramble toward some nearby bushes. White further testified that once the defendant had moved out of the vehicle he stood upright, raised his arm chest high, and fired a shot toward the place where George had gone. White testified that the defendant's right hand, holding the gun, was facing palm-side up. White stated that he heard the defendant ask, "Where did they go?", but he could not remember whether the question was asked before or after the gun was fired. White stated that although he did not see the defendant aim the gun at anyone, his initial reaction after the shot was fired was to look toward the corner of the building in the direction that the shot had been fired.

White testified that after the shot had been fired, the defendant moved toward the place where the men had been sitting, with the gun still in his hand. The defendant looked at Rucker, whose nickname was "Low-Life," and said, "I ought to kill you, Low." Rucker responded that he had never done anything to the defendant.

Rucker testified to a similar version of the events. Rucker testified that when the defendant got out of the vehicle he asked, "Where are they at now?" As the defendant asked this

question, the gun was pointed toward where the three men were sitting and was fired. Rucker stated that he then went to his hands and knees. George got up and moved toward the space between the buildings. Rucker stated that after the shot was fired, the defendant looked at him and stated, "Low, I ought to kill you." After this statement, the defendant returned to the vehicle and left.

In his statement to the police, the defendant admitted that at the scene of the altercation he had stepped out of the car he was riding in and "caught myself shooting up in the air." One shot was fired, but the defendant claims that he did not see anybody get hit. The defendant also told the police that he had asked the three men where his property was and why had he been beaten. When asked by the police why he had taken a gun out at the scene, the defendant stated, "I guess more or less for protection or something." The defendant further stated that he was angry and hurt.

After the defendant's car pulled away from the scene, White and Rucker followed the path that George had taken to the passageway between the apartment buildings. Drops of blood were found starting at the corner of the apartment building near the area where the three men had been sitting prior to the shooting. The drops of blood continued in a path leading to Rucker's apartment, where George was found lying on the floor with a bullet wound in his chest. George died from the gunshot wound.

The pathologist who performed the autopsy testified that the bullet passed through George's left upper arm and then entered the left side of his chest, passing through the right ventricle and coming to rest in the right chest cavity. The pathologist further testified that the bullet found in the chest cavity appeared to be a large caliber bullet which would be consistent with a .38-caliber bullet.

The defendant testified that after the incident he sold the gun to a drug dealer. He also asked a friend, Patricia Davis, to drive him to his brother's house near 22d and Howard Streets. Davis testified that as they drove by the area, she saw police gathered there. She saw the defendant turn away from the car window and put his hands up to his face. She further testified that the

defendant told her to keep going. When the police saw the defendant in the car, it was pulled over and the defendant was arrested.

On the appeal to this court, the defendant argues that the circumstantial evidence of his intent to kill the victim was insufficient to support a finding of his guilt beyond a reasonable doubt. The defendant argues that although he may have had "evil intentions with respect to the Valentine boys," brief for appellant at 8, he had no intent to kill the victim. The defendant maintains that when he returned to the scene of the incident looking for the Valentine brothers, he shot the gun into the air, and the bullet must have ricocheted off something and accidently hit George.

Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred. *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993); *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992).

> When some evidence in a criminal case is circumstantial, such evidence is to be treated in criminal cases the same as direct evidence, and the State is entitled upon review to have all conflicting evidence, both direct and circumstantial, resolved in its favor. . . . Circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.

(Citations omitted.) *State v. Tucker*, 242 Neb. at 345, 494 N.W.2d at 579.

"The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding an incident." *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 400, 488 N.W.2d 546, 548 (1992), citing *State v. Rokus, supra*. "Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death." *State v. Rokus*, 240 Neb. at 622, 483 N.W.2d at 155.

The theory advanced by the defendant, that the gun was shot in the air and the bullet ricocheted and accidently hit the victim, could reasonably be rejected by the trial court. At trial, the

pathologist testified that the bullet hit the victim's skin at an angle that was not completely perpendicular, based on the shape of the wound, which suggested that the bullet may have been tumbling. The pathologist testified that the tumbling of the bullet could have been caused either by a defective gun or by the bullet's having been deflected. He testified that the bullet in this case could not have ricocheted off the ground. When asked if the bullet could have ricocheted off something else, the pathologist testified that if the bullet had hit something substantial, he believed it likely that the bullet would be distorted or flattened or have nicks, pieces, or chunks missing from it. The bullet in this case was intact.

Accordingly, it appears unlikely that the bullet fired by the defendant ricocheted off something before it struck the victim. Based upon all of the facts and circumstances, including the defendant's actions and statements, there was sufficient evidence to support the trial court's finding that the defendant was guilty of murder in the first degree for the death of George. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

SHELTER INSURANCE COMPANIES, APPELLEE, V. ALICE M. FROHLICH, APPELLANT.

498 N.W.2d 74

Filed April 2, 1993. No. S-90-554.

1. **Contracts.** A third-party beneficiary who accepts a benefit under a contract also assumes an obligation imposed by the contract conferring the benefit.
2. **Subrogation: Words and Phrases.** Subrogation is substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.
3. **Subrogation: Liability.** To be entitled to subrogation, one must pay a debt for which another is liable.
4. **Subrogation.** Generally, subrogation is unavailable until the debt owed to a subrogor has been paid in full.
5. **Contracts: Subrogation.** If a contract provides for subrogation on payment of

less than the full amount of a debt or loss, partial payment of a debt or loss may be the basis for subrogation.

6. **Contracts: Subrogation: Equity.** Unless a contract specifically provides otherwise, equitable principles apply even when a subrogation right is based on contract.
7. _____: _____: _____. If a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation.
8. **Contracts: Insurance: Subrogation.** An insurance policy reaffirms the rights of parties relative to subrogation but, in the absence of an express provision to the contrary, does not alter fundamental principles pertaining to subrogation.
9. _____: _____: _____. In the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss.
10. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
11. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
12. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel.

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

Daniel J. Duffy and Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Kathleen A. Jaudzemis and Andrew D. Strotman, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and HOWARD, D.J., Retired.

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989) (Uniform Declaratory Judgments Act), Shelter Insurance Co. (Shelter) brought an action for a declaratory judgment against Alice M. Frohlich concerning funds held in trust under an escrow agreement pertaining to distribution of settlement proceeds from Frohlich's settlement of her personal injury claim against Gini and Harlan Denbeste. After the

district court for Lancaster County granted summary judgment to Shelter, Frohlich appealed.

BACKGROUND

On August 12, 1984, Frohlich was a passenger in a car driven by Frankie Tipton, a policyholder insured by Shelter. Tipton's car collided with a car driven by Gini Denbeste. Farmers Mutual of Nebraska had the liability insurance coverage on the Denbeste automobile. As a result of the collision, Frohlich suffered severe and permanent injuries which left her partially disabled and which resulted in medical expenses exceeding $50,000.

On September 6, 1984, since Tipton's policy contained a "medical pay" provision, Frohlich's lawyer telephoned Shelter regarding reimbursement of medical expenses paid by Frohlich on account of the accident. In a September 14 letter to Frohlich's lawyer, Shelter stated that Tipton's policy provided $10,000 in medical payment coverage in the following policy provision:

> **Coverage C—Medical Payments**—The Company will pay all reasonable expenses which are incurred within one year from the date of accident for necessary medical, surgical, x-ray, and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services, for bodily injury caused by accident and sustained by:
>
> . . . .
>
> (b) Any other person while occupying (1) the described automobile, while being used by the named insured . . . .

Shelter's letter also called attention to a subrogation clause in Tipton's policy:

> In the event of any payment under Coverage C [Medical Payments] of this policy, the Company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization, and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.

On October 26, Frohlich's lawyer wrote in response to Shelter's letter, disputing Shelter's claimed subrogation interest resulting from any payment made under the medical pay provision of Tipton's policy: "At this time we are not prepared to concede that point as we believe that the Nebraska Supreme Court will resolve that issue with a contrary interpretation." Moreover, in the October 26 letter, Frohlich asserted that she was entitled to the entire $10,000 medical payment coverage because her medical expenses at that time exceeded $31,000. Shelter paid Frohlich $10,000 under Tipton's policy and, in a letter accompanying the payment, stated: "This letter is also to advise we will pursue our own subrogation for medical payments against Farmers Mutual of Nebr."

Later, Frohlich sued Gini Denbeste and her father, Harlan Denbeste. As a result of compromise and settlement of Frohlich's claim against Denbestes, Farmers Mutual paid Frohlich $212,500. Shelter did not participate in the settlement process. The record does not contain the actual settlement agreement or release for Frohlich's claim against Denbestes. However, as an aspect of the settlement, Frohlich, Denbestes, and Farmers Mutual, but not Shelter, signed an escrow agreement which required that $10,000 of the $212,500 settlement be deposited in escrow and which further provided: (1) Farmers Mutual acknowledged receipt of Shelter's subrogation claim; (2) the $10,000 escrow fund would be released when Shelter withdrew its subrogation claim, the statute of limitations barred Shelter's claim, or the subrogation claim was resolved; and (3) Frohlich would hold harmless the escrow agent, Denbestes, and Farmers Mutual from any claim by Shelter concerning its subrogation claim and the escrow fund. The escrow agreement expressly stated that the escrow fund resulted from "a compromise settlement of [the] litigation" between Frohlich and Denbestes.

Shelter subsequently filed its declaratory judgment action against Frohlich, asserting entitlement to the $10,000 escrow fund by virtue of Shelter's payment to Frohlich under Tipton's policy and the doctrine of subrogation. Both Shelter and Frohlich moved for a summary judgment. The court entered summary judgment for Shelter and ordered that the $10,000

escrow fund be paid to Shelter.

ASSIGNMENTS OF ERROR

Frohlich asserts that the district court erred by (1) finding that Shelter has a subrogation interest in the $10,000 escrow fund and ordering that the fund be paid to Shelter, (2) finding that Shelter was not required to prove that Frohlich was fully compensated for her injuries sustained in the automobile accident, (3) ruling that Shelter's action was properly brought against Frohlich rather that against Denbestes and Farmers Mutual, and (4) failing to find that Shelter waived its subrogation interest in the escrow fund.

STANDARD OF REVIEW

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] 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.

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988). Accord, *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992).

SHELTER'S SUBROGATION INTEREST

Frohlich contends that Shelter has no subrogation right as the result of the medical payments provision of Tipton's policy. However, Tipton's policy expressly stated that Shelter "shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization."

In *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143

(1989), Milbank brought an action against its insured, Henry, who had been injured while driving her car. In the suit against Henry, Milbank joined as defendants the other motorist involved in the accident and his insurance company which provided liability coverage. Milbank sought to recover the amount paid to Henry under the medical payments provision of her Milbank policy. At issue was the validity of a subrogation provision in Milbank's policy: " 'If we make a payment under this policy and the person, to or for whom payment is made recovers damages from another, that person shall hold in trust for us the proceeds of the recovery and shall reimburse us to the extent of our payment.' " 232 Neb. at 419, 441 N.W.2d at 144-45. This court stated that " 'a subrogation clause of this kind which gives an insurer a right to subrogation against a third-party tortfeasor for medical payments actually made is a valid and enforceable contractual provision.' " 232 Neb. at 420, 441 N.W.2d at 145 (quoting *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 245 N.W.2d 844 (1976)).

Although the subrogation clause in Shelter's policy differs verbally from the clause presented in *Milbank Ins. Co.*, the difference is immaterial for the purpose of determining whether Shelter's subrogation provision is valid. Both the subrogation provision in Shelter's policy and the provision examined in *Milbank Ins. Co.* state, in substance, that an insurer has a right of subrogation for a recovery from a tort-feasor when the insurer has made payments to the insured under the medical payments coverage of an insurance policy. Thus, the subrogation clause in the insurance agreement between Tipton and Shelter is valid.

The question remains, however, whether Shelter's subrogation right applies when Shelter, under its medical payment coverage, pays medical expenses of one other than its insured. The fact that Frohlich was not one of Shelter's policyholders does not determine whether Shelter is entitled to subrogation. Frohlich became a third-party beneficiary of the policy or insurance contract between Tipton and Shelter when Shelter paid Frohlich's medical expenses as required by the policy which Shelter had issued to Tipton. Therefore, Frohlich, by accepting a contractual benefit, is bound by the subrogation

clause contained in the insurance policy. See *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984) (a third-party beneficiary who accepts a benefit under a contract also assumes an obligation imposed by the contract conferring the benefit). Thus, under the provisions of Tipton's insurance policy, Shelter obtained a subrogation right or interest concerning money recovered by Frohlich when Shelter paid the debt or obligation owed to Frohlich by Denbestes and their insurer. Yet, the precise nature or extent of Shelter's subrogation interest or right is undefined by Tipton's insurance policy.

General Principles of Subrogation.

"Subrogation is substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee." *Ehlers v. Perry*, 242 Neb. 208, 221, 494 N.W.2d 325, 334 (1993). Generally, " ' " '[s]ubrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.' " ' " *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 194, 459 N.W.2d 718, 734 (1990) (quoting *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988)). Accord *Ehlers v. Perry, supra*. The preceding applies to subrogation based on a contract, known as conventional subrogation, as well as to subrogation arising by operation of law, that is, legal subrogation.

"To be entitled to subrogation, one must pay a debt for which another is liable." *Ehlers v. Perry*, 242 Neb. at 222, 494 N.W.2d at 335. See, also, *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange*, 204 Neb. 414, 282 N.W.2d 601 (1979); *Luikart v. Buck*, 131 Neb. 866, 270 N.W. 495 (1936).

Generally, subrogation is unavailable until the debt owed to a subrogor has been paid in full. See *Skinkle v. Huffman*, 52 Neb. 20, 71 N.W. 1004 (1897). See, generally, 73 Am. Jur. 2d *Subrogation* § 30 n.21 (1974). However, if a contract provides for subrogation on payment of less than the full amount of a debt or loss, partial payment of a debt or loss may be the basis

for subrogation. See *American Surety Co. of N. Y. v. Clarke*, 94 Mont. 1, 20 P.2d 831 (1933). See, generally, 73 Am. Jur. 2d, *supra*, § 33 n.43. However, unless a contract specifically provides otherwise, equitable principles apply even when a subrogation right is based on contract. *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983); *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 316 N.W.2d 348 (1982); *Willard v. Automobile Underwriters, Inc.*, 407 N.E.2d 1192 (Ind. App. 1980); *Skauge v. Mountain States Tel. & Tel.*, 172 Mont. 521, 565 P.2d 628 (1977); *Lyon v. Hartford Accident and Indemnity Company*, 25 Utah 2d 311, 480 P.2d 739 (1971), *overruled on other grounds, Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Utah 1985). Also, if a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation. See, *Willard v. Automobile Underwriters, Inc., supra*; *Maryland Casualty Co. v. Southern Pac. Co.*, 119 F.2d 672 (9th Cir. 1941). See, generally, 73 Am. Jur. 2d, *supra*, § 33 n.45. When a right of subrogation arises by operation of law, existence of an agreement or contract authorizing subrogation is unnecessary. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). Thus, as this court acknowledged in *Rawson v. City of Omaha*, the right of subrogation "does not rest on contract and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable." 212 Neb. at 164, 322 N.W.2d at 384.

Subrogation and Insurance.

In the context of insurance, the right of subrogation is based on two premises: (1) an insured should not be allowed to recover twice for the same loss, which would be the result if the insured recovers both from the insured's insurer and the tort-feasor, and (2) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured. See, *Shelter Mut. Ins. Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992); *Powell v. Blue Cross and Blue Shield*, 581 So. 2d 772

(Ala. 1990); *Rimes v. State Farm Mut. Auto. Ins. Co., supra*; *Ortiz v. Great Southern Fire & Cas. Ins. Co.*, 597 S.W.2d 342 (Tex. 1980); *Wimberly v. Am. Cas. Co. of Reading, Pa.*, 584 S.W.2d 200 (Tenn. 1979); *Skauge v. Mountain States Tel. & Tel., supra*; *Oss v. United Services Auto. Ass'n*, 807 F.2d 457 (5th Cir. 1987). See, also, 16 George J. Couch, Cyclopedia of Insurance Law § 61:18 (rev. ed. 1983). As observed in *Oss v. United Services Auto. Ass'n*, subrogation clauses should be construed to "confirm, but not expand, the equitable subrogation rights of insurers." 807 F.2d at 460 (citing 4 George E. Palmer, The Law of Restitution § 23.14 (1978)). Moreover,

> subrogation is in its nature equitable . . . . [T]he insurance contract setting up and declaring the rights between the parties preserves the unity and control of the insured over his cause of action for personal injury and property damage against the tort-feasor, and yet fully protects the insurer's subrogation right.

Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 592-93, 169 N.W.2d 601, 604 (1969).

Thus, an insurance policy reaffirms the rights of parties relative to subrogation but, in the absence of an express provision to the contrary, does not alter fundamental principles pertaining to subrogation. Although Shelter's subrogation right arises under its insurance policy issued to Tipton, the exact nature and extent of Shelter's subrogation right is determined by the circumstances of Frohlich's settlement and the resulting equities.

IS TOTAL COMPENSATION OF A SUBROGOR REQUIRED?

The Argument.

Frohlich contends that Shelter, in order to prevail and recover on the basis of subrogation, must prove that she has been fully compensated for her loss resulting from the automobile accident. However, Shelter contends that, under *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989), Nebraska law imposes no requirement that an insurer prove that its subrogor has been fully compensated for a loss before the insurer is entitled to subrogation.

In *Milbank Ins. Co.*, this court simply held that a subrogation clause in a medical payments provision of an insurance policy is valid and binding as the result of payments for covered medical expenses. Additionally, in *Milbank Ins. Co.*, we held that a settlement between the insured and a third party did not destroy the insurer's subrogation right when the third party had notice of the insurer's subrogation interest and claim. However, in *Milbank Ins. Co.*, we did not address the issue whether a subrogation right is conditioned on full compensation of a subrogor.

Is Full Compensation a Prerequisite to Subrogation?

Although we have not previously addressed the precise issue presented in Frohlich's case, we have stated that

> "[w]here the assured, as in case of partial insurance, sustains a loss, in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrong-doer. But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, based on his right in equity to subrogation. *But the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery*; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution."

(Emphasis supplied.) *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 133, 109 N.W.2d 174, 177-78 (1961) (quoting *Newcomb et al. v. Cincinnati Ins. Co.*, 22 Ohio St. 382, 10 Am. R. 746 (1872)). Accord *Krause v. State Farm Mut. Auto. Ins. Co., supra.*

This brings us to the question: Is an insured's full compensation for a loss a prerequisite to subrogation?

Shelter cites only one appellate decision to support its contention that full compensation is unnecessary for an

insurer's right of subrogation. See *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Anderson*, 48 Ala. App. 172, 263 So. 2d 149 (1972). On the other hand, research indicates that nearly every appellate court that has considered the question has recognized that unless an insurance policy contains a provision to the contrary, an insurer's right to recover under a subrogation clause of an insurance policy requires that the insured must have been fully compensated for the loss covered by the policy. See, e.g., *Shelter Mut. Ins. Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992) (the full compensation rule was inapplicable on the facts of the case but, in an appropriate factual setting, applies to an insurer's right of subrogation); *Powell v. Blue Cross and Blue Shield*, 581 So. 2d 772 (Ala. 1990) (a subrogation right does not exist until an insured has been fully compensated for a loss); *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983) (notwithstanding the insurer's payment of an insured's medical expenses, an insurance policy's subrogation clause does not entitle the insurer to reimbursement from the insured's settlement proceeds when the recovery failed to fully compensate the insured); *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 316 N.W.2d 348 (1982) (an insurance policy subrogation clause for reimbursement of medical expenses paid on behalf of an insured does not entitle the insurer to reimbursement when the insured's settlement was for an amount less than the total damages sustained by the insured); *Southern Farm Bureau Cas. Ins. v. Sonnier*, 406 So. 2d 178 (La. 1981) (when an insurer pays its insured only part of the damages caused by a tort-feasor, the insurer is only partially subrogated to the insured's right to compensation, and the insured, in preference to the insurer-subrogee, is entitled to seek the balance of the partially paid claim against the tort-feasor); *Ortiz v. Great Southern Fire & Cas. Ins. Co.*, 597 S.W.2d 342 (Tex. 1980) (summary judgment is improper in a suit on a fire insurance policy covering a structure when the record failed to disclose what portion of the insured's settlement was allocated to the loss of real property); *Wimberly v. Am. Cas. Co. of Reading, Pa.*, 584 S.W.2d 200 (Tenn. 1979) (insurer has no subrogation right in the insured's recovery from a tort-feasor where the insured has not

been fully compensated for the loss); *Skauge v. Mountain States Tel. & Tel.*, 172 Mont. 521, 565 P.2d 628 (1977) (when an insured has sustained a loss exceeding the amount paid by the insurer, the insured is entitled to full compensation for the entire loss before the insurer can assert its right of legal subrogation against the insured or the tort-feasor); *Lyon v. Hartford Accident and Indemnity Company*, 25 Utah 2d 311, 480 P.2d 739 (1971), *overruled on other grounds, Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Utah 1985) (an insured must make a full recovery for a loss before the insurer is entitled to any part of a recovery from the tort-feasor); *Mattson v. Stone*, 32 Wash. App. 630, 648 P.2d 929 (1982) (if an insured has recovered all damages by a tort-feasor, the insurer has a subrogation interest in the recovery); *Oss v. United Services Auto. Ass'n*, 807 F.2d 457 (5th Cir. 1987) (summary judgment is unavailable in the absence of a factual finding concerning the expected amount of medical costs or the ability of the tort-feasor to pay beyond the amount received in a settlement). See, generally, 3 John A. & Jean Appleman, Insurance Law and Practice § 1675 (Supp. 1992); 16 George J. Couch, Cyclopedia of Insurance Law, ch. 61, *Subrogation* (rev. ed. 1983). Thus, in the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right of subrogation only when the insured has obtained an amount that exceeds the insured's loss.

Although courts have expressed various rationales for the conclusion that an insured must be fully compensated for a loss before the insurer is entitled to subrogation, the underlying premise seems to be that, under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment by virtue of an insured's recovering payment of all or part of those same damages from the tort-feasor. As observed in *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d at 276-77, 316 N.W.2d at 355:

> "[W]here either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume." [Quoting *Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537, 253 N.W.2d 512 (1977).]

. . . .

> . . . [W]e find it difficult to justify the position of the insurer, which has already been paid a premium for the risk it assumed and which would have been obligated to make the medical payments irrespective of its insured's negligence and irrespective of whether or not a culpable third party could have been found.

Also, in *Rimes* the court noted that "[s]ubrogation is to be allowed only when the insured is compensated in full by recovery from the tortfeasor. The insured is to be made whole, but no more than whole." 106 Wis. 2d at 272, 316 N.W.2d at 353. Accord, *Powell v. Blue Cross and Blue Shield*, 581 So. 2d 772 (Ala. 1990); *Skauge v. Mountain States Tel. & Tel., supra.*

Moreover, as the court expressed in *Oss v. United Services Auto. Ass'n*, 807 F.2d at 460:

> "[T]he subrogation clause would not be regarded, even by a careful and intelligent reader, as qualifying the basic promise to pay, and to give it that effect is to enforce provisions drafted by the insurer that are inherently deceptive." This is good reason for holding that the "[subrogation] clause must be subordinated to the basic insurance promise" and that the insurer should not "recover sums received by the insured from the tort source until the insured has been fully indemnified."

Allowing an insurer to subrogate against an insured's settlement when an insured has not been fully compensated would mean that all the insured's settlement could be applied to a medical payment subrogation claim with nothing left to compensate the insured for excess medical bills or personal injuries. Insurance companies accept premiums in exchange for medical payment coverage and may be obligated to pay medical expenses regardless of their insured's negligence or whether a third-party tort-feasor is liable and, therefore, must pay damages. In addition, there is little empirical substantiation that possible reimbursement through successful subrogation is considered in determining insurance premiums for medical payment coverage. See *Rimes, supra.*

Because the record in Frohlich's case fails to answer the question whether Frohlich has been fully compensated as the

result of the settlement with the Denbestes and Farmers Mutual, there is a genuine issue of material fact concerning compensation for Frohlich's loss from the automobile accident; hence, the court erred by granting summary judgment to Shelter.

Whether Shelter's subrogation right can be enforced against Frohlich requires resolution of factual issues, such as the amount of medical costs incurred by Frohlich and other damages sustained by her. See, *Skauge v. Mountain States Tel. & Tel., supra*; *Oss v. United Services Auto. Ass'n, supra.* Additionally, other factors affecting enforceability of a subrogation right may include the tort-feasor's ability to pay beyond the amount of the subrogor's settlement and whether the settling parties have stipulated that the settlement satisfies all damages sustained by the subrogor. See *Rimes, supra.* If Frohlich's damages, as later determined at the trial level, exceed the amount which she received in settlement of her claim against Denbestes, Frohlich has not been fully compensated for her loss, and, consequently, Shelter is not entitled to any part of the proceeds from settlement of Frohlich's claim against the Denbestes.

PROPER PARTIES?

Frohlich contends that the trial court erred in ruling that Shelter's claim was properly brought against Frohlich instead of Denbestes and Farmers Mutual. However, Frohlich does not discuss this assignment of error.

"To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred." *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 861, 491 N.W.2d 341, 350 (1992). Accord, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989). See, also, Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Therefore, we do not address Frohlich's third assignment of error.

WAIVER

Finally, Frohlich contends that by stating that "we will pursue our own subrogation for medical payments against

Farmers Mutual of Nebr.," Shelter waived its right to proceed against Frohlich.

"A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986) (execution of child custody agreement was not irrevocable waiver of parental right to custody). Accord, *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). Furthermore, "[i]n order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part." *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 665, 437 N.W.2d 778, 785 (1989).

Although Shelter's statement may indicate an intention to proceed against Farmers Mutual, that statement, by itself, cannot be characterized as "clear, unequivocal, and decisive action" constituting a "voluntary and intentional relinquishment" of its right to proceed against Frohlich. Thus, Frohlich's contention that Shelter waived its subrogation right is without merit.

CONCLUSION

Since the district court erred in granting summary judgment to Shelter, we reverse the judgment of the district court and remand this cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., not participating.

STATE OF NEBRASKA EX REL. DENNIS GRAMS, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL CONTROL, APPELLANT, V. RANDALL R. BEACH, APPELLEE.

498 N.W.2d 83

Filed April 2, 1993. No. S-90-1049.

1. **Actions: Penalties and Forfeitures.** In an action for civil penalties under Neb. Rev. Stat. § 81-1508(1)(c) (Reissue 1987), the size of an operation must be considered in determining the amount, if any, of a penalty.
2. **Statutes: Penalties and Forfeitures.** A penal statute should be given a sensible construction. The rule requiring strict construction of penal statutes is not violated by giving words of the statute their full meaning in the connection in which they are employed.
3. **Penalties and Forfeitures.** A showing of pollution is not requisite to recovery of a civil penalty under Neb. Rev. Stat. § 81-1508(1)(c) (Reissue 1987).

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, William L. Howland, Timothy J. Doyle, and, on brief, Steven J. Moeller for appellant.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellee.

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

WHITE, J.

Dennis Grams, as director of Nebraska's Department of Environmental Control (department), appeals the district court's dismissal of the department's action for civil penalties against appellee, Randall R. Beach. The district court held that although Beach had violated an administrative order, the State did not prove an element necessary to recover penalties for the violation. We reverse and remand.

During the time relevant to this action, Beach owned a mobile home park in Norfolk. Situated on the property were two waste-water lagoons. The department discovered that the lagoons were leaking waste water into a nearby lake. The department then issued an administrative order requiring

Beach to prevent leakage from the lagoons and to maintain the waste water at safe levels. Beach failed to comply with the order.

The department then brought suit against Beach, seeking injunctive relief and civil penalties under Neb. Rev. Stat. § 81-1508(1)(c) (Reissue 1987) for violation of its order. The district court granted a permanent injunction, later holding a hearing on the penalty issue and whether Beach should be held in contempt for failing to comply with the injunction. The court found Beach in contempt and jailed him until he had purged himself of contempt, but dismissed the department's action for penalties.

The court held that although the department had proven a violation of the administrative order, it had not shown any evidence of pollution. The court thus denied the request for penalties and dismissed that cause of action. The department then perfected this appeal.

The department alleges that the district court committed two errors. First, the department alleges that it was error to dismiss the action for civil penalties and to conclude that pollution is an element that the department must prove in a § 81-1508(1)(c) action for violation of a departmental order. Second, the department alleges that the court erred by not considering the size of the operation as a basis for determining penalties.

Section 81-1508 provides, in pertinent part:

> (1) Any person who violates any of the provisions of the Environmental Protection Act or who fails to perform any duty imposed by such act shall:
>
> . . . .
>
> (c) . . . for violation of . . . orders of the director under the National Pollutant Discharge Elimination System . . . *be subject to a civil penalty of not more than five thousand dollars per day, the amount of such penalty to be based on the size of the operation and the degree and extent of the pollution.*

(Emphasis supplied.)

The issue facing us hinges on the meaning of the emphasized statutory language above. Beach argues, and the district court held, that a showing of pollution is a necessary element for recovery of a civil penalty against the violator. Conversely, the

department argues that once a violation occurs, a penalty may be imposed, and that existence of pollution is only a factor to be considered when calculating the amount of the penalty.

The parties have not indicated, nor has our research discovered, any other jurisdictions employing similar statutory language. The legislative history of the statute offers no insight into the intent behind the pertinent language. We therefore rely solely on the statutory language itself to determine its meaning.

The meaning of statutory language is a question of law. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). On questions of law, this court is obliged to reach a conclusion independent of the decision reached by the trial court. *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

When interpreting a statute, we are guided by a number of rules. The language of the statute is to be considered in its plain, ordinary, popular sense. *In re Application A-16642, supra.* Furthermore, we must attempt to give effect to all parts of the statute, and if it can be avoided, no word, clause, or sentence of the statute will be rejected as superfluous or meaningless. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). Finally, it is not within the province of a court to read anything plain, direct, and unambiguous out of the statute. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

With the foregoing rules in mind, it is apparent that the cause must be remanded to the district court for further factual findings. Although the statute leaves the amount of the penalty to the discretion of the courts, the district court improperly treated a showing of pollution as requisite to imposition of a penalty.

Under § 81-1508(1)(c), any person "who violates . . . the Environmental Protection Act . . . shall . . . for violation of . . . orders of the director . . . be subject to a civil penalty . . . ." It is clear from the terms of the statute that in situations similar to the case before us, the imposition of a penalty is conditioned on violation of the department's order. The district court specifically found that such a violation occurred.

However, the court also conditioned the penalty on the final

clause of subsection (c) of the statute: "the amount of such penalty to be based on the size of the operation and the degree and extent of the pollution." This was incorrect.

The "size of the operation" and "pollution" provisos bear only on the *amount* of the penalty, not on whether a penalty may be imposed. Under the statute, the district court has discretion to determine how large the penalty should be—up to $5,000 per day. The court may even determine that despite a violation, the lack of pollution and size of operation warrant no penalty. See § 81-1508(1)(c). However, the court may not deny a penalty simply on the ground that no pollution was shown; the size of the operation must also be considered when arriving at the penal amount.

The department accurately points out the ramifications of following a "showing of pollution" penalty analysis. Section 81-1508(1)(c) also provides that individuals shall be subject to civil penalties for, among other things, refusing the right of inspection to the department, violating filing requirements, and failing to obtain a permit. None of these violations involve pollution. Under the district court's analysis, such violations could not result in penalties. Such a construction does not give effect to all the terms of the statute.

We agree with Beach that because § 81-1508 is a penal statute, it must be strictly construed. See, *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991); *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990). However, we have also stated: "A [penal] statute should be given a sensible construction. . . . The rule requiring strict construction of penal statutes is not violated by giving words of the statute their full meaning in the connection in which they are employed." (Citations omitted.) *State v. Ewing*, 221 Neb. 462, 467, 378 N.W.2d 158, 162 (1985).

When all portions of § 81-1508(1)(c) are given effect, the statute does not lend itself to the construction given it by the district court. A showing of pollution is not requisite to recovery of a civil penalty under the statute. The court's verdict must be reversed and the cause remanded for additional findings.

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside

on appeal unless clearly wrong. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992); *Nelson-Holst v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992). Nothing in the record indicates that the district court erred in finding that Beach violated the department's order or that the department failed to prove pollution.

We thus remand to the district court to consider the size of the operation, in addition to the lack of pollution. From those factual considerations, the court will determine whether a penalty should be awarded, and if so, the extent of that penalty.

REVERSED AND REMANDED WITH DIRECTIONS.

BETHESDA FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

498 N.W.2d 86

Filed April 2, 1993. No. S-90-1159.

Administrative Law: Health Care Providers: Sales. A corporation operating a long-term-care facility under a contract with the Nebraska Department of Social Services to provide services to medicaid recipients is subject to regulations providing for the recapture of depreciation in the event of a sale of the facility for a price in excess of book value.

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

Robert L. Lepp and Howard N. Kaplan, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and James Hatheway for appellee.

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

BOSLAUGH, J.

The plaintiff, Bethesda Foundation, is a Nebraska nonprofit corporation organized for the purpose of operating hospitals

for the general public and nursing homes for aged and infirm persons. It is a tax-exempt charitable organization. Prior to September 30, 1988, Bethesda owned and operated 12 nursing homes in Nebraska known as Bethesda Care Centers. Bethesda also operated a leased nursing home in Nebraska known as Grandview Manor. The plaintiff operated all of these facilities as licensed long-term-care facilities in accordance with and under the laws and regulations of the State of Nebraska and the Nebraska Department of Social Services. The facilities were certified by the department as providers of long-term-care service under 42 U.S.C. § 1396 (1988).

All at times prior to September 30, 1988, Bethesda and each of the facilities entered into one or more written contracts with the department to provide long-term-care services to medicaid recipients, and accordingly, each facility was entitled to reimbursement as provided in the Nebraska state plan for determining long-term-care reimbursement and the Nebraska regulations codifying the plan. These contracts stated that the policies and procedures of the department in the administration of the medicaid program would be followed.

The medicaid program is a cooperative federal program which the United States, by and through the Health Care Financing Administration of the U.S. Department of Health and Human Services (HHS), supervises and which partially provides funds to the states for medical assistance payments to needy people. See Social Security Act title XIX, 42 U.S.C. § 1396. Each state must submit to the Secretary of Health and Human Services for approval a plan that conforms to the requirements of 42 U.S.C. § 1396a (1988) and the implementing regulations issued by HHS.

Section 1396a(13)(A) provides that a medicaid plan must provide for payment "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations . . . ."

The Nebraska Department of Social Services is responsible for the administration of the medicaid program pursuant to

Neb. Rev. Stat. § 68-1018 et seq. (Reissue 1990). In administering the program, the department reimburses medicaid-certified nursing home facilities for the cost of care to medicaid-eligible patients. The department determines payment or reimbursement rates for a nursing home based on allowable costs incurred by the facility.

Payment for long-term-care services is set forth in 471 Neb. Admin. Code, § 12-011 et seq. (1987). Rates paid to long-term-care providers must be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities to provide services in conformance with state and federal laws, regulations, and quality and safety standards." 471 Neb. Admin. Code § 12-011.02.

Since October 17, 1977, the Nebraska medicaid program has recognized depreciation as an allowable cost. The regulations also provide for the recapture of depreciation upon the sale of a long-term-care facility for a profit.

> Depreciation in 471 NAC 12-011.08D refers to real property only. A long term care facility which is sold for a profit and has received NMAP payments for depreciation, shall refund to the Department the lower of -
>
> 1. The amount of depreciation allowed and paid by the Department between July 1, 1976, and the time of sale of the property; or
>
> 2. The product of the ratio of depreciation paid by the Department since July 1, 1976, to the total depreciation accumulated by the facility (adjusted to total allowable depreciation under the straight-line method, if any other method has been used) times the difference in the sale price of the property over the book value of the assets sold. . . .

471 Neb. Admin. Code § 12-011.08D.

Prior to March 30, 1988, Bethesda notified the department of its pending sale of its 12 nursing homes in Nebraska to MTC West, Inc. On March 30, 1988, the department notified Bethesda of its estimate of the amount owed by Bethesda for depreciation recapture. The department's final computation was that $662,599 of depreciation payments made to Bethesda

since October 17, 1977, was to be recaptured as a result of the gain on the sale of the nursing homes.

On September 30, 1988, the closing date for the purchase of the nursing homes, Bethesda paid, under protest, $662,599 to the department as recaptured depreciation. Immediately thereafter, Bethesda filed a timely request for an administrative appeal.

On December 28, 1989, the director of the department found that the action of the audit division was correct and that the plaintiff was required to pay the department $662,599 as reimbursement for depreciation claimed in the operation of 11 of the facilities which had been sold for a profit.

Upon appeal to the district court, the order of the director was affirmed. From that judgment the plaintiff has appealed to this court.

In summary, the plaintiff has assigned as error the district court's determination that the department's implementation of the medicaid recapture regulation did not violate Neb. Const. art. VIII, § 2, as a tax on a tax-exempt charitable organization; that the department's implementation of the medicaid recapture regulation was not an unconstitutional violation of the separation of powers of state government; that the department's administration of the medicaid program did not violate the Equal Protection Clause of the U.S. Constitution; that the medicaid recapture regulation did not violate the Due Process Clause; and that the department applied the medicaid recapture regulation properly.

In Bethesda's first two assignments of error, it is argued that the depreciation recapture is a tax and therefore violates Neb. Const. art. VIII, § 2, providing for tax-exempt status for charitable organizations, and the separation of powers doctrine. Bethesda asserts the depreciation recapture is a tax because long-term providers who sell their facilities for a gain are not reimbursed for their actual depreciation costs when they are required to pay depreciation recapture. Accordingly, Bethesda contends that since it was not reimbursed for its actual depreciation cost, the recapture payment shifts that cost from the department back to Bethesda.

Depreciation is based on an inexact estimate of an asset's

consumption, and determining what consumption has actually occurred is difficult. *Creighton Omaha Regional Health Care v. Sullivan*, 950 F.2d 563 (8th Cir. 1991). Therein, the U.S. Court of Appeals for the Eighth Circuit upheld the HHS regulation providing for the recapture of unearned depreciation expenses paid to a medicare provider when the sale of the provider's assets exceeded the assets' book value. The court agreed with the HHS Secretary's interpretation that to the extent an asset has not lost value, the provider has not incurred an actual cost.

We agree with the Eighth Circuit's interpretation of the purpose of depreciation recapture and find that it is not the equivalent of a tax. Accordingly, Bethesda's first two assignments are without merit.

Bethesda argues that the department's implementation of the depreciation recapture regulation violates the Equal Protection Clause of the U.S. Constitution because it arbitrarily, capriciously, and without rational justification treats similarly situated buyers and sellers of health care facilities in Nebraska differently and because it is imposed upon only those long-term providers who sell their facilities at a gain, without making a similar adjustment to those providers who do not sell their facilities at a gain.

> In the absence of interference with a "fundamental right" or discrimination against a "suspect" class, a classification within or by a statute and resultant disparate treatment or effect on similarly situated individuals will be upheld against an "equal protection attack" if the classification is rationally related to a legitimate governmental purpose.

Willis v. City of Lincoln, 232 Neb. 533, 541, 441 N.W.2d 846, 851 (1989).

In this case, no fundamental right or suspect class is at issue. All long-term nursing home providers who voluntarily participate in Nebraska's medicaid program are subject to the depreciation recapture regulation. That is merely a condition of participation in the medicaid program.

When a provider sells its assets at a gain, depreciation is recaptured to the extent that the asset has not lost value and the

provider has not incurred an actual cost. See *Creighton Omaha Regional Health Care v. Sullivan, supra.* This is not an arbitrary, capricious, or irrational regulation. *Id.*

Bethesda next contends that the department's recapture regulation violates its right to due process under the law because prior to December 1, 1984, a provider who owned a long-term-care facility for 10 consecutive years or more could avoid the recapture of depreciation upon the sale of the facility. Since many of Bethesda's facilities had been owned for 10 years prior to the department's revision of the depreciation policies, Bethesda claims the change of the regulation retroactively removed a vested right and benefit contracted and relied upon by Bethesda until the time of the sale of the facilities.

Bethesda and each of its facilities entered into contracts with the department to provide long-term care. The contracts stated that the policies and procedures of the department would be followed.

This court has previously determined that the department's change in its depreciation recapture regulation did not have a retroactive effect and therefore could not violate a provider's right to due process. See *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990). Bethesda is not entitled to conclude that its depreciation reimbursement was not subject to being recaptured upon the sale of its facilities, and it did not have a constitutionally protected property right in those reimbursements.

Finally, Bethesda argues that the department applied its depreciation recapture regulation improperly because it did not consider the effect of inflation and market forces in determining the amount of depreciation to be recaptured.

The Eighth Circuit Court of Appeals has concluded, with the majority of U.S. Courts of Appeal addressing this issue, that "it is a valid implementation of the statute to recapture the difference between the sale price and the net book value, even though this gain may be due to inflation or market forces." *Creighton Omaha Regional Health Care v. Sullivan*, 950 F.2d at 565.

As this court stated in *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), we do not

function as a super administrative agency and will not substitute Bethesda's methodology for that developed by the department. "Such would amount to a violation of separation of power." *Id.* at 149, 362 N.W.2d at 52.

The judgment of the district court is affirmed.

AFFIRMED.

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF GRAND ISLAND, A SAVINGS AND LOAN ASSOCIATION, APPELLANT, V. MCDERMOTT & MILLER, A PARTNERSHIP, ET AL., APPELLEES.

497 N.W.2d 678

Filed April 2, 1993. No. S-90-1163.

1. **Contracts.** If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms.
2. _____. The words of a contract must be given their plain and ordinary meaning, as an average, ordinary, or reasonable person would understand them.
3. **Contracts: Appeal and Error.** Where there is a question as to a contract's meaning, an appellate court will apply the general rule that the contract will be construed against its drafter.
4. **Pleadings: Proof.** The party who pleads a setoff bears the burden of proving it.
5. **Evidence: Proof.** Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof.
6. **Records: Appeal and Error.** When reviewing the decision of a lower court, an appellate court may consider only evidence included within the record.
7. _____: _____. A party's brief may not expand the evidentiary record.
8. **Evidence: Records: Appeal and Error.** Evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded with directions.

Daniel M. Placzek, of Luebs, Beltzer, Leininger, Smith & Busick, for appellant.

Les Seiler, of Brock & Seiler, for appellees.

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

WHITE, J.

Home Federal Savings & Loan Association of Grand Island (Home Federal) appeals the judgment of the district court awarding Home Federal approximately $12,600 from appellees McDermott & Miller, P.C. (the corporation), and Integrated Computer Concepts, Inc. (Although Integrated Computer Concepts remains a named party to this suit, it was dissolved after its assets were purchased by the corporation. We will refer to the corporation and Integrated Computer Concepts as defendants.) The district court arrived at the award amount by allowing defendants a setoff of $19,149.05. Home Federal thus appealed to this court. We reverse, and remand with directions.

This action represents a second appeal from proceedings we first considered in *Home Fed. Sav. & Loan Assn. v. McDermott & Miller*, 234 Neb. 11, 449 N.W.2d 12 (1989). That opinion more greatly details the facts surrounding the case.

On January 2, 1979, the corporation purchased an accounting practice from McDermott & Miller, a partnership (the partnership). Pursuant to a 1981 agreement, the corporation agreed to accelerate the payments for the accounting practice to one of the partnership's partners, Martin Chapman. Chapman was also a shareholder and employee of the corporation.

Under the 1981 agreement, if the acceleration payments required the corporation to borrow money at an increased interest rate, Chapman would indemnify the corporation for the difference in interest. The indemnification was to occur by reducing Chapman's bonuses, using a "differential rate" equation. Depending on certain contingencies, the agreement also allowed the corporation to recover the interest rate differential by offsetting against "any monies otherwise owing Chapman."

Chapman later assigned his right to the accelerated payments to Home Federal as security for a loan. Home Federal notified the partnership of the assignment on August 1, 1985, and requested direct receipt of the monthly payments.

On August 1, Home Federal received three partnership checks which represented payments under both the accounting and computer transactions. Following those payments,

however, defendants withheld accounting practice payments from the partnership that would have been made to Chapman. The partnership also withheld Chapman's portion of the computer business payments. Home Federal then sued defendants and the partnership, seeking, under the assignment, to recover Chapman's share of the payments.

On the original appeal to this court, we affirmed the trial court's judgment for Home Federal against the partnership. *Home Fed. Sav. & Loan Assn., supra.* Home Federal thus received all the undistributed payments held by the partnership. The district court then reviewed the record to determine Home Federal's rights against defendants. *Id.*

The district court ruled that defendants could assert their setoff defense against Home Federal and were thus entitled to an "indemnity of interest" in the amount of $19,149.05. In so ruling, the court held that the corporation had not waived the setoff defense and was not estopped from asserting it. The court awarded Home Federal a judgment of $7,797.80, prejudgment interest of $4,833.28, and postjudgment interest. The court denied Home Federal's subsequent motion for new trial.

Restated, Home Federal alleges that the district court erred by (1) finding that the corporation had not waived the setoff defense; (2) finding that the corporation was not estopped from raising the setoff defense; (3) determining that the 1981 agreement provided for any "interest rate differential" setoff, especially a setoff as extensive as the one awarded; (4) not determining that defendants failed to adequately prove the amount of setoff; and (5) overruling Home Federal's motion for new trial. Because we find it dispositive, we address only Home Federal's fourth assignment of error.

Home Federal argues that (1) defendants have failed to adequately prove the amount of the claimed setoff and (2) pursuant to the 1981 agreement, defendants have failed to timely assert their setoff claims. Home Federal's contentions may be distilled to an argument that defendants have foregone the remedial provisions of their own contract. Because this argument hinges on the provisions of the 1981 agreement, we turn to the applicable language from that document.

The 1981 agreement, which provided for acceleration of Chapman's payments for the accounting practice, states, in relevant part:

> 5. *INDEMNITY FOR INTEREST*: As CORPORATION will incur, or may incur, certain interest costs which it would not otherwise have incurred but for this [acceleration] Agreement, CHAPMAN agrees to indemnify and hold the CORPORATION harmless from such increased interest costs. *During the time CHAPMAN is an employee of CORPORATION, CHAPMAN'S compensation will be reduced in the form of reduced bonuses* . . . but his regular base salary payments shall not be reduced. . . .
>
> . . . .
>
> f. *Should CHAPMAN'S employment terminate with the CORPORATION, or shall no bonus be available from which to pay CORPORATION*, he shall indemnify and hold the CORPORATION harmless, *yearly*, on any interest costs incurred by the CORPORATION . . . and the CORPORATION is authorized to offset such amounts *against any monies otherwise owing CHAPMAN*.

(Emphasis supplied.)

We have repeatedly held that if the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms. *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). See, also, *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989). Furthermore, the words of a contract must be given their plain and ordinary meaning, as an average, ordinary, or reasonable person would understand them. *Elson, supra*; *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988).

Whether a document is ambiguous is a question of law. *Knox, supra*. As an appellate court considering such a question, we are obligated to reach a conclusion independent of the trial court's decision. *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

With the foregoing rules in mind, we turn to the language of the 1981 agreement. The language is clear and unambiguous and does not require construction. Under the pertinent provisions of the agreement, the corporation may recover the interest rate differential in three situations. First, while Chapman is one of its employees and receives bonuses, the corporation may recover by reducing Chapman's bonuses. Second and third, if Chapman receives no bonuses, or ceases to work for the corporation, the corporation may offset against any other monies owed to Chapman—on a yearly basis. Given its plain and ordinary meaning, the contractual language clearly lends itself to this interpretation.

However, even if defendants asserted some other meaning for the contract, e.g., that "no bonus" means "no bonus adequate to cover that year's interest differential," it would be to no avail. Where there is a question as to a contract's meaning, we apply the general rule that the contract will be construed against its drafter—here, the corporation. See, *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

The party who pleads a setoff bears the burden of proving it. *Heusser v. McAtee*, 151 Neb. 828, 39 N.W.2d 802 (1949); *Citizens Nat. Bank v. Rawley*, 131 Neb. 10, 267 N.W. 151 (1936). See, also, *Carlson v. Nelson*, 204 Neb. 765, 285 N.W.2d 505 (1979), *modified* 205 Neb. 483, 288 N.W.2d 489 (1980). Thus, defendants bore the burden of proving that they were entitled to a setoff under the 1981 contract. They have not done so.

As stated before, during the time Chapman was in its employ, the corporation could reduce his bonuses to recover the interest rate differential. Pursuant to subsection 5(f) of the agreement, if Chapman was an employee, yet received no bonus, the corporation could annually offset the interest rate differential against any other monies owing Chapman, including his payments for the sale of the accounting practice. Should it cease to employ Chapman, the corporation could also, on a yearly basis, offset against the accounting-practice payments.

The foregoing summary of the 1981 agreement's setoff

provisions emphasizes the importance of two questions. First, did Chapman cease to be employed by the corporation, and if so, when? Second, did Chapman receive any bonuses, and if so, in what amount? The record fails to adequately answer either of these questions.

The record indicates that Chapman was employed by the corporation at least until May 28, 1985. Because Chapman was an employee during that time and because defendants now seek to offset against proceeds from the sale of the accounting practice ("monies otherwise owing Chapman"), the 1981 agreement requires defendants to show that Chapman received no bonuses during that period. See *Heusser, supra*; *Citizens Nat. Bank, supra.*

The record contains no indication that bonuses were not paid prior to May 28, 1985. In fact, the corporation's president admitted that in one of the years at issue, setoff had been claimed against a bonus owed to Chapman. Neither does the fact that defendants sought to recover "monies otherwise owing" indicate that Chapman received no bonuses. "Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof." *Moudry v. Parkos*, 217 Neb. 521, 526, 349 N.W.2d 387, 390 (1984). Defendants, having failed to meet their burden of proof for the period preceding May 28, are not entitled to a setoff for that period.

The record is even less supportive of defendants' setoff claim for the period following May 28. There is no indication of how long Chapman remained an employee of the corporation after that date. The record indicates only that sometime after May 28, Chapman resigned.

Following Chapman's resignation, and assuming he received no bonuses when he ceased to be an employee, the corporation could simply make yearly setoff claims against the 1979 contract payments, which the corporation began doing in August 1985. Thus, the initial fact of concern is the date that Chapman's employment ended; that fact is not part of the record. Furthermore, the record is again silent regarding Chapman's bonuses—if, when, and to what extent they were paid. Having failed to establish these facts, defendants have not

met their burden of proof for the period following May 28. As such, they may not claim their contractual right of setoff for that period.

We note that in their brief defendants state that Chapman resigned on a specified date. However, they cite no portion of the record for this information, as required by our rules. See Neb. Ct. R. of Prac. 9D(2)d (rev. 1992). When reviewing the decision of a lower court, we may consider only evidence included within the record. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991); *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985). A party's brief may not expand the evidentiary record. *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987). The alleged date of Chapman's resignation is not a part of the record, and thus, we may not consider it.

We recognize that a civil verdict will not be disturbed unless clearly erroneous. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. *State ex rel. Grams v. Beach, ante* p. 126, 498 N.W.2d 83 (1993); *City of La Vista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992). Furthermore, when determining whether the evidence was sufficient to support the trial court's decision, we consider the evidence in the light most favorable to the successful party, resolving every controverted fact in that party's favor and giving that party the benefit of every reasonable inference deducible from the evidence. *In re Estate of Markus*, 232 Neb. 947, 442 N.W.2d 883 (1989); *Blanchette, supra*.

In the case before us, however, the evidence does not support a setoff in favor of defendants. In order to receive a setoff, defendants were required to show the period that Chapman served as an employee of the corporation and the amount, if any, of Chapman's bonuses. The record does not contain this essential information. Evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom. The evidence in the record

does not support the district court's decision; the decision must therefore be reversed.

Defendants have not appealed the district court's grant of prejudgment and postjudgment interest. We thus reverse the setoff of $19,149.05 in favor of defendants and remand the cause to the district court to calculate appropriate interest.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., not participating.

LESTER FULK, APPELLANT, V. JOHN McLELLAN, APPELLEE.
498 N.W.2d 90

Filed April 2, 1993. No. S-90-1205.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of all facts well pled, as well as the factual and legal inferences which may reasonably be deduced therefrom, but the court does not accept the conclusions of the pleader.
2. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of defendant to plaintiff.
3. **Demurrer: Appeal and Error.** When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, an appellate court is not informed of the reason the petition was deficient.
4. **Actions: Negligence: Pleadings.** To state a cause of action for negligence, a plaintiff must plead facts on which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from such failure.
5. **Actions: Fraud: Proof.** In order to properly state a cause of action for misrepresentation, the well pled facts and permissible inferences of plaintiff's petition must assert the following elements: (1) A representation was made; (2) the representation was false; (3) the representation was known to be false when made, was made recklessly without knowledge of its truth and as a positive assertion, or was negligently made; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff reasonably did so rely; and (6) the plaintiff suffered damages as a result.
6. **Demurrer: Pleadings: Damages.** In order for a petition that is being challenged by demurrer to sufficiently state money damages resulting from a defendant's alleged negligence or misrepresentation, the plaintiff must plead facts which

show the plaintiff has become liable to pay a specific amount and has or will have to incur such cost. In contrast, a petition which merely alleges damages which might arise in the future is premature and fails to state a cause of action.

7. **Attorney Fees.** Attorney fees will generally be allowed only in such cases as are provided for by statute or where a uniform course of procedure has been to allow such recovery.
8. **Pleadings: Claims: Contribution.** Under Fed. R. Civ. P. 19, joinder is not required of persons against whom a defendant may have a claim for contribution. Moreover, failure to implead a defendant does not bar a subsequent suit for contribution or indemnity.
9. **Limitations of Actions: Pleadings: Proof.** Where a petition does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute and has the burden of proving the affirmative defense.
10. **Principal and Agent: Liability.** An agent may be liable for the agent's fraudulent conduct, such as a misrepresentation of a material fact, during a transaction on behalf of the principal. An agent is personally liable to third persons for the agent's misfeasances and positive wrongs.

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

Frederick B. Allan, Jr., of Bauer, Galter, O'Brien & Allan, for appellant.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

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

WHITE, J.

Plaintiff-appellant, Lester Fulk, commenced an action against defendant-appellee, John McLellan, alleging that Fulk was damaged because of McLellan's negligence and misrepresentations. The district court sustained McLellan's demurrer to Fulk's second amended petition and dismissed the actions. Fulk appeals.

In reviewing an order sustaining a demurrer, an appellate court accepts the truth of all facts well pled, as well as the factual and legal inferences which may reasonably be deduced therefrom, but the court does not accept the conclusions of the pleader. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156

(1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of defendant to plaintiff. *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991).

Plaintiff's second amended petition asserted the following: From 1965 to July 31, 1986, defendant was employed by the Gering National Bank & Trust Company (bank). As a bank officer, defendant was responsible for the line of credit and loans made by the bank to Donald and Marilyn Fulk (the Fulks), relatives of the plaintiff.

During 1984, defendant contacted plaintiff and his wife to inquire whether they would guarantee a portion of the debt owed by the Fulks. After several discussions, plaintiff and his wife agreed that they would sign a limited guarantee as to $68,000 of the remaining indebtedness the Fulks owed to the bank. At all times relevant to the execution of the guarantee, plaintiff could not read and relied almost totally on his wife to read and review documents before his signing them. Based upon the prior discussions, understandings, and representations, plaintiff, alone and unaccompanied by his wife, executed what he thought was a limited guarantee. Defendant witnessed the guarantee document. Plaintiff never received a copy of the executed document and was unaware that the guarantee was unlimited.

In a letter dated April 11, 1986, defendant informed plaintiff that repayment of the Fulks' debt had become problematic and that the parties needed to discuss plaintiff's liability on the guarantee. Several meetings took place between the parties after receipt of the letter. It was at one of the first two meetings that plaintiff discovered he had signed an unlimited guarantee.

On April 30, 1986, the defendant agreed that plaintiff's liability under the guarantee would be restricted to the $68,000 figure originally agreed upon. This agreement was memorialized in defendant's notations in the Fulks' files and in the following handwritten notation appearing on the top of the guarantee document: "Current obligation is agreed as of 4-30-86 is $68,000."

Following the April 30 meeting, plaintiff met with defendant and various officers of the bank to finalize the agreement. The parties prepared and signed a formal agreement recognizing plaintiff's limited guarantee. The formal agreement was submitted to the bank on July 25, 1986. Simultaneous with this transaction, the bank officials entered into an agreement with the Fulks regarding their remaining indebtedness. The parties agreed to meet on August 1, 1986, to complete the transaction and prepare any remaining notes and documents. Defendant did not record this transaction in the minutes of either the loan committee or the board of directors of the bank.

On July 31, the Comptroller of the Currency declared the bank to be insolvent and terminated its powers in existence as a national banking association. When plaintiff returned to complete the transaction on August 1 as planned, a representative of the Federal Deposit Insurance Corporation (FDIC) refused plaintiff's tendered check. After the bank was declared insolvent, defendant failed to report the April 30 agreement on the criticized asset report filed by the bank while it was operating under the jurisdiction of the Comptroller of the Currency.

On October 20, 1987, the FDIC filed a complaint against plaintiff in the U.S. District Court for the District of Nebraska, requesting a money judgment in the amount of $196,867.72, together with accrued interest, for a total of more than $300,000. Plaintiff thereafter reached a settlement with the FDIC for $267,000.

In the amended petition, plaintiff first alleged that defendant's negligence in failing to properly record and report the April 30 transaction resulted in plaintiff's being denied a defense against the FDIC, thus forcing plaintiff to be held liable, without limitation, for the Fulks' debt owed to the bank. Plaintiff also alleged that defendant's negligence directly and proximately caused plaintiff to file a chapter 11 bankruptcy proceeding, resulting in significantly related costs.

Plaintiff's second cause of action alleged that he was damaged by defendant's misrepresentation. Plaintiff asserted that defendant wrongfully had plaintiff execute an unlimited guarantee when defendant knew, or should have known, that

plaintiff could not read; that plaintiff was unaccompanied by his wife; and that plaintiff was relying upon the prior conversations, understandings, and representations made by the defendant that the guarantee was limited to $68,000. Plaintiff alleged that as a direct and proximate result of this misrepresentation, he was damaged in the amount of $267,000 plus costs and attorney fees incurred in filing the bankruptcy proceedings.

Defendant demurred, alleging that plaintiff's second amended petition (1) did not state facts sufficient to constitute a cause of action for either negligence or misrepresentation; (2) was premature, in that plaintiff had not yet suffered any damages; (3) requested judgment for attorney fees, which were not recoverable under Nebraska law; (4) did not state a cause of action because plaintiff elected to settle with the FDIC rather than to proceed to trial and test its defenses, and plaintiff failed to plead that defendant was a party in such action or had been given an opportunity to defend such action or appear to contest the liability of plaintiff; (5) was barred by the statute of limitations; and (6) did not state a cause of action because defendant was acting within the scope of his employment and therefore was not personally liable to plaintiff. Without making specific findings, the district court sustained the demurrers and dismissed plaintiff's petition.

The district court did not state its reasoning for sustaining defendant's demurrer. As we have previously expressed, " ' " '[w]hen a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient. . . .' " ' " *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 791, 452 N.W.2d 746, 748-49 (1990). Having no specific findings before us, we must review the grounds of the demurrer to determine if any one objection, or any objections taken together, supports the district court's decision to sustain the demurrer and dismiss the actions.

Defendant's first objection by demurrer alleged that the petition did not state facts sufficient to constitute a cause of action for either negligence or misrepresentation. To state a

cause of action for negligence, a plaintiff must plead facts on which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from such failure. *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991).

Plaintiff's petition did not identify a specific legal duty owed by defendant to plaintiff. However, to resist a challenge on demurrer, a plaintiff's petition need only plead facts from which it can be inferred that defendant owed a legal duty to protect the plaintiff from injury. *Widga, supra.* The petition here infers that a duty of reasonable care to comply with bank regulations for recording and reporting arose from defendant's affirmative efforts in seeking out plaintiff to act as a guarantor and from the alleged misrepresentations that created a risk of injury to plaintiff.

This court has never determined whether a bank official has a legal duty to use reasonable care in administering loans and related documents on behalf of borrowers or guarantors, nor need we now. Those jurisdictions which recognize a duty to process financial documents with reasonable care hold that where only economic loss is at issue, liability for negligence may be imposed based upon contractual privity or its equivalent. *High v. McLean Financial Corp.*, 659 F. Supp. 1561 (D.D.C. 1987); *Yousef v. Trustbank Sav., F.S.B.*, 81 Md. App. 527, 568 A.2d 1134 (1990). Plaintiff's negligence action fails to plead or otherwise imply that privity of contract existed between plaintiff and defendant in his individual capacity. Therefore, plaintiff's petition fails to state a cause of action in negligence.

In order to properly state a cause of action for misrepresentation, the well pled facts and permissible inferences of plaintiff's petition must assert the following elements: (1) A representation was made; (2) the representation was false; (3) the representation was known to be false when made, was made recklessly without knowledge of its truth and as a positive assertion, or was negligently made; (4) the representation was made with the intention that plaintiff should rely on it; (5) plaintiff reasonably did so rely; and (6) plaintiff suffered damages as a result. *Commerce Sav. Scottsbluff v.*

F.H. Schafer Elev., 231 Neb. 288, 436 N.W.2d 151 (1989).

Plaintiff's petition asserts that (1) defendant agreed and represented that plaintiff's liability on the guarantee would be limited to $68,000; (2) the guarantee was in fact unlimited; (3) when plaintiff signed the guarantee, defendant, falsely or recklessly, without knowledge of the truth, made the representation that the guarantee was limited as agreed; (4) defendant knew or should have known that plaintiff could not read and was unaccompanied by his wife, and therefore the representation was made with the intention that plaintiff rely on it; (5) in signing the guarantee, plaintiff reasonably relied upon the prior conversations, understandings, and representations made by defendant; and (6) as a result of defendant's misrepresentations, plaintiff was damaged by incurring unlimited liability for the Fulks' debt. Based on the foregoing, we find that plaintiff's petition sufficiently stated a cause of action for misrepresentation.

Defendant's demurrer to the amended petition asserted that the petition failed to state a cause of action because the action was premature. Defendant emphasized that the petition did not allege that a judgment had been entered against plaintiff in favor of FDIC. Arguing that entering into a settlement agreement is wholly insufficient, defendant maintains that plaintiff has not yet suffered damages, making the petition premature. We find defendant's argument to be without merit.

The petition alleges that because of defendant's negligence and misrepresentations, the FDIC filed a complaint against plaintiff. Subsequently, plaintiff reached a settlement agreement with the FDIC for $267,000, in addition to incurring costs in filing for chapter 11 bankruptcy protection. There is no indication in the pleading that plaintiff was not contractually bound by the FDIC settlement agreement. In order for a petition that is being challenged by demurrer to sufficiently state money damages resulting from a defendant's alleged negligence or misrepresentation, the plaintiff must plead facts which show the plaintiff has become liable to pay a specific amount and has or will have to incur such cost. In contrast, a petition which merely alleges damages which might arise in the future is premature and fails to state a cause of action. *St. Paul*

Fire & Marine Ins. Co. v. Touche Ross & Co., 234 Neb. 789, 452 N.W.2d 746 (1990). Finding nothing in plaintiff's petition to indicate that the settlement agreement was merely speculative or illusory, we find plaintiff's petition sufficiently alleged damages to state a cause of action.

Defendant further asserted in his demurrer that plaintiff's request for attorney fees incurred in the action and costs of defense in the FDIC action and the bankruptcy proceeding are not recoverable under Nebraska law and therefore do not constitute a cause of action. Attorney fees will generally be allowed only in such cases as are provided for by statute or where a uniform course of procedure has been to allow such recovery. *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988). While it is true that plaintiff failed to plead an applicable statute or course of procedure which allows the recovery of attorney fees, plaintiff's failure to do so is not dispositive of the appeal before this court. We previously determined that plaintiff sufficiently pled the FDIC settlement as damages resulting from the misrepresentations. Therefore, defendant's objection to additional requests for damages need not be addressed, considering that the trial court sustained the demurrer to the entire petition.

Defendant also demurred based on the fact that plaintiff elected to settle the case with the FDIC instead of proceeding to trial and testing his defenses and that plaintiff failed to either (1) plead that defendant was a party in such action, (2) plead that defendant was given an opportunity to defend such action, or (3) plead that defendant was given an opportunity to appear therein and contest the liability of plaintiff.

Plaintiff argues that under Fed. R. Civ. P. 14, his right as a defendant in the FDIC action to bring in a third party is permissive and not compulsory. Defendant asserts that joinder of this action in the federal action would have promoted efficiency and allowed the courts to settle the disputes in one action. Additionally, defendant maintains that by electing to settle with the FDIC instead of making defendant a party to the action and progressing to trial, plaintiff is barred from bringing this action.

Defendant does not assert that he was precluded from

protecting his interest in the outcome of the FDIC action by exercising his opportunity to intervene, nor does he claim that he was a necessary and indispensable party under Fed. R. Civ. P. 19. Even so, under Fed. R. Civ. P. 19, joinder is not required of persons against whom a defendant may have a claim for contribution. *Nottingham v. General American Communications Corp.*, 811 F.2d 873 (5th Cir. 1987), *cert. denied* 484 U.S. 854, 108 S. Ct. 158, 98 L. Ed. 2d 113; *Westmont Industries, Inc. v. Weinstein*, 762 F. Supp. 646 (M.D. Pa. 1989). Moreover, failure to implead a defendant does not bar a subsequent suit for contribution or indemnity. *DeVore Brokerage Co. v. Goodyear Tire & Rubber Co.*, 308 F. Supp. 279 (M.D. Tenn. 1969). We therefore find that plaintiff's decision to settle with the FDIC without joining defendant as a party in the federal action was not sufficient grounds upon which the trial court could sustain the demurrer.

Next, defendant generally asserted in his demurrer that the statute of limitations on plaintiff's causes of action had expired. The applicable statute of limitations governing both the negligence and misrepresentation actions states:

> The following actions can only be brought within four years: . . . (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud
> . . . .

Neb. Rev. Stat. § 25-207 (Reissue 1989).

Plaintiff's original petition was filed April 6, 1990. The alleged acts of negligence occurred sometime on or after April 30, 1986. Plaintiff's petition infers that because plaintiff could not read and did not receive a copy of the guarantee, the misrepresentation was not discoverable until sometime after the letter of April 11, 1986. If a 4-year statute of limitations is applied, neither cause of action was barred under the facts as alleged. Where, as here, the petition does not disclose on its face that it is barred by the statute of limitations, defendant must plead the statute and has the burden of proving the affirmative defense. See *DeSciose v. Chiles, Heider & Co.*, 239 Neb. 195,

476 N.W.2d 200 (1991). Defendant's general allegation, without more, was insufficient to justify the district court's order sustaining the demurrer.

Lastly, defendant maintained that he could not be held personally liable to plaintiff because he was employed by the bank at the time of the alleged wrongful acts and was acting within the scope of his employment. We find this last assertion to also be without merit. As this court has previously recognized, "an agent may be liable for the agent's fraudulent conduct, such as a misrepresentation of a material fact, during a transaction on behalf of the principal. . . . ' "An agent is personally liable to third persons for [the agent's] misfeasances and positive wrongs. . . ." ' " (Citation omitted.) *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 167, 421 N.W.2d 766, 772 (1988).

Accepting the truth of all well pled facts, in addition to all permissible inferences, we find plaintiff's petition failed to state a cause of action for negligence, but did sufficiently state a cause of action for misrepresentation. Consequently, we reverse the order of the district court sustaining defendant's demurrer in its entirety.

REVERSED AND REMANDED.

IN RE ESTATE OF DOROTHY I. WELLS, DECEASED. JANE W. LONG, APPELLANT, V. KATHRYN J. ANDERSON ET AL., APPELLEES.

497 N.W.2d 683

Filed April 2, 1993. No. S-90-1268.

1. **Wills.** Under Neb. Rev. Stat. § 30-2328 (Reissue 1989), an instrument testamentary in nature is valid as a holographic will, whether witnessed or not, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator.
2. _____. The two purposes of requiring a date on a holographic will are to enable courts to determine if the testator had the requisite testamentary capacity at the time the will was executed and to determine, when more than one document is offered for probate, which is the last will.

3. **Wills: Statutes.** When the purposes for requiring a date on a holographic will can be satisfied, a holographic will dated by only a month and year substantially complies with the provisions of Neb. Rev. Stat. § 30-2328 (Reissue 1989).
4. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Thomas M. Locher and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellees.

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

BOSLAUGH, J.

This case involves the validity of a holographic will executed by the decedent, Dorothy I. Wells, who died March 3, 1989. She was survived by her sister, Kathryn J. Anderson, and her three nieces, Jane W. Long, Joan Schukei, and Patricia Hootman.

On October 13, 1969, the decedent executed a will which satisfied the requirements of the Nebraska Probate Code relating to the execution of a will. This will provided that if Wells was survived by her sister, Anderson, the entire estate was devised and bequeathed in trust for the benefit of Anderson during her lifetime, the income to be distributed to Anderson during her lifetime, with the remainder to Long, Schukei, and Hootman, the nieces of the decedent. The trustee was authorized to distribute such sums of the principal for the benefit of Anderson as deemed necessary for her medical care, comfortable maintenance, and welfare. The will was informally admitted to probate March 13, 1989.

On May 11, 1989, Long filed a petition in the county court for Douglas County for the formal probate of a holographic will, alleged to have been executed by the decedent. The holographic will provided: "Oct - 1985 I hereby appoint Jane Long - as executor of my estate - Anita Gardner is my personal banker -

She'll help - Norwest Banks - 20th & Farnum [sic] present will is out dated - I leave all assetts [sic] to Jane - Dorothy Wells."

The parties stipulated that the holographic will was entirely in the handwriting of the decedent.

Anderson, Schukei, and Hootman filed objections to the formal probate of the holographic will. The objectors alleged that the holographic will was not the free and voluntary act of the decedent; that the decedent was of unsound mind during the time relevant to the making of the holographic will; and that the material provisions of the holographic will, the indication of the date of signing, and the signature were not all in the handwriting of the decedent.

On November 30, 1990, the objectors filed a motion for summary judgment, which the trial court sustained on December 17. The trial court specifically found that the holographic will failed to comply with the provisions of Neb. Rev. Stat. § 30-2328 (Reissue 1989), relating to an indication of the date of signing, and declared the holographic will to be invalid. From that judgment, the proponent has appealed.

The proponent has assigned as error the finding that as a matter of law, the holographic will was invalid.

Section 30-2328 provides the statutory authority for a holographic will. It states:

> An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence.

The two purposes of requiring a date on a holographic will are to enable courts to determine if the testator had the requisite testamentary capacity at the time the will was executed and to determine, when more than one document is offered for probate, which is the last will. *Bonenfant v. Tabery*, 112 Cal. App. 3d 81, 169 Cal. Rptr. 126 (1980); *In re French's Estate*, 137

Mont. 228, 351 P.2d 548 (1960).

The California appellate courts have determined that specification of only a month and year in a holographic will is insufficient compliance with the probate code because reference could be to more than one day. See, *Bonenfant, supra*; *Estate of Carson*, 174 Cal. App. 2d 291, 344 P.2d 612 (1959).

The Montana Supreme Court has held that a holographic will dated by only a month and year substantially complied with its probate statute. *In re Irvine's Estate*, 114 Mont. 577, 139 P.2d 489 (1943). According to the Montana Supreme Court, the purpose of the requirement of a date on a holographic will can be satisfied if given the month and the year. *In re French's Estate, supra*.

We believe that the better rule is that when the purposes for requiring a date on a holographic will can be satisfied, a holographic will dated by only a month and year substantially complies with the provisions of § 30-2328. However, in the present case, both purposes have not been satisfied.

The objectors have raised an issue as to the decedent's testamentary capacity.

At the hearing on the motion for summary judgment, the objectors offered an affidavit of Dr. James J. Shehan, which was received in evidence. Dr. Shehan had reviewed the records of the decedent's personal physician and the records of Methodist Hospital and the Lutheran Medical Center concerning treatment received by the decedent. It was his opinion that due to an injury for which the decedent had been treated on September 30, 1985, the decedent was not competent and lacked testamentary capacity and because of the extent of the injury, the decedent's decrease in mental function would not have cleared in less than 7 days.

The proponent offered affidavits of Lorraine Cobb and Myrna Robbins, which were also received in evidence.

When the decedent resided at Drake Court Apartments, Cobb was employed as a general custodian from October 1979 to December 31, 1989. Cobb had contact with and talked to the decedent almost every day during that time until March 1988. At no time did the decedent appear to be confused or fail to

recognize Cobb. Cobb occasionally did shopping for the decedent, who provided a written shopping list which was legible. The decedent always provided a reasonable and adequate amount of money for the items she ordered.

The proponent also introduced an affidavit by Robbins, the resident manager at Drake Court Apartments from August 1980 to July 1990. During her employment, the affiant became acquainted with the decedent and had frequent contact with her both in person and by telephone. According to Robbins, the decedent always paid her rent in person with a check. The decedent did not require a receipt, stating, " 'My check is my receipt.' " In 1988, the decedent advised Robbins that Long was her sole heir and was to be her executor. According to Robbins, during the entire time of her residence at Drake Court Apartments, the decedent "always knew where she lived, was always rational and completely able to handle all of her own affairs."

We think the evidence presented at the hearing on the motion for summary judgment presented a question of material fact as to the testamentary capacity of the decedent.

> A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.

McCormack v. First Westroads Bank, 238 Neb. 881, 883, 473 N.W.2d 102, 105 (1991).

Because the record presents a genuine issue of material fact as to the testamentary capacity of the decedent, the trial court erred in sustaining the objectors' motion for summary judgment. The judgment is reversed and the cause remanded for trial on the issue of whether the decedent possessed the requisite testamentary capacity at the time the holographic will was made.

REVERSED AND REMANDED.

WHITE, J., dissenting.

I agree that an issue of fact exists as to testamentary capacity,

necessitating a reversal of the summary judgment. However, I would not remand the cause for trial, convinced as I am that the admission of the document to probate as a valid holographic will is specifically forbidden by Neb. Rev. Stat. § 30-2328 (Reissue 1989), requiring the instrument to be dated. Instead, I would dismiss the petition with prejudice.

HASTINGS, C.J., joins in this dissent.

TIMOTHY GERKEN, APPELLANT, V. HAWKINS CONSTRUCTION COMPANY, APPELLEE.
IRENE GERKEN AND TIMOTHY GERKEN, APPELLANTS, V. HAWKINS CONSTRUCTION COMPANY, APPELLEE.

498 N.W.2d 97

Filed April 9, 1993. Nos. S-90-1062, S-90-1105.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Pleadings.** A petition is sufficient if, under the facts alleged, the law entitles a plaintiff to recover. That is to say, facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
3. **Motor Vehicles: Theft: Damages.** No liability attaches to the owner of a car when taken by a thief, or other unauthorized person, who, while driving the same, has an accident therewith resulting in injury and damage to third persons.

Appeals from the District Court for Douglas County: DONALD J. HAMILTON and JOHN E. CLARK, Judges. Affirmed.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson, for appellants.

Ronald F. Krause and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

BOSLAUGH, J.

These cases arise out of an incident that occurred in Omaha, Nebraska, on June 30, 1986. On that date, the defendant, Hawkins Construction Company, was engaged in constructing the Arthur C. Storz Expressway. The defendant was using a large bulldozer which it left at the defendant's worksite near 2614 Saratoga Street at the end of the workday. The petitions allege that on the evening of June 30, a person or persons unknown to the plaintiffs climbed aboard the bulldozer, started it, put it into forward operation, and then abandoned it. As a result, the bulldozer collided with a house at 2614 Saratoga Street, occupied by the plaintiff Timothy Gerken, damaging the house and its contents.

The plaintiffs in case No. S-90-1105 are Irene Gerken and Timothy Gerken. Irene Gerken is alleged to be the owner of the house at 2614 Saratoga Street, which has been sold to Timothy Gerken, her son, pursuant to an oral agreement. The plaintiffs allege the damages to the house amounted to $30,000.

The plaintiff in case No. S-90-1062 is Timothy Gerken, who alleges that personal property of his having a value of $750 was destroyed and that he was in the house at the time the bulldozer collided with it. As a result, he was placed in immediate terror, fright, and fear for his safety and has suffered mental and emotional harm and physical injury, including a $5,000 loss of income.

The defendant filed general demurrers to the petitions in each case. The trial court sustained the demurrers and dismissed the petitions. The plaintiffs have appealed from those judgments.

> "[W]hen ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. . . . A petition will be sufficient if, under the facts alleged, the law entitles a plaintiff to recover. . . . That is to say, facts are sufficient to constitute a cause of action when they are

> a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff."

Northland Ins. Co. v. State, 242 Neb. 10, 12-13, 492 N.W.2d 866, 868 (1992).

The petitions alleged that the defendant was negligent in the storage, protection, and care of the bulldozer. Specifically, the petitions alleged that the defendant left the bulldozer at the worksite unattended and unsecured. In addition, the defendant left an operating key in or near the bulldozer ignition. The petitions further alleged that the work area where the bulldozer was left was a residential area occupied by many low-income families with children. Further, the worksite had been subject to vandalism prior to June 30, 1986. The plaintiffs allege that the defendant's negligence was the proximate cause of their injury and property damage.

The petitions also alleged the contract between the city of Omaha and the defendant provided:

> "In the performance of this contract, the contractor shall comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and make any other needed actions, on his own responsibility, or as the State Highway Department contracting officer may determine, reasonably and necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract."

The plaintiffs further alleged that the defendant was negligent in the following particulars:

> (a) Defendant failed to use reasonable care in protecting the safety of the public while engaged in the construction project for the City of Omaha by failing to fence the construction site to prevent access to construction equipment by unauthorized personnel, by failing to place a watchman or other person on site, after hours, to prevent access to construction equipment by unauthorized personnel, and by failing to render dangerous machinery

inoperable except to authorized personnel.

(b) By leaving an ignition key in or about the bulldozer, Defendant created an attractive nuisance, inviting children known to be in the area to put into operation a highly dangerous piece of equipment.

The trial court based its decision on *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959). Although *Hersh v. Miller* involved an automobile rather than a bulldozer, the trial court stated there was no valid reason or reasonable basis to deviate from the rule stated in the *Hersh v. Miller* case, that the intervening acts of a thief were the proximate cause of the harm inflicted upon the plaintiffs.

In *Hersh v. Miller*, the plaintiff alleged that the defendant left an automobile unlocked and unguarded in violation of an ordinance that required automobiles to be locked. The petition further alleged that a 12-year-old started the automobile, drove it away, and subsequently collided with the plaintiff's truck. After discussing the concepts of negligence, proximate cause, and efficient intervening cause, this court noted:

> We have never dealt squarely with a case, such as here, where a thief, or any other unauthorized person, takes a car parked in violation of an ordinance such as here presented. However, many courts have as is evidenced by the annotation contained in 51 A. L. R. 2d at page 633, under the subject "Liability for damage or injury by stranger starting motor vehicle left parked on street." The great majority thereof have come to the conclusion that no liability attaches. As stated in Galbraith v. Levin, 323 Mass. 255, 81 N. E. 2d 560: "* * * the conduct of the thief was an intervening cause which the defendants were not bound to anticipate and guard against." . . . As stated in Permenter v. Milner Chevrolet Co., *supra*, by quoting from Midkiff v. Watkins (La. App.), 52 So. 2d 573: "Under the facts as related in this case, we are convinced that there was an intervening cause which broke the sequence of the defendant's alleged negligence, if any. To hold the defendants liable in this case would go far towards making them insurers as to the consequences of every accident in which their car might become involved

> while operated by thieves or their successors in possession."

169 Neb. at 522, 99 N.W.2d at 882. The *Hersh v. Miller* court concluded:

> We think the reasons stated by the majority of the courts that have passed thereon that no liability attaches to the owner of a car parked in violation of such ordinance when taken by a thief, or other unauthorized person, who, while driving the same, has an accident therewith resulting in injury and damage to third persons, such as the appellant, are sound and should be followed. The same would be true in the absence of such an ordinance.

Id. at 523, 99 N.W.2d at 882. The *Hersh v. Miller* holding was affirmed in a later case, *Flannery v. Sample Hart Motor Co.*, 194 Neb. 244, 231 N.W.2d 339 (1975).

There are cases in other jurisdictions in which it has been held that cases involving heavy equipment such as a bulldozer should be distinguished from the cases involving automobiles. See, for example, *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955), cited by the plaintiffs. However, we believe the applicable rule is that stated in the *Hersh v. Miller* and *Flannery v. Sample Hart Motor Co.* cases.

We conclude that the actions of the unknown person or persons who started the bulldozer before it collided with the Gerkens' house was an independent intervening cause, which was the proximate cause of the accident. The plaintiffs did not allege facts in their petitions that show that the acts of the unknown person or persons in the operation of the bulldozer were foreseeable by the defendant. Although the amended petitions alleged that the area where the construction site was located was a residential area occupied by many low-income families with children and also alleged that the construction site had previously been subject to vandalism, the petitions did not allege that the bulldozer was actually operated by children or that any heavy equipment in the construction area had previously been vandalized or tampered with on prior occasions. Consequently, the petitioners failed to allege facts to indicate that the acts of the unknown person or persons in the operation of the bulldozer were foreseeable by Hawkins. But,

even assuming, without deciding, that Hawkins was negligent in its storage of the bulldozer, the acts of the unknown person or persons in this case broke the causal connection between the original wrong and the injury. The fact that the vehicle involved in this case was a bulldozer rather than an automobile is not a sufficient reason for this court to deviate from the rule set forth in *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959).

The judgments of the district court are affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

Irene Gerken and Timothy Gerken alleged that Hawkins Construction Company, by its contract with the city of Omaha, had expressly agreed to "provide all safeguards, safety devices and protective equipment and make any other needed actions . . . reasonably and necessary to protect . . . the safety of the public." Notwithstanding that contractual obligation, Hawkins supplied no personnel to look after the construction site at the completion of a workday. Also, Hawkins failed to fence the area of the construction site where the bulldozer was kept, although the site was located within a residential area where children lived and had been subject to vandalism before the incident in question. Hawkins' bulldozer was left unattended at the unsecured construction site and had no locking device to prevent operation by unauthorized personnel. Moreover, the bulldozer's operating key was left in its ignition switch or otherwise easily accessible for starting the bulldozer. Some unknown person or persons started the bulldozer which, in turn, damaged Gerkens.

Based on the preceding factual setting, the majority concludes that unauthorized use of the bulldozer was unforeseeable and, therefore, was an intervening act which Hawkins could not have anticipated; hence, the unforeseeable operation of the bulldozer was a superseding cause that precludes Hawkins' liability.

" 'Foreseeability is a factor in establishing a defendant's duty . . . .' " *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 173, 425 N.W.2d 872, 881 (1988) (quoting *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987)). Accord, *Dowis*

v. Continental Elev. Co., 241 Neb. 207, 486 N.W.2d 916 (1992); *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991). An intervening act, reasonably foreseeable by a defendant, does not preclude the defendant's liability. See *Mundt v. Northwestern Bell Tel. Co.*, 230 Neb. 192, 430 N.W.2d 530 (1988). "Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 778, 408 N.W.2d 280, 285 (1987). Accord, *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., supra*; *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). Consequently, foreseeability, as a factor in causation, is usually a question for the fact finder and ordinarily is not a subject for judicial determination as a matter of law raised by a demurrer.

Although the majority of this court invokes a rule regarding car theft to deny Gerkens their day in court, a more realistic and cogent analysis that distinguishes car theft from unauthorized use of a construction company's bulldozer was expressed by Justice Roger Traynor in *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955), a case involving liability for damages when a construction company's bulldozer was set in operation by vandals at a construction site. As Justice Traynor pointed out, "[a]utomobiles do not arouse curiosity, and ordinarily the only appreciable risk that they will be set in motion if they are left unattended arises from the possibility of their being stolen," and "it could reasonably be inferred that [the bulldozers] were attractive to children when left unattended at the end of the working day." 44 Cal. 2d at 776, 285 P.2d at 271. Hence, there was a justifiable "conclusion that there was a reasonably foreseeable risk that defendants' bulldozers might be tampered with when left unattended." *Id.*

Justice Traynor continued the analysis:

> Given this foreseeable risk of intermeddling, the question is presented whether defendants were under a duty to exercise reasonable care to prevent intermeddlers from putting their bulldozers in operation. . . . The risks arising from intermeddling with bulldozers, however, are entirely different from those arising from the driving of an automobile by a thief. Bulldozers are relatively uncommon, and curious children or others attracted by

> them ordinarily will not know how to operate them. An intermeddler who starts a bulldozer accidentally or otherwise may not be able to stop it, and the potentialities of harm from a 26-ton bulldozer in uncontrolled motion are enormous . . . . The extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers.
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> . . .
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> In the absence of an effective lock the bulldozer engine could be started by pushing in a lever and stepping on the starter. Moreover, the engine could be started with the bulldozer in gear, and if so started, the bulldozer would commence to move immediately. Although this risk could be avoided by the use of a simple but effective lock, there is evidence that no such lock was used. Accordingly, there is substantial evidence that defendants did not exercise reasonable care to prevent intermeddlers from setting their bulldozer in motion.
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> . . . It is settled, however, that "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." (Rest. Torts, § 449 . . . .) The possibility of the intentional, wrongful misconduct that occurred in this case was not so remote as not to constitute "one of the hazards" that would justify the conclusion that defendants' failure to lock the bulldozer was negligent. Accordingly, defendants' duty to protect plaintiffs from injuries caused by the uncontrolled and unauthorized operation of their bulldozer included a duty to protect plaintiffs from the intentional misconduct of the young men, and such misconduct did not therefore constitute a superseding cause of plaintiffs' harm.

44 Cal. 2d at 776-77, 285 P.2d at 271-72. Other courts have concurred in the Traynor analysis and distinction between

automobile theft cases and unauthorized use of a construction company's bulldozer. See, *Foreign Auto Prep. Serv. Inc. v. Vicon Constr. Co.*, 193 N.J. Super. 420, 474 A.2d 1088 (1984) (whether owner of a bulldozer could foresee that vandals would operate the bulldozer was a question of fact); *Batiste v. Boh Bros. Const. Co., Inc.*, 404 So. 2d 1348 (La. App. 1981) (a jury could reasonably conclude that the defendant, as the owner of a bulldozer at a construction site, could foresee that the bulldozer would be operated by vandals with relative ease, especially in view of prior acts of vandalism at the construction site); *Bronk v. Davenny*, 25 Wash. 2d 443, 171 P.2d 237 (1946) (owner of a tractor was liable for damage caused by a young boy who easily started the unattended and unsecured tractor).

The facts alleged by Gerkens show, or provide a basis for a reasonable inference, that the unsecured bulldozer was accessible to anyone and could easily be started, since the operating key was left readily available or actually in the bulldozer's ignition switch. Previous vandalism at the unfenced construction site indicated that trespassers, including neighborhood children, could enter the area, tamper with Hawkins' heavy equipment, and start the bulldozer without any degree of difficulty or expertise. Under those circumstances, a recognizable and realizable likelihood existed that an unauthorized person or unauthorized persons would enter the construction site. After starting the bulldozer, an untrained intermeddler or joyrider would discover that the heavy equipment was difficult to control. At that point, the bulldozer would be released on its course of destruction rather than construction.

Disregarding the foregoing implications and reasonable inferences drawn from Gerkens' petitions, the majority has completely ignored the fact that Gerkens' appeals involve rulings on demurrers. By applying a rule of law regarding an owner's liability for a stolen automobile, the majority has mechanically extended the car-theft rule and, in so doing, has bulldozed foreseeability as the cornerstone of duty in the foundation of a negligence cause of action. On the facts pleaded by Gerkens, a cause of action was stated against Hawkins, and for that reason, Hawkins' demurrers should

have been overruled so that the proceedings could continue against Hawkins. Since the majority has reached the opposite conclusion, I dissent.

WHITE and LANPHIER, JJ., join in this dissent.

PROFESSIONAL FIREFIGHTERS OF OMAHA, LOCAL 385, APPELLANT AND CROSS-APPELLEE, V. CITY OF OMAHA, APPELLEE AND CROSS-APPELLANT.

498 N.W.2d 325

Filed April 9, 1993. No. S-90-1206.

1. **Summary Judgment.** Summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
3. **Statutes: Appeal and Error.** The interpretation of statutes is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
4. **Actions: Parties: Judgments: Words and Phrases.** An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
5. _____: _____: _____: _____. The portion of the definition of indispensable party which speaks in terms of not ending up with a final determination which may be wholly inconsistent with equity and good conscience relates not to questions of general policy, but to some legal right of the indispensable party.
6. **Jurisdiction: Standing.** Only a party who has standing may invoke the jurisdiction of a court.
7. **Actions: Standing.** One must have some legal interest in the outcome of the litigation in order to maintain suit.
8. _____: _____. Standing is not a mere pleading requirement, but, rather, an indispensable component of a party's case.
9. **Taxation: Standing.** Standing arises upon a special injury to the suing party itself

or on that party's status as a resident taxpayer.

10. **Declaratory Judgments: Claims.** Declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.
11. **Jurisdiction.** The existence of an actual case or controversy is necessary for the exercise of judicial power.
12. **Actions: Equity: Taxation: Municipal Corporations.** A taxpayer, for the benefit of a municipal or public corporation, may commence and prosecute to judgment an equitable action to enforce a right of action which the governing body has refused to enforce.
13. _____: _____: _____: _____. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he or she, in common with other property holders, may otherwise be compelled to pay.
14. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
15. **Actions: Pleadings: Taxation: Municipal Corporations.** To plead a resident taxpayer's action, the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless.
16. **Municipal Corporations.** A municipal corporation possesses, and can exercise, the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.
17. **Municipal Corporations: Legislature.** A municipality is a creature of the Legislature and derives its powers from that source.
18. **Statutes: Municipal Corporations.** Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant.

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

John P. Fahey and Gerellen R. Rome, of Broom, Johnson, Fahey & Clarkson, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Wendy E. Hahn for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellant, Professional Firefighters of Omaha, Local 385, a labor organization, seeks a declaration that the defendant-appellee, the City of Omaha, is required to provide specialized aircraft rescue and firefighting services to its airport authority. Concluding that the city is under no mandatory duty to provide such services to the authority, the district court granted the city's motion for summary judgment. The local has appealed, asserting that the district court erred in so ruling. The city has cross-appealed, asserting that the local lacks standing to sue. We affirm.

II. SCOPES OF REVIEW

Summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993). In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Abdullah v. Gunter*, 242 Neb. 854, 497 N.W.2d 12 (1993); *Economy Preferred Ins. Co. v. Mass, supra*; *Parrish v. Omaha Pub. Power Dist., supra*.

However, on matters of law, including the interpretation of statutes, we, as an appellate court, have an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *Stratbucker Children's Trust v. Zoning Bd., ante* p. 68, 497 N.W.2d 671 (1993); *Sports Courts of Omaha v. Meginnis, supra*; *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993).

III. FACTS

Pursuant to the Nebraska Cities Airport Authorities Act, Neb. Rev. Stat. ch. 3, art. 5 (Cum. Supp. 1957), the city created the authority on March 3, 1959. The city then, while retaining title, conveyed to the authority the use of real property upon which the authority constructed an airport terminal and related facilities.

Under a series of cooperative agreements, the city, for the ensuing three decades, provided the authority with city firefighters. The authority supplied this airport firefighting unit with housing and with special equipment which enabled the unit to conduct aircraft rescue and firefighting operations, a specialized firefighting service.

In 1977, the authority began reimbursing the city 50 percent of the airport unit personnel costs and in 1984 increased its reimbursement to 66 percent. On January 19, 1990, the authority decided to discontinue its cooperative arrangements with the city and to hire its own personnel to perform the specialized firefighting services the city's employees had been performing with the authority's equipment.

Having previously expressed its displeasure with the authority's decision to hire its own specialized firefighters, the city then removed its firefighters from the airport and reassigned these 12 employees throughout its fire division. Thus, none of its employees suffered a reduction in classification or benefits.

As the recognized collective bargaining representative for the employees of the city's fire division, the local contends that the removal of the city's firefighters from the airport reduced the division's numbers, thereby reducing the local's membership and revenue.

IV. ANALYSIS

Although the issue is not raised by the parties, at first blush it would appear that the authority is an "indispensable party" to the adjudication of this matter. Such, however, proves not to be the case.

An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be

finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. See *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991).

In determining whether the authority is such a party, it must be borne in mind that the local asks only that the city be compelled to provide the authority with specialized firefighting services; the local does not ask that the authority be prevented from also providing its own such services if it wishes or that it be required to pay the city for any services the city provides. Admittedly, it would be wasteful in the extreme for both the city and the authority to provide the same firefighting services, but this lawsuit does not concern itself with waste or with what the authority may or may not do; it concerns itself solely with the obligation of the city to provide specialized firefighting services.

While a portion of the definition of indispensable party speaks in terms of not ending up with a final determination which "may be wholly inconsistent with equity and good conscience," that phrase relates not to questions of general policy, but to some legal right of the indispensable party.

Thus, we move on to the issues raised by the parties, which, as noted in part I, are (1) the city's claim on cross-appeal that the local lacks standing to bring this action and (2) the local's claim that the district court wrongly decided the city had no duty to provide specialized firefighting services to the authority.

1. Standing

As the city correctly urges, only a party who has standing may invoke the jurisdiction of a court. *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991); *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979). Stated otherwise, "[o]ne must have some legal interest in the outcome of the litigation in order to

maintain suit." *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. at 898, 327 N.W.2d at 602. Moreover, standing is not a mere pleading requirement but, rather, an indispensable component of a party's case. Standing arises upon a special injury to the suing party itself or on that party's status as a resident taxpayer. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, *supra*.

(a) Special Injury Status

The local contends that it has standing by reason of a special injury peculiar to itself.

> "The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination."

Mullendore v. Nuernberger, 230 Neb. 921, 925, 434 N.W.2d 511, 514-15 (1989), quoting *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). See, *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952); *Graham v. Beauchamp*, 154 Neb. 889, 50 N.W.2d 104 (1951).

> "While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. . . .
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> "The 'case or controversy' prerequisite to maintain litigation applies with equal, if not stronger, force to an action for a declaratory judgment, since the right to maintain the action is expressly granted only to those 'person[s] . . . whose rights, status or other legal relations are affected by a statute.' [Neb. Rev. Stat. § 25-21,150 (Reissue 1989).]
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> ". . . .
>
> ". . . 'In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted.' *Stahmer v. Marsh*, 202 Neb. 281,

> 284, 275 N.W.2d 64, 66 (1979). . . . 'Clearly, the plaintiff must show that conditions exist which justify the court's exercise of its discretionary power to grant declaratory relief. . . . ' . . . Thus . . . a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action.
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> "Therefore, a plaintiff in a declaratory judgment action challenging the validity of a statute must prove that the plaintiff is a person 'whose rights, status or other legal relations are affected' by the challenged statute. See § 25-21,150."

H.H.N.H., Inc. v. Department of Soc. Servs., 234 Neb. 363, 367, 451 N.W.2d 374, 376-77 (1990), quoting *Mullendore v. Nuernberger, supra*.

The city argues that the local has failed to make a showing that its rights or status is affected by the city's ultimate acquiescence in the authority's decision. Because all of the city's firefighters, with but one or two exceptions, maintain membership in the local, the local argues that the 12 lost positions at the airport automatically translated not only into a present loss of membership and accompanying dues but to a future loss as well.

Even assuming for the purpose of this analysis, but not deciding, that the city by contract or other means can bind itself to never reduce the size of its fire division for any reason, we have been provided no evidence that the city purported to undertake such an obligation. That being so, the local has failed to prove that it is a party "whose rights, status or other legal relations are affected" by the city's acquiescence in the authority's decision. Therefore, the local does not have "special injury" standing.

(b) Taxpayer Status

However, the local claims that it nonetheless has standing to bring this action by reason of its status as a resident taxpayer. We have long recognized that a taxpayer, for the benefit of a municipal or public corporation, may commence and prosecute to judgment an equitable action to enforce a right of action which the governing body has refused to enforce. *Nebraska*

Sch. Dist. No. 148 v. Lincoln Airport Auth., 220 Neb. 504, 371 N.W.2d 258 (1985), citing *Shepard v. Easterling*, 61 Neb. 882, 86 N.W. 941 (1901), *overruled on other grounds, Wilson v. Otoe County*, 71 Neb. 435, 98 N.W. 1050 (1904). "There is an exception to the general interest prohibition where a resident taxpayer (who has a general interest with other taxpayers) sues to enjoin an illegal act by a municipal body." *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. at 507, 371 N.W.2d at 261.

A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he or she, in common with other property holders, may otherwise be compelled to pay. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth., supra*; *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952). Moreover, a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Id.* See *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982).

"To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless." *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. at 508, 371 N.W.2d at 261-62, citing *Sesemann v. Howell*, 195 Neb. 798, 241 N.W.2d 119 (1976).

The record establishes that the local is a resident taxpayer of the city, that the city removed a fire engine from the airport and allocated $400,000 for the construction of a new firehouse, and that the local made a demand upon the city to provide specialized firefighting services to the authority. These circumstances, coupled with the local's claim that the $400,000 allocation was made necessary because of the city's illegal failure to fulfill its firefighting duty, give the local standing to maintain this action as a resident taxpayer.

2. Duty of City

We thus reach the local's claim that the district court erred in

finding that the city does not have a mandatory duty to provide specialized firefighting services to the authority.

The well-settled rule in this jurisdiction is that a municipal corporation possesses, and can exercise, the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Jacobs v. City of Omaha*, 181 Neb. 101, 147 N.W.2d 160 (1966); *Christensen v. City of Fremont*, 45 Neb. 160, 63 N.W. 364 (1895). See, *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976).

A municipality is a creature of the Legislature and derives its powers from that source. *Obitz v. Airport Authority of the City of Red Cloud*, 181 Neb. 410, 149 N.W.2d 105 (1967). The city, by virtue of its metropolitan classification, is governed by chapter 14 of the Revised Statutes. Cities of the metropolitan class have the express power

> (2) to purchase, lease, lease with option to buy, acquire by gift or devise, and hold real and personal property within or without the limits of the city for the use of the city, and real estate sold for taxes, (3) to sell, exchange, lease, and convey any real or personal estate owned by the city, in such manner and upon such terms as may be to the best interests of the city . . . (4) 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, and (5) to exercise such other and further powers as may be conferred by law.

Neb. Rev. Stat. § 14-101 (Reissue 1991). In addition to these general powers, metropolitan-class cities have the authority

> [t]o make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof in addition to the police powers expressly granted herein; and in the exercise of the police power, to pass all needful and proper ordinances and impose fines, forfeitures, penalties, and

> imprisonment at hard labor for the violation of any ordinance, and to provide for the recovery, collection, and enforcement thereof; and in default of payment to provide for confinement in the city or county prison, workhouse, or other place of confinement with or without hard labor as may be provided by ordinance.

Neb. Rev. Stat. § 14-102(25) (Cum. Supp. 1992).

Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant. *Briar West, Inc. v. City of Lincoln, supra*; *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940).

The clear import of §§ 14-101 and 14-102 is that the city has the power to provide firefighting services to the authority. In addition, Omaha Mun. Code, ch. 1, § 1.8, provides: "The police power of the city is hereby extended to include all lands or property owned or leased by the city or any agency of the city and the general ordinances of the city shall be applicable on such property."

In arguing that the city cannot abdicate its responsibility to provide firefighting services to the authority, the local overlooks that the city continues to provide the same regular firefighting services to the authority as it does to the rest of the city. All that the city has done is to reassign firefighters who had been providing the authority with specialized firefighting services.

Claspill v. City of Springfield, 598 S.W.2d 183 (Mo. App. 1980), is factually similar. Therein, the firefighters' union brought an action alleging that the municipality violated its charter by removing the firefighting responsibilities at the municipal airport from the municipality's fire department and transferring such responsibilities to the aviation board. In affirming the lower court's judgment for the municipality, the *Claspill* court found that the municipality had authority under its charter to assign the firefighting function to the board. Like the city in the situation at hand, the municipality in *Claspill* continued to provide the airport regular firefighting services. In no sense did the city in the case at hand abdicate its firefighting responsibilities to the authority.

The local further contends that the city should not be permitted to allow the authority to perform its own specialized firefighting services because there is no guarantee that the authority will do so competently. This contention overlooks that the authority is required to comply with federal law regarding aviation safety. Federal Aviation Administration regulations in 14 C.F.R. part 139 (1992) establish the standards and procedures the authority must meet in this regard; the record establishes that the failure to meet them would adversely affect the authority's ability to conduct airline operations.

And the local's position fails on yet another ground. The Nebraska Cities Airport Authorities Act, Neb. Rev. Stat. §§ 3-201, 3-239, and 3-501 to 3-514 (Reissue 1991 & Cum. Supp. 1992), provides:

> Any city may create an airport authority to be managed and controlled by a board, which board, when and if appointed, shall have full and exclusive jurisdiction and control over all facilities owned or thereafter acquired by such city for the purpose of aviation operation, air navigation, and air safety operation. . . . Each such board shall be a body corporate and politic, constituting a public corporation and an agency of the city for which such board is established.

§ 3-502 (Reissue 1991).

The local suggests the foregoing should be read so as to limit the authority to controlling only air safety. But in construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). The reading espoused by the local would be nonsensical, for an authority's interest does not end upon the touching of an aircraft's wheels to the ground; an authority is concerned with all aspects of getting an aircraft and its occupants safely into and out of an airport. When § 3-502 is read in light of § 3-504(17) (Reissue 1991), which provides that an authority shall have the power "[t]o do all things necessary or convenient to carry out the powers expressly conferred on such

authorities" by the act, we must conclude that the authority has the right to control more than air safety and has the right to provide itself with specialized firefighting services.

Moreover, § 3-513 (Reissue 1991) provides: "Insofar as the provisions of [the Cities Airport Authorities Act] are inconsistent with the provisions of any other act or of any city charter, if any, the provisions of [the Cities Airport Authorities Act] shall be controlling." Section 3-513 is, in effect, a type of supremacy clause, which nullifies any inconsistent statutory or municipal charter provisions. Therefore, § 3-513 empowers the authority to assume responsibility for specialized firefighting duties, irrespective of the city's desires in the matter.

V. JUDGMENT

The record failing to sustain either the city's or the local's assignment of error, the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court that the judgment of the district court dismissing the petition of the plaintiff should be affirmed, but for different reasons.

The amended petition contains no allegation of an illegal expenditure of tax funds by the defendant. The affidavit of Randall Hoke, which recites that the defendant is allocating $400,000 for a new firehouse, does not say that this is illegal. Consequently, I would hold that the plaintiff failed to allege any facts showing that it had standing to seek declaratory or injunctive relief.

In reaching its decision, the court found it necessary to decide that the defendant had no duty to provide specialized firefighting services to the airport authority. It seems to me that the authority is a necessary party if its rights are to be determined. See *Marsh v. Marsh*, 173 Neb. 282, 113 N.W.2d 323 (1962).

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

WHITE, J., concurring.

I join in only so much of the concurring opinion of Justice

Boslaugh as suggests that the airport authority was a necessary party to this action.

KWIK SHOP, INC., DOING BUSINESS AS KWIK SHOP, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

498 N.W.2d 102

Filed April 9, 1993. Nos. S-91-012 through S-91-021.

1. **Constitutional Law: Standing: Statutes.** To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
2. **Constitutional Law: Statutes: Presumptions.** It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
3. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution.
4. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
5. **Constitutional Law: Statutes: Due Process.** When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.
6. _____: _____: _____. Due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it.
7. **Legislature: Governmental Subdivisions.** The Legislature cannot delegate its powers to make law to local governing bodies without imposing adequate standards to guide the discretion of those bodies.
8. **Constitutional Law: Statutes.** When an amendatory act is invalid, the previous statute on the subject remains in full force and effect.
9. **Constitutional Law: Equal Protection: Sales: Liquor Licenses.** Convenience stores may not be treated differently from other operations which combine the sale of alcoholic liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance.

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

Donald L. Dunn, Carl J. Sjulin, and Penny J. Berger, of Rembolt Ludtke Parker & Berger, for appellant.

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellee City of Lincoln.

Richard L. Boucher for appellee Mothers Against Drunk Driving.

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

LANPHIER, J.

Acting in accordance with the recommendation of the appellees, the City of Lincoln, Mothers Against Drunk Driving, the Lincoln Package Beverage Association, the Culler Neighborhood Association, and Joe Quattrocchi, and pursuant to the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,121 (Reissue 1988 & Cum. Supp. 1990), the Lincoln City Council (Council) denied 10 applications for class B liquor licenses filed by the appellant, Kwik Shop, Inc. (Kwik Shop). These licenses would allow Kwik Shop to sell beer at retail outlets within the City of Lincoln's corporate limits for consumption away from the existing convenience store premises sought to be licensed. Upon appeal by Kwik Shop, the Lancaster County District Court affirmed the actions of the Council based upon § 53-134 (Cum. Supp. 1990). Kwik Shop challenged the constitutionality of that version of § 53-134, contending that the statutory standards were arbitrary and analogous to the prior version of § 53-134 which was declared unconstitutional by this court. After the district court's affirmance, Kwik Shop timely appealed to this court. It asks that we reverse the judgment of the district court, declare the statute unconstitutional, and order the Council to issue the licenses. We reverse, and remand with directions.

BACKGROUND

On December 12, 1989, Kwik Shop filed with the Nebraska Liquor Control Commission (Commission) two applications for class B liquor licenses for two of its convenience stores. A class B license permits the retailer to sell beer only, in the

original package, for consumption off the premises. § 53-124(5)(B) (Cum. Supp. 1990). On December 14, the Commission gave notice to the City of Lincoln of the filing of the applications, and on January 15, 1990, a hearing was held before the Council regarding these first two applications.

On February 23, 1990, Kwik Shop filed with the Commission an additional eight applications for class B liquor licenses for eight different retail establishments. On February 28, the Commission gave notice to the City of Lincoln of these applications, and on March 19, a hearing was held regarding the eight applications.

Each of the hearings was conducted pursuant to the procedures set forth in § 53-134 (as amended by 1989 Neb. Laws, L.B. 781). At the outset of each hearing, Kwik Shop filed a written objection to proceeding in conformance with the procedures established by L.B. 781. After Kwik Shop offered evidence addressing each of the 20 criteria to be considered by the licensing body as set forth in § 53-134, evidence relating to the applications was presented by the City of Lincoln. Three persons also appeared in opposition to the applications, representing the appellees Mothers Against Drunk Driving, the Lincoln Package Beverage Association, the Culler Neighborhood Association, and Joe Quattrocchi, the owner of an established liquor store.

At the conclusion of each hearing, a motion to deny was made with respect to each application. The motions passed, and resolutions denying each application were adopted.

On appeal, the district court affirmed the Council's denial of all 10 of Kwik Shop's applications, finding that pursuant to L.B. 781, there was some competent evidence supporting the Council's decision. The district court also found that the Council, in denying these applications, was acting within its jurisdiction and authority. This appeal followed.

ASSIGNMENTS OF ERROR

Kwik Shop assigns a number of errors, contending in summary that the district court erred in failing to find that (1) Kwik Shop had standing to challenge L.B. 781's constitutionality, (2) L.B. 781 is unconstitutional on its face and

as applied, (3) the Council failed to act in an unbiased fashion, (4) the Council failed to note the issues to be considered at the hearings and failed to make findings of fact upon each contested issue as required by § 53-134(3), (5) the Council failed to provide notice to appellant in conformance with § 53-134(3), (6) the Council acted in excess of its statutory authority, (7) the Council failed to approve appellant's applications based upon the unconstitutional procedures set forth in L.B. 781, and (8) the Council based its decisions on grounds that are unsupported in view of the record.

THE CONSTITUTIONALITY OF L.B. 781

As a threshold question to the determination of this case, we must first address the question of whether, as Kwik Shop asserts, L.B. 781 unconstitutionally delegates legislative power to local governing bodies. Kwik Shop launches a broad constitutional attack against L.B. 781, encompassing no less than 11 provisions of the Nebraska Constitution and 4 provisions of the U.S. Constitution. Before the analysis of those constitutional issues can proceed, however, we must determine whether Kwik Shop has standing to mount such an attack.

KWIK SHOP'S STANDING

To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988). As Kwik Shop challenges a number of provisions within the Nebraska Liquor Control Act, this standard must be applied to each challenge individually.

Kwik Shop's constitutional challenges can be divided into two groups: those which challenge the standards used by local governing bodies in determining whether to grant licenses and those which challenge the local governing bodies' authority as to existing licenses and licensed premises. Kwik Shop's

challenges on the latter are premature and made without standing. As stated above, to have standing, a contestant must show that he or she is, or is about to be, adversely affected by the language in question. Kwik Shop's challenges are made as an applicant only; consequently, it lacks standing to challenge provisions which apply only to licensed premises. As such, we will not address these attacks to the statute.

As to Kwik Shop's challenges concerning the constitutionality of the standards used by local governing bodies in determining whether to grant licenses, standing is established. To have standing, as stated above, one must be adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. Kwik Shop has been adversely affected by the relevant provisions of the Nebraska Liquor Control Act by the Council's denial of its applications. Thus, Kwik Shop has standing to challenge only those provisions of the Nebraska Liquor Control Act which relate to license applicants.

WHETHER § 53-134 IS VAGUE

Kwik Shop argues that § 53-134, as amended by L.B. 781, is impermissibly vague, in violation of the 5th and 14th amendments to the U.S. Constitution. Kwik Shop also contends that this vagueness creates an unconstitutional delegation of power from a legislative power to an administrative or executive authority, in violation of Neb. Const. art. II, § 1.

Before we address Kwik Shop's contentions, a discussion of this court's standard of review as to the constitutionality of statutes is helpful. It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. See *id.* See, also, *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). The burden of establishing the unconstitutionality of a statute is on the one attacking its

validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987).

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). See, also, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). "In other words, due process requires that an enactment supply (1) a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited' and (2) 'explicit standards for those who apply [it].' " *ABC Books, Inc.*, 238 Neb. at 382, 470 N.W.2d at 764 (quoting *Grayned, supra*).

Kwik Shop contends that the 20 standards established by L.B. 781 (codified at § 53-134(2)(a) through (t)) are vague and arbitrary in that no standards are supplied to measure them against. Section 53-134, as amended by L.B. 781, provided that only the requirements of the Nebraska Liquor Control Act and the following criteria are to be considered:

> (a) The adequacy of existing law enforcement . . . ;
>
> (b) The recommendation of the police department . . . ;
>
> (c) Existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises . . . ;
>
> (d) Zoning restrictions . . . ;
>
> (e) Sanitation or sanitary conditions on or about the proposed licensed premises;
>
> (f) The existence of a citizen's protest and similar evidence . . . ;
>
> (g) The existing population and projected growth within . . . the area to be served;
>
> (h) The existing liquor licenses . . . ;
>
> (i) Whether the proposed license would be compatible with the neighborhood . . . ;
>
> (j) Whether the type of business or activity proposed to be operated . . . is and will be consistent with the public interest as declared in section 53-101.01;

> (k) Whether the applicant can ensure that all alcoholic beverages . . . will be handled by persons in accordance with section 53-102;
>
> (l) Whether the applicant has taken every reasonable precaution to protect against the possibility of shoplifting of alcoholic liquor . . . ;
>
> (m) Whether the applicant is fit, willing, and able to properly provide the service in conformance with all provisions and requirements . . . pursuant to the act;
>
> (n) Whether the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to ensure that the licensee can conform to all the provisions and requirements . . . pursuant to the act;
>
> (o) The background information of the applicant established by information contained in the public records of the commission and investigations conducted by law enforcement agencies;
>
> (p) Past evidence of discrimination involving the applicant . . . ;
>
> (q) Whether the applicant . . . suppressed any fact or provided any inaccurate information to the commission . . . ;
>
> (r) Proximity of and impact on schools, hospitals, libraries, parks, and other public institutions;
>
> (s) Whether activities proposed to be conducted on the licensed premises . . . will create unreasonable noise or disturbance; and
>
> (t) Compliance with state laws, liquor rules and regulations, and municipal ordinances and regulations . . . .

Kwik Shop argues that these factors are "meaningless in the abstract" and that without any statutory standards, the local governing body can "arbitrarily decide whether a license should issue based on its own unstated, inconsistent and potentially unconstitutional standards." Brief for appellant at 20. The question therefore becomes whether the enactment promulgated by L.B. 781 provides the local governing bodies with adequate, sufficient, and definite standards within which

they are to exercise their discretion, while also providing potential applicants a reasonable opportunity to know what is required to obtain a license.

We find that it does not. The requirement that the local governing bodies consider the "adequacy of existing law enforcement," the "recommendation of the police department," "[z]oning restrictions," "[s]anitation . . . conditions," and the various other statutory criteria does not, by itself, provide sufficient guidance either to the governing body or to the applicant to meet the requirements of procedural due process.

Additionally, L.B. 781, § 12, amended § 53-134 to provide that, when performing their licensing functions, local governing bodies can consider an applicant's "(t) Compliance with . . . municipal ordinances and regulations . . . ." Subsection (t) in effect empowers local governing bodies to adopt by ordinance licensing regulations which must be met by applicants before a license will issue, without providing any standards to limit the contents of the regulations. Such a scheme does not provide sufficient guidance to meet the requirements of a constitutional delegation of legislative power.

Neither § 53-134 as a whole nor subsection (t) in particular provides adequate notice to persons of ordinary intelligence regarding the circumstances necessary to acquire a liquor license, nor do they provide adequate standards to governing bodies which rule on applications.

Accordingly, not only does the enactment fail on due process grounds, but because of its vagueness, it is also an unconstitutional delegation of power under Neb. Const. art. II, § 1. Article II, § 1, of the Nebraska Constitution provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

In *Bosselman, Inc. v. State*, 230 Neb. 471, 476, 432 N.W.2d 226, 229 (1988), we addressed the issue of the delegation of such power and stated:

> "It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492, 100 A.L.R. 686. The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689. . . .
>
> "The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act."

(Quoting *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).) "Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available." *Bosselman, Inc.*, 230 Neb. at 476, 432 N.W.2d at 229-30.

In applying the principles set forth in *Lincoln Dairy Co.*, this court has held that where the Legislature has provided " ' "reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority." ' " *Bosselman, Inc.*, 230 Neb. at 476-77, 432 N.W.2d at 230. Accord, *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988); *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987). In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979), this court delineated the standards to be applied when examining a legislative delegation:

> The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary

> power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. 1 Am. Jur. 2d, Administrative Law, § 117, p. 923. The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases. 1 Am. Jur. 2d, Administrative Law, § 118, p. 925. This is particularly true where . . . the violation of any such regulation does not constitute a criminal act.

As stated above, § 53-134, as amended by L.B. 781, does not provide the local governing bodies with adequate, sufficient, and definite standards within which they are to exercise their discretion. The conclusion that L.B. 781 "delegates this State's legislative power to the local governing bodies in violation of Neb. Const. art. II, § 1, is inescapable." *Bosselman, Inc.*, 230 Neb. at 478, 432 N.W.2d at 231. Accordingly, without the unconstitutional delegation to the local governing bodies, no part of the enactment is workable. No part of the enactment is severable from the portion thereof which contains the unconstitutional delegation, and, as a consequence, the entire enactment must fail. See, *Bosselman, Inc., supra*; *Snyder v. IBP, inc.*, 229 Neb. 224, 426 N.W.2d 261 (1988); *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988). In determining that § 53-134 is unconstitutional, making the entire enactment invalid, it becomes unnecessary to consider Kwik Shop's other claims of constitutional infirmity. We turn, then, to our review of the Council's findings.

STANDARD OF REVIEW

We have addressed similar issues in the recent cases of *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993), *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993), and *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992), where we held that

decisions under the authority of the Commission are to be reviewed by appeal. In the case of appeal, the matter is reviewed de novo on the record. *Gas 'N Shop, supra*; *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988). However, the above cases addressed only applications which were filed between the time when § 53-1,116(5) (Reissue 1984) was in effect and the time 1989 Neb. Laws, L.B. 780, and L.B. 781 became effective. Section 53-1,116(5)(b) (Cum. Supp. 1986), which was enacted between that time, was determined to be unenforceable by *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), which declared § 53-134 (Cum. Supp. 1986) to be an unconstitutional delegation of power and, accordingly, declared the entire enactment to be unenforceable. Legislation which attempted to cure the constitutional infirmities of the enactment was also declared invalid by *Gas 'N Shop*, so the previous statute on the subject was applied.

Such is also the case here. We have determined that § 53-134, as amended by L.B. 781, is unconstitutionally vague and unconstitutionally delegates legislative power. Without the delegation, no part of the enactment is workable, and, consequently, the entire enactment is unenforceable. "When an amendatory act is invalid, the previous statute on the subject remains in full force and effect." *Gas 'N Shop*, 241 Neb. at 900, 492 N.W.2d at 9. See, *State v. Anderson*, 188 Neb. 491, 197 N.W.2d 697 (1972); *State v. Greenburg*, 187 Neb. 149, 187 N.W.2d 751 (1971). Thus, the controlling language is found in § 53-1,116(5) (Reissue 1984): "Any decision of the commission . . . refusing to grant . . . a license . . . may be reversed, vacated, or modified by the district court of Lancaster County on appeal . . . ." Consequently, Kwik Shop invoked the jurisdiction of the proper district court.

The next step is to determine the scope of our review. As § 53-1,116 (Cum. Supp. 1990) is unenforceable, we turn to the previous statute on the subject—§ 53-1,116 (Reissue 1988). However, that version and the 1986 version have also been declared unenforceable by this court in *Bosselman, Inc.* As noted above, the controlling language is found in § 53-1,116(5) (Reissue 1984), which provides that decisions of the

commission are to be reviewed by appeal. In the case of appeal, the matter is reviewed de novo on the record. Accordingly, we review the Council's decision de novo on the record.

THE COUNCIL'S FINDINGS

Having determined that it is the law as it existed prior to *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), which controls, we next look at § 53-132 (Reissue 1984), which provided, in relevant part:

> (2) A retail license . . . shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city . . . where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.
>
> (3) In making its determination pursuant to subsection (2) of this section the commission shall consider:
>
> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city . . . and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses . . . with similar privileges within the neighborhood or community of the location of the proposed licensed premises;
>
> (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

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

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

The record before us makes it abundantly clear that Kwik Shop, which has operated the 26 licensed premises it presently holds in a lawful manner, satisfies the conditions specified in § 53-132(2)(a), (b), and (c). We thus proceed to subsection (2)(d) of the statute and apply the evidence bearing on the factors listed in § 53-132(3). Our consideration of the factors will be set out below.

In its resolutions of denial to each of Kwik Shop's 10 applications, the Council made the following 6 identical findings in support of each of these denials:

1. . . . [T]he existing law enforcement resources and services in the area were inadequate. . . .

2. The Lincoln Police Department issued a negative recommendation for this proposed license. . . .

3. . . . [T]he existing population of the City of Lincoln and the projected population growth of the City of Lincoln and within the area proposed to be served were inadequate to support the proposed license. . . .

4. . . . [T]he existing licenses, and the class of such licenses . . . all within [a] one mile radius from the proposed location were adequately serving the area. . . .

5. . . . [T]he area in which the alcoholic liquor was proposed to be displayed and kept in and sold from was not reasonably secured. . . .

6. . . . [T]he applicant had not demonstrated that the issuance of the license was consistent with promoting the health, safety and welfare of the people of the City of Lincoln, Nebraska.

As an additional finding in its denial of one of the Kwik Shop applications, the Council added a seventh finding that "the license would not be compatible with the neighborhood."

The Council's first finding (adequacy of law enforcement

resources and services) and second finding (negative recommendation of the police department) are based almost exclusively on a letter from Lincoln police chief Allan Curtis. The letter, identical in both hearings, states in relevant part:

> The pending applications of several grocery and convenience stores for the expansion of existing licenses or creation of new licenses within the City of Lincoln has focused attention on an issue the Lincoln Police Department considers extremely important. We would be opposed to the issuance or expansion of licenses in any manner.

Curtis, however, offered no evidence to support this concern or opposition. As we stated in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 903, 492 N.W.2d 7, 11 (1992): "[T]here is no evidence which establishes that illegal activity increases merely because a new license is issued."

The Council's third finding (population) in each of the cases is based on an affidavit of Kent Morgan, assistant planning director for the City of Lincoln, dated April 17, 1987. The affidavit sets forth Lincoln's 1960, 1970, and 1980 populations, as well as an estimate of the population as of January 1, 1987. The affidavit also states that "as a general rule, the City Planning Department projects the population of Lincoln to be growing at a rate of approximately one percent per year." The fact that Lincoln is growing consistently is not disputed by the parties. Moreover, evidence presented by Kwik Shop at the hearings indicates that there are fewer off-sale-only licenses in Lincoln today than in 1970, while the population has increased 28 percent since 1970. The Council's finding that the population is inadequate to support the proposed licenses runs contrary to the record.

The Council's fourth finding (existing licenses) is based upon the total number of all licenses of all classes that are within a 1-mile radius of each of Kwik Shop's proposed licensed premises. Such a comparison is misleading, however, because it includes on-sale as well as off-sale licenses. Kwik Shop presented evidence which broke down the number of licenses not only into off-sale and on-sale, but into class B (beer only) and class D (alcoholic liquor including beer) licenses. The

evidence presented by Kwik Shop indicates that its proposed licensed premises have as few as one and no more than five class B and/or class D licenses located within 1 mile. Without fact-based distinctions, the Council's blanket claim of adequate service around each location appears arbitrary and is not, in fact, supported by the record.

The Council's fifth finding (security) is not supported by any evidence whatsoever. Kwik Shop, on the other hand, presented substantial evidence at each of the hearings which clearly indicates that Kwik Shop would display, keep, and sell alcoholic liquor only from secured areas on its premises. Consequently, the Council's fifth finding is unsupported.

The Council's sixth finding (health, safety, and welfare) is a groundless assertion not supported by any evidence in the record.

Lastly, we find that the Council's seventh finding (neighborhood compatibility), included in the denial resolution of only one application, is also not supported by the record. The Council found that Kwik Shop's proposed license would not be compatible with the neighborhood in the area of the 4750 Calvert Street Kwik Shop location. Neither the City of Lincoln nor any other party appeared to present evidence concerning the compatibility of a licensed location in this particular neighborhood, however.

Nothing in the evidence indicates that the granting of the licenses would not be in the public interest. We turn, then, to the remaining factors in § 53-132(3).

We first note that while three people representing four of the appellees appeared at the hearings in opposition to Kwik Shop's applications, there is no evidence of a citizens' protest as such, as envisioned by § 53-132(3)(b). Additionally, of the appellees which appeared at the hearings, two—the Lincoln Package Beverage Association and Joe Quattrocchi, the owner of an established liquor store—clearly had a financial interest in having the licenses denied. The other two appellees at the hearings "indicated a general aversion to alcohol sales or to the sale of alcohol in [convenience] Stores." *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 756, 497 N.W.2d 647, 650 (1993).

Population, the neighborhoods of the proposed licensed premises, the existence of other licenses, and the adequacy of existing law enforcement—subsections (3)(c), (d), (e), and (g), respectively—have been addressed earlier. We now address the remaining criteria of § 53-132(3).

All the locations are heavily traveled, high-traffic areas; at least 7,100 and as many as 24,700 vehicles pass the various Kwik Shop locations daily. There is nothing in the record indicating that granting the licenses would increase traffic to an unmanageable level.

The record also does not indicate that zoning restrictions pose a problem. The evidence establishes that the stores are all located in areas zoned for business or commercial use, and a zoning change would not be necessary to permit the sale of beer at the subject premises.

Lastly, we note that the record contains nothing adverse to Kwik Shop's showing that its sanitation and sanitary conditions at each store are favorable.

Viewed as a whole, the evidence establishes that the requested licenses are in the public interest. Thus, we reach the question of whether the evidence before us indicates that the licenses are or will be "required by the present or future public convenience and necessity" as required by § 53-132(2)(d). We believe that they are.

As we stated in both *Hy-Vee Food Stores* and *Gas 'N Shop*, combining the concept of public convenience and necessity with the sale of alcohol appears oxymoronic. However, the Legislature has deemed it appropriate to allow private establishments to sell alcoholic liquor in this state. The record indicates that many individuals might feel less comfortable buying off-sale beer at a local tavern or a full-service liquor store than at a convenience store. Further, there is no close approximation between the purchase of off-sale beer at a convenience store and the purchase and consumption of beer in an "on premises" establishment. See *Hy-Vee Food Stores, supra*. "Accordingly, convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the

State's policy of furthering temperance." *Gas 'N Shop*, 241 Neb. at 905, 492 N.W.2d at 12.

CONCLUSION

The record does not indicate a legitimate reason for denying Kwik Shop the requested licenses. We therefore reverse, and remand to the district court with directions that the licenses be issued.

REVERSED AND REMANDED WITH DIRECTIONS.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, A CORPORATION, APPELLANT, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLEE.

498 N.W.2d 333

Filed April 9, 1993. No. S-91-071.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Statutes: Motor Vehicles: Insurance.** The Motor Vehicle Safety Responsibility Act's omnibus clause, Neb. Rev. Stat. § 60-534 (Reissue 1988), applies only to motor vehicle liability policies which have been certified pursuant to Neb. Rev. Stat. §§ 60-528 to 60-531 (Reissue 1988).
3. _____: _____: _____. The omnibus clause of Neb. Rev. Stat. § 60-534 (Reissue 1988) applies only to owners and operators of motor vehicles who must certify their motor vehicle liability policy in order to reinstate an operator's license or registration which has been suspended or revoked for failure to pay a judgment.
4. _____: _____: _____. One instance where certification is necessary under the Motor Vehicle Safety Responsibility Act is when a person is attempting to reinstate his operator's license or owner's registration for failure to pay a judgment. A person must stay, satisfy, or discharge the judgment and present a certificate of insurance which certifies that he has a motor vehicle policy which insures the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured.

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

Jack Zitterkopf and John B. McDermott, of McDermott, Depue & Zitterkopf, for appellant.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

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

LANPHIER, J.

Platte Valley Auto Mart, Inc. (Auto Mart), loaned Jenny Wichelt a 1988 Dodge Aries K while her own car was being repaired. While in Wichelt's custody, the loaner car was damaged to the extent of $5,581.79. Auto Mart's insurer, Universal Underwriters Insurance Company, plaintiff-appellant, paid Auto Mart for the damage and sought to subrogate against Wichelt's insurer, Farm Bureau Insurance Company of Nebraska, defendant-appellee, in the district court for Dawson County. Plaintiff later dismissed the subrogation claim and initiated a declaratory judgment action to determine whether under the terms of its insurance policy it could maintain such a subrogation claim. This is an appeal from a declaratory judgment against plaintiff. We reverse the judgment and remand the cause.

FACTS

The case was submitted on stipulated facts. Plaintiff's insured is Auto Mart, a licensed automobile dealer engaged in the business of selling and repairing autos. On December 1, 1988, defendant's insured, Wichelt, brought her vehicle into Auto Mart for repair. Auto Mart loaned Wichelt a 1988 Dodge Aries K for her use while her vehicle was being repaired. This loaner car was not registered separately by Auto Mart, but was operated under dealer plates.

Later that same day, Wichelt lost control of the loaner car and landed in a ditch. The vehicle sustained damage in the amount of $5,581.79. After reimbursing Auto Mart for the damage, plaintiff presented Wichelt and her insurance carrier, defendant, with its subrogation claim for the amount stated above.

The issue presented to the district court was whether Wichelt

was an insured under plaintiff's policy covering Auto Mart. The insurance policy covering Auto Mart provides several definitions for the word "insured" which are relevant in this case.

Coverage Part 900 includes coverage for injury and physical damage for losses sustained out of the use of an "OWNED AUTO" or a "TEMPORARY SUBSTITUTE AUTO."

Coverage Part 500 defines insured with respect to "AUTO HAZARD," in part, as "[a]ny other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission."

Additional definitions in the insurance policy will be provided as necessary for the discussion and resolution of the issues.

The district court found that plaintiff could not maintain a subrogation action against defendant's insured because she was an insured person under plaintiff's policy and that under those circumstances, defendant's coverage was excess to plaintiff's coverage on the vehicle. Plaintiff contends the district court erred (1) in finding that Wichelt was an insured under plaintiff's policy of insurance and that therefore a subrogation action against her was untenable and (2) in finding and declaring that defendant's coverage was excess to that of plaintiff.

STANDARD OF REVIEW

Whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 496 N.W.2d 766 (1991). Here, plaintiff seeks a declaratory judgment permitting it to pursue its subrogation rights against defendant's insured. Subrogation is an equitable doctrine applied in order to avoid unjust enrichment when one party has discharged an obligation which should have been satisfied in whole or in part by another. *Reese v. AMF-Whitely*, 420 F. Supp. 985 (D.C. Neb. 1976). Although the parties in this action contracted for subrogation rights, "[I]f a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable

principles control subrogation." *Shelter Insurance Co. v. Frohlich, ante* p. 111, 118, 498 N.W.2d 74, 79 (1993). Thus, the nature of the dispute is in equity, and equitable principles apply.

In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Waite v. A. S. Battiato Co., supra*; *Citizens State Bank v. Jennings State Bank*, 236 Neb. 307, 461 N.W.2d 78 (1990); *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990). However, this case was tried on stipulated facts.

The trial court found generally for defendant and found that Wichelt was an insured under plaintiff's policy. The trial court did not specify under which coverage Wichelt was an insured.

The relevant coverages under which plaintiff insured Auto Mart were the basic auto coverage (Coverage Part 900) and the garage coverage (Coverage Part 500).

COVERAGE PART 900

Wichelt does not fall under the provisions of the Coverage Part 900. Under that coverage, plaintiff agreed to pay "all sums the INSURED legally must pay as damages . . . because of INJURY to which this insurance applies, caused by an OCCURRENCE arising out of the ownership, maintenance, use loading or unloading of an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO."

This coverage names as an insured "any other person using an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO within the scope of YOUR permission." The Dodge Aries K does not fall under the definition of either owned auto or temporary substitute auto.

OWNED AUTO

The general conditions section of the policy indicates that each word written in all capital letters is ascribed a specific

meaning under that coverage. In order to fall under the definition of owned auto under Coverage Part 900, the Dodge Aries K would have to be scheduled in the declarations for that coverage part. It is not listed among the autos which are covered under Coverage Part 900.

TEMPORARY SUBSTITUTE AUTO

The vehicle also does not fall under the definition of temporary substitute auto provided by Coverage Part 900: " 'TEMPORARY SUBSTITUTE AUTO' means an AUTO YOU or a member of YOUR household do not own or LEASE, when it is used temporarily with the owner's permission to replace an OWNED AUTO which is out of service due to its repair, servicing, loss or destruction."

The words "you" and "your" are defined as the person or organization shown in the declarations as the named insured. The definition of temporary substitute auto contemplates the named insured's use of another's vehicle when the owned auto is out of service. The facts of the instant case are different. The vehicle being used was owned by Auto Mart. By definition, the Dodge Aries K was not a temporary substitute auto. In light of the foregoing, Wichelt was not an insured under Coverage Part 900.

COVERAGE PART 500

The other provision under which defendant claims that Wichelt is an insured is Coverage Part 500. Auto Mart's policy provides that the insurance carrier will pay any sum the "INSURED legally must pay as damages . . . because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS or AUTO HAZARD." Auto hazard, as defined under this section, refers, in part, to the use of any auto owned by the named insured which is "furnished for the use of any person or organization."

Coverage Part 500 is the applicable coverage in this case because the Dodge Aries K was furnished to Wichelt by the plaintiff's insured, who owned the vehicle. However, plaintiff is only obligated to pay sums for which the insured is liable. With

respect to auto hazard, the coverage designates as an insured "[a]ny other person or organization *required by law* to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission." (Emphasis supplied.)

MUST WICHELT BE AN INSURED UNDER STATE LAW?

The relevant statute in this case is the Motor Vehicle Safety Responsibility Act, as set out in Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988). Section 60-534 requires an insurance policy to insure the person named in the policy as well as any person who drives the insured vehicle with the permission of the named insured. Section 60-561 states in relevant part that "nor shall sections 60-516 to 60-544 apply to any automobile liability policy which has not been certified as provided in sections 60-528 to 60-531 as proof of financial responsibility." This court must determine whether plaintiff was required to insure Wichelt under § 60-534 or whether it was exempt from such a requirement pursuant to § 60-561.

CERTIFICATION

This court in *State Farm Mut. Auto Ins. v. Pierce*, 182 Neb. 805, 157 N.W.2d 399 (1969), stated that Nebraska had no general omnibus clause and that the act had been amended to apply only to automobile liability policies which had been certified as provided by §§ 60-528 to 60-531. See, also, *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 493 N.W.2d 171 (1992). The question arises as to which automobile policies must be certified and what constitutes certification.

WHEN IS CERTIFICATION NECESSARY?

Sections 60-507 and 60-508 address the security that must be provided by an operator of a vehicle involved in an accident. When a person is involved in an accident which results in bodily injury or property damage in excess of $500, § 60-507 permits the Department of Motor Vehicles to suspend the person's driving privilege unless that person provides security to satisfy any judgment against him. Section 60-508 forgoes the

depositing of security if, in one instance, the owner or operator provides proof that he has an automobile liability policy in effect.

The second situation where proof of financial responsibility is required under the act involves a person whose license has been revoked or suspended for failure to pay a judgment against him. See §§ 60-516 to 60-527. In order to reinstate the operator's license or an owner's registration for failure to pay the judgment, the person must stay, satisfy, or discharge the judgment and show proof of financial responsibility. § 60-519. A person may demonstrate proof of financial responsibility under § 60-528 in several ways. One method is to file a certificate of insurance which certifies that there is a "motor vehicle liability policy," not an "automobile liability policy" as required by § 60-508, for the benefit of the person required to show proof of financial responsibility.

Section 60-533 specifically defines a motor vehicle liability policy as one certified as provided in §§ 60-529 to 60-531. Pursuant to § 60-534, this motor vehicle liability policy must insure the person named therein "and any other person, *as insured*, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured . . . ." (Emphasis supplied.) This provision is known as the omnibus clause.

Section 60-561 states that §§ 60-516 to 60-544 shall not apply to "any automobile policy which has not been certified as provided in sections 60-528 to 60-531 as proof of financial responsibility." Thus, the omnibus clause of § 60-534 applies only to owners and operators of motor vehicles who must certify their motor vehicle liability policy in order to reinstate their operator's license or registration which has been suspended or revoked for failure to pay a judgment.

In this case, no evidence has been presented that Auto Mart was required to, nor that it did, certify its automobile policy under §§ 60-528 through 60-531. Therefore, Wichelt was not covered as an insured under the auto hazard provision of plaintiff's policy, because plaintiff was not required by law to be an insured.

PROOF OF INSURANCE REQUIRED TO REGISTER LOANER CAR?

Defendant claims that plaintiff was nevertheless required to insure Wichelt, because under Neb. Rev. Stat. § 60-302 (Reissue 1988), "[a]ll applications for registration of motor vehicles shall be accompanied by proof of financial responsibility . . . or by a certificate or policy of insurance." However, according to the stipulated facts, although Auto Mart held the certificate of title on the Dodge Aries K, the vehicle was not registered separately by Auto Mart, but was operated under dealer plates. Neb. Rev. Stat. § 60-320 (Reissue 1988) provides in part:

> (1) Each licensed dealer in motor vehicles . . . doing business in this state in lieu of the registering of each motor vehicle or trailer which such dealer owns of a type otherwise required to be registered . . . may (a) operate or move the same upon the streets and highways of this state solely for purposes of transporting, testing, demonstrating, or use in the ordinary course and conduct of his or her business as a motor vehicle or trailer dealer . . . .
>
> (2) . . . Motor vehicles or trailers owned and held for sale by such dealer and bearing such dealer number plates may be driven upon the streets and highways for a period of forty-eight hours as service loaner vehicles by customers having their vehicles repaired by the dealer.

Auto Mart was exempt from registering the Dodge Aries K under § 60-320 because it was a licensed dealer. As such, plaintiff was not required to present an insurance policy as proof of financial responsibility and not required by law to insure Wichelt.

CONCLUSION

Since Wichelt was not an insured as provided by either of the applicable coverages, the trial court was incorrect in finding that she was an insured under plaintiff's policy and in holding that plaintiff could not maintain a subrogation action against defendant and Wichelt. Both parties have clauses within their policies that state they are in excess over any other insurance.

However, because Wichelt was not an insured under plaintiff's policy, the coverage provided by her own insurance carrier, defendant, was primary to plaintiff's insurance policy covering Auto Mart.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILFRED W. NIELSEN, APPELLANT.

498 N.W.2d 527

Filed April 9, 1993. No. S-91-1199.

1. **Effectiveness of Counsel.** Assistance of counsel means effective assistance of counsel.
2. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
3. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing at a bench trial for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
4. **Postconviction: Effectiveness of Counsel: Proof.** When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
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 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.
6. **Criminal Law: Mental Competency.** To be found sane under the *M'Naghten* rule, a defendant must have (1) the capacity to understand the nature of the act alleged to be criminal and (2) the ability to distinguish between right and wrong with respect to such act.
7. **Constitutional Law: Effectiveness of Counsel.** The Sixth Amendment guarantee

of the right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

8. **Trial: Appeal and Error.** A defendant cannot elect a particular trial strategy and then complain if it proves unsuccessful.
9. **Trial: Effectiveness of Counsel.** The fact that a trial strategy adopted by defense counsel (and the defendant) proves to be unsuccessful in that the defendant is convicted does not alone sustain a finding of ineffectiveness of counsel.
10. **Appeal and Error.** A defendant cannot complain of error which the defendant invited the court to commit.
11. **Effectiveness of Counsel.** The ineffectiveness of counsel will not be judged by hindsight.
12. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
13. **Effectiveness of Counsel.** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
14. **Intent: Evidence: Weapons.** Malice may be inferred from the shooting of another person with a deadly weapon.
15. **Intent: Words and Phrases.** Malice is the intentional doing of a wrongful act without just cause or excuse.
16. **Homicide: Intent: Evidence.** The location, nature, and number of wounds inflicted are circumstances from which a jury may draw the inference that a killing is done with deliberate and premeditated malice.
17. **Intent: Evidence.** Malice may be inferred from words passing between defendant and victim.
18. **Criminal Law: Trial: Evidence: Convictions: Appeal and Error.** In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.
19. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
20. **Criminal Law: Trial: Jury Instructions: Proof.** In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.
21. **Trial: Expert Witnesses.** The law is settled that the trier of fact is not obligated to take the opinion of an expert as binding upon it.
22. **Effectiveness of Counsel.** A defense attorney's duty is to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
23. **Trial: Witnesses: Effectiveness of Counsel.** A strategic decision to call, or not to call, particular witnesses will not, without more, sustain a finding of

ineffectiveness of counsel.

24. **Effectiveness of Counsel: Appeal and Error.** The court will not second-guess reasonable strategic decisions made by defense counsel.
25. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
26. **Effectiveness of Counsel: Confessions: Evidence.** The failure of counsel to investigate or move to suppress a questionable confession is not per se ineffective assistance of counsel if it can be shown from the record that the evidence is so overwhelming against the defendant that failure to investigate or suppress the confession was a reasonable strategic move by counsel or that the defendant suffered no prejudice from counsel's inaction.
27. **Effectiveness of Counsel.** The adequacy of counsel cannot be determined solely on the basis of the amount of time counsel spent interviewing a client.

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

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

Wilfred W. Nielsen, pro se.

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

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

FAHRNBRUCH, J.

Claiming he had ineffective assistance of counsel at his trial, Wilfred W. Nielsen, who is serving a life prison sentence for the November 19, 1977, shooting death of his father-in-law, Edward Grabbe, prays in this postconviction action (1) that his conviction be set aside and (2) that he be discharged or resentenced or granted a new trial, as may appear appropriate.

On his direct appeal, Nielsen's conviction and sentence for first degree murder were affirmed. See *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979) (*Nielsen I*).

After a thorough review of the record, we agree with the postconviction relief trial judge that Nielsen is entitled to no relief on his postconviction relief motion.

ASSIGNMENTS OF ERROR

In his assignment of error in this court, Nielsen simply

claims, "The [postconviction] court erred in finding that [Nielsen] received effective assistance of [trial] counsel thereby overruling and dismissing [Nielsen's] motion for post conviction relief."

Nielsen's 46-page, 162-paragraph motion for postconviction relief filed in the district court for Washington County alleges numerous ways in which he claims his trial counsel was ineffective. The Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution guarantee a criminal defendant the right to assistance of counsel. "The United States Supreme Court and this court have held that the term 'assistance of counsel' means '*effective*' assistance of counsel." *State v. Stewart*, 242 Neb. 712, 719, 496 N.W.2d 524, 528-29 (1993), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989).

In this appeal, Nielsen basically argues that his trial counsel was ineffective in (1) making a deliberate decision to pursue a "non-existing insanity defense," brief for appellant at 8, thus allowing a State's expert psychiatric witness to describe to the jury Nielsen's guilt of first degree murder and in effect admitting Nielsen's guilt, confusing the jury as to the only defense available to Nielsen (lack of intent), and allowing prejudicial excludable evidence to be considered by the jury; (2) failing to object to an insanity instruction when the defense had introduced no evidence of insanity, unnecessarily confusing the jury, to Nielsen's prejudice; (3) failing to fully investigate and present all possible defenses available; (4) failing to move for a continuance of the trial to investigate testimony of certain witnesses; (5) failing to object to the introduction of certain evidence; (6) failing to properly prepare for trial; and (7) failing to request a manslaughter instruction.

In a pro se brief, Nielsen asserts that the postconviction relief court erred in failing to find that Nielsen's trial counsel had labored under a conflict of interest and therefore had provided Nielsen with ineffective assistance of counsel. Nielsen's trial counsel testified at the postconviction hearing that he had no conflict of interest with Nielsen. Inherent in the postconviction court's holding is a finding that Nielsen had failed to prove that

his trial counsel had a conflict of interest with his client. Even Nielsen testified at his postconviction hearing that his conflict of interest claim was unproven. This assigned error needs no further discussion.

We have fully reviewed other ways not mentioned in the preceding two paragraphs that Nielsen argues that his trial counsel was deficient and find that Nielsen's arguments are without merit and do not require discussion. Neither Nielsen's argument nor his showing demonstrates a reasonable probability that, but for trial counsel's deficient performance, the result of Nielsen's trial would have been different. See *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992).

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Lyman, supra*; *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992).

In an evidentiary hearing at a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992) for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. See, *State v. Carter, supra*; *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991).

When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Lyman, supra*; *State v. Carter, supra*; *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

To sustain a claim of ineffective assistance of counsel as a

violation of the Sixth Amendment to the U.S. 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. See, *State v. Lyman, supra*; *State v. Sanders, supra*; *State v. Carter, supra*; *State v. Moss, supra*.

FACTS

Although this case has been the subject of a direct appeal, see *Nielsen I*, we recount those facts relevant to Nielsen's motion for postconviction relief. The evidence at Nielsen's trial, including his statements to officers and his own testimony, reflects the following:

On the morning of November 19, 1977, Nielsen, a professional hunter and owner of a commercial hunting club near Mondamin, Iowa, left his home in Blair, Nebraska, to hunt with club members. The group hunted until about 11 a.m. Nielsen testified that he was upset because his wife had refused to have sexual relations with him the previous night. He said he was further bothered by the fact that it was a bad hunting day.

An admitted alcoholic, Nielsen had not had an alcoholic drink since beginning alcohol treatment July 28, 1977. Nielsen related that after the hunt on November 19, he began thinking about drinking a beer. Fighting his urge to drink alcoholic beverages, Nielsen bypassed bars in Mondamin and Magnolia, Iowa. He did stop at a bar in Logan, Iowa, to buy a sandwich. He said that while he was in the bar, he had at least four or five cans of beer.

Upon leaving the Logan bar, Nielsen said, he drove back to Blair, where he stopped at another bar at approximately 12:30 p.m. Nielsen said he had another seven or eight beers, purchased two cans of beer to take with him, and left that bar around 3 p.m. He drove to a local service station, bought gasoline, and returned to his home.

Once at home, Nielsen said, he sat down and began drinking the beer he had taken home with him. He said his wife was very

upset to see him drinking. When she tried to discuss his drinking of alcoholic beverages with him, he shoved her onto a couch. Nielsen said he then went to a liquor store and purchased a half pint of cold whiskey. Upon returning home, Nielsen found his wife and infant daughter gone. Nielsen then drove to Tekamah to see if his wife was at her sister's home. Nielsen said he took backroads to avoid being picked up for drunk driving. He said he had two half pints of whiskey with him and admitted drinking en route to Tekamah.

Nielsen testified he did not recall the trip to Tekamah. His next recollection was sitting in the driveway of Edward and Opal Grabbes' farm near Spiker, Nebraska. The Grabbes were Nielsen's parents-in-law.

Nielsen entered the Grabbe home carrying a loaded automatic rifle. When fully loaded, the weapon held five bullets, one in the chamber and four in the magazine. Present in the Grabbe home were Edward and Opal Grabbe and their 21-year-old son, Rick. Rick Grabbe testified that a commotion in the Grabbe kitchen first drew his attention to Nielsen's being in the home. Rick's father went into the kitchen. While Edward Grabbe and Nielsen were in the kitchen, Rick saw Nielsen point his gun and fire it toward the floor. After Nielsen fired the shot, he said to Edward Grabbe, "See, it works." Nielsen called Edward Grabbe "a dirty god-damned son-of-a-bitch." Apparently, at some point, Nielsen laid his gun down temporarily and told Edward Grabbe, "*See, you've got me to back down and lay my gun down.*" The evidence reflects that Nielsen fired a second shot in the kitchen.

Rick Grabbe testified that after the second shot, his mother became hysterical and his father was concerned as to whether he should call a doctor. Nielsen, in a "command-type voice," then told Edward Grabbe, "Let's go outside." The elder Grabbe was dressed in work clothes and requested permission to put on his coveralls. Nielsen responded, "*You won't be needing them.*" After this exchange, Rick Grabbe ran upstairs to his bedroom. While examining his pistol to see if it was loaded, Rick heard a shot. His mother shouted, "Ricky, he shot Dad." Rick went out his bedroom window and onto a porch roof. As he was going out onto the roof, he heard another shot. He jumped from the

roof and hid under the porch until he heard Nielsen drive off. Then he went to check on his parents. Both appeared to be dead outside. Nielsen was subsequently charged with first degree murder in the death of Edward Grabbe and also with first degree murder as a result of the death of Opal Grabbe. After his trial for the murder of Edward Grabbe, Nielsen pled no contest to second degree murder for the killing of Opal Grabbe, for which he received a concurrent life sentence. When he entered his no contest plea, Nielsen specifically admitted, in response to a question from the judge, that he purposely and maliciously killed Opal Grabbe.

Before trial, Nielsen's counsel considered a possible insanity defense in regard to Edward Grabbe's death. He had Nielsen examined by four psychiatrists to determine whether Nielsen was legally sane under the *M'Naghten* rule at the time of the killing and whether Nielsen was competent to participate in his own defense. To be found sane under the *M'Naghten* rule, a defendant must have (1) the capacity to understand the nature of the act alleged to be criminal and (2) the ability to distinguish between right and wrong with respect to such act. See *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989).

All four psychiatrists concluded that Nielsen was sane under the *M'Naghten* rule at the time he killed his father-in-law. Nevertheless, Nielsen's counsel filed a notice of intent to rely on an insanity defense pursuant to Neb. Rev. Stat. § 29-2203 (Cum. Supp. 1976). The State then requested and was granted a court order to have Nielsen examined by the State's psychiatrist, Dr. William Bruns. Dr. Bruns, too, concluded in his report that Nielsen was legally sane at the time of Edward Grabbe's killing. He also detailed Nielsen's history of alcoholism and Nielsen's intoxication at the time he shot Grabbe.

At trial, the defense did not offer evidence of insanity on the part of Nielsen. However, the State introduced in its case in chief evidence of Nielsen's state of mind at the time Edward Grabbe was killed. At the time of Nielsen's trial, the State had the burden of proving beyond a reasonable doubt that Nielsen was not insane under the *M'Naghten* rule at the time he killed Edward Grabbe. See *State v. Russell*, 194 Neb. 64, 230 N.W.2d

196 (1975). Dr. Bruns testified in narrative form about the events of the day of the killing as related to him by Nielsen, and Dr. Bruns' written report was received into evidence, both without objection. Defense counsel had not sought to have either Dr. Bruns' testimony or his report suppressed prior to or at Nielsen's trial.

On cross-examination of Dr. Bruns, defense counsel was successful in obtaining corroboration of Nielsen's contention that he was intoxicated at the time Edward Grabbe was killed. Defense counsel was also able to elicit testimony from Dr. Bruns on the effects of chronic alcoholism generally, and its effects on Nielsen in particular. However, the jury convicted Nielsen of first degree murder in the death of Edward Grabbe. Nielsen was sentenced to life imprisonment.

In his postconviction motion, Nielsen claims that his trial counsel was deficient in making a deliberate decision to pursue a "non-existing insanity defense." Nielsen contends this decision allowed Dr. Bruns to describe to the jury Nielsen's guilt of first degree murder, thus in effect admitting Nielsen's guilt, confusing the jury as to the only defense available to Nielsen (lack of intent), and allowing prejudicial excludable evidence to be considered by the jury. At the postconviction hearing, Nielsen's trial counsel testified that notice of the insanity defense was a *trial strategy* to have a witness called by the State corroborate Nielsen's claim that Nielsen was intoxicated at the time he killed Grabbe and therefore could not form the requisite intent to commit first degree murder. Trial counsel further testified that before his trial, Nielsen had agreed with this strategy.

The district judge who presided at the postconviction evidentiary hearing, personally attended by Nielsen with his court-appointed counsel, found that Nielsen's

> [trial] counsel's performance was not deficient and, even if it was deficient, in whole or in part, there is no demonstration of a reasonable probability that but for [trial] counsel's deficient performance the result of the proceedings would have been any different.
>
> [Nielsen] was given a life sentence upon conviction and not the death penalty. While trial counsel was unable to

> secure conviction for a lessor [sic] offense, he was able to spare his client from the death penalty. He did so with two witnesses; one was a defense witness ([Nielsen]) and the other was a State's witness (Dr. [William] Bruns.)

The postconviction court further found:

> At the time of sentencing the trial court found that [Nielsen's] "capacity to appreciate the wrongfullness [sic] of his conduct or to conform his conduct to the requirement of the law was impaired as a result of intoxication" and that "had he not been intoxicated, he might have thought long enough before shooting to realize he should not follow through with the impulsive act." The [trial] [c]ourt noted in this regard that this "was taken right out of the doctor's report." Based on the trial court's findings at sentencing, the doctor's testimony was pivotable [sic].

The postconviction judge also found that Nielsen "has failed to show that [trial] counsel's performance was deficient and that he was prejudiced" and overruled Nielsen's postconviction relief motion.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

Nielsen urges that his trial counsel's performance was deficient under the standard enunciated by the U.S. Supreme Court in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Under *Cronic*, the Sixth Amendment guarantee of "[t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." 466 U.S. at 656.

The *Cronic* Court noted that counsel is presumed competent, but delineated three circumstances which are inherently prejudicial to the accused and under which ineffective assistance of counsel is presumed. First is when the accused is completely denied counsel at any critical stage of the proceedings. Second is the failure of counsel to subject the prosecution's case to meaningful adversarial testing. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347

(1974) (petitioner denied right of effective cross-examination)). Third, surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (counsel appointed within a few days of trial to defend several young, ignorant, illiterate defendants charged with a capital offense which had been highly publicized and which had aroused horror and hostility in the community)).

The record does not support a claim that the performance of Nielsen's counsel justifies the presumption of ineffectiveness as contemplated by *Cronic*. Nor can it be said that Nielsen's counsel failed to subject the State's case to meaningful adversarial testing or that the surrounding circumstances justify an inference of prejudice.

Upon the facts hereafter stated, we find that Nielsen's trial counsel's performance should not be presumed ineffective and prejudicial under *Cronic*. We will consider defense counsel's performance under the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the companion case to *Cronic*. Under *Strickland*, a defendant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense in such a way that the defendant was denied a fair trial, that is, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

INSANITY PLEA

Much of Nielsen's ineffective assistance of counsel claim attacks the decision to enter a plea of insanity 12 days before trial. Nielsen contends that there was no expert evidence that Nielsen was insane at the time of killing Edward Grabbe. Nielsen complains that by his counsel's filing a notice of intent to rely on an insanity defense, Nielsen in effect admitted all elements of the crime, thus relieving the State of its duty to prove all elements of first degree murder beyond a reasonable doubt. Additionally, Nielsen claims the State was then allowed to have Nielsen examined by a psychiatrist. Nielsen contends

that the psychiatrist's testimony included highly prejudicial and excludable evidence which would not otherwise have been placed before the jury.

Nielsen's trial counsel testified at the postconviction hearing that since Nielsen had admitted shooting Edward Grabbe, and in view of Rick Grabbe's testimony, Nielsen's only available defense was that due to his intoxication Nielsen was unable to form the requisite intent or premeditation required to convict him of first degree murder. Trial counsel testified that he thought it was to Nielsen's advantage to have corroborating testimony of Nielsen's intoxication come from an expert witness called by the State rather than from an expert paid by Nielsen. He reasoned that if the State's expert testified to Nielsen's intoxication, it would be difficult for the State to argue that Nielsen was not intoxicated. Trial counsel testified that there was no other witness to testify that Nielsen *was* intoxicated prior to, or at the time of, the shootings. In fact, Nielsen's counsel knew that the State would call numerous witnesses to testify that Nielsen *was not* intoxicated on the afternoon of November 19.

Nielsen's trial counsel testified that he informed his client of the proposed trial strategy and, with Nielsen's consent, trial counsel filed an insanity plea. At the time, Nielsen was told by his trial counsel that he would be examined by a psychiatrist selected by the State and that any statement he made to the State's psychiatrist could be used in court. This admonition was repeated by the psychiatrist before he examined Nielsen. At trial, as defense counsel predicted, the psychiatrist, based upon what Nielsen told him, did corroborate Nielsen's testimony that Nielsen was intoxicated at the time he shot and killed Grabbe.

By its verdict, it is obvious that the jury found beyond a reasonable doubt that Nielsen, at the time of shooting Edward Grabbe, had the capacity to, and did indeed, form the requisite intent to kill Grabbe, and that he did so with deliberate and premeditated malice. It is also obvious that the jury did not believe that Nielsen was intoxicated at the time of Grabbe's death, or that if he was intoxicated, the degree of Nielsen's intoxication did not prevent him from forming the intent to kill Grabbe or from killing Grabbe with deliberate and

premeditated malice.

A defendant cannot elect a particular trial strategy and then complain if it proves unsuccessful. *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984). The fact that a trial strategy adopted by defense counsel (and the defendant) proves to be unsuccessful in that the defendant is convicted does not alone sustain a finding of ineffectiveness of counsel. *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990). *Nielsen himself agreed at his postconviction hearing that his trial counsel was ineffective only to the extent that he was unable to convince 12 jurors that Nielsen did not intend to pull the trigger when he shot and killed Edward Grabbe.* The fact that trial counsel's strategy of using the State's expert witness to corroborate Nielsen's claimed lack of intent caused by his alleged intoxication was unsuccessful in convincing the jury that Nielsen was not guilty of first degree murder does not support a claim of ineffectiveness of counsel. As trial counsel testified, lack of intent due to intoxication was the only defense Nielsen had.

Assuming, but not deciding, that some of the testimony of the State's psychiatrist was excludable as Nielsen contends, he cannot complain about it after the fact. A defendant cannot complain of error which the defendant invited the court to commit. See *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991). The postconviction record reflects that Nielsen not only agreed with his trial counsel's strategy to use the State's expert to corroborate Nielsen's claim of intoxication at the time of his crime, but he took an active part in executing that strategy. By doing so, Nielsen participated in inviting any error in the admission of the testimony of the State's psychiatrist. Although Nielsen testified at his postconviction hearing that in hindsight, he would have liked to not have trial counsel file a notice of insanity, the ineffectiveness of counsel will not be judged by hindsight. See *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

This court has held that in determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. See *State v.*

Lyman, 241 Neb. 911, 492 N.W.2d 16 (1992). The two prongs of the *Strickland* test do not necessarily have to be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland, supra*. See, also, *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992); *State v. Wickline, supra*; *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992).

It is undisputed that Nielsen shot and killed Edward Grabbe. Nielsen himself admitted shooting Grabbe, and his brother-in-law witnessed all the events prior and up to the actual shooting. The principal issue at trial was whether Nielsen's alleged intoxication rendered him incapable of forming the intent or having the deliberate and premeditated malice necessary to convict him of first degree murder.

Nielsen contends that he was prejudiced when the State's expert psychiatric witness, Dr. Bruns, testified without objection that Nielsen had stated that "he aimed his gun and fired it" at Edward Grabbe and when Dr. Bruns' written report containing this statement was subsequently allowed to go to the jury. Nielsen argues that Dr. Bruns' testimony provided the only evidence of deliberate and premeditated malice and of intent, elements which were necessary under Nebraska law to convict Nielsen of first degree murder. We disagree. The record is replete with evidence proving these elements. Nielsen himself testified that he was upset with his wife the day he went to his in-laws' home. There was testimony by Nielsen and other witnesses that the relationship between Nielsen and his in-laws had not been good for a variety of reasons, among which was Nielsen's drinking. Even without Dr. Bruns' testimony, deliberate and premeditated malice, as well as intent, could be inferred beyond a reasonable doubt by the jury from other evidence of Nielsen's actions and statements on the day of the killing.

Malice may be inferred from the shooting of another person with a deadly weapon. *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965). "Malice" is the intentional doing of a wrongful act without just cause or excuse. *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). Nielsen was a commercial hunter who was familiar with guns and the applicable safety

rules. Obviously the safety on his loaded automatic rifle was not engaged as Nielsen stood in the kitchen of the Grabbe home, because the gun was fired. Nielsen testified that the shot was accidental, although Rick Grabbe's testimony indicates otherwise. From the facts, a jury could conclude beyond a reasonable doubt that Nielsen was put on notice that the safety on his rifle was not engaged, and that he either did not engage the safety because he still intended to use the weapon or that he did engage the safety and disengaged it to shoot and kill Edward Grabbe. Given Nielsen's familiarity with guns, and the ease with which an accidental firing could have been prevented, the fact that Nielsen did nothing to prevent further "accidental" firings and eventually shot his father-in-law and, after an interval of time, shot his mother-in-law with a deadly weapon is further evidence from which the jury could conclude beyond a reasonable doubt that Nielsen did intend to kill Edward Grabbe with deliberate and premeditated malice.

The location, nature, and number of wounds inflicted are circumstances from which a jury may draw the inference that a killing is done with deliberate and premeditated malice. *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). Nielsen was admittedly a "fairly good shot" and killed Grabbe with a single bullet to the head and then killed Opal Grabbe. These are circumstances which would permit a jury to infer beyond a reasonable doubt that Nielsen intentionally killed Grabbe with deliberate and premeditated malice. There is no evidence that either Edward Grabbe or his wife was armed when they were shot.

Malice may be inferred from words passing between defendant and victim. See, *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991); *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975). Rick Grabbe testified at trial that he saw Nielsen *point his rifle toward the kitchen floor and fire it*, after which Nielsen stated, "See, it works." He heard Nielsen call Edward Grabbe "a dirty god-damned son-of-a-bitch." Apparently, at some point, Nielsen temporarily laid his gun down and told Grabbe, "*See, you've got me to back down and lay my gun down.*" Nielsen, "in a command-type voice," told his father-in-law, "Let's go outside." When the elder Grabbe

requested permission to put on his coveralls, Nielsen responded, "*You won't be needing them*."

In contrast to Rick Grabbe's clear testimony regarding events on the day of the killing, Nielsen testified that his memory of the day's events was "vague." He frequently answered questions both on direct and cross-examination by saying he did not "recall" or did not "remember." Nielsen's testimony in his own defense, and particularly as to what occurred as he and Grabbe walked outside, was often contradictory. For example, Nielsen testified on direct examination that he was the first to start down the steps outside the back of Grabbe's house. On cross-examination, Nielsen testified that it was possible that Grabbe started down the steps first.

Nielsen's testimony at his postconviction hearing, at which time he claimed that his memory was much improved, was inconsistent with his trial testimony. Nielsen testified at his trial that Grabbe pushed or shoved into him as they went out the door, that Nielsen began to fall on the steps, and that as Nielsen turned, his rifle fired accidentally. At his postconviction hearing, Nielsen stated that he clearly remembers that it was Grabbe who walked out of the house first. There was evidence that Nielsen said that Grabbe grabbed for Nielsen's gun and that the two struggled. At the postconviction hearing, Nielsen claimed that there was no struggle over the gun. Instead, Nielsen claimed that he stumbled while walking out and unintentionally shot Grabbe when Grabbe reached to steady him.

None of this, of course, explains why Nielsen would have then proceeded to shoot and kill Opal Grabbe. Nielsen claimed at trial that he could not remember killing his mother-in-law after he killed her husband. At Nielsen's trial, evidence of the killing of Opal Grabbe was admitted for the limited purpose of showing the intent or motive of Nielsen in killing Edward Grabbe, and the jury was so instructed. Nielsen's killing of Opal Grabbe was further evidence from which the jury could have inferred beyond a reasonable doubt that Nielsen intentionally shot Edward Grabbe.

Finally, while at his postconviction hearing Nielsen continued to deny "aiming" the weapon at Grabbe, he

nevertheless admitted that he was intentionally "pointing" the loaded rifle at Grabbe. The difference between "aiming" and intentionally "pointing" a loaded rifle is insignificant in determining intent under the circumstances of this case. Nielsen's own postconviction testimony makes it clear that he was not prejudiced by Dr. Bruns' testimony that Nielsen "aimed" his rifle at Grabbe.

In *State v. Coleman*, 239 Neb. 800, 814-15, 478 N.W.2d 349, 358 (1992), this court held:

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

Even if Dr. Bruns' testimony that Nielsen said he "aimed his gun and fired it" at Grabbe was inadmissible to show deliberate and premeditated malice or intent and was improperly admitted into evidence through ineffectiveness of trial counsel, there was other, properly admitted, overwhelming direct and circumstantial evidence of Nielsen's intent and his deliberate and premeditated malice to support his conviction. The admission of Dr. Bruns' testimony to which Nielsen objects was harmless error beyond a reasonable doubt. Therefore, Nielsen has failed to demonstrate a reasonable probability that, but for the admission of the testimony of the State's expert psychiatric witness, the outcome of his trial would have been different.

INSANITY INSTRUCTION

Nielsen also claims that his trial counsel was ineffective for failing to object to an insanity instruction given by the trial court when the defense had introduced no evidence of insanity

and that the instruction was unnecessarily confusing to the jury, to his prejudice. Nielsen cites *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984), in support of this claim.

In *Vosler*, the defendant pled not guilty to a charge of first degree murder but did not file a written notice of intention to plead not responsible by reason of insanity. At trial, the defendant introduced two expert witnesses who testified as to the defendant's inability to form the requisite intent for first degree murder. The State then introduced the testimony of its own expert witness on the element of intent.

The court instructed the jury that one option was to find the defendant not responsible by reason of insanity. The court further instructed the jury that intent was an element of both first and second degree murder. The defendant objected to the giving of the insanity instruction, which objection was overruled.

The defendant was convicted of second degree murder, and on appeal assigned as one error the giving of the insanity instruction. He argued that insanity was never an issue in his case and that his expert testimony was directed only toward showing that his act of killing was not one of premeditated malice. This court reversed Vosler's conviction, stating:

> Defendant correctly argues that any instruction concerning an *unpled and unproved* insanity defense is likely to confuse a jury as to the proper role the evidence concerning the defendant's mental condition is to play in its determinations. The insanity defense instruction should not have been given.

(Emphasis supplied.) *Vosler*, 216 Neb. at 469, 345 N.W.2d at 811.

Nielsen's case is distinguishable from *Vosler*. Nielsen's insanity defense was not unpled. To the contrary, Nielsen raised the issue of his insanity prior to trial in accordance with the requirements of § 29-2203 (Cum. Supp. 1976), the statute then in effect. Although all defendants are presumed sane, the law at the time of Nielsen's trial was that if *any evidence* tending to show a defendant's insanity was adduced by either the defendant or the State, the State had the burden of convincing the jury beyond a reasonable doubt of the defendant's sanity as

one of the elements necessary to establish guilt. See *Thompson v. State*, 159 Neb. 685, 68 N.W.2d 267 (1955).

In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged. *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989). Therefore, the question before this court is whether there was any evidence adduced by either Nielsen or the State tending to show that Nielsen was insane at the time he killed Grabbe, so as to justify the giving of an insanity instruction.

Dr. Bruns, an expert witness called by the State, testified that Nielsen was able to understand and appreciate the nature and quality of his actions and that Nielsen knew right from wrong. Thus, according to Dr. Bruns' testimony, Nielsen was legally sane. However, the law is settled that the trier of fact is not obligated to take the opinion of an expert as binding upon it. See, *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990); *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990).

There was other evidence adduced at trial from which a jury might have concluded that Nielsen was legally insane. The report of a neurologist which was entered into evidence by the State indicated that Nielsen at one time had been kicked in the head and had been unconscious. He had a history of blackouts when he was intoxicated. Nielsen's history also included ingestion of Sominex in the summer of 1977 and during the 2 weeks prior to Edward Grabbe's killing. The report further noted in regard to the side effects of scopolamine, an ingredient of Sominex:

> The patient may be restless, excited, confused and exhibits weakness, giddiness and muscular incoordination. The behavior and mental symptoms may suggest an *acute organic psychosis. Memory is disturbed.* Orientation is faulty. Hallucinations (especially visual) are common. The sensorium is clouded, and mania and delirium are not uncommon. The diagnosis of an acute schizophrenic episode or alcoholic delirium has mistakenly been made in some patients.

(Emphasis supplied.)

Nielsen testified of memory lapses the afternoon of Edward

Grabbe's killing. He could not recall the details of driving to his sister-in-law's house in Tekamah or driving to the Grabbe farm. He did not remember killing Opal Grabbe. His recollection of other events that day was "hazy," and his thinking was "upset."

Additionally, Dr. Bruns' report which was received into evidence reported Nielsen as saying that he felt like "passing out" inside the Grabbe house. That report also stated that Nielsen said that when Nielsen's gun discharged, killing Edward Grabbe, it was "like total pitch black" and that Nielsen had no further recollection of events until he found himself "on the other side of the river" in his pickup truck.

Presented with the above evidence, a jury could logically conclude, although Nielsen's jury obviously did not, that Nielsen was suffering from an earlier head injury, from an alcoholic blackout, or from a drug-induced psychosis at the time he killed Edward Grabbe, and that the State had failed to prove Nielsen's sanity beyond a reasonable doubt. There being evidence to support an insanity instruction, it was not error to so instruct the jury, and Nielsen was not prejudiced by trial counsel's failure to object to such an instruction.

INVESTIGATION OF POSSIBLE DEFENSES

Next, Nielsen claims that his trial counsel failed to fully investigate and present all possible defenses of law and fact in a proper and timely manner. Examined more closely, Nielsen's argument is really complaining that counsel did not obtain expert witnesses to (1) construct alternate theories of how the shooting of Grabbe could have occurred and (2) testify as to the effect of Nielsen's alcoholism. Nielsen believes such witnesses could have provided testimony to negate the element of intent.

Specifically, Nielsen alleges that a firearms expert or a pathologist could have conducted examinations or tests to disprove the State's allegation that Nielsen raised his rifle to his shoulder, aimed it, and fired it at Grabbe, particularly in regard to the distance of the gun from the entrance wound and the angle of the gun in relation to the path of the fatal bullet through Grabbe. However, in a letter entered into evidence by Nielsen at his postconviction hearing, pathologist Dr. Vincent Dimaio stated that he was unable to contradict the conclusions

of Dr. Jerry Jones, the State's pathologist who performed an autopsy upon Grabbe's body and who testified at Nielsen's trial. Dr. Dimaio further stated that to determine the exact distance from which a gun will produce characteristic marks at an entrance wound, it is necessary to test the weapon in question. That could not be done in this case because Nielsen disposed of the murder weapon in the Missouri River on the way home after killing the Grabbes. The gun has never been recovered.

Dr. Jones testified at the postconviction hearing that it is difficult to accurately determine the trajectory of a bullet in a head wound because of the mobility of the head. Dr. Dimaio's letter was in agreement with Dr. Jones' testimony.

Nielsen's trial counsel testified at the postconviction hearing that he did not hire pathology or firearms experts on Nielsen's behalf because in his opinion, they would not have benefited Nielsen. Nielsen has presented no evidence that such expert testimony would in any way negate an intentional shooting of Grabbe. Based upon the available facts, neither pathologist would speculate as to how Grabbe's gunshot wound occurred.

Nielsen also argues that trial counsel should have obtained an expert witness to testify as to the effects of Nielsen's alcoholism. The record shows that Dr. Bruns testified extensively as to Nielsen's intoxication and the effect that such intoxication could have had on Nielsen's ability to deliberate on his actions and their consequences. As previously stated, Nielsen's trial counsel, with the agreement of Nielsen, deliberately used the State's witness to show Nielsen's intoxication because he believed such testimony would be more effective than the testimony of a paid defense witness. Although Nielsen entered the deposition of an alcohol counselor into evidence at his postconviction hearing, he has failed to show that such an expert could have testified to anything more than Dr. Bruns did at trial.

A defense attorney's duty is to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *State v. Ryan*, 233 Neb. 151, 444 N.W.2d 656 (1989); *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988). A strategic decision to call, or not to call, particular witnesses will not, without more, sustain a finding of

ineffectiveness of counsel. See, *State v. Jones*, 241 Neb. 740, 491 N.W.2d 30 (1992); *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). The court will not second-guess reasonable strategic decisions made by defense counsel. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992).

Nielsen has made no showing that any expert witnesses would have been of benefit to his defense, and he therefore suffered no prejudice by his counsel's decision not to call such experts. Defense counsel's decisions in this regard appear to be reasonable under the circumstances and do not support a claim of ineffectiveness.

FAILURE TO OBTAIN CONTINUANCE

Nielsen claims that his trial counsel was deficient in failing to request a continuance or postponement of his trial due to the State's late endorsement of three witnesses. In Nielsen's direct appeal, he alleged that the trial court erred in permitting the late endorsement of these witnesses. See *Nielsen I*. Although Nielsen correctly states that this court took note of the fact that there had been no motion for continuance, he ignores the court's holding that he was not prejudiced by the testimony of any of these three witnesses. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), *cert. denied* ____ U.S ____, 111 S. Ct. 2279, 115 L. Ed. 2d 965. We abide by our previous holding and decline to reexamine the issue.

FAILURE TO OBJECT TO EVIDENCE

Nielsen asserts that certain statements he made to law enforcement officials while in the Washington County jail were made involuntarily and therefore suppressible. He claims that trial counsel was ineffective for failing to file motions to suppress such statements and for failing to object to the admission of the statements into evidence. The record shows that Nielsen asked why he was being arrested and whom he had killed when he was arrested on the day of the killings. On the day following his arrest, Nielsen told the sheriff that he did not remember shooting "the woman" but would show the sheriff

where he had thrown the gun. The weapon was never found. Later that same day, Nielsen went with the sheriff, a State Patrol investigator, his own attorney, and the county attorney to the site where he had thrown the gun into the river. Still later that day, Nielsen requested to call his wife and told the sheriff that he wanted to tell her "[he] didn't mean to." On December 21 Nielsen told a deputy sheriff, "The first one was an accident. I don't remember shooting the woman."

Nielsen maintains that these statements were coerced from him in response to his requests to use the telephone. However, the sheriff testified at Nielsen's postconviction hearing that Nielsen's statements were voluntary, having been initiated by Nielsen himself. By denying Nielsen postconviction relief, the postconviction hearing judge resolved this factual dispute against Nielsen and was not clearly wrong in so doing.

The failure of counsel to investigate or move to suppress a questionable confession is not per se ineffective assistance of counsel if it can be shown from the record that the evidence is so overwhelming against the defendant that failure to investigate or suppress the confession was a reasonable strategic move by counsel or that the defendant suffered no prejudice from counsel's inaction. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992).

None of Nielsen's pretrial statements were necessary for his conviction, and some were cumulative to his testimony at trial. If we assume that any of Nielsen's statements to the sheriff and a deputy sheriff constituted a confession, and if we further assume that such statements were inadmissible, the error in receiving the statements was harmless beyond a reasonable doubt because, as previously noted, the other evidence produced by the State overwhelmingly established the defendant's guilt of the charges of which he was convicted. See, *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989); *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988). Nielsen has failed in his burden to show that his trial counsel's inaction prejudiced his defense in such a way as to change the outcome of his trial.

FAILURE TO PROPERLY PREPARE FOR TRIAL

Nielsen contends that his trial counsel failed to properly prepare for trial because he met with Nielsen only once before trial, and that was on the eve of the trial itself. Other evidence of counsel's failure to prepare for trial cited by Nielsen includes a failure to object to certain exhibits and failure to cross-examine Dr. Bruns until 2 days after the State's direct examination of that witness.

The record does not support Nielsen's claim that trial counsel met only on the eve of trial with Nielsen. Nielsen's trial counsel testified at the postconviction hearing that he initially interviewed Nielsen at the Washington County jail 2 or 3 days after Nielsen was arrested. Although he had no idea of the total number of times he interviewed Nielsen, he stated he had "frequent interviews" with Nielsen during trial preparation. For a time, Nielsen was held in the Sarpy County jail. The Sarpy County jail telephone log entered into evidence showed numerous phone calls from Nielsen to trial counsel's law firm. The individual who was a Sarpy County deputy sheriff at the time Nielsen was incarcerated at the Sarpy County jail testified that incoming calls to Nielsen were not logged, nor were phone calls made by Nielsen at times he had unlimited access to a telephone in his cell, so any additional calls made to Nielsen from his counsel, or from Nielsen to his counsel, would not be reflected in the log.

The adequacy of counsel cannot be determined solely on the basis of the amount of time counsel spent interviewing a client. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156. Nielsen has failed to establish that his trial counsel spent an inadequate amount of time with him in preparing for trial. Neither has Nielsen shown that he was prejudiced by counsel's failure to spend additional time with him.

As to Nielsen's complaint that trial counsel failed to cross-examine Dr. Bruns in a timely fashion, the record shows that direct examination of Bruns was not completed until 5:15 p.m. on April 19, 1978, at which time Nielsen's trial counsel felt it was too late to begin cross-examination. Cross-examination was then scheduled for April 21 at 9 a.m., the next time Dr.

Bruns was available. Nielsen has made no showing as to how this delayed cross-examination of Dr. Bruns operated to his prejudice. In fact, the delay allowed Nielsen's counsel to obtain a transcribed copy of Dr. Bruns' direct examination and to cross-examine Dr. Bruns on his testimony line by line, carefully eliciting corroboration of Nielsen's claimed intoxication and evidence of its effect on Nielsen's ability to formulate the intent to commit first degree murder. This conduct by Nielsen's trial counsel does not support an ineffectiveness of counsel claim.

INVOLUNTARY MANSLAUGHTER DEFINITION AND INSTRUCTION

Next, the defendant claims that his counsel was ineffective because he failed to request an instruction defining involuntary manslaughter and explaining the difference between voluntary and involuntary manslaughter. The record reflects that the jury was instructed on murder in the first degree, murder in the second degree, and manslaughter. At the time of Nielsen's trial, Neb. Rev. Stat. § 28-403 (Reissue 1975) provided, "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter . . . ." This court recently held in *State v. Carter*, 241 Neb. 645, 659, 489 N.W.2d 846, 857 (1992):

> By finding the defendants guilty of the greater offense, first degree murder, the jury not only determined that the defendants had *intentionally* killed the victim, but it also found that the defendants killed the victim *purposely and with deliberate and premeditated malice*. [Citations omitted.] To have found the defendants guilty of only manslaughter, the jury would have had to find that the defendants acted without malice when they killed the victim. [Citation omitted.]

When the jury convicted Nielsen of first degree murder and declined to convict him of manslaughter, it was necessarily convinced beyond a reasonable doubt that Nielsen had intentionally and with deliberate and premeditated malice killed Edward Grabbe. To have found Nielsen guilty of manslaughter, the jury would have had to find that he acted

without deliberate and premeditated malice, a finding inconsistent with the verdict rendered.

Moreover, the jury was instructed that if it found Nielsen guilty of murder in the first degree it was not to consider the lesser-included offenses set forth in the instructions. Once the jury found Nielsen guilty of first degree murder, any further instruction defining voluntary and involuntary manslaughter obviously would have been of no benefit to Nielsen, and he was not prejudiced by its absence.

CONCLUSION

The record fails to reflect that Nielsen was prejudiced in any way by trial counsel's admittedly novel trial strategy. The district judge who presided over Nielsen's postconviction hearing was not clearly wrong in his finding that Nielsen is not entitled to postconviction relief. We thus affirm the order of the district court denying Nielsen's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM C. SAULSBURY, APPELLEE.

498 N.W.2d 338

Filed April 9, 1993. No. S-92-198.

1. **Constitutional Law: Statutes: Indictments and Informations.** A question as to the validity of a statute on which an information is based is not properly raised by a plea in bar. Such question, if it goes to the constitutionality of the statute on its face, should be raised by demurrer or by motion to quash.
2. **Constitutional Law: Statutes.** If a statute is generally constitutional, and for some circumstance peculiar to the situation of the accused is unconstitutional, that is a matter which is properly triable under the general issue or a plea of not guilty.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Criminal Law: Due Process: Statutes.** Due process of law requires that criminal

statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment.

5. **Criminal Law: Statutes.** It is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction.
6. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the statutory purpose.
7. **Criminal Law: Statutes: Photographs.** In prosecutions under the Child Pornography Prevention Act, Neb. Rev. Stat. § 28-1463.01 et seq. (Reissue 1989), the sexual nature of a photograph is not determined solely from the subjects of the photograph, but from the motives of the persons generating the photograph.
8. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it should be given a sensible construction, and general terms should be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

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

Elizabeth Fredricey Waterman, of Cook, Wightman & Doyle, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and CHEUVRONT, D.J.

LANPHIER, J.

Defendant, William C. Saulsbury, was charged, under the Nebraska Child Pornography Prevention Act, Neb. Rev. Stat. § 28-1463.01 et seq. (Reissue 1989), with making, publishing, directing, creating, or in any manner generating a visual depiction of sexually explicit conduct which has a child as one of its participants. See § 28-1463.03. Defendant filed a plea in abatement and a motion to quash the pornography charge on the basis that the statute was unconstitutionally vague or, alternatively, did not apply to his conduct. The State appeals the ruling of the district court for Dawson County sustaining Saulsbury's motion to quash. We reverse the judgment and

remand the cause with directions.

STATEMENT OF FACTS

On June 27, 1991, the State filed a two-count information against defendant. Count I is not at issue. Count II alleged that defendant violated § 28-1463.03, which prohibits, in part, a person from knowingly making or generating in any manner a visual depiction of sexually explicit conduct in which a child is a participant. Sexually explicit conduct is defined, in part, as a display of erotic nudity which includes the visual depiction of the female breasts or the developing breast area of a female child "for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved." § 28-1463.02(3). Child, in the case of a "participant," is defined as any person under the age of 18 years, and in the case of a "portrayed observer," is any person under the age of 16 years. § 28-1463.02(1). The State filed a bill of particulars alleging, with respect to count II, that between February 1 and 15, 1991, defendant made, created, or generated photographic slides of a solitary 15-year-old female in which her breasts were displayed. On January 21, 1992, defendant filed a plea in abatement and motion to quash count II of the information, stating that the statute was "unconstitutional as applied to the Defendant." In the alternative, defendant claimed that the statute did not apply to him or his conduct.

On January 24, 1992, the district court held a hearing on the defendant's plea in abatement and motion to quash. Defendant introduced into evidence, from the bill of particulars, photographs depicting a solitary female in various poses. Some of the photographs displayed an exposed breast and the developing breast area of the 15-year-old. The district court found that the plea in abatement was not proper to address the issue of "whether the conduct involved in this case is constitutionally protected, and whether the activities of the Defendant were such as to have his actions fall within the ambit of the statute." However, the court proceeded to find that the actions of defendant were constitutionally protected and that the statute had been "unconstitutionally applied to the

Defendant," and therefore, the court granted the motion to quash.

The court further sustained the motion to quash because it did not find that the photographs violated § 28-1463.01 et seq. The court acknowledged there was some exposure of human female breasts, but found that in order to implicate the statute, there must be a showing of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons in the visual depiction. The court determined that this was not shown and granted the motion to quash count II.

The State timely appealed and received leave to docket error proceedings. The State contends the trial court erred in (1) ruling that the motion to quash was the proper method to question the constitutionality of the statute as applied to defendant and that therefore the court should not have conducted a hearing thereon and (2) finding that § 28-1463.01 was unconstitutional as applied to defendant.

MOTION TO QUASH

The State contends that the motion to quash was inappropriate because defendant challenged the constitutionality of the statutes as applied to him. As provided in Neb. Rev. Stat. § 29-1808 (Reissue 1989), "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." In *State v. Valencia*, 205 Neb. 719, 727, 290 N.W.2d 181, 185 (1980), this court stated:

> "The question as to the validity of the statute on which the information is based is not properly raised by a plea in bar. Such question, if it goes to the constitutionality of the statute on its face, should be raised by demurrer or by motion to quash. If the statute is generally constitutional, and for some circumstance peculiar to the situation of the accused is unconstitutional, that is a matter which is properly triable under the general issue or a plea of not guilty." In the instant case, therefore, since the defect in question was a matter of interpretation of the statute itself, it would appear that either a motion to quash or a

demurrer would be a proper method to challenge the constitutionality of the statute.

The issue is whether defendant as a person "involved" in the display of erotic nudity had the purpose of real or simulated overt sexual gratification in generating the photographs. That is not discernible from the record. The trial court was therefore incorrect in ruling that the motion to quash was the proper procedure to raise the constitutionality of the statute as applied to defendant.

The constitutionality of the statute as applied to defendant is triable under a plea of not guilty.

STANDARD OF REVIEW

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).

CHILD PORNOGRAPHY PREVENTION ACT APPLICATION

Section 28-1463.03 of the Child Pornography Prevention Act reads in part: "(1) It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers."

Section 28-1463.02(5) defines "[s]exually explicit conduct" in relevant part as "(e) erotic nudity." Section 28-1463.02(3) further defines "[e]rotic nudity" as "the display of . . . the human female breasts . . . for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved."

The person depicted in this case is a child as defined in the statute. Due process of law requires that criminal statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment. The dividing line between what is lawful and unlawful cannot be left to conjecture. *State v. Pierson*, 239

Neb. 350, 476 N.W.2d 544 (1991). However, it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. *Id.* The district court in the present case determined that the overt sexual gratification or sexual stimulation of the "persons involved" referred to the persons within the photograph or visual depiction. In construing a statute, an appellate court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the statutory purpose. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). In holding that appearing in a film which involved minors engaged in sexually explicit conduct violated the statute, this court in *State v. Jensen*, 226 Neb. 40, 44, 409 N.W.2d 319, 321 (1987), found it clear that the Legislature intended the statute to be "thorough, exhaustive, and to describe all the activity involved in generating child pornography."

The purpose of the statute is to eliminate the sexually explicit depiction and exploitation of children as defined. Reading the entire section, it is apparent the Legislature intended that the sexual nature of the photograph be determined not solely from the subjects of the picture, but also from the motives of the persons generating the picture. The statute proscribes the visual depiction of a minor female's breasts or the developing breast area of a female child "for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved." § 28-1463.02(3). The Legislature intended the statute to be read as referring to those "persons involved" in the publishing, directing, creating, providing, or in any manner generating any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers. The terms of the statute were meticulously defined. The statute provides notice that the visual depiction for sexual gratification of a female child displaying her breasts or the developing breast area will violate the statute.

The foregoing interpretation is in accord with federal decisions ruling on the constitutionality of federal child pornography laws. The standard for obscenity enunciated in

Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), was different from the standard applied in cases involving child pornography.

In *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), the Court held that states have a broader power in regulating the pornographic depictions of children. "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." 458 U.S. at 764. The Court in *Ferber* required that legislation prohibiting child pornography be addressed to works that "*visually* depict sexual conduct by children below a specified age." (Emphasis in original.) 458 U.S. at 764. *Ferber* involved the prosecution of a bookstore proprietor convicted of distributing sexually explicit materials involving minors, in violation of federal child pornography provisions. The Court did not address the issue of whether the intention of the producer or creator of the photographs was to be taken into account in determining the sexual nature of the pictures.

Since *Ferber*, federal courts have dealt with the intention issue on several occasions. In defining "sexually explicit conduct," as used in 18 U.S.C. § 2256(2)(E) (1988), as the "lascivious exhibition of the genitals or pubic area of any person," courts have found relevant the intentions of the photographer in taking the photographs. See, *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied* 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118; *U.S. v. Villard*, 885 F.2d 117 (3d Cir. 1989); *U.S. v. Arvin*, 900 F.2d 1385 (9th Cir. 1990), *cert. denied* 498 U.S. 1024, 111 S. Ct. 672, 112 L. Ed. 2d 664 (1991); *U.S. v. Cross*, 928 F.2d 1030 (11th Cir. 1991), *cert. denied* 499 U.S. 929, 112 S. Ct. 594, 116 L. Ed. 2d 618. In *Wiegand*, the court considered several depictions in separate photographs of two minor females aged 10 and 17. In both instances, the court found that the exhibition was lascivious because the photographer posed them according to his own pedophilic lusts. The court noted that in regard to a 10-year-old, it was unlikely she could have had any sexual intentions in her poses.

In the context of the statute applied to the conduct of

> children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by § 2255(2)(E) is a picture of a child's sex organs displayed lasciviously—that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

812 F.2d at 1244. (In 1986, Congress amended the Child Protection Act of 1984, U.S.C. §§ 2251 to 2257. Section 2256 replaced § 2255 as the section providing definitions.)

In *Cross*, the defendant fraudulently induced a photographer and the parents of minor children to take part in a scheme whereby the minors posed for nude photographs. The court noted that the pictures qualified as lewd under the child pornography statute, as defined by the act prior to amendment, even though the children were not portrayed as sexually coy or inviting, because the photographs displayed full frontal nudity of the girls and were arranged by defendant in order to be used to satisfy his sexual interests or those of other pedophiles.

In *Villard*, the defendant was convicted of transporting magazines with sexually explicit photographs of minors. *Villard* is similar to *Ferber* in that they both involve the prosecution of the person who distributes prohibited material and not the person taking the photograph. The court in *Villard* found that in determining whether a visual depiction constituted lascivious exhibition of the genitals, as prohibited under federal legislation, a court should look at the photograph rather than at the viewer and determine the intended effect and not the actual effect on the viewer. In order to determine the intended effect, it would be relevant to look to the motives of the person who generated the visual depiction—in the present case, defendant. Unlike *Ferber* and *Villard*, the identity of the photographer in the present case is apparent, and he is the subject of the prosecution. Therefore, in determining whether defendant violated § 28-1463.03, the trial court should consider whether defendant took the photographs for the purpose of his own overt sexual gratification or sexual stimulation.

As stated in *Arvin*, child pornography can be prohibited even if not obscene. See, also, *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). A determination of whether defendant took the pictures for the purpose of real or simulated overt sexual gratification or sexual stimulation should include a consideration of the factors enunciated in *United States v. Dost*, 636 F. Supp. 828 (1986), and approved in *U.S. v. Wiegand, supra*, and *U.S. v. Villard, supra*. *Dost* set forth a number of factors to consider in determining whether there had been a depiction of lascivious exhibitions under the federal child pornography law, which factors are

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F. Supp. at 832.

Dost, and other cases adopting such factors, involved the meaning of the phrase "lascivious exhibition of the genitals or pubic area." In federal legislation, the term defined by that phrase is "sexually explicit conduct." Because the Nebraska statute uses the same term, the factors set out in *Dost* and other cases are relevant to determining whether there has been a depiction of real or simulated overt sexual gratification or sexual stimulation. However, the Nebraska statute is broader in that it also prohibits the depiction of a female's breasts if she is under the age of 18 years.

Although a penal statute must be strictly construed, it should be given a sensible construction, and general terms should be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *State v.*

Pierson, 239 Neb. 350, 476 N.W.2d 544 (1991). The Court in *Ferber* stated that the conduct prohibited must be sufficiently defined by applicable state law "as written or authoritatively construed." 458 U.S. at 764. The cases discussed above demonstrate the absurdity of a contrary interpretation. Any other construction of the Nebraska Child Pornography Prevention Act would render it ineffectual against a defendant who photographed a solitary child below the age of majority in various poses designed to satisfy the warped sexual lust of the photographer, because it would be absurd to believe the child depicted was in any manner receiving sexual gratification or sexual stimulation. As stated in *U.S. v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990), *cert. denied* 498 U.S. 1024, 111 S. Ct. 672, 112 L. Ed. 2d 664 (1991):

> In order to be lascivious, the exhibition must be pornographic, even if it need not be obscene. At the same time, it must be recognized that the type of sexuality encountered in pictures of children is different from that encountered in pictures of adults. This is because children are not necessarily mature enough to project sexuality consciously. Where children are photographed, the sexuality of the depictions often is imposed upon them by the attitude of the viewer or photographer. The motive of the photographer in taking the pictures therefore may be a factor which informs the meaning of "lascivious."

CONCLUSION

In light of the foregoing, this court finds that the motion to quash was improperly granted. Whether § 28-1463.03 was constitutionally applied to defendant and his conduct requires determination of his intent. Examination of intent is necessary to determine whether sexual gratification was a motive in the display of the depicted minor's breasts or developing breast area. This intent is not determinable on the face of the record, but is triable under a plea of not guilty. We reverse the district court's judgment and remand the cause with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM H. TONEY, APPELLANT.

498 N.W.2d 544

Filed April 9, 1993. No. S-92-271.

1. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1989), the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, materiality of the statement, probative importance of the statement, interests of justice, and whether notice of the statement's prospective use as evidence was given to an opponent.
2. **Rules of Evidence: Hearsay: Appeal and Error.** An appellate court, reviewing a trial court's ruling on admissibility under Neb. Evid. R. 804(2)(e), will affirm the trial court's ruling unless the trial court has abused its discretion concerning admissibility.
3. **Rules of Evidence: Hearsay.** Under Neb. Evid. R. 804(2)(e), a court must make a preliminary inquiry (Neb. Evid. R. 104) to determine whether a declarant had personal knowledge (Neb. Evid. R. 602) regarding the subject matter of the statement that is sought to be introduced pursuant to the residual exception to the hearsay rule.
4. _____: _____. In determining admissibility under Neb. Evid. R. 804(2)(e), a court must examine the circumstances surrounding the declaration in issue and may compare the declaration to the closest hearsay exception as well as consider a variety of factors affecting trustworthiness of a statement, such as the nature of a statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.
5. _____: _____. In Neb. Evid. R. 804(2)(e)(i), the requirement that the statement be offered as evidence of a material fact means that not only must the fact the statement is offered to prove be relevant, but that the fact to be proved be of substantial importance in determining the outcome of the litigation.
6. _____: _____. In addition to a statement's possessing equivalent guarantees of trustworthiness, Neb. Evid. R. 804(2)(e)(ii) requires that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."
7. _____: _____. The expression in Neb. Evid. R. 804(2)(e)(ii) that a statement be "more probative . . . than any other evidence" which might be reasonably procured is characterized as a general requirement of necessity rather than a strict requirement that the statement be essential to a proponent's case.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

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

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

SHANAHAN, J.

William H. Toney appeals from his convictions of second degree murder in the death of Darrin Sherrod and use of a firearm to commit that murder. Crucial to Toney's conviction in his trial by jury in the district court for Douglas County was resolution of contradictory eyewitness testimony concerning the shooting which resulted in Sherrod's death.

I. MOTION IN LIMINE

Before trial, when Toney notified the State that he intended to use Baron Smith's out-of-court statements made to Ben Gray, the State moved to preclude Toney's introduction of Gray's testimony containing Smith's discussion about the Sherrod homicide. In response to the State's motion, Toney offered Gray's deposition. Smith himself was a homicide victim 9 days after Sherrod's death. Gray was a producer for an Omaha television station which covered the aftermath of the Sherrod fatality.

For approximately 7 years before Sherrod's death, Smith and Gray had been acquainted as volunteer workers in the C.W. Boxing Club sponsored by Carl Washington. On the day after Sherrod's death, Gray met Smith at the boxing club. Smith said that he had been on the street where the shooting occurred and further stated that he had "observed what happened" and that "he was a witness to the entire incident . . . . I was a witness there. I was an eyewitness, and I can tell you for a fact that William Toney did not do the shooting." Smith said that someone was attempting to inculpate Toney in the shooting, "to put it on William Toney," but that Smith wanted Gray "to know that William Toney is not the guy that pulled the trigger." In his conversation with Gray, Smith identified the person who shot

Sherrod, but, on the basis of journalistic privilege, Gray declined to divulge that identification. Without disclosing the identity of the person or persons responsible for shooting Sherrod, Gray related that Smith, referring to Toney, stated: "He's not the guy that did it. He's their uncle. He was there, but he didn't do it." Smith had "nothing to gain by telling an untruth to help William Toney." In fact, Smith was not even personally acquainted with Toney. However, Smith said that he was frightened by the prospects of retaliation from those involved in the shooting and that "he would be in too much trouble on the street, if he came forward" with information concerning the person who actually shot Sherrod. Fearing that Smith's well-being might be jeopardized as the result of disclosing information about the Sherrod homicide, Gray discouraged Smith from publicly disclosing what he knew about the shooting. Eight days later, Smith was killed.

Toney sought admission of Gray's testimony regarding Smith's statements to Gray under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1989), the residual exception to the hearsay rule, which provides that if a declarant is unavailable as a witness,

> [a] statement not specifically covered by any of the foregoing exceptions [to the hearsay rule] but having equivalent circumstantial guarantees of trustworthiness, [may be admitted] if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement . . . .

The court sustained the State's motion in limine and excluded Gray's testimony containing Smith's statements.

II. TONEY'S TRIAL

1. General Background

Late in the evening of July 29, 1991, a group of three women and six men, ages 16 to 19 years, were gathered on the sidewalk in a residential area of Omaha where they were eating pizza

when 20-year-old Darrin Sherrod, driving a Chevrolet Malibu south on 33d Street, collided with a car parked near the group. The parked car was owned by Terrance Toney, one of the group. Sherrod stopped and got out of his car to inspect the damage. Sherrod's girl friend, who had been following Sherrod, stopped her car about half a block behind Sherrod's Malibu and saw some of those who had been on the sidewalk move toward Sherrod and push him as he stood near his car. While she was backing her car north on 33d Street, the young woman heard several gunshots and then saw Sherrod, blood covered and running toward her car. Noticing Carl Washington in his car parked in front of his residence, the young woman asked for help. Washington called 911, but, when the rescue squad arrived, Sherrod was dead.

The following morning, police took Terrance Toney into custody for questioning at the police station. Early in the questioning, Terrance Toney stated that he was at the scene of the shooting, but he denied having any weapon that evening and further denied being involved in the assault on Sherrod. Terrance Toney also denied that he saw the person who shot Sherrod. Later during interrogation, Terrance Toney told police that he had seen his uncle, William Toney, shoot Sherrod. Terrance Toney's brother, Troy Toney, who had also been brought to the police station for questioning, stated that he was at the scene of the shooting, but he denied seeing the shooting or any handgun at the scene and also denied striking Sherrod. However, after Troy Toney heard Terrance Toney tell police that William Toney had shot Sherrod, Troy Toney concurred in Terrance Toney's version of the shooting.

2. The State's Witnesses at Trial

Terrance Toney testified that after Sherrod's car collided with his parked car, he, Troy Toney, and their uncle, William Toney, walked to Sherrod, who was standing beside his Malibu. First, Terrance Toney pushed Sherrod backward, and then Troy Toney "punched" Sherrod in the eye. Meanwhile, Terrance Toney noticed a "shiny glare" in William Toney's hand, saw William Toney raise his hand, and heard two shots as William Toney used a "small . . . silver gun" to shoot Sherrod. At that

point, Terrance Toney grabbed a .38-caliber revolver from Troy Toney's "pants pocket" and went behind the Malibu, where he fired five shots into the car's rear window. According to Terrance Toney, Morris "Mo" Williford was not involved in the fracas or shooting. After the shooting, everyone scattered.

Troy Toney testified that he, Terrance Toney, and William Toney approached Sherrod, who was standing beside his car. Terrance Toney pushed Sherrod, and then Troy Toney struck Sherrod. A few seconds later, when William Toney was approximately a car length from Sherrod, Troy Toney saw William Toney's "arm go up" while William Toney was holding "a small shiny .22" which Troy Toney had not seen before that time. Troy Toney heard two shots just before Terrance Toney took the .38-caliber revolver from Troy Toney and shot out the rear window of Sherrod's Malibu. As testified by Troy Toney, Williford was not directly involved in the altercation.

According to the testimony of Morris "Mo" Williford, when Terrance and Troy Toney were scuffling with Sherrod, Williford was approximately a car length from that tussle and was looking away from the scene when the first shot was fired. Some 10 seconds later, Terrance Toney shot the rear window out of Sherrod's car. Williford testified that he had never seen either Terrance or Troy Toney with a "small gun," but about a week before the shooting he had seen a silver or chrome .22-caliber derringer lying in the grass where the group had gathered before Sherrod's Malibu collided with Terrance Toney's parked car. However, on the night of the shooting, Williford did not see a .22-caliber derringer.

A witness for the State, Jesse McGhee, who was one of those gathered on the sidewalk before the collision, testified that he did not see William Toney with "a weapon" that evening, but had seen Terrance and Troy Toney with "a small two-shot derringer" sometime before the night when Sherrod was shot.

A pathologist testified that the autopsy he performed on Sherrod's body revealed no bruises or marks on Sherrod's head or face. However, he found two gunshot wounds, one in Sherrod's left chest which caused Sherrod to bleed to death, and another gunshot wound in Sherrod's left forearm which was marked by stippling or powder burns, indicating that the

muzzle of the firearm was 6 to 8 inches from Sherrod's arm when the gun was discharged. Two .22-caliber bullets were extracted from Sherrod's body. Police never recovered a .22-caliber firearm in connection with the Sherrod shooting.

3. Defense Witnesses

Latonya Johnson, one of the women in the group which had congregated on the sidewalk, testified that Mo Williford was at Sherrod's car when Troy Toney struck Sherrod. Williford had a "little silver gun" which he pointed at Sherrod. This was the same gun which Terrance Toney had previously attempted to sell to Johnson's girl friend, Melissa Jones. As Sherrod tried to run away, Johnson saw Williford "start shooting a gun" which he had been pointing at Sherrod. Terrance Toney had a larger gun which he also pointed at Sherrod. At the time of the shooting, William Toney was "on his way down by the cars" parked ahead of Sherrod's Malibu. On cross-examination of Latonya Johnson, the State injected the possibility that she was biased and slanted her testimony because she was the sister of Tanika Johnson, the girl friend of William Toney, the defendant.

Melissa Jones, who was also one of the group on the sidewalk, testified that Terrance Toney pulled Sherrod out of his car and that both Troy Toney and Williford struck Sherrod. As Sherrod tried to run away, Williford started shooting at him. When the shooting started, William Toney was approaching Sherrod's car. Jones corroborated Latonya Johnson's testimony that Terrance Toney had tried to sell Jones "a small gun" earlier in the day, before Sherrod was shot. During cross-examination, Jones admitted that she had been previously convicted of giving false information to police.

Tanika Johnson, another in the group, also testified that Terrance and Troy Toney hit Sherrod and that Terrance Toney had a gun and shot toward Sherrod. William Toney was nearing Sherrod's car when the shots were fired. In cross-examining Tanika Johnson, the prosecutor raised the possibility that Tanika was William Toney's girl friend or at least more than a casual acquaintance of William Toney's, since Tanika had written to William Toney in jail while he awaited trial for the

Sherrod homicide.

Carl Washington, who lived near the scene of the shooting, testified that while he was getting into his car parked in front of his house, he saw Sherrod run down the street and then sit down on the curb. When he discovered that Sherrod was bleeding, Washington returned to his house and phoned for assistance. Later in the evening, after the Sherrod shooting, Baron Smith, a friend of Washington's, was at Washington's house and told him that he, Smith, was at the scene and saw the shooting take place. According to Washington, Smith said that he heard "Fat Mo" say, "Bust a cap in the fool," and saw "Mo shoot Sherrod." On cross-examination, the State attempted to discredit Washington by showing that Washington had told police that he had no information about the shooting or Sherrod's assailant. Washington countered that he was trying to shield Smith because Smith had some unpaid traffic fines and was afraid of being arrested. Washington testified that Smith died 9 days after Sherrod's death.

4. VERDICT

Shortly after noon on January 22, 1992, the case was submitted to the jury, which returned a "guilty" verdict at 3 p.m. the next day.

III. ASSIGNMENTS OF ERROR

Among his assignments of error, William Toney contends that Baron Smith's out-of-court statements to Ben Gray were admissible under Rule 804(2)(e) and that, therefore, the district court erred by sustaining the State's motion in limine and excluding Gray's testimony that contained statements by Smith, an unavailable witness, which exculpated Toney from involvement in Sherrod's death.

IV. STANDARD OF REVIEW

"[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92

(1991). See, also, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). "In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord, *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Messersmith, supra*. See *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

V. RESIDUAL EXCEPTION TO THE HEARSAY RULE

1. Factors for Admissibility

In determining whether a statement is admissible under Rule 804(2)(e), the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, materiality of the statement, probative importance of the statement, interests of justice, and whether notice of the statement's prospective use as evidence was given to an opponent. See *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979). See, also, *United States v. Cree*, 778 F.2d 474 (8th Cir. 1985).

Although the State argues on appeal that Toney failed to give notice of his intended evidential use of Smith's statements to Gray, we recall that admissibility of Smith's statements was challenged by the State's motion in limine which expressly referred to Rule 804(2)(e). That motion was filed in response to Toney's notice concerning prospective introduction of Smith's statements as evidence. The notice requirement of Rule 804(2)(e) states:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it . . . .

Under the circumstances, lack of notice is not an issue in this

appeal.

Even when a trial court has considered the foregoing factors in determining whether a statement is admissible under Rule 804(2)(e), an appellate court, reviewing admissibility under the residual exception to the hearsay rule, must reverse the trial court's ruling if the appellate court arrives at " 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors,' " and that the error was prejudicial. *Huff v. White Motor Corp.*, 609 F.2d at 291 (quoting *In re Josephson*, 218 F.2d 174 (1st Cir. 1954)). Thus, an appellate court, reviewing a trial court's ruling on admissibility under Rule 804(2)(e), will affirm the trial court's ruling unless the trial court has abused its discretion concerning admissibility.

(a) Trustworthiness

In *State v. Jacob*, 242 Neb. 176, 194, 494 N.W.2d 109, 121 (1993), we held that if requisite notice has been given to an opponent and the evidence is highly probative, the critical issue in determining whether statements are admissible under the residual exception is "whether the circumstances surrounding the making of the hearsay statements by [a declarant] provided the guarantees of trustworthiness comparable to the other hearsay exceptions in the Nebraska Evidence Rules." As we held in *Jacob*, under Rule 804(2)(e), a court must make a preliminary inquiry (Neb. Evid. R. 104) to determine whether a declarant had personal knowledge (Neb. Evid. R. 602) regarding the subject matter of the statement that is sought to be introduced pursuant to the residual exception to the hearsay rule. Furthermore, in determining admissibility under Rule 804(2)(e), a court must examine the circumstances surrounding the declaration in issue and may compare the declaration to the closest hearsay exception as well as consider a variety of factors affecting trustworthiness of a statement, such as the nature of a statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath;

whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement. See *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). See, generally, 2 McCormick on Evidence § 324 (John W. Strong, 4th ed. 1992).

In *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985), the trial court, pursuant to the residual hearsay exception (Fed. R. Evid. 804(b)(5)), admitted testimony of an FBI agent regarding certain statements of a declarant who died before trial. In affirming the trial court's ruling of admissibility, the appellate court noted that the declarant had volunteered the information and that he was a seemingly disinterested person who had no apparent motive to lie. Moreover, the declarant had directly observed the incident in question. The incident was not so complex as to raise any question about the declarant's ability to perceive, remember, or recount the incident. Finally, the court noted that the declarant had repeated the statement to a private investigator in the presence of a court reporter.

This court addressed a similar situation in *State v. Beam*, 206 Neb. 248, 292 N.W.2d 302 (1980). In *Beam*, the district court, relying on Rule 804(2)(e), admitted into evidence statements made by a declarant whose later death was the basis of a criminal charge against her husband. The statements were made to the declarant's attorney and to a deputy sheriff. In evaluating the trustworthiness of those statements, the court observed that the declarant's statements to her attorney were "made in the course of a professional consultation for purposes of legal advice and possible litigation. Under such circumstances, it is reasonable to assume that an accurate statement of facts would normally be given." 206 Neb. at 254, 292 N.W.2d at 306. Concerning the declarant's statement to the deputy sheriff, this court noted that the deputy sheriff

> was in the course of performance of his official duties, a disinterested witness, and not acquainted with the decedent at the time he found her in the truck in a church parking lot in the middle of the night. She had been crying. She was upset and emotionally disturbed.

206 Neb. at 254-55, 292 N.W.2d at 306. Thus, the court in *Beam* concluded that the statements had guarantees of trustworthiness and were admissible under the residual exception to the hearsay rule, Rule 804(2)(e).

In the present case, Toney sought the admission of statements made by Baron Smith, an eyewitness to the shooting of Sherrod. Unlike the situation in *State v. Jacob*, where the declarant lacked personal knowledge about the subject matter of her statements, Smith's statements to Gray included the assertion that Smith personally witnessed the Sherrod shooting and saw in detail what had happened. Smith had no motive to speak untruthfully about Toney, who was neither related to Smith nor even one of Smith's acquaintances. Moreover, Smith was unrelated to others who claimed to have witnessed the assault on Sherrod and the shooting and was unrelated to anyone who might have been implicated in the assault or shooting. Therefore, Smith was a disinterested observer who had no reason to lie about the shooting and, consequently, was an ostensibly truthful source of information concerning the events surrounding the Sherrod shooting. Smith voluntarily approached Gray, a television producer and member of the news media. However, Smith expressed fear, which to Gray appeared to be well founded, that Smith would suffer some reprisal for communicating information about the Sherrod shooting. Notwithstanding that fear for his own safety, Smith, without prompting from Gray, disclosed information concerning Toney's innocence in the Sherrod shooting. Such disclosure was made against Smith's interest in his own safety and self-preservation. Thus, Smith's fear of reprisal for disclosure, a fear shared by Gray, lends authenticity to the contents of Smith's statements to Gray. The relative spontaneity of Smith's statements, made to Gray on the day after the shooting, also supplies some reliability for the statements. See *State v. Plant, supra* (spontaneity is an indication of a statement's reliability). Having considered all the circumstances surrounding Smith's statements to Gray, we conclude that Smith's statements had the requisite guarantees of trustworthiness for admissibility under Rule 804(2)(e).

(b) Materiality

> "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is 'in issue,' that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> "The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . ."

State v. Baltimore, 236 Neb. 736, 740, 463 N.W.2d 808, 812 (1990) (quoting McCormick on Evidence § 185 (Edward W. Cleary 3d ed. 1984)). Accord, *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). In Rule 804(2)(e)(i), "[t]he requirement that the statement be offered as evidence of a material fact probably means that not only must the fact the statement is offered to prove be relevant, Rule 401, but that the fact to be proved be of substantial importance in determining the outcome of the litigation." Michael H. Graham, Handbook of Federal Evidence § 803.24 at 946 (3d ed. 1991). See, also, *United States v. Iaconetti*, 406 F. Supp. 554 (1976), *affirmed* 540 F.2d 574 (2d Cir.), *cert. denied* 429 U.S. 1041, 97 S. Ct. 739, 50 L. Ed. 2d 752 (1977), *reh'g denied* 430 U.S. 911, 97 S. Ct. 1186, 51 L. Ed. 2d 589.

In Toney's case, the main issue is whether Toney was guilty of killing Sherrod. Smith's statements were offered for the proposition that Toney was not the person who shot Sherrod. Clearly, Smith's statements, if admitted into evidence, would have been available for the jury during their deliberation whether the State had proved its homicide charge against Toney. For that reason, Smith's statements were material in Toney's case.

(c) Probative Value: Relative Necessity

As the advisory committee's note to Fed. R. Evid. 804(b) states: "The [residual exception to the hearsay] rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."

Consequently, in addition to a statement's possessing equivalent guarantees of trustworthiness, Rule 804(2)(e)(ii) requires that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." However, the expression in Rule 804(2)(e)(ii) that a statement be "more probative . . . than any other evidence" which might be reasonably procured is characterized as a general requirement of necessity rather than a strict requirement that the statement be essential to a proponent's case; for example, see, *United States v. Vretta*, 790 F.2d 651 (7th Cir. 1986), *cert. denied* 479 U.S. 851, 107 S. Ct. 179, 93 L. Ed. 2d 115 (hearsay evidence was the most probative evidence because the hearsay evidence was necessary to complete a pattern of criminal conduct which might not otherwise be clearly established), and *United States v. Boulahanis*, 677 F.2d 586 (7th Cir. 1982), *cert. denied* 459 U.S. 1016, 103 S. Ct. 375, 74 L. Ed. 2d 509 (the residual exception to the hearsay rule does not require that hearsay evidence must be essential to a case, but only that the hearsay evidence be the most probative evidence reasonably available on a material issue).

On one hand, some of Smith's statements to Gray were unduplicated in Carl Washington's testimony. For instance, Smith stated that apparently someone at the shooting was attempting to inculpate William Toney in Sherrod's death and that William Toney was not "the guy that did it. He's their uncle," which might be interpreted that Terrance and Troy Toney were actually culprits in the killing.

On the other hand, because some of Smith's out-of-court statements were introduced into evidence through Washington's testimony, some of Smith's statements sought to be introduced through Gray's testimony might be cumulative. " 'Cumulative evidence' means 'tending to prove the same

point to which other evidence has been offered.' " *State v. Coleman*, 239 Neb. 800, 814, 478 N.W.2d 349, 358 (1992). However, as the court observed in *U.S. v. Shaw*, 824 F.2d 601, 610 (8th Cir. 1987), *cert. denied* 484 U.S. 1068, 108 S. Ct. 1033, 98 L. Ed. 2d 997 (1988): " '[E]ven though the evidence may be somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the "more probative" requirement can not be interpreted with cast iron rigidity.' " (Quoting 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803 (24) [01] (1985).)

On cross-examination of Washington and the three young women, the State laid a foundation to impeach those witnesses by calling into question their veracity and indicating that those defense witnesses were unworthy of belief. For example, the State implied that Washington and Melissa Jones had supplied misinformation or even lied to the police. Regarding Latonya and Tanika Johnson, the prosecutor injected the innuendo that these women were biased in favor of William Toney to the extent that they would distort events surrounding Sherrod's death, or, as some might say euphemistically, the truth would be severely disadvantaged by their testimony. Regarding those defense witnesses who may have been impeached in the jury's eyes, Smith's statements to Gray might rehabilitate those witnesses or corroborate their testimony which the State aimed to discredit. In summary, the fact that other testimony was offered on similar subjects expressed in Smith's statements to Gray did not prevent admissibility of Smith's statements offered under the residual exception to the hearsay rule.

Consequently, Smith's statements to Gray would supply not only credible substantive evidence on the material issue of Toney's guilt, but would also serve to restore or preserve credibility for those witnesses whose veracity was assailed on cross-examination by the State.

(d) Interests of Justice

As the U.S. Supreme Court stated in *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973): "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend

against the State's accusations." "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* Later, in *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), the Supreme Court noted that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " An essential component of this guarantee

> is an opportunity to be heard. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

476 U.S. at 690-91. Therefore, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. at 302.

In *Huff v. White Motor Corp.*, 609 F.2d 286, 295 (7th Cir. 1979), a product liability case, the court stated that "[a]dmission of the evidence will best serve the interests of justice by increasing the likelihood that the jury will ascertain the truth about the cause of the accident." The interests of justice are no less served in a criminal case wherein a defendant must be accorded the opportunity to present an adequate defense to rebut the State's evidence that tends to prove the defendant's guilt for the crime charged. Thus, "the interests of justice always will be served in admitting reliable, relevant hearsay evidence within the confines of the evidentiary boundaries in our ever never ending search for the truth." *United States v. Vretta*, 790 F.2d 651, 660 (7th Cir. 1986), *cert. denied* 479 U.S. 851, 107 S. Ct. 179, 93 L. Ed. 2d 115.

We note that Toney's case was submitted to the jury shortly after noon on January 22, 1992, and that the verdict was returned at 3 p.m. the next day. From the time involved in the jury's deliberation, we can reasonably conclude that the State's case against Toney was not viewed by the jury as overwhelming

or open-and-shut. Although we do not know exactly what went through the collective mind of the jury in Toney's case, the time consumed in deliberation may well indicate extensive effort by the jury in its resolution of the contradictory testimony from those who witnessed events surrounding the fatal shooting of Sherrod. Perhaps Smith's statements to Gray, if received in evidence, would have been considered by the jury and would have affected its verdict to the point of an acquittal. Although we cannot state with certainty that admission of Smith's statements to Gray would have resulted in Toney's acquittal, we are able to conclude that Smith's statements exhibited the guarantees of trustworthiness and were shown to be material and generally necessary for Toney's defense. Under the circumstances, the interests of justice as well as Toney's constitutionally guaranteed right to a fair trial as an aspect of due process lead us to the conclusion that the trial court abused its discretion in ruling that Smith's statements to Gray were inadmissible.

VI. CONCLUSION

Baron Smith's hearsay statements to Ben Gray met all the requirements for admissibility under Rule 804(2)(e), the residual exception to the hearsay rule, and, thus, should have been admitted into evidence. For that reason, exclusion of Smith's statements was an abuse of discretion. Because the State has not demonstrated that exclusion of the statements was harmless error, exclusion of Smith's statements is reversible error. See *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). In light of our disposition of Toney's appeal, it is unnecessary to discuss Toney's assigned errors regarding the prosecutor's allegedly unconstitutional use of peremptory challenges to remove certain jurors from the panel and the trial court's instruction on reasonable doubt. We, therefore, reverse the trial court's judgments entered on the verdicts in Toney's case and remand this cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SAUNDRA HAMILTON, APPELLANT, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, AND R. GREEN, APPELLEES.

498 N.W.2d 555

Filed April 16, 1993. No. S-90-679.

1. **Appeal and Error.** An appellate court will only address issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error.
2. **Political Subdivisions Tort Claims Act: Negligence: Liability.** The discretionary function or duty exemption in the Political Subdivisions Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.
3. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, proximate causation, and damages.
4. **Negligence: Pleadings.** The enumeration of specific acts of negligence should state the ultimate acts of negligence and not the conclusion of the pleader.
5. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
6. **Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action" means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
7. **Pleadings: Proximate Cause: Damages.** In determining whether the plaintiff's petition states facts sufficient to constitute a cause of action, it is necessary to examine whether specific facts are enumerated which would serve to establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of plaintiff's damages.
8. **Police Officers and Sheriffs: Liability.** Law enforcement officials and, consequently, state and local governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.
9. _____: _____. The existence of a duty, if any, to a particular individual is determined by police actions rather than representations. Hence, more than general reliance is needed to require the police to act on behalf of a particular individual. The plaintiff must specifically act or refrain from acting in such a way as to exhibit particular reliance upon the actions of the police in providing personal protection. Liability may be established, therefore, if the police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking.

10. **Police Officers and Sheriffs.** An actionable duty to provide police service may arise when (1) there is some form of privity between the police department and the victim that sets the victim apart from the general public and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim.
11. **Demurrer: Pleadings: Appeal and Error.** When testing whether a petition which has been challenged by a demurrer states a cause of action, an appellate court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; it does not, however, accept as true the conclusions of the pleader.
12. **Negligence: Pleadings.** To state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that failure.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Robert V. Broom, of Broom, Johnson, Fahey & Clarkson, for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Thomas O. Mumgaard for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., MERRITT, D.J., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Plaintiff, Saundra Hamilton, appeals the judgment of the district court, which dismissed her cause of action after having sustained the demurrer of the defendants, City of Omaha and police officer R. Green. The plaintiff elected not to plead further. We affirm.

Plaintiff's action was brought pursuant to the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991). In her petition, the plaintiff alleged that on the evening of January 14, 1988, she was physically assaulted by her former husband, Jeffrey Hamilton. She then left the scene of that assault and returned to her home. Two police officers arrived at the scene of the assault and were advised by witnesses as to the identity of the plaintiff and her attacker.

Continuing, her petition alleged that within 20 minutes of the plaintiff's arrival at home, Jeffrey Hamilton arrived and

harassed and threatened her. The plaintiff immediately called the police, and Officer Green arrived just after Jeffrey Hamilton departed. The plaintiff explained what had happened and requested a "special watch number" because she feared for her safety. According to the petition, Officer Green stated that she would not need a special watch number and that he would be on duty and in the immediate area to protect her.

The plaintiff further alleged that she stayed at her residence in reliance on Officer Green's assurance, but that within 15 to 20 minutes of Officer Green's departure, Jeffrey Hamilton returned, kicked in the door, and entered her home. The plaintiff immediately called 911, reported the attack in progress, and attempted to escape through another door when she was assaulted by Jeffrey Hamilton. The plaintiff ran outside and across the street, trying to get help at a neighbor's home. Jeffrey Hamilton caught her and struck her on the left ankle, above the left knee, and on the left thigh and left arm with a tire iron. She was finally dragged down the stairs by Jeffrey Hamilton and fell onto the concrete. Plaintiff alleged that as a result of that assault she suffered bodily injuries and sought money damages.

The allegations concerning the negligence claimed on the part of the defendants were as follows:

> 8. Defendant R. Green was negligent in failing, refusing and neglecting to protect Plaintiff from her assailant after having affirmatively assured her that he would protect her and in failing, refusing and neglecting to be available to provide protection to Plaintiff after having assured her he would provide protection. Said negligence is imputable to the City of Omaha as Defendant R. Green's employer. Defendant City of Omaha was further negligent in failure to devise and implement adequate and effective training of a police officer regarding appropriate and adequate treatment of domestic assaults as well as failing to implement and enforce adequate response procedures to such domestic assaults and threats.

Defendants demurred on the ground that the petition failed to state a cause of action and that the court has no jurisdiction over the subject matter of the action alleged because it falls

within the scope of § 13-910(2) (discretionary function or duty on the part of a political subdivision or its employees).

On appeal, plaintiff assigns as error that the court sustained the demurrer, finding that her petition failed to allege facts sufficient to constitute a cause of action and finding that the acts of the police officer were excluded under the Nebraska Political Subdivisions Tort Claims Act as discretionary acts. The district court did not designate upon which basis the demurrer was sustained.

Although the plaintiff alleged that the city was negligent in failing to devise and implement adequate and effective training in regard to domestic assaults, she does not assign as error or argue in her briefs that the district court erred in not considering that allegation. This court will only address issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

The plaintiff contends, however, that the conduct of the individual police officer alleged did not involve a discretionary decision within the meaning of § 13-910(2). In discussing the distinction between discretionary and operational functions in the context of a similar provision in the State Tort Claims Act, this court noted that:

> Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act. . . .
>
> . . . .
>
> However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. . . . In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.

(Citations omitted.) *Wickersham v. State*, 218 Neb. 175, 180, 354 N.W.2d 134, 138-39 (1984). The same rule would apply to the Political Subdivisions Tort Claims Act.

The purpose for this distinction was discussed in

Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983), in which the plaintiffs alleged that a county sheriff was liable for failure to respond in a timely manner to their call for assistance. The Supreme Court of Washington observed:

> A governmental entity's exercise of discretionary acts at a basic policy level is immune from suit, whereas the exercise of discretionary acts at an operational level is not. . . . The purpose of such an exception is to preserve the integrity of our system of government by ensuring that each coordinate branch of government may freely make basic policy decisions.
>
> . . . .
>
> A simple decision whether to dispatch an officer to the scene of a crime or to investigate a crime, without more, does not involve a basic policy decision by a high level executive which would render the decision maker immune from suit. Rather, the decision is more properly characterized as operational, for it involves a type of discretion exercised at an everyday operational level.

(Citation omitted.) *Id.* at 282, 669 P.2d at 456.

As alleged in the petition, the conduct of the individual police officer in the instant case did not involve policy-level decisionmaking, but involved actions which he allegedly took, or refused to take, at the operational level. Thus, the provisions of § 13-910 would not exempt the officer or the city, as his employer, from liability.

For purposes of the Political Subdivisions Tort Claims Act, a tort claim is defined as

> any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death but shall not include any claim accruing before January 1, 1970.

§ 13-903(4).

A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, proximate causation, and damages. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). See *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986).

The enumeration of specific acts of negligence should state the ultimate acts of negligence and not the conclusion of the pleader. *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 203 N.W.2d 494 (1973).

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

A statement of "facts sufficient to constitute a cause of action" means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Balfany v. Balfany*, 239 Neb. 391, 476 N.W.2d 681 (1991); *Gruenemeier v. Seven-Up Co.*, 229 Neb. 267, 426 N.W.2d 510 (1988).

Thus, in determining whether the plaintiff's petition stated facts sufficient to constitute a cause of action, it is necessary to examine whether specific facts are enumerated which would serve to establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of plaintiff's damages.

The threshold issue is whether the plaintiff has alleged the existence of facts sufficient to establish that a duty existed between the defendant police officer and the plaintiff. Well over 100 years ago, the U.S. Supreme Court declared that law enforcement officials and, consequently, state and local governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct. *South et al. v. State of Maryland, Use of Pottle*, 59

U.S. (18 How.) 396, 15 L. Ed. 433 (1856).

In its discussion of the duty of care owed by a government employee to the general public, this court quoted from *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982), as follows:

> "We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery. [Citations omitted.] Thus, the parameters of duty owed by the state will ordinarily be coextensive with those owed by others."

Maple v. City of Omaha, 222 Neb. at 300, 384 N.W.2d at 260. We went on to say:

> In any event, we are persuaded by the reasoning of the Arizona court in *Ryan*. However, as noted in *Ryan*, the plaintiff still must show that a duty was owed to him, that this duty was breached, and that an injury was proximately caused by that breach.

Id. at 301-02, 384 N.W.2d at 260.

In regard to a general duty to control the conduct of third persons, the Restatement (Second) of Torts § 315 at 122 (1965) states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

In *Thomas v. City of Philadelphia*, 133 Pa. Commw. 121, 574 A.2d 1205, 1206 (1990), the court discussed the circumstances whereby a special relationship between the police and a crime victim may be established:

> In claiming a special relationship, the individual: "must demonstrate that the police were: 1) aware of the *individual's* particular situation or unique status, 2) had knowledge of the potential for the particular harm which the *individual* suffered, and 3) voluntarily assumed, in light of that knowledge, to protect the *individual* from the

> precise harm which was occasioned." . . .
>
> The two situations that provide exceptions to the no-duty rule are (1) to protect individuals who have aided law enforcement as informers or witnesses; or (2) where the police have expressly promised to protect specific individuals from precise harm.

(Citation omitted.)

These two situations were discussed at length in *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983). In observing that "[a] special relationship undoubtedly exists where an individual assists law enforcement officials in the performance of their duties," *id.* at 1312, the court enumerated situations where liability arose because the police made "active use" of a private citizen in investigation or arrest of a criminal. The court went on to note, however, that

> [i]n contrast, a special relationship does not come into being simply because an individual requests assistance from the police. . . . Otherwise, a police officer's general duty to the public inevitably would narrow to a special duty to protect each and every person who files a complaint with the department and attaches a request for help. . . .
>
> Nor is the situation changed when the police gratuitously promise to provide protection. . . . A promise to act adds nothing to the obligation law enforcement officers have already assumed as members of a police force guided exclusively by the public interest. . . .
>
> Between these boundaries are circumstances where the police do not benefit from a citizen's aid but nevertheless affirmatively act to protect a specific individual or a specific group of individuals from harm, in such a way as to engender particularized and justifiable reliance.

(Citations omitted.) *Id.* at 1313-14. The court emphasized that the existence of a duty, if any, to a particular individual is determined by police *actions* rather than *representations*. The court also noted:

> Hence, more than general reliance is needed to require the police to act on behalf of a particular individual. The plaintiff must specifically act, *see Florence v. Goldberg,*

> *supra*, 44 N.Y.2d at 197, 375 N.E.2d at 767, 404 N.Y.S.2d at 587 (plaintiff discontinued walking son to school, having "reason to rely" on presence of crossing guard), or refrain from acting, *see Bloom v. City of New York, supra*, 78 Misc.2d at 1078, 357 N.Y.S.2d at 981 (plaintiff restrained by police from providing own safeguards for property), in such a way as to exhibit particular reliance upon the actions of the police in providing personal protection. Liability is established, therefore, if the police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking.

468 A.2d at 1315.

Other jurisdictions have found that explicit assurances of protection that give rise to reliance are sufficient to create an actionable duty. For example, in *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P.2d 451 (1983), the court reiterated the general rule that the duty to provide police protection is owed to the public at large and unenforceable as to individual members of the public. The court noted the exception " 'where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons.' " *Id.* at 285, 669 P.2d at 457. The court concluded that an actionable duty to provide police services will arise when:

> (1) there is some form of privity between the police department and the victim that sets the victim apart from the general public . . . and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim. . . .
>
> The term privity is used in the broad sense of the word and refers to the relationship between the police department and any "reasonably foreseeable plaintiff" . . . . As to the second element, the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance. . . .

(Citations omitted.) *Id.* at 286, 669 P.2d at 458. In that case, 11 calls for assistance were made to the defendant's police

department commencing within 2 minutes of the beginning of an assault upon the plaintiffs and continuing over the period of another 1 hour 4 minutes. In spite of assurances by the police that someone would be right there, it was not until after 1 hour 20 minutes that an officer arrived.

In *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983), the estate of a woman killed by a burglar brought suit against a city and county for negligence in their response to the victim's call for assistance made to a special 911 number. She had placed her call for assistance at 9:29, and by 9:42 she had been assaulted and had suffered injuries from which she died. In finding that the city and county had a duty to protect the decedent, the court noted that those seeking emergency assistance were encouraged to call the 911 number, rather than their local police number, and that the victim had been affirmatively assured that help would be there "right away." It should be noted that the decedent lived but 1,300 feet from the village police station and when the neighbor who found her called directly to that station, a police car responded within a minute. The court found that

> [c]onsidering the fact that she was merely a block and a half from the local police station, and was not yet at the mercy of the intruder, it cannot be said as a matter of law that this assurance played no part in her decision to remain in her home and not seek other assistance. Unfortunately, it only increased the risk to her life.

60 N.Y.2d at 305, 457 N.E.2d at 721, 469 N.Y.S.2d at 616.

In the instant case, the city argues that the plaintiff has pled only that she continued to stay home, "the very place where she had sought refuge from her husband," and that her reliance was merely a "general" reliance upon regular police protection. Brief for appellees at 13. However, this argument disregards the consideration that the plaintiff was threatened by her assailant after she retreated to her home and that she allegedly received Officer Green's assurance following this event.

Although the plaintiff's petition contains allegations of specific reliance on Officer Green's assurance of protection, it is not clear from the petition that Officer Green undertook any special action on the plaintiff's behalf. In regard to Officer

Green's response to her concerns, the plaintiff alleges only that "Defendant R. Green stated that she would not need a special watch number and that he would be on duty and would be in the immediate area to protect her."

However, assuming, without deciding, that an officer's assurance alone is sufficient to give rise to a duty, we find that the plaintiff's action was properly dismissed for failure to state facts sufficient to constitute a cause of action.

When testing whether a petition which has been challenged by a demurrer states a cause of action, this court is required to accept as true all the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; it does not, however, accept as true the conclusions of the pleader. *Lewis v. Union Pacific RR. Co.*, 242 Neb. 744, 497 N.W.2d 33 (1993); *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

> The longstanding rule is that to state a cause of action for negligence, one must plead facts from which it can be inferred that the defendant owed a legal duty to protect the plaintiff from injury, that the defendant failed to discharge that duty, and that damage proximately resulted from that failure. See, *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988) . . . .

Widga v. Sandell, 236 Neb. 798, 801, 464 N.W.2d 155, 158 (1991). " 'The enumeration of specific acts of negligence should state the *ultimate acts of negligence* and not the conclusion of the pleader.' " (Emphasis in original.) *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 262, 430 N.W.2d 893, 896 (1988).

As stated above, the plaintiff alleged that Officer Green assured her that he would be in the immediate area to protect her. She further alleged that she stayed at her residence in reliance on this assurance, although there was no allegation of an alternative which she would have pursued absent such reliance.

In cases such as this, it is necessary to state facts which, if proven, would establish that the defendants owed a duty and that they breached that duty, proximately causing the plaintiff's damages. In regard to Officer Green's alleged negligence, the

petition states:

> Defendant R. Green was negligent in failing, refusing and neglecting to protect Plaintiff from her assailant after having affirmatively assured her that he would protect her and in failing, refusing and neglecting to be available to provide protection to Plaintiff after having assured her he would provide protection.

The petition thus relies on bare legal conclusions and generalizations and lacks any allegations of specific *acts* or omissions which would establish a duty as well as a breach of that duty and proximate causation. The petition alleges neither that Officer Green assured plaintiff she could remain at home nor what alternative action plaintiff would have taken absent the claimed assurances made by Officer Green.

The plaintiff failed to allege facts sufficient to constitute a cause of action, and the district court was correct in sustaining the demurrer and dismissing the action.

AFFIRMED.

FAHRNBRUCH, J., concurs.

LANPHIER, J., dissenting.

I respectfully dissent. Plaintiff's petition states that the defendants, the City of Omaha and Officer R. Green, were negligent in "failing . . . to protect Plaintiff from her assailant after having affirmatively assured her that he would protect her and in failing . . . to be available to provide protection to Plaintiff after having assured her" that he would. The petition further alleges she stayed at home in reliance on the representation. The majority determines that the petition "relies on bare legal conclusions and . . . lacks any allegations of specific *acts*" and therefore "failed to allege facts sufficient to constitute a cause of action."

This is incorrect for two reasons.

First, plaintiff's petition states exactly what her action is premised upon: defendant Green's failure to protect plaintiff after assuring her that he would be in the immediate area to do so. These are not legal conclusions, but specific acts which, if proved, establish negligence.

Second, the majority raises the historic standard for applying

a demurrer to a petition. It is well established that the "general allegation of negligence is good against a demurrer" where no motion to make more definite and certain has been filed. *Crawford v. Ham*, 209 Neb. 802, 805, 311 N.W.2d 896, 898 (1981). See, also, *Bunselmeyer v. Hill*, 179 Neb. 140, 137 N.W.2d 354 (1965); *Behrens v. Gottula*, 160 Neb. 103, 69 N.W.2d 384 (1955); *Chicago, R. I. & P. R. Co. v. O'Donnell*, 72 Neb. 900, 101 N.W. 1009 (1904). The petition at issue meets this standard. Also, in considering a demurrer, a court must assume the facts pled in the petition are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged. See, *Lewis v. Union Pacific RR. Co.*, 242 Neb. 744, 497 N.W.2d 33 (1993); *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992). The judgment of the lower court sustaining defendants' demurrer should be reversed.

There are additional reasons defendants' demurrer should have been overruled. The majority cites *Thomas v. City of Philadelphia*, 133 Pa. Commw. 121, 574 A.2d 1205 (1990), to illustrate that the plaintiff in the instant case had not established a relationship with defendant Green which would impose liability. *Thomas* requires that the police (1) be aware of an individual's particular situation, (2) be aware of the potential for the particular harm which was suffered, and (3) assume the duty to protect that individual from that precise harm. *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983), also cited by the majority, further narrows the circumstances required for a cause of action by requiring the establishment of a "special relationship" between the victim and the police. A special relationship is formed when the police "affirmatively act to protect a specific individual . . . from harm, in such a way as to engender particularized and justifiable reliance." *Id.* at 1313-14. Additionally, the majority notes that the *Morgan* court emphasized that the existence of a duty, if any, to an individual is determined by police actions rather than representations. However, the majority opinion fails to recognize that Officer Green's visit to the plaintiff, together with the representation to protect, constitutes "action." These facts establish misfeasance rather than mere nonfeasance as apparently found by the majority. See *Tarasoff v. Regents of*

University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In light of these criteria, defendant Green did have a duty to protect plaintiff.

The pled facts demonstrate that (1) Officer Green was aware of plaintiff's particular situation because he discussed it with her at her home; (2) Officer Green had knowledge of the potential for the particular harm plaintiff suffered, due to events which occurred earlier that evening; (3) Officer Green voluntarily assumed, in light of this knowledge, to protect plaintiff from the precise harm to which plaintiff was subjected. Plaintiff, in reliance on these representations, did not seek shelter elsewhere, but remained in what she perceived to be the safety of her home. Fifteen minutes later, plaintiff's former husband broke down plaintiff's door, chased her across the street, and beat her with a tire iron. These circumstances plainly meet the special relationship requirement of *Morgan* and the relationship requirement of *Thomas*.

If recovery is denied when an officer explicitly assures a victim of domestic or other violence that he or she may remain at home and be protected, and fails to do so, then when can liability be established? To permit defendants to escape liability without even a trial in such circumstances would prevent citizens from ever recovering due to clear negligence of the police following a promise of protection which a hapless victim relies on.

For the reasons cited, I would reverse the judgment of the district court.

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

JOYCE SELL, APPELLEE, V. MARY LANNING MEMORIAL HOSPITAL ASSOCIATION, APPELLANT.

498 N.W.2d 522

Filed April 16, 1993. No. S-90-980.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.

2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat the defendant's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the plaintiff. Such being the case, the plaintiff 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 deduced from the evidence.
3. **Mental Distress: Negligence: Proximate Cause: Proof.** As a prerequisite to a valid claim for negligent infliction of emotional distress, the plaintiff is required to show that a negligent act of the defendant's proximately caused the plaintiff to suffer severe emotional distress.
4. **Mental Distress.** To be actionable, emotional distress must have been so severe that no reasonable person could have been expected to endure it. Furthermore, the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.

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

John A. Wagoner and Robert W. Wagoner for appellant.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

PER CURIAM.

Joyce Sell, plaintiff, brought an action against Mary Lanning Memorial Hospital Association (Hospital) for negligent infliction of emotional distress. The petition sought recovery for injuries sustained by plaintiff after the Hospital had mistakenly advised her that her son had died from injuries he sustained in an accident. The case was tried in the district court for Adams County, where the jury returned a verdict for plaintiff in the amount of $15,000. The Hospital timely appealed to this court.

BACKGROUND

The record shows that during the late evening of June 13, 1987, Scott Sell and Jon Stones, both then 17 years old, were critically injured when the motorcycle they were riding collided with an automobile. Both Scott Sell and Jon Stones were thereafter taken by ambulance to the emergency room of the

Hospital, where they arrived shortly after midnight on June 14. Jon Stones was pronounced dead at the Hospital at 1:10 a.m.

Wayne Kimminau, a friend of the boys', was at the emergency room when the ambulance arrived and gave the Hospital's personnel the names of the boys and the names and addresses of their parents. There is some dispute as to whether Kimminau also identified the boys themselves for the Hospital's personnel.

Plaintiff, who is the mother of Scott Sell, and the rest of Scott Sell's immediate family arrived at the Hospital at approximately 1 a.m. At 1:30, the emergency room physician, Dr. Lawrence Banta, advised them that Scott Sell had died at 1:10 as a result of injuries suffered in the accident. The identification of the decedent had been provided to Dr. Banta by an emergency room nurse. Dr. Banta thereafter asked the Sells if they wished to view the body, but they declined to do so and went home instead.

Plaintiff and her family began making burial arrangements the next day, Sunday, including selecting a casket and taking Scott Sell's clothes and graduation picture to the mortuary. On Monday, the Sells chose a burial plot at the cemetery and selected the flower arrangements for the funeral. The Sells then went to the mortuary Monday afternoon to finalize the burial arrangements. Upon their arrival, the mortician asked plaintiff and her husband to view the body of their son. When the casket was opened, plaintiff and her husband saw the body of Jon Stones.

Plaintiff and her family immediately proceeded to the Hospital, where they demanded to see the patient in the intensive care unit. Lt. Stephen Murphy of the Hastings Police Department met the family in the lobby and directed them into a conference room while the patient in the intensive care unit was identified. All during these events, Jean Stones, the mother of Jon Stones, and her father, Charles Theesen, had kept a 24-hour vigil at the bedside of the patient in intensive care, believing it to be Jon Stones. After the Sells arrived at the Hospital, a positive identification was made, identifying the boy in intensive care as their son, Scott Sell.

ASSIGNMENTS OF ERROR

The Hospital assigns four errors, contending that the trial court: (1) erred in failing to hold as a matter of law that plaintiff did not establish a prima facie case of negligent infliction of emotional distress, and, thus, it was error to overrule the Hospital's motion for a directed verdict; (2) erred in not giving the jury a superseding/intervening instruction when requested to do so by the Hospital when the evidence clearly supported one; (3) erred in submitting instructions on the elements of a cause of action for negligent infliction of emotional distress, on proximate cause, and on damages when there was no evidence to support the giving of such instructions; and (4) erred in overruling the Hospital's motion for new trial or, in the alternative, its motion for a judgment notwithstanding the verdict.

STANDARD OF REVIEW

A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). In reviewing the action of a trial court, we must treat the defendant's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the plaintiff. Such being the case, the plaintiff 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 deduced from the evidence. *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984); *B. E. Implement Co. v. Valley Farm*, 216 Neb. 269, 343 N.W.2d 892 (1984).

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Hospital first contends that plaintiff failed to establish a prima facie cause of action for negligent infliction of emotional distress. We agree, but not for the reasons cited by the Hospital.

The Hospital relies on *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985), where this court abolished the strict "zone

of danger" requirement, adopting instead the "bystander recovery" test. Under this approach, a plaintiff bystander can recover for negligently inflicted suffering resulting from the plaintiff's concern for the safety of another if (1) there was a marital or intimate familial relationship between the plaintiff and the victim and (2) the plaintiff's emotional trauma resulted from either death or serious injury to the victim. If this were the only avenue for an action for negligent infliction of emotional distress, the Hospital's contentions would be correct. Plaintiff's son did not suffer serious injury or death due to the Hospital's negligence.

However, in three recent cases we have demonstrated a willingness to recognize a cause of action for negligent infliction of emotional distress by a "direct victim" of a defendant's negligence. In the first of these cases, *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992), the plaintiff brought an action against a hospital for negligent infliction of emotional distress. The plaintiff claimed that he suffered emotional distress after learning that while he was in the hospital he had received treatment from a nurse not licensed to administer such treatment. We affirmed the trial court's dismissal of the case upon a finding that there was no negligence by the defendant hospital which would support such an action.

In *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992), decided shortly after *Turek*, the plaintiff brought an action against a hospital for negligent infliction of emotional distress after the hospital reported to the county coroner unusual circumstances surrounding the death of the plaintiff's daughter. This report resulted in the plaintiff's being questioned by the police concerning her daughter's death, which questioning the plaintiff claimed caused her emotional distress. We stated that "[i]n order to recover, the plaintiff was required to show that a negligent act of the defendant's proximately caused her to suffer severe emotional distress." *Schleich*, 241 Neb. at 769, 491 N.W.2d at 310. Again, however, no negligence by the defendant was proven by the plaintiff, nor was there a showing of severe emotional distress, so no recovery could be had.

In the most recent case, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993), the plaintiff brought an action against her father's employer after discovering that her father had accidently been killed on the job. We found that there was no evidence that the death of the plaintiff's father "had an extraordinary effect, either psychological or physical," on the plaintiff. *Id.* at 734, 496 N.W.2d at 916. Accordingly, there was not " 'emotional distress' sufficiently severe and medically significant to be actionable under Nebraska law." *Id.* We therefore affirmed the district court's summary judgment.

This case is most similar to *Parrish*. This court has held that as a prerequisite to a valid claim for negligent infliction of emotional distress, "the plaintiff [is] required to show that a negligent act of the defendant's proximately caused her to suffer severe emotional distress." *Schleich*, 241 Neb. at 769, 491 N.W.2d at 310. The facts of this case support the first two requirements for a claim of negligent infliction of emotional distress: that the Hospital was negligent and that this negligence was the proximate cause of plaintiff's injury.

However, the third requirement of the claim, medically diagnosable emotional distress, disposes of this appeal. In elaborating upon the third requirement, we have stated:

> To be actionable, emotional distress must have been so severe that no reasonable person could have been expected to endure it. *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985); *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981). Furthermore, the emotional anguish or mental harm must be *medically diagnosable* and must be of sufficient severity that it is *medically significant*.

(Emphasis supplied.) *Schleich*, 241 Neb. at 770-71, 491 N.W.2d at 310-11. Accord *Parrish, supra*.

The record shows that after being misinformed of her son's death, plaintiff was continually crying, had trouble eating and sleeping, and at some point had to be put on medication so that she could rest. Dr. Banta, the physician who mistakenly informed plaintiff of her son's death, testified that after receiving the news, plaintiff was in a "state of shock." Dr.

Banta, who was receiving training in psychiatry at the time, further added that he was referring to "shock" as a layman would understand it and not "shock" in medical terms, which would require fainting or the like. Plaintiff's husband testified that upon receiving the news, plaintiff was a "basket case" and had to be helped from the Hospital. Finally, plaintiff herself testified that due to this episode, her "life [will] never be the same . . . [b]ecause you always think about it."

Without minimizing plaintiff's apparent and understandable heartache upon being told of her son's death, we find that "an action for emotional distress is a particular type of legal action which requires 'emotional distress . . . so severe that no reasonable person could have been expected to endure it,' " emotional distress evidencing " 'sufficient severity that it is medically significant.' " *Parrish*, 242 Neb. at 734, 496 N.W.2d at 916 (citing *Schleich, supra*). Under that standard, plaintiff failed to present a prima facie case of negligent infliction of emotional distress. The district court should have found as a matter of law that the Hospital was entitled to a directed verdict and should have dismissed the cause at the close of plaintiff's case.

CONCLUSION

Plaintiff failed to establish a prima facie cause of action for negligent infliction of emotional distress. Thus, the Hospital's motion for a directed verdict should have been granted. Accordingly, the trial court's judgment is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FAHRNBRUCH, J., concurs in the result.

CAPORALE, J., concurring.

I concur with the majority's conclusion that the district court's judgment must be reversed and the cause remanded for dismissal, but I differ as to the reason.

In my view the plaintiff, Joyce Sell, has failed to prove any facts constituting a cause of action, notwithstanding that the record supports a finding that the defendant, Mary Lanning Memorial Hospital Association, violated its own rules

concerning the identification of unconscious or dead persons brought to it. We have defined a "cause of action" as a set of facts on which recovery may be had. *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). Stated in a slightly different way, a cause of action consists of a fact or facts that give one a right to judicial relief. *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155 (1991). In more elaborate terms, a cause of action is the judicial protection of one's recognized right or interest when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). Thus, inherent in a common-law cause of action is the juridical determination that a given set of facts gives rise to a right or interest the violation of which warrants vindication.

I have difficulty accepting the notion that the courts must intervene each and every time a mistake has been made and rush to assuage one's transitory psychic reaction with a monetary award. The most important factors to take into account in determining whether a court should take cognizance of an occurrence and give common-law relief are the nature of the mistake and the resulting consequences.

Under the circumstances presented in this case, it seems to me we should shed tears for the loss of young Jon Stones' life, empathize with the grief of his family and friends, rejoice in Scott Sell's life, and move on.

LANPHIER, J., dissenting.

The majority today, in ratifying the Hospital's allegation that it was necessary for plaintiff to adduce expert medical or psychological evidence regarding her mental suffering and distress, ignores the obvious. The requirement that emotional distress be "medically diagnosible" as set forth in *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993); *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992); and *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992), should not be read to mean "*diagnosed*." While I agree that the court has stated that to be actionable, " 'emotional distress must have been so severe that no reasonable person could have been

expected to endure it,' " I disagree that explicit proof of such distress by way of expert testimony is necessary in every case, particularly in this case.

In *Eiting v. Godding*, 191 Neb. 88, 91, 214 N.W.2d 241, 243-44 (1974), this court stated:

> In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. [Citation omitted.]
>
> Courts generally limit such cases to those where the causal connection is clearly apparent from the injury itself and the circumstances surrounding it or where the cause of the injury relates to matters of common experience, knowledge, and observation of laymen.

It does not require "special technical knowledge or science" in order to realize that a parent would suffer emotional distress as a result of the notification of the death of a child. We should not close our eyes to what the rest of the world can see. We recognized this in *James v. Lieb*, 221 Neb. 47, 53, 375 N.W.2d 109, 113 (1985), when we quoted approvingly from *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980):

> "[T]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on safer hues. No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure."

I can find no better expression that the loss of a child causes emotional suffering of such a universal character that no further proof of injury is necessary. The trial court read that portion of *James v. Lieb* into the record in overruling the motion for directed verdict. I agree.

Today's decision requires plaintiff to prove with medical certainty, as part of a prima facie case of negligent infliction of

emotional distress, that emotional distress resulting from the perceived death of a child is severe. Such a holding constitutes judicial overkill. The result will prove to be of benefit primarily, if not exclusively, to expert witnesses rather than the judicial system. I hope our society has not reached the point where we need a doctor to tell us what emotional impact results from loss of a child. Perhaps we have. Following a tragic death, we are increasingly seeing reporters for the electronic media inquire of a bereaved family member, "How do you feel?" Perhaps the judicial system is recognizing that nescience. I am reminded of Louis Armstrong's answer to a request to define jazz: "Man, if you gotta ask you'll never know." This is not a case of hard facts making bad law, but, rather, hard law begetting bad results. I would affirm the verdict of the district court jury.

WHITE and SHANAHAN, JJ., join in this dissent.

JOHN O. ELIKER AND DONNA J. ELIKER, HUSBAND AND WIFE, APPELLEES, V. CHIEF INDUSTRIES, INC., APPELLANT.
498 N.W.2d 564

Filed April 23, 1993. No. S-90-564.

1. **Actions: Contracts: Rescission: Equity.** An action to rescind a written instrument is an equity action.
2. **Equity: Appeal and Error.** On appeal from the district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Contracts: Rescission.** Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement.
4. **Contracts: Consideration: Breach of Contract: Rescission: Equity.** Although failure of consideration is not generally considered a sufficient ground for equitable cancellation of a contract, a ground for equitable cancellation may arise from a breach of contract which is so substantial and fundamental as to defeat the object of the parties in entering into the contract.
5. **Construction Contracts: Words and Phrases.** Substantial performance of a

building contract exists where all of the essentials necessary for the full accomplishment of the purposes of the contract have been performed with such approximation to complete performance that the owner obtains substantially what is called for by the contract.

6. **Construction Contracts: Breach of Contract: Rescission.** Rescission is the proper remedy where a breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement, so that it leaves the property bargained for uninhabitable for all practical purposes.

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

Douglas L. Kluender, of Healey Wieland Law Firm, for appellant.

No appearance for appellees.

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

HASTINGS, C.J.

John O. and Donna J. Eliker brought this action to obtain rescission of a home construction contract entered into with Chief Industries, Inc. The district court found that the plaintiffs were entitled to rescission of the contract, together with repayment of sums which they had expended on the house, and relief from the existing mortgage. The court further ordered that upon rescission of the contract and the making of the required repayments, the defendant was entitled to a quitclaim deed to the property from the plaintiffs.

An action to rescind a written instrument is an equity action. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985).

On appeal from the district court to an appellate court, an equity case is tried as to factual issues de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Helvey v. Dawson Cty. Bd. of Equal.*, 242 Neb. 379, 495 N.W.2d 261 (1993); *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992).

On February 15, 1984, the Elikers entered into a contract

with Chief Industries for the purchase of a new home. The Elikers moved into the home on May 27, 1984, and immediately began to notice defects in material and workmanship. Apparent defects, inter alia, included a cracked driveway; drain tile which allowed water to drain into the garage; numerous exterior foundation cracks; an exterior wall which was bowed inward 1 to 2 inches; water seepage in the basement and garage; numerous severe cracks in the basement walls, including one which allowed daylight to show through; wooden center beams which extended through the concrete floor into the earth, as a potential source for termite infestation; doors which were out of alignment; drywall with extreme horizontal cracking and buckling; a large crack located in the center of the living room ceiling extending down the west wall of the house; and a living room floor which was separating into two halves, with the resulting two floor levels on different planes.

A registered land surveyor who surveyed the property testified that the foundation was not square, the house was not square, and the foundation was not level. Building contractor Lawrence Peterson testified that he had inspected the house and estimated that it would cost $23,477.25 to do the necessary repairs. A licensed real estate appraiser, Stanley Trampe, stated that his inspection of the property revealed it would be necessary to spend a minimum of $18,500 for repairs and that even after the repairs were accomplished the house would have limited marketability because of the inherent structural defects. Chief Industries' director of purchasing stated that the repairs that he believed were necessary could be done for less than $5,500 and would not include foundation repairs.

The district court found that the cost of repair, when added to the present value of the home, exceeded the value of the home after that repair and that the plaintiffs were entitled to rescission. Chief Industries asserts that the district court erred in holding that rescission was an appropriate remedy for a construction contract.

Chief Industries asserts that the proper remedy for breach of a construction contract may be found in the language of this court in *Moss v. Speck*, 209 Neb. 46, 48, 306 N.W.2d 156, 157 (1981):

> [W]here defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects, but where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.

Chief Industries also contends that while rescission of a contract is allowable in certain circumstances, it is an extreme remedy available only where damages cannot be utilized to compensate the plaintiffs for their loss.

Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement. See 13 Am. Jur. 2d *Cancellation of Instruments* § 23 (1964). Although failure of consideration is not generally considered a sufficient ground for equitable cancellation of a contract, a ground for equitable cancellation may arise from a breach of contract which is so substantial and fundamental as to defeat the object of the parties in entering into the contract. *Id.*

In *Klapka v. Shrauger*, 135 Neb. 354, 361, 281 N.W. 612, 616 (1938), this court discussed the general rule:

> "It is not every breach of a contract or failure exactly to perform—certainly not every partial failure to perform—that entitles the other party to rescind. A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract; the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom. A rescission is not warranted by a mere breach of contract *not so substantial and fundamental as to defeat the object of the parties in making the agreement*."

(Emphasis supplied.)

Substantial performance of a building contract exists where all of the essentials necessary for the full accomplishment of the purposes of the contract have been performed with such approximation to complete performance that the owner obtains substantially what is called for by the contract. *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961). Such was not the case here.

The Iowa Court of Appeals, in *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 181 (Iowa App. 1988), quoting *The Maytag Co. v. Alward*, 253 Iowa 455, 112 N.W.2d 654 (1962), stated:

> "There is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances of the particular case. It is permitted for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof, and *for such a breach as substantially defeats its purpose*. It is not permitted for a slight, casual, or technical breach, but, as a general rule, *only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.* Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient."

Although Chief Industries asserts that the proper remedy for breach of a construction contract is damages rather than rescission, the existing case law does not preclude the application of an equitable remedy where a breach of the contract is so substantial that it defeats the object of the parties in entering into the agreement. Where damages are inadequate, or inordinately difficult to assess, the equitable remedy may apply. As stated in *Moss v. Speck*, 209 Neb. at 48, 306 N.W.2d at 157, in an action at law, damages may be measured by "the cost of remedying the defects" or by "the difference between the value as constructed and the value if built according to the contract." However, the court further noted:

The latter rule contemplates instances where the contract

> has been substantially complied with, *the structure as completed will serve substantially as well as would the structure if completed according to the contract*, and completion in accord with the contract terms would either endanger the balance of the structure or be possible only at inordinate cost.

(Emphasis supplied.) *Id.*

In evaluating these alternative remedies in light of the facts of the instant case, it is instructive to note that the district court found that "the cost of repair, when added to the present value of the home, exceeds the value of the home after that repair." Implicit in that conclusion, which is amply supported by the record, is the finding that the necessary repairs could not be accomplished for less than $5,500, as Chief Industries contends, but, rather, would cost in the range of $18,500 to $23,500, as estimated by a licensed real estate appraiser and a building contractor, respectively. Both of the latter estimates contemplated extensive renovation. The building contractor testified that in order to remedy the defects he would first replace the foundation and basement floor, which would require "jacking up the house" while the excavation was done on the outside and the concrete removed. He also stated that the Elikers would have to move out of the house for 6 weeks while the repairs were accomplished. Although the real estate appraiser's estimate did not include a new foundation, he enumerated many significant repairs which would be necessary, including such items as stabilization of the roof, new drywall, installation of steel jacks in the basement, leveling of the living room floor and rebolting the center beam, excavation around the outside perimeter and installation of new drain tile, and raising the house to replace a load-bearing wall between the garage and the basement. Thus, the first measure of damages, the cost of remedying defects, is not applicable, since reconstruction of a substantial portion of the building would be required. The alternative measure of damages, applicable when the defects cannot be remedied without reconstruction of, or material injury to, a substantial portion of the building, is not appropriate when the structure *as completed* will not serve substantially the same purpose as if it had been completed

according to the contract. From an examination of the record, it is clear that the structure, as completed, does not serve the same purpose as it would have if completed according to the contract.

In *Whiteley v. O'Dell*, 219 Kan. 314, 548 P.2d 798 (1976), the defendant agreed to construct a house for the plaintiffs which was similar to another house he had built. While construction of the house was still in progress, the plaintiffs became aware that the contractor was not complying with certain contract specifications. For example, the builder used sealdown shingles rather than the T-lock shingles which the plaintiffs had specifically ordered, and the defendant did not offer to replace them. In addition, the contract specified that the house was to be all brick, but the plaintiffs discovered that brick veneer was added only to the front and that the ledge necessary to support the brick veneer had been omitted on three sides of the house. Although the defendant attempted to remedy this problem by laying cement blocks where the ledge should have been extended from the foundation, a construction expert testified that the use of this method could cause an unequal bearing on the footings of the house. The Supreme Court of Kansas noted the general rule that in order to warrant rescission, a breach must be material and the failure to perform so substantial as to defeat the object of the parties in entering the agreement. The court found that compliance with the specifications was important to the plaintiffs, that the failure to include a ledge on three sides of the house and the use of the wrong shingles constituted a present material breach of the contract, and that these substantial variations "obviously should entitle the purchaser to rescind the contract." 219 Kan. at 318, 548 P.2d at 802.

In the instant case, the variations between the house that the Elikers bargained for and the structure as completed were egregious. The record contains numerous instances of defects in material and workmanship; for example, the contract provided that steel floor jacks were to be installed in the basement; instead, 4 by 4 wood columns were used and extended through the floor, exposing them to moisture and potential problems of rotting and termites. Real estate appraiser Trampe also testified

that the dividing wall between the garage and the basement was built on the concrete floor, with no moisture barrier. Trampe stated that the load-bearing wall, exposed to constant moisture in the garage, would rot and provide a perfect habitat for termites.

Undoubtedly, the Elikers, or any purchaser, would not bargain for the purchase of a new home with a design which would cause it to split in half at both the floor and the ceiling. Chief Industries' director of purchasing, Jack Henry, admitted that the house had a faulty design, that the workmanship was substandard, and that prior to the Elikers' complaint, he was aware of the problem of the ceiling crack because it had appeared in other houses in the subdivision. When Henry was questioned about the appearance of the ceiling as he proposed to repair it, he was asked: "Q. Did the model home that they looked at, at the time they looked at it, have that ceiling? A. At the time that they looked at it, it did not. Q. Was it cracked? A. I don't know if it was cracked when they looked at it."

Thus, the Elikers were apparently unaware that their new home would require extensive repair to the ceiling.

In his deposition, real estate appraiser Richard Keith testified that he had inspected the Elikers' property on May 2, 1985, and again on February 13, 1990. It was Keith's opinion that the property had significantly deteriorated during that period of time. Keith stated that the problems which he observed in the home were mostly structural, and when asked to define structural, he responded:

> Well, the basis of any improvement on real estate is the foundation it sets on. And if that is not correct and enduring, there's no way the improvement can ever reach a typical economic life. And for some reason, it seems that everything points back to the foundation on this problem for the major problems that are not cosmetic, and that it continues to deteriorate with no stabilization.

On cross-examination, Keith was also asked if the house was "totally uninhabitable," to which he replied:

> I think to answer that question I would have to establish some relationship of the term uninhabitable. Having worked in an eminent domain work, being associated with

> relocations programs over the years at the Department of Roads and on the federal level, it would be my opinion of having worked in those programs that the property would not be adjudged a decent, safe and sanitary home for a relocatee from one of those projects.

Although the Elikers purchased the house for $52,195, at the time of trial real estate appraiser Trampe estimated its value at $35,500 for an investor-type buyer. He agreed that repairs alone would not materially improve the situation. He testified in part:

> Once again, I've said that this is an investor-type house only at this point in time. Now, when an investor is going to buy this house, he's buying it for one reason, profit. At the same time, investors that deal in houses have one golden rule: Do not touch anything that has structural or plumbing defects, 'cause you don't know what you're going to get into. Your costs are going to go up to try to fix 'em up. If you don't fix 'em up right — and that's what concerns me about my estimate here — If you don't fix 'em up right, there is a continuing liability that's going to go with that house if you ever sell it. So, really, my $18,500 I'm referring to, is a minimum not a maximum that this could cost.

Trampe also stated that problems with the house could very possibly continue, because the majority of the problems were caused by the foundation wall, and that the Elikers would probably end up spending more money than his estimate of what an investor would need to spend.

In *Bernstein v. Ainsworth*, 220 Neb. 670, 371 N.W.2d 682 (1985), homeowners sought recovery for damages to their home resulting from the overflow of a manmade lake. This court found that the petition failed to state a cause of action against the developer who sold a vacant lot to the vendors, but noted:

> [The plaintiffs] equate the implied warranty that some courts have held exists between the builder of a house and the buyer of that house to the sale of a lot to a buyer who contracts with another to build a house on the lot. Nebraska has adopted the builder-vendor rule in *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925

> (1974). In the *Henggeler* case we held "As a general rule a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner and in accordance with good usage and accepted practices in the community in which the work is done." *Id.* at 319, 214 N.W.2d at 926.

220 Neb. at 676, 371 N.W.2d at 687.

Other jurisdictions have found rescission to be justified where there has been a substantial breach of the implied warranty of habitability. In *Finke v. Woodard*, 122 Ill. App. 3d 911, 462 N.E.2d 13 (1984), the plaintiffs sought damages and an order of rescission as a result of defects in a new home built and sold by the defendant. Defects included improperly installed appliances, interior walls which were weak and separated from the ceiling, doors which would not close, a crack which developed in the concrete floor of an outside storage shed, and a malfunctioning septic system. While noting that not every breach will warrant the extraordinary remedy of rescission, the court found that the evidence suggested that the breach of the implied warranty of habitability was substantial and justified rescission, stating:

> " ' "[A] party may terminate or rescind a contract because of substantial nonperformance or breach by the other party." [Citation.] "A total breach of contract is a nonperformance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end." (A. Corbin, Contracts sec. 946, at 925 (1952).) Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case. A. Corbin, Contracts sec. 946, at 925 (1952).' "

122 Ill. App. 3d at 916, 462 N.E.2d at 17 (quoting *C. G. Caster Co. v. Regan*, 88 Ill. App. 3d 280, 410 N.E.2d 422 (1980)).

Similarly, in *Wall v. Foster Petroleum Corp.*, 791 P.2d 1148 (Colo. App. 1989), rescission was found to be an appropriate remedy. In *Wall*, the plaintiff discovered that water had seeped into his basement and cracks had developed in the basement

slab and upper portions of the house; he later learned that the house was situated on a type of soil that expanded when mixed with water, putting pressure on the foundation and other structural components. The defendant argued, as in the instant case, that the house could be repaired and that, therefore, the plaintiff was entitled to damages rather than rescission. The court stated:

> Here, defendant was neither negligent in building the house nor fraudulent in its representations. However, this implied warranty arises because the builder-vendor holds himself out as having the expertise to construct a livable dwelling . . . and rescission is an appropriate remedy for misrepresentation, even if the seller does not realize the falsity of the misrepresentation. . . .
>
> Generally, rescission may be granted if the facts show that there is a substantial breach, that the injury caused is irreparable, or that damages would be inadequate, difficult, or impossible to assess. . . . Here, the evidence supports the trial court's determination that the breach was substantial and the damage was incurable. Additionally, given the ongoing nature of the problem, damages would be difficult, if not impossible, to assess. Accordingly, rescission of the contract is warranted.

(Citations omitted.) 791 P.2d at 1150.

The purchaser of a new home expects it to be, at the very least, structurally sound and habitable. The purchaser should also not be faced with the virtual impossibility of resale because of the home's latent defects. We hold that rescission is the proper remedy where a breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement, so that it leaves the property bargained for uninhabitable for all practical purposes. The record supports such a conclusion in this case, and the record establishes that the defendant breached its duty to construct a house reasonably fit for its intended use. Because damages would be an inadequate remedy, rescission is the appropriate remedy, and the district court was correct in awarding that remedy.

AFFIRMED.

REGENCY HOMES ASSOCIATION, APPELLEE, V. GEORGE W. EGERMAYER, JR., AND JEAN M. EGERMAYER, APPELLANTS.

498 N.W.2d 783

Filed April 23, 1993. No. S-90-710.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Foreclosure: Liens: Real Estate: Equity.** An action to foreclose a lien on real estate is grounded in equity.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, 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.
4. **Contracts: Real Estate: Words and Phrases.** A covenant is either real or personal. Covenants that run with the land are real, as distinguished from personal covenants that do not run with the land.
5. **Contracts: Assignments.** A personal covenant is not assignable.
6. **Contracts: Real Estate.** The "touch and concern" requirement of a real covenant is met when the covenant affects the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. The covenant must impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land.
7. **Contracts: Real Estate: Fees.** The following factors are to be considered in determining whether a covenant to pay dues to a recreational facility touches and concerns the land: (1) whether the recreational facility and the residential area are part of a common scheme of development, (2) whether the recreational facility is in close proximity to the residential area, and (3) whether the covenant grants the right of common use of the recreational facility to all property owners.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellants.

William A. Day, Jr., and William J. Dunn, of Gross & Welch, P.C., for appellee.

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

FAHRNBRUCH, J.

After trial of this real estate foreclosure action, the district court for Douglas County held, inter alia, that a declaration requiring Regency subdivision homeowners to pay dues to Regency Homes Association (RHA) is a valid covenant running with the land.

The trial court entered judgment for $884 plus costs against the appellant homeowners, George W. Egermayer, Jr., and his wife, Jean M. Egermayer. RHA's foreclosure of its lien against the Egermayers' real estate for unpaid RHA dues and other charges was also upheld.

We affirm the judgment of the district court.

ASSIGNMENT OF ERROR

The sole issue raised by the Egermayers on appeal is whether the trial court erred in finding the Declaration of March 19, 1968 (Declaration), to be a valid covenant running with the land as it applies to the obligation of a property owner to pay dues to a social club open to the public and owned by a private individual.

For reasons hereinafter discussed, we believe the Egermayers have mischaracterized the nature of the obligation imposed by the covenant. The issue may more accurately be described as whether the trial court erred in finding the Declaration to be a valid covenant running with the land as it applies to the obligation of a property owner to pay money to a homeowners' association that operates a recreational facility.

The Egermayers also assign as error the district court's failure to grant their motion for new trial. This assignment of error is not discussed in their brief. To be considered by the Supreme Court, an error must be assigned *and discussed* in the brief of one claiming that prejudicial error has occurred. *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992); *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991); *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991).

STANDARD OF REVIEW

An action to foreclose a lien on real estate is grounded in equity. See, *County of Keith v. Fuller*, 234 Neb. 518, 452 N.W.2d 25 (1990); *Production Credit Assn. of the Midlands v.*

Schmer, 233 Neb. 749, 448 N.W.2d 123 (1989). In an appeal of an equity action, this 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, this 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. *Id.*

FACTS

The Regency subdivision, a large multiuse development with residential, commercial, and recreational areas, was developed in Omaha in the late 1960's by Regency, Inc., and United of Omaha. Regency, Inc., apparently was or is a wholly owned subsidiary of United of Omaha. The plaintiff, RHA, was incorporated in the State of Nebraska on March 15, 1968.

In the Declaration, Regency, Inc., set forth the general and specific covenants governing the subdivision, and five individuals described as "all of the owners other than Regency, Inc.," accepted and agreed to the Declaration. At issue in this lawsuit is § 4 of the Declaration, requiring property owners to be members of RHA. That section provides:

> 4. Association: The involved property is . . . included in membership in [RHA] subject to all and each of the following conditions and other terms:
>
> a. [RHA] will have the right, in general, without any part of its net earnings inuring to the private benefit of its members, to promote and sustain their social welfare and otherwise provide for their health, pleasure, recreation, safety, and other nonprofitable interests by acquiring, maintaining, operating, contributing to the acquisition, maintenance, or operation of, or otherwise *making available for use any one or more area entrances or entry structures, boat docks, golf courses, lakes, parks, swimming pools, tennis courts, and any other recreational equipment*, facilities, grounds, or structures, by providing weed and other actual or potential nuisance abatement or control, security service, and other community services, by exercising architectural control and securing

compliance with or enforcement of applicable covenants, easements, restrictions, and similar limitations, *by fixing and collecting or abating dues or other charges for financing its operations*, by delegating by contract or otherwise to any other Nebraska nonprofit corporation general responsibility for administration and executive management of its affairs, and . . . to engage in any other venture for the mutual nonprofitable interests of its members for which a corporation may be organized under the Nebraska Nonprofit Corporation Act, as amended.

b. . . . [E]very lot will be automatically included in membership in [RHA] as a benefit or burden running with and charge upon the ownership of each such lot . . . .

c. Dues or other charges for each lot included in membership fixed by [RHA] in the manner set out in its Articles of Incorporation or its By-Laws, as from time to time amended, will each constitute until abated or paid a lien upon and charge against such lot in favor of [RHA] . . . .

(Emphasis supplied.)

Section 5 of the Declaration provides for enforcement of covenants, easements, and other terms of the Declaration through legal and equitable proceedings, and entitles RHA to "fix a reasonable charge for such action as a lien upon and charge against such lot in favor of [RHA]." The parties have stipulated that the Declaration was recorded at pages 103 through 116 of book 461 of the Miscellaneous Records of the Register of Deeds of Douglas County, Nebraska.

The recreational facilities for the Regency subdivision were developed by United of Omaha, the developer of the subdivision, in the late 1960's. A 25-acre lake was built first, followed by construction of a clubhouse in 1968-69. Other amenities included a private lakeshore park, tennis courts, and a swimming pool, all funded by United of Omaha for the benefit of Regency dwellers. The recreational facility has been known as Regency Lake and Tennis Club (RLTC). United of Omaha also owned and maintained a 1-acre park within the subdivision.

On May 31, 1980, United of Omaha deeded the 1-acre park

and the 4 acres on which RLTC is situated, including the clubhouse, tennis courts, and parking lot, to RHA. Although use of Regency Lake is available to RHA members, the lake itself continues to be privately owned and is now operated by Regency Lake Association. RHA contributes 35 percent of the operating costs of the lake, which costs are shared by two other entities.

The RHA bylaws create and define two classes of membership:

> SECTION 2: MEMBERS
>
> . . . .
>
> b. Regular Members: Regular Members shall be as follows:
>
> (1) Each individual contract purchaser or owner of a residential lot or a townhouse lot or dwelling unit within the limits of any real property included in membership, any one of each of several individual contract purchasers or owners of any one such lot or unit designated by them . . . and each corporate or other non-individual contract purchaser or owner of any such lot or unit shall be a Regular Member and have one such membership for such lot or unit.
>
> . . . .
>
> c. Special Members: Special Members shall be as follows:
>
> (1) Any individual shall be eligible for membership as and shall become a Special Member upon the submission of any application of content and form directed by the Board of Directors and the acceptance and approval thereof by it, but so far as practicable the total number of Special Members shall not be more than the total number of residential lots and townhouse lots or dwelling units within the limits of all real property included in membership reduced by the total number of individual Regular Members.

From fiscal year 1978-79 through the 1988-89 fiscal year, the period of time reflected in the record, regular RHA members were required to pay dues of $225 per year to RHA. Special membership dues were $325 for fiscal year 1978-79 and had

increased to $600 annually by fiscal year 1988-89. Regular RHA members have also been required since the 1984-85 fiscal year to pay a special assessment, described as maintenance dues, of $100 per year to the RHA. These additional dues pay the city of Omaha for upgraded maintenance of common areas of the subdivision. The cost of such maintenance was supported by the taxing authority of a sanitary and improvement district prior to Regency's annexation by the city of Omaha in the early 1980's.

The Egermayers purchased their property in Regency as the last of several rapid real estate transactions. This may account for the later confusion by RHA as to who was responsible for payment of the regular membership fees on the Egermayer property. Regency, Inc., originally deeded Lot 10, Regency First Addition, by warranty deed to Almyra B. Gordon on April 23, 1971. On August 17, 1978, Jeanne M. Kautter purchased the property from Gordon's estate, and on October 9, 1978, Jeanne M. and William H. Kautter conveyed the property to Patricia M. Fitl by warranty deed. Finally, on December 11, 1978, James G. and Patricia M. Fitl conveyed Lot 10 to George W. and Jean M. Egermayer as joint tenants.

The record shows that the Fitls applied to become special members of RHA on June 14, 1978, prior to the time Patricia Fitl bought Lot 10. The accounts receivable ledger for the Fitls' account indicates a payment of $325 on June 21, 1978, for 1978-79 dues, and another payment of $360 on April 11, 1979, for 1979-80 dues. This amount was credited back to the Fitls on April 26, 1979, with the notation "cr. spec. dues," and was rebilled as regular dues of $225 that same date, even though Lot 10 had been conveyed to the Egermayers over 4 months previously. James Fitl testified in his deposition that the Fitls owned no other property in Regency at that time.

The Fitls continued to pay dues to RHA as regular members through 1986. However, RHA's 1987-88 dues statement to the Fitls was returned unpaid and marked "please cancell [sic]." The RHA manager testified she immediately called James Fitl, who informed her that the property had been sold to the Egermayers 6 years previously. She further testified that the RHA had not been notified of this sale.

On May 19, 1987, the RHA manager billed George Egermayer for the 1987-88 dues and assessments. The Egermayers have refused to pay the assessment for regular membership in RHA. They assert that they are willing to pay the $100 annual assessment for maintenance, but the record reflects that the Egermayers have never made payments of any type to RHA.

On September 1, 1988, RHA sued the Egermayers to foreclose its lien on the Egermayer property for dues and other charges, plus interest.

George Egermayer testified at trial that he was unaware of any requirement to pay dues to RHA from the time he purchased the lot until RHA billed the Egermayers for membership in 1987. However, he agreed at trial that he had purchased the property subject to easements, reservations, restrictions, and protective covenants of record, as noted on the deed to the property.

The district court found that "[t]he declaration of record requiring owners of the residential lots in question to be members of [RHA] and to pay dues and assessments is a valid covenant running with the land and is binding on [the Egermayers]." The court further found that RHA was entitled to foreclose its lien in the amount of $884 and costs. The Egermayers timely appealed to this court.

NATURE OF REGENCY HOMES ASSOCIATION AND REGENCY LAKE AND TENNIS CLUB

As a preliminary matter, it is necessary to determine to what type of entity the Egermayers, as Regency property owners, are required by the Declaration to pay dues. As previously noted, the Egermayers have characterized the issue in this case as whether the Declaration is a "valid covenant running with the land as it applies to the obligation to join and pay dues to *a social club open to the public* and *owned by a private individual*." (Emphasis supplied.)

First, we consider the Egermayers' contention that the Declaration requires them to pay dues to a social club. The Declaration requires that Regency property owners pay dues to the RHA; there is no requirement that dues be paid to RLTC. In

fact, the Declaration makes no mention of RLTC. However, the Egermayers argue that RHA and RLTC are the same entity. The manager of RHA, Hildegard Herzfeldt, seemed to concede this point at trial when she testified as follows: "[Appellants' attorney:] The Regency Lake and Tennis Club, is that a name for the same entity as the Regency Home Association, or is that a separate entity? [Herzfeldt:] That's right. It's the same. Q. It's the same? A. Yes." In addition, in interrogatories RHA identified both the members of RHA and the members of RLTC by referring to an attached copy of the 1988-89 RLTC directory.

However, other evidence in the record indicates that RHA and RLTC are not in fact identical entities. A former president of RHA, John Hubbard, testified that RHA is the "formal body of members" and that RLTC has no separate existence from RHA as a subsidiary corporation, a sole proprietorship, or partnership. Hubbard further testified that RLTC is "just a facility or a club or an activity that is operated by [RHA] as a corporation."

While RLTC may have no separate existence apart from RHA, it is quite apparent that RHA does have an existence apart from RLTC. For example, RHA maintains a 1-acre park and an entrance to the residential area which are not maintained by the city of Omaha, provides architectural review for the subdivision, and provided security patrol for the subdivision until after Regency was annexed by the city. Although RHA also operates and maintains the RLTC, we conclude upon a de novo review that this is not RHA's sole function, and the Egermayers cannot complain that they are being assessed dues merely for a social club.

Next, we turn to the assertion that RLTC is a nonexclusive club which is open to the public. The word "public" may be defined as "the community at large . . . . [It] does not mean all the people . . . but so many of them as contradistinguishes them from a few." Black's Laws Dictionary 1227 (6th ed. 1990). On the other hand,

> [m]embership in a club arises out of the application of the member, its acceptance by the club, and the provisions of the by-laws. A private club has the right to select its own

> members, and membership in such context is not a constitutional right, but rather is a bare privilege . . . .

14A C.J.S. *Clubs* § 10 at 614-15 (1991).

The terms of the RHA bylaws; the fact that membership is available only to Regency property owners and a limited number of other individuals who must apply for membership, must be recommended by two members, and must be approved by the board of directors; and the fact that the RLTC is not open to the general public are all indicia of a private club.

Finally, we turn to whether RLTC is a "privately owned" facility. The Egermayers state that at the time they bought their lot, "both the lake and the social club were privately owned. Today, the lake continues to be privately owned." Brief for appellants at 20.

The record indicates that all of the facilities of RLTC with the exception of the lake were deeded to RHA by United of Omaha, the developer of Regency, on May 31, 1980. This was almost a year and a half after the Egermayers bought Lot 10. Since that time, members of RHA have had a common ownership of the club facilities. The fact that United of Omaha retained ownership of RLTC for approximately 12 years is not dispositive of whether RLTC is "privately owned." See *Boyle v. Lake Forest Property Owners Ass'n*, 538 F. Supp. 765 (S.D. Ala. 1982) (holding that a developer, carrying out a uniform plan of development for a residential subdivision, may arrange for provision of certain services to the subdivision and for the maintenance of the facilities devoted to common use, and may bind the lot purchasers in the subdivision to pay for those items.)

Nor does the fact that Regency Lake is privately owned impute private ownership to RLTC. Although RHA pays a portion of the maintenance for the lake, RHA members are allowed access to the facility. Under the circumstances, it cannot be said that the Egermayers are being required to pay dues to a privately owned club.

Upon a de novo review of the record, we conclude that the Egermayers are not being required by the Declaration to pay dues to a public social club which is privately owned, but to a homeowners' association. We thus turn to the underlying issue

in the case, that is, whether the Declaration is a valid covenant running with the land as it applies to the obligation of a property owner to pay dues to a homeowners' association which operates a recreational facility.

VALIDITY OF THE COVENANT

The precise question of whether a property owner is bound by a covenant to pay dues to a homeowners' association for the maintenance of recreational facilities is one of first impression in Nebraska. Other jurisdictions have considered the issue, and we turn to those cases for guidance.

The nature of the covenant to pay dues to the RHA, that is, whether the covenant runs with the land, is central to the determination of the issue before the court. "A covenant is either real or personal. Covenants that run with the land are real as distinguished from personal covenants that do not run with the land." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 907 (1978). A personal covenant is not assignable. See, e.g., *Whitney v. Combe*, 151 Neb. 401, 37 N.W.2d 613 (1949); *Raintree Corp. v. Rowe, supra*. If the covenant at issue is personal, it is not binding on the Egermayers; if the covenant is real, it runs with the land, and the Egermayers are bound by the terms of the Declaration.

The general rules governing the running of covenants are rooted in the English common law. It was *Spencer's Case*, 5 Co. Rep. 16 a, 77 Eng. Rep. 72 (1583), which first stated that for a covenant to run with the land it must "touch or concern" the land, and it must expressly bind assigns. As the law of covenants evolved, the English courts distinguished between negative covenants, which bind the covenantor not to perform an act, and affirmative covenants, which require the covenantor to perform an act. See 5 Richard R. Powell, The Law of Real Property ¶ 675[1] (1993). The English courts looked with disfavor on covenants requiring affirmative action, and ultimately adopted the rule that affirmative covenants may not run with the land either at law or in equity. *Id.* at ¶¶ 670[2] and 675[1].

Generally, in the United States the three essential requirements for a covenant of any type to run with land are (1)

the grantor and the grantee intend that the covenant run with the land, as determined from the instruments of record; (2) the covenant must "touch and concern" the land with which it runs; and (3) the party claiming the benefit of the covenant and the party who bears the burden of the covenant must be in privity of estate. See, e.g., *Neponsit P. O. Ass'n v. Emigrant I. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 62 N.C. App. 205, 302 S.E.2d 848 (1983), *cert. denied* 309 N.C. 461, 307 S.E.2d 364; *Lake Arrowhead Club v. Looney*, 112 Wash. 2d 288, 770 P.2d 1046 (1989); *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182, 457 N.E.2d 1226 (1983).

The Egermayers do not dispute that the first and third of these requirements are met. Moreover, the recorded instruments in the record support that the grantor, Regency, Inc., and the five original grantees intended the covenants contained in the Declaration to run with the land and that the Egermayers and RHA are in privity of estate. Rather, the Egermayers argue that the covenant in question does not "touch and concern" the land. Therefore, we limit our analysis to that issue.

The "touch and concern" requirement of a real covenant is one with which many jurisdictions have struggled. The New York Court of Appeals has held that

> a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. [Citations omitted.] That method of approach has the merit of realism. The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?

Neponsit P. O. Ass'n v. Emigrant I. Sav. Bank, 278 N.Y. at 257-58, 15 N.E.2d at 796. In that case, the court held that purchasers of individual lots in a residential community also obtained the right of enjoyment of the roads, streets, beaches,

and other improvements, and thus were liable for paying the costs of such improvements as required by covenant. The court further held that the property owners' association was entitled to enforce the covenant by foreclosure of its lien against the property owner.

In *Chesapeake Ranch Club v. CRC Members*, 60 Md. App. 609, 483 A.2d 1334 (1984), the Maryland Court of Special Appeals held that a covenant to pay an annual road charge was one which touched and concerned the land, but held that a covenant requiring property owners to pay dues to a recreational and social club did not run with the land. The Maryland court stated that the test of whether a covenant runs with the land is " 'whether it tends directly or necessarily to enhance [the land's] value or render it more beneficial or convenient to those by whom it is owned or occupied,' " *id.* at 616, 483 A.2d at 1337, and found that the amenities of the club merely benefited the community as a whole and did not increase the value of individual lots.

The Oregon Court of Appeals has held that severability of club membership from property ownership defeated the "touch and concern" requirement because property owners had no commonality of interest in the club property. *Ebbe v. Senior Estates Golf and Country Club*, 61 Or. App. 398, 657 P.2d 696 (1983). In that case, the court held that payment of an initiation fee for membership in a golf club did not "touch and concern" the land when membership was mandatory for initial purchasers, but membership was neither mandatory nor guaranteed for subsequent purchasers.

The U.S. District Court for the Southern District of Alabama, applying Alabama law, found that covenants meet the "touch and concern" requirement when "the provisions thereof enhance the value of the various individual lots in the . . . [s]ubdivision, constitute a part of a common plan or scheme of development of the subject subdivision and grant rights of use of the common facilities to the Grantees." *Boyle v. Lake Forest Property Owners Ass'n*, 538 F. Supp. 765, 768-69 (S.D. Ala. 1982). The court held that a covenant which required payment of dues to a homeowners' association to enable the association to acquire recreational facilities and other common

areas from the developer of the subdivision was one which touches and concerns the land, and thus was an affirmative covenant running with the land. The club was open to all homeowners in the subdivision and to members of similar clubs established by the developer in other parts of the country. The court concluded that mandatory membership in the Lake Forest Yacht and Country Club enhanced the value of the individual lots in the subdivision.

Similarly, the Illinois Supreme Court found that a covenant requiring condominium owners to pay dues to a for-profit sports club developed by the condominium developer touched and concerned the land because the facility was adjacent to the condominium units, was used by residents of the condominiums, and was part of a common building plan. *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182, 457 N.E.2d 1226 (1983).

California's "touch and concern" requirement is determined by statute. "Section 1468 of the Civil Code embodies the common law requirements [that a burden touch and concern the land] by specifically stating that a covenant running with the land must relate '. . . to the use, repair, maintenance or improvement of . . . such land or some part thereof . . . .' " *Anthony v. Brea Glenbrook Club*, 58 Cal. App. 3d 506, 510, 130 Cal. Rptr. 32, 34 (1976). In that case, a covenant required membership in a homeowners' association which operated a clubhouse, swimming pool, and recreation area located within the subdivision. All members of the club were homeowners in the subdivision, and all fees paid to the homeowners' association were used for maintenance and support of the club. The court held that mandatory membership in the homeowners' association was a valid and enforceable covenant running with the land.

The North Carolina Court of Appeals has held that "[t]o touch and concern the land the object of the covenant must be annexed to, inherent in, or connected with, the land." *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 62 N.C. App. 205, 210, 302 S.E.2d 848, 852 (1983), *cert. denied* 309 N.C. 461, 307 S.E.2d 364. The court found that a covenant to pay fees to a homeowners' association for

maintenance of recreational facilities touched and concerned the land. The recreational facility was within the subdivision, and the court found it irrelevant that the facility was not adjacent to each individual lot.

All of these tests for whether a covenant touches and concerns the land are helpful, but none provides such a clear-cut rule as to be dispositive of the present case. Indeed, the New York Court of Appeals has aptly concluded that " '[i]t has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case.' " *Neponsit P. O. Ass'n v. Emigrant I. Sav. Bank*, 278 N.Y. 248, 256, 15 N.E.2d 793, 795 (1938).

Nonetheless, for the purpose of analysis, we adopt the New York Court of Appeals' rule that the touch and concern requirement of a real covenant is met when the covenant affects the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. The covenant must impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land.

Based upon the holdings of jurisdictions which have considered issues similar to the one before us, we believe the following factors are to be considered in determining whether a covenant to pay dues to a recreational facility touches and concerns the land: (1) whether the recreational facility and the residential area are part of a common scheme of development, (2) whether the recreational facility is in close proximity to the residential area, and (3) whether the covenant grants the right of common use of the recreational facility to all property owners.

Applying the above factors to this case, we must first determine whether the residential area and the recreational areas of Regency were part of a common scheme of development. John Maenner, president of Maenner Company, the sales agent for all the property within Regency, was involved with the initial planning for the subdivision. Maenner testified

that Regency was by far the largest of the more than 35 subdivisions he had helped develop in Omaha and that there was considerable planning and thought given to the special amenities for the area. Such amenities included the lake, the club, and related facilities.

Louis R. Seybold, now retired from the Maenner Company, was also involved in the development of Regency, and testified that the subdivision was a planned community which was to have multiple uses, including an office park, apartments, townhomes, single-family homes, and sporting amenities. The sporting amenities included a 25-acre lake, a private lakeshore park, a 1-acre park in the residential area, and 4 acres of land upon which RLTC was ultimately built. Seybold testified that he had been involved in 10 to 12 other residential developments in the Omaha area and that Regency was far larger and more elaborate than any of the other developments. Such testimony by Maenner and Seybold leaves no doubt that the residential and recreational areas of Regency are part of a common scheme of development.

Next, we must determine whether the RLTC is in close proximity to the residential area of Regency. The RLTC, while located in the Regency development, is located across a four-lane road from the residential area. The Egermayers complain of the fact that the RLTC is not centrally located within the residential area and is instead located next to a commercial area. The evidence reflects that while the RLTC is not in the single-family residential area of Regency, it is bordered on one side by the Regency Apartments, and it is also bordered by Regency Lake.

Moreover, while the Egermayers perceive the location of the RLTC to be a negative, it is entirely conceivable that some property owners might perceive the location favorably. There are valid reasons why a property owner might not want to live in very close proximity to a recreational facility. The increase in noise, litter, and traffic often occasioned by such a facility are some reasons which come immediately to mind. Because the RLTC is located within the Regency development, even though it is across a four-lane street from the single-family residential area, we find that the RLTC is in close proximity to that

residential area.

As to the third factor, the language of the covenant leaves no doubt that all Regency property owners have a right of common use of the RLTC. The introductory paragraph of § 4 of the Declaration states that "[t]he involved property . . . will be . . . included in membership in [RHA] . . . ." Section 4b states that "every lot will be automatically included in membership in [RHA] . . . ."

The Egermayers do not deny that as Regency property owners, they have a right of common use of the RLTC. Instead, their position is that because Regency property owners are not the *exclusive* users of RLTC, the covenant requiring payment of dues to RHA does not touch and concern the land. The Egermayers assert that the existence of a special membership class for those who live outside the Regency subdivision makes RLTC a public facility which has no particular value to property owners in Regency.

This argument fails for two reasons. First, as previously noted, RLTC cannot be characterized as a public facility. Second, even though special members are allowed to join RHA and use the RLTC facility, the Regency property owners still have a common property right with one another. All Regency property owners are required to pay dues to RHA for membership in RLTC, and all have a common right to use of the facilities. The existence of a special membership class is not dispositive. See *Boyle v. Lake Forest Property Owners Ass'n*, 538 F. Supp. 765 (S.D. Ala. 1982) (holding that requirement to pay dues for maintenance of club, which was used by property owners in subdivision as well as members of other clubs owned by same developer, was a valid covenant running with the land). Cf. *Ebbe v. Senior Estates Golf and Country Club*, 61 Or. App. 398, 657 P.2d 696 (1983) (holding that club membership had been severed from property ownership when subsequent purchasers were neither required to join nor were they guaranteed membership in golf club, and mandatory "initiation fee" could not be assessed as a lien against the property of such a purchaser).

This brings us to the ultimate question of whether RLTC enhances the value of individual properties in the Regency

subdivision. George Egermayer testified that in his opinion, RLTC adds no value whatsoever to his property because the facility is located across four lanes of traffic from the residential area, it is not centrally located, it is next to a commercial area, and it is open to the public. Another homeowner in the Regency subdivision testified that in his opinion, mandatory membership in the RHA definitely enhanced the property values in the area and that property values would be adversely affected if membership in RHA were to be voluntary rather than mandatory. Two of the original developers of the Regency subdivision, neither of whom lives in Regency, also testified that the absence of mandatory dues to RHA would be detrimental to property owners and that property values would be lowered.

Whether membership in RHA benefits individual Regency homeowners is a material issue of fact in determining whether the covenant requiring membership touches and concerns the land. The only evidence that membership in RHA does not benefit individual property owners was offered by the party seeking to avoid payment of the mandatory dues. After considering all the testimony on this issue, we agree with the California Court of Appeals that "the maintenance of a well-kept clubhouse, recreational area and swimming pool . . . enhance[s] the value of each home therein. . . . [T]he so-called 'burden' of maintaining membership in this association would in reality be an asset to each and every property owner in the use of his land." *Anthony v. Brea Glenbrook Club*, 58 Cal. App. 3d 506, 511, 130 Cal. Rptr. 32, 34 (1976).

Apart from the social amenities offered by RLTC, we find that membership in RHA provides numerous other benefits to property owners. There was testimony that RHA dues pay for maintenance of a 1-acre park within the subdivision, as well as the green areas at the 96th Street entrance to the subdivision. George Egermayer concedes that maintenance of the common areas of the subdivisions, parks, drives, and trees adds value to his property. We can only conclude that maintenance of the green areas owned by RHA and paid for through part of the annual $225 assessment contributes some of this added value.

Dues also paid for the services of a private security patrol for

the residential neighborhood until sometime after the subdivision was annexed by the city of Omaha. Financial statements entered into evidence reflect that as much as $17,128 per year was spent for security patrol through the fiscal year ending May 31, 1985. Private security service is an asset which enhances the value of individual properties.

The bylaws of RHA provide for an architectural control committee and authorize the expenditure of funds by that committee. The architectural review committee reviews and approves all new construction, as well as additions or modifications to existing structures, to ensure that the external designs of all buildings and structures are in harmony with the "surroundings, topography, and other relevant architectural factors of concern." A former president of RHA testified that while he was president the committee met from time to time and incurred certain expenses, including payments to experts to advise the committee. Again, this is a function of RHA which benefits all property owners in Regency by protecting against unsightly or inappropriate building in the subdivision.

CONCLUSION

Upon a de novo review of the record, we conclude that the covenant requiring membership in the RHA enhances the value of individual properties in the Regency subdivision so as to meet the "touch and concern" requirement of a real covenant running with the land. RHA is entitled to foreclose its lien upon the Egermayer property to enforce payment of the RHA dues and other charges required by the covenant.

There being no cross-appeal, the judgment of the district court in its entirety is affirmed.

AFFIRMED.

WILLIAM HOESLY, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, AND KERMIT R. MCMURRY, DIRECTOR, NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEES.

498 N.W.2d 571

Filed April 23, 1993. No. S-91-038.

1. **Joint Accounts.** A certificate of deposit in the names of multiple parties is a type of joint account.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes: Legislature: Intent.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
4. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
5. **Public Assistance: Intent.** Under the language of Neb. Rev. Stat. § 68-1002 (Reissue 1990), depriving oneself of resources is not, in and of itself, a disqualifying act; the disqualification results from doing so with the intention and for the purpose of becoming eligible for public assistance.
6. **Judgments: Appeal and Error.** A judgment which is unsupported by competent and relevant evidence is an error on the record.
7. **Public Assistance: Intent: Words and Phrases.** "Purpose" with respect to Neb. Rev. Stat. § 68-1002 (Reissue 1990) means an intention or aim, object, plan, or project.
8. **Intent: Words and Phrases.** An intention or plan requires intelligence to be applied to a problem in seeking a desired result.
9. **Statutes.** If there is a conflict, the special provisions of a statute prevail over general provisions in the same or other statutes.
10. **Constitutional Law: Appeal and Error.** Generally, a constitutional question will not be considered on appeal if not properly raised in the trial court.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Paul Schumacher for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

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

CAPORALE, J.

Acting through the defendant-appellee Nebraska Department of Social Services and its director, the defendant-appellee Kermit R. McMurry, the State disqualified the plaintiff-appellant, William Hoesly, from receiving further public assistance monies. Hoesly appealed to the district court, which implicitly found that Hoesly had renounced an after-acquired interest in certain personal property with the intention and for the purpose of continuing to qualify for such assistance, and thus affirmed the State's determination. Hoesly here asserts the district court erred in so ruling. We affirm.

Because the petition instituting the proceedings for review of the State's determination was filed in the district court after July 1, 1989, we review the district court's judgment for error appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992). See, also, *Department of Soc. Servs. v. Person*, 234 Neb. 865, 453 N.W.2d 390 (1990).

Hoesly was a recipient of assistance to the aged, blind, or disabled under the provisions of Neb. Rev. Stat. § 68-1001 et seq. (Reissue 1990) and of medical assistance under the provisions of Neb. Rev. Stat. § 68-1018 et seq. (Reissue 1990). On January 11, 1990, Hoesly's father died intestate, possessed of two certificates of deposit issued by a local bank. Although neither the actual certificates nor copies of them are in the record, a letter from the bank recites that one certificate, having a value of $21,091.35, stands in the name of Hoesly or his father with the right of survivorship, and the other, having a value of $11,000, stands in the name of Hoesly, his father, and Hoesly's two sisters with the right of survivorship.

At no time did Hoesly contribute funds to the certificates of deposit, nor did he receive any money or interest therefrom. Prior to his father's death, Hoesly's sole financial asset was a bank account with a balance of approximately $1,800.

On January 31, 1990, a local office of the department received a telephone call from Hoesly's niece, requesting a copy of the department's regulations, and specifically such

regulations as would allow Hoesly to renounce his share of his father's estate.

On March 14, 1990, the department sent Hoesly notice that his assistance was being terminated, effective March 31, because he now had an interest in resources in excess of the maximum limit permitted him, i.e., $2,000. See 469 Neb. Admin. Code, ch. 2, § 009.08 (1989). On April 12, Hoesly executed a renunciation of his rights to inherit or receive any property from his father's estate because he was "getting along fine and . . . didn't need the money."

The resolution of this case requires an interpretation and application of language found in several statutes.

Section 68-1002(3) provides, in pertinent part, that in order to qualify for assistance to the aged, blind, or disabled, an individual must not have "deprived himself directly or indirectly of any property whatsoever for the purpose of qualifying for" such assistance.

Nebraska's renunciation provisions are contained in Neb. Rev. Stat. § 30-2352 (Reissue 1989):

> (a)(1) A person . . . who is an heir . . . surviving joint owner or surviving joint tenant . . . may renounce in whole or in part, or with reference to specific parts, fractional shares, undivided portions or assets thereof, by filing a written instrument of renunciation within the time and at the place hereinafter provided.
>
> . . . .
>
> (c) Unless the transferor of the interest has otherwise indicated in the instrument creating the interest, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent or had died prior to the date on which the transfer creating the interest in such person is made, as the case may be . . . . The person renouncing shall have no power to direct how the interest being renounced, shall pass . . . . In every case when the renunciation is within the time periods set forth . . . the renunciation relates back for all purposes to the date of death of the decedent or the date on which the

transfer creating the interest in such person is made, as the case may be.

Specifically with regard to the right of survivorship, Neb. Rev. Stat. § 30-2704(a) (Reissue 1989) reads:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 30-2703 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

We consider first whether Hoesly possessed a present interest in the certificates of deposit even prior to the death of his father.

A certificate of deposit in the names of multiple parties is a type of joint account. *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988). Neb. Rev. Stat. § 30-2703(a) (Reissue 1989) states that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." In *Peterson*, 230 Neb. at 488, 432 N.W.2d at 237, we construed § 30-2703(a) to mean:

> One who knowledgeably creates a joint account with another arguably does so with the present intent to employ the account's survivorship characteristic in substitution for a testamentary device. Like testamentary devices, under § 30-2703 creation of a joint account, without more, accomplishes no present transfer of title to property. If, as in this case, all sums deposited into the joint account are deposited by one person, the joint account contemplates transfer of title to those funds to the other person or persons named on the account upon the death of the depositor. Of course, others named as joint holders of the account have the power to withdraw funds from the account before the death of the depositor, but under § 30-2703, they arguably do not have the right to do so.

Cf. 469 Neb. Admin. Code, ch. 2, § 009.03A2a (1988).

Because Hoesly's father was the sole depositor on both certificates of deposit, Hoesly did not possess an interest in the certificates until the occasion of his father's death.

Accordingly, we next concern ourselves with the interplay between §§ 68-1002 and 30-2352. As we embark on that task, we recall that statutory interpretation is a question of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Professional Firefighters of Omaha v. City of Omaha, ante* p. 166, 498 N.W.2d 325 (1993); *McDonald's Exec. Off. v. Nebraska Dept. of Revenue, ante* p. 82, 497 N.W.2d 377 (1993). In settling upon the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. See, *Fecht v. The Bunnell Co., ante* p. 1, 497 N.W.2d 50 (1993); *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992). Furthermore, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Fecht, supra*; *Curry, supra*; *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993).

We have previously construed § 68-1002 in *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988). Therein, Meier sought and was denied access to the very assistance programs now before us. The department found that Meier was ineligible, claiming that she had dissipated personal funds and real estate with the intention and for the purpose of qualifying for public assistance. In upholding the district court's reversal of the department's determination, we, citing *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987), found that the evidence did not support the department's determination, emphasizing that

under the language of § 68-1002, depriving oneself of resources is not, in and of itself, a disqualifying act; the disqualification results from doing so with the intention and for the purpose of becoming eligible for public assistance.

Thus, we must determine whether the competent and relevant evidence supports the district court's finding that Hoesly's renunciation was with the intention and for the purpose of becoming eligible for public assistance. See *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989) (judgment unsupported by competent and relevant evidence example of error on record).

We have said that "purpose" with respect to § 68-1002 means an " 'intention, or aim, object, plan, project.' " *Zybach*, 226 Neb. at 402-03, 411 N.W.2d at 631, quoting Black's Law Dictionary 1112 (5th ed. 1979). "An intention or plan requires intelligence to be applied to a problem in seeking a desired result." *Zybach*, 226 Neb. at 403, 411 N.W.2d at 631.

The fact that Hoesly renounced his interest in the certificates of deposit shortly after he was notified of the termination of his eligibility for public assistance supports the district court's finding, as does Hoesly's statement that he was "getting along fine and . . . didn't need the money." Hoesly's statement overlooks that he is doing so only because he is living off resources produced by others.

The question therefore becomes which statute, the qualification statute, § 68-1002(3), or the renunciation statute, § 30-2352, controls Hoesly's destiny in this matter. Bearing in mind our rule that if there is a conflict the special provisions of a statute prevail over general provisions in the same or other statutes, *Cole v. Kilgore*, 241 Neb. 620, 489 N.W.2d 843 (1992), we rule that the qualification statute controls. That statute addresses a specific, narrow situation involving public assistance recipients attempting to purposely and intentionally dispossess themselves of property for the purpose of qualifying for assistance. The clear import of § 68-1002 is to prevent citizens from raiding the public purse when they possess sufficient resources to care for themselves. Although § 30-2352 expressly states that a renunciation relates back to the death of the decedent "for all purposes," § 68-1002 provides an

exception to this general rule.

Nonetheless, Hoesly asks that we adopt the reasoning of *Nielsen v. Cass County Social Services Bd.*, 395 N.W.2d 157 (N.D. 1986). Therein, the petitioner's mother, Evelyn Olson, was a recipient of medical assistance. Upon the death of Olson's mother, Olson was to inherit, by intestate succession, property valued at $23,000. However, Olson renounced her interest in her mother's estate. Determining Olson's interest prior to renunciation to be an inchoate property right and thus an available resource, the assistance authorities disqualified Olson. Moreover, the authorities determined that the renunciation constituted a transfer of property under N.D. Cent. Code § 50-24.1-02(1) (1981), which also disqualified Olson.

However, the Supreme Court of North Dakota held that Olson's renunciation of her interest in the inheritance did not disqualify her. N.D. Cent. Code § 30.1-10-01 (Supp. 1991) provided:

> 1. . . . [T]he representative of an incapacitated or protected person, who is an heir . . . may renounce, in whole or in part, the right of succession to any property or interest therein . . . by filing a written renunciation under this section.
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> . . . .
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> 3. Unless the decedent or donee of the power has provided otherwise, the property or interest renounced devolves as though the person renouncing predeceased the decedent . . . . A renunciation relates back for all purposes to the date of the death of the decedent or the donee of the power.

The *Nielsen* court decided that the foregoing provisions "unambiguously provide that the effect of a renunciation is to treat the interest as though it never passed to the renouncing party, because that party is deemed to have predeceased the decedent from whom the interest would have been received." *Nielsen*, 395 N.W.2d at 159. The *Nielsen* court also wrote that the language "for all purposes" rendered nugatory the state's position that Olson's interest in her mother's estate was an available resource and that her renunciation was a disqualifying

transfer.

The dissenting judge complained:

> It is widely known that as a result of soaring medical costs, medical assistance for the needy has become a substantial, if not onerous, part of both Federal and State expenditures. There can be little doubt that the purpose of Section 50-24.1-02(1) was to require those who have assets available to them to pay for medical assistance to pay those costs from those assets in order that those who have no assets available may be provided for from the public fisc. It is apparent to me that the legislative intent in enacting Section 50-24.1-02(1) was to prevent a person from purposely becoming impoverished in order to obtain medical assistance at the taxpayers' expense and to the benefit of the person's relatives and heirs. The result reached by the majority opinion does violence to that purpose and intent. The result can justifiably be considered by the taxpayers as a "rip-off."

Nielsen, 395 N.W.2d at 161.

Whatever may be the merits of the dissenting opinion, *Nielsen* is distinguishable from the case before us. The North Dakota statute affecting eligibility to receive assistance provided that no person who made an "assignment or transfer" of property for the purpose of establishing eligibility could receive assistance. The *Nielsen* court chose to read this statute narrowly. However, § 68-1002 paints in much broader strokes, declaring an individual ineligible if he or she has deprived himself or herself "directly or indirectly of any property whatsoever" for the purpose of qualifying for assistance.

Because Hoesly has failed to meet his burden of proving his entitlement to public assistance, see *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988), his assignment of error is without merit.

Although not assigned as error, Hoesly nevertheless argues that if we affirm the district court's judgment, "the system of intestate succession set forth in §30-2303 as is based on genetic lineage is unconstitutional and a [sic] arbitrary denial of due process and equal protection depriving him of his entitlement to Aid and arbitrarily forcing upon him the unwanted

responsibility of property and its disposal." Brief for appellant at 10.

In the first place, the issue before us does not implicate the system of intestate succession. Hoesly did not acquire his interest in the certificates of deposit through succession; he acquired his interest through being named a coowner of the certificates with the right of survivorship.

Moreover, in his petition to the district court, Hoesly's only constitutional allegation was that the director's finding and order was "in violation of constitutional provisions." A mere blanket challenge of unconstitutionality is not specific enough to allow a trial court to make an informed ruling on the constitutional validity of a statute and robs the trial court of its role as a decisionmaker; it thus does not properly raise a constitutional issue. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). Since as a general matter a constitutional question will not be considered on appeal if not properly raised in the trial court, *id.*, even if intestate succession were to have been involved, Hoesly's effort to flesh out his constitutional claim in this court would have come too late.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITEHEAD OIL CO., DOING BUSINESS AS U-STOP CONVENIENCE SHOP, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

498 N.W.2d 793

Filed April 23, 1993. Nos. S-91-116, S-91-117, S-91-118, S-92-048, S-92-049.

Constitutional Law: Equal Protection: Sales: Liquor Licenses. Convenience stores may not be treated differently from other operations which combine the sale of alcoholic liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

Donald L. Dunn and Penny J. Berger, of Rembolt Ludtke Parker & Berger, for appellant.

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

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

LANPHIER, J.

The Lincoln City Council, acting in accordance with the recommendation of the appellees, the City of Lincoln, the Lincoln Package Beverage Association, and Mothers Against Drunk Driving, and pursuant to the Nebraska Liquor Control Act, denied the appellant Whitehead Oil Co.'s applications for liquor licenses for five convenience stores. The Lancaster County District Court affirmed the denials. We reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

Whitehead Oil Co., doing business as U-Stop Convenience Shop (U-Stop), filed with the Nebraska Liquor Control Commission (Commission) five applications for class B liquor licenses for five of its convenience stores. A class B license permits the retailer to sell beer only, in the original package, for consumption off the premises. Neb. Rev. Stat. § 53-124(5)(B) (Reissue 1988). On February 20, 1990, a hearing was held before the Lincoln City Council (Council) regarding the first three applications, and on October 15, 1990, a hearing was held on the other two applications.

Each of the hearings was conducted pursuant to the procedures set forth in Neb. Rev. Stat. § 53-134 (Cum. Supp. 1990) (as amended by 1989 Neb. Laws, L.B. 781). After U-Stop offered evidence addressing each of the 20 criteria to be considered by the licensing body as set forth in § 53-134, evidence relating to the applications was presented by the City of Lincoln. A representative of the Lincoln Package Beverage Association appeared in opposition to the applications at both hearings, and a representative of Mothers Against Drunk Driving appeared in opposition to the applications at the second

hearing.

At the conclusion of each of the hearings, and without discussion, a motion to deny was made with respect to each application. The motions passed, and resolutions denying each application were thereafter adopted.

On appeal, the district court affirmed the Council's denial of all five of U-Stop's applications, finding that pursuant to L.B. 781, there was some competent evidence supporting the Council's decisions. This appeal followed.

ASSIGNMENTS OF ERROR

For the reasons set forth in *Kwik Shop v. City of Lincoln, ante* p. 178, 498 N.W.2d 102 (1993), we need not address the majority of U-Stop's assignments of error, which relate to the constitutionality of L.B. 781. The only remaining issue to be addressed, then, is whether the Council's denials were supported by the record.

STANDARD OF REVIEW

The facts, evidence, and decisions of the Council are in relevant respects the same in this appeal as in *Kwik Shop*. Our analysis today is thus governed by that opinion. For the reasons articulated in *Kwik Shop*, this appeal is controlled by Neb. Rev. Stat. § 53-1,116(5) (Reissue 1984), and our scope of review is de novo on the record. See, also, *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992).

THE CITY COUNCIL'S FINDINGS

As the findings of the Council in the instant case are nearly the same as in *Kwik Shop*, we will follow the analysis set forth in *Kwik Shop*, noting any factual discrepancies between the cases. Having determined that it is the law as it existed prior to L.B. 781 which controls, we look to Neb. Rev. Stat. § 53-132 (Reissue 1984) for guidance in reviewing the Council's findings. Section 53-132 provides, in relevant part:

> (2) A retail license . . . shall be issued . . . if . . . (a) the applicant is fit, willing, and able to properly provide the service proposed . . . , (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant

has demonstrated that . . . the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.

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

(a) The recommendation of the local governing body;

(b) The existence of a citizens' protest . . . ;

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

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

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

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

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

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

(j) Whether the type of business or activity proposed . . . will be consistent with the public interest.

The training procedures, management, and other evidence presented by U-Stop make it clear that U-Stop has the ability to more than satisfy the conditions specified in § 53-132(2)(a), (b), and (c). We thus proceed to subsection (2)(d) of the statute and apply the evidence bearing on the factors listed in § 53-132(3). Our consideration of the factors will be set out below.

The Council made six identical findings in support of its resolutions of denial to each of U-Stop's applications: (1) The existing law enforcement resources in the area were inadequate; (2) the Lincoln Police Department issued a negative recommendation for the proposed licenses; (3) Lincoln's existing population and projected growth did not warrant the licenses; (4) the area around each location was adequately served by existing licenses; (5) the area in which the alcoholic

liquor was proposed to be kept was not reasonably secure; and (6) the applicant did not demonstrate that the issuance of the license would promote the health, safety, and welfare of the people of Lincoln.

The Council's first finding (adequacy of law enforcement resources) and second finding (negative recommendation of the police department) are based almost exclusively on a letter from Lincoln police chief Allan Curtis. The letter, identical in both hearings, states in relevant part:

> The pending applications of several local grocery and convenience stores for the expansion of existing licenses or creation of new licenses within the City of Lincoln has focused attention on an issue the Lincoln Police Department considers extremely important. We would be opposed to the issuance or expansion of licenses in any manner.

Curtis, however, offered no evidence to support this concern or opposition. As we stated in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 903, 492 N.W.2d 7, 11 (1992): "[T]here is no evidence which establishes that illegal activity increases merely because a new license is issued."

The Council's third finding (population) is based on an affidavit of Kent Morgan, assistant planning director for the City of Lincoln, dated April 17, 1987. The affidavit sets forth Lincoln's 1960, 1970, and 1980 populations, as well as an estimate of the population as of January 1, 1987. The affidavit also states that "as a general rule, the City Planning Department projects the population of Lincoln to be growing at a rate of approximately one percent per year." The fact that Lincoln is growing consistently is not disputed by the parties. Moreover, evidence presented by U-Stop at the hearings indicates that there are fewer off-sale-only licenses in Lincoln today than in 1970, while the population has increased 28 percent since 1970. The Council's finding that the population of Lincoln is inadequate to support the proposed licenses runs contrary to the record.

The Council's fourth finding (existing licenses) is based upon the total number of all licenses of all classes that are within a 1-mile radius of each of U-Stop's proposed licensed premises.

Such a comparison is misleading, however, because it includes on-sale as well as off-sale licenses. U-Stop presented evidence which broke down the number of licenses not only into off-sale and on-sale, but into class B (beer only) and class D (alcoholic liquor including beer) licenses. The evidence presented by U-Stop indicates that its proposed licensed premises have as few as one and no more than six class B and/or class D licenses located within 1 mile. Without fact-based distinctions, the Council's blanket claim of adequate service around each location appears arbitrary and is not, in fact, supported by the record. "The arbitrary recommendation of denial made by a city council, based only on the belief that there are sufficient licenses, does not now, if it ever did, . . . justify the denial of an otherwise valid application." *McChesney v. City of No. Platte*, 216 Neb. 416, 419, 343 N.W.2d 925, 927 (1984), *overruled on other grounds, R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988). Accord *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993).

The Council's fifth finding (security) is not supported by any evidence whatsoever. U-Stop, on the other hand, presented substantial evidence at each of the hearings which clearly indicates that U-Stop would display, keep, and sell alcoholic liquor only from secured areas on its premises.

The Council's sixth finding (health, safety, and welfare) is a conclusory assertion without any apparent support.

Nothing in the foregoing indicates that the granting of the licenses would not be in the public interest. We turn, then, to the remaining factors of § 53-132(3).

We first note that while parties representing two organizations appeared at the hearings in opposition to U-Stop's applications, there is no evidence of a citizens' protest as such, as envisioned by § 53-132(3)(b). Additionally, of the parties which appeared at the hearings, the Lincoln Package Beverage Association clearly had a financial interest in having the licenses denied, while Mothers Against Drunk Driving "indicated a general aversion to alcohol sales or to the sale of alcohol in [convenience] stores." *Hy-Vee Food Stores*, 242 Neb. at 756, 497 N.W.2d at 650. In *Joe and Al's IGA, Inc. v.*

Nebraska Liquor Control Commission, 203 Neb. 176, 181, 277 N.W.2d 693, 696 (1979), we stated:

> [P]rotests to be effective must be of some substance. Here, stripped of form, they were all authored and signed by citizens involved in the liquor business, competitors if you will, who simply didn't want any competition. The claim that there were too many licenses . . . has a hollow ring
> . . . .

As the issues of population, the existence of other licenses, and the adequacy of existing law enforcement—subsections (3)(c), (e), and (g), respectively—have been addressed earlier, we turn to the remaining criteria of § 53-132(3).

All the locations are heavily traveled, high-traffic areas; at least 10,100 and as many as 21,500 vehicles pass the various U-Stop locations daily. Further, the Lincoln Traffic Engineering Division determined that there would be "[n]o significant peak hour changes expected" if the licenses were granted.

The record also does not indicate that zoning restrictions pose a problem. The evidence establishes that the stores are all located in areas zoned for business or commercial use, and a zoning change would not be necessary to permit the sale of beer at the subject premises.

Further, we note that the record contains nothing adverse to U-Stop's showing that its sanitation and sanitary conditions at each store are favorable.

When viewed as a whole, the evidence before us persuades this court that granting the requested licenses would be in the public interest. Thus, we reach the question of whether the evidence indicates that the licenses are or will be "required by the present or future public convenience and necessity" as provided by § 53-132(2)(d). We believe that they are.

As we stated in *Kwik Shop v. City of Lincoln, ante* 178, 498 N.W.2d 102 (1993); *Hy-Vee Food Stores, supra*; and *Gas 'N Shop, supra*, combining the concept of public convenience and necessity with the sale of alcohol appears oxymoronic. However, the Legislature has deemed it appropriate to allow private establishments to sell alcoholic liquor in this state. The record indicates that many individuals

might feel less comfortable buying off-sale beer at a local tavern or a full-service liquor store than at a convenience store. Further, there is no close approximation between the purchase of off-sale beer at a convenience store and the purchase and consumption of beer in an "on premises" establishment. See *Hy-Vee Food Stores, supra*. "Accordingly, convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance." *Gas 'N Shop*, 241 Neb. at 905, 492 N.W.2d at 12.

CONCLUSION

The evidence before us does not support a legitimate reason for denying U-Stop its requested licenses. We therefore reverse, and remand to the district court with directions that the licenses be issued.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN M. CONNELY, APPELLANT.

499 N.W.2d 65

Filed April 23, 1993. No. S-92-761.

1. **Constitutional Law: Statutes: Standing.** In order to have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** Before a court can declare a statute unconstitutional, its unconstitutionality must be clearly demonstrated, and the burden to do so rests upon the party making the claim of unconstitutionality.
4. **Constitutional Law: Statutes.** The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

5. _____: _____. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
6. _____: _____. In determining whether a statute is vague and therefore does not give a defendant adequate notice that his or her conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged.
7. _____: _____. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision; the test is whether the defendant could reasonably understand that his or her conduct was proscribed by the statute.
8. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.
9. **Criminal Law: Entrapment.** Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced.
10. _____: _____. Where one has no previous intent or purpose to violate the law, but does so only because one is induced to commit the act by law enforcement officers or agents, one is entitled to the defense of entrapment.
11. **Criminal Law: Entrapment: Intent.** Entrapment consists of two elements: (1) government inducement of the defendant to commit the offense charged and (2) a defendant's predisposition to commit the criminal act was such that he or she was not otherwise ready and willing to commit the offense on any propitious opportunity.
12. **Entrapment: Evidence: Proof: Juries.** Entrapment is in the nature of an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant. When a defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact for the jury, and the burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
13. **Entrapment: Verdicts: Evidence: Appeal and Error.** When reviewing jury verdicts regarding the defense of entrapment, an appellate court will disturb the jury's findings only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law.
14. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to a jury, which are within a jury's province for disposition.
15. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
16. _____: _____. An appellate court will not set aside a guilty verdict in a criminal

case where such verdict is supported by relevant evidence; only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the defendant-appellant, Steven M. Connely, was adjudged guilty on each of two counts of dispensing or delivering an anabolic steroid, in violation of Neb. Rev. Stat. §§ 28-446 and 28-447 (Cum. Supp. 1990), and was thereafter sentenced. Upon Connely's appeal, the district court affirmed the judgment of the county court. Connely now asserts that the district court erred in failing to find that the county court erred on the record by its failure to find that (1) §§ 28-446 and 28-447 are unconstitutionally vague, (2) he was unlawfully entrapped, and (3) the evidence is insufficient to support the conviction. We affirm.

II. FACTS

Connely was a college criminal justice major aspiring to gain employment in one of a variety of federal law enforcement agencies. In October 1990, he researched using steroids because of a demanding schedule and his desire to prepare to join the Drug Enforcement Administration. He purchased books on the subject, including one entitled "Anabolic Reference Guide." After reading these materials, Connely decided to try a short cycle of 8 weeks of use of the oral steroid methyltestosterone. Failing to attain the results he had wanted, he discontinued

taking the substance in February 1991.

After receiving information about the possible sale of anabolic steroids at a college campus, a police investigator, on April 2, 1991, contacted a confidential informant who was enrolled in a course with Connely, a person who had been called to the investigator's attention as a possible seller. According to the informant, he, at approximately 4 p.m., went to Connely's campus dormitory and approached Connely about purchasing some steroids. The informant asserts he claimed he was "getting into lifting" and "wanted to get big." However, Connely disputes this, testifying that the informant spoke only of a desire to lose weight and of wanting to get in shape for an upcoming sheriff's physical fitness test.

Connely told the informant that he did not know if he could find any steroids at that time and asked what kind of steroid the informant wanted. The informant replied that he did not know anything about them. Reading out of a reference guide describing the substance, Connely began listing different types of steroids. The informant initially asked for "pill form steroids," but Connely told him that they were hard to find and were not as effective as injectable-form steroids.

According to the informant, Connely then called someone on the telephone and left a message on an answering machine, explaining that he had someone wishing to purchase steroids and asking that the call be returned. Shortly thereafter, the telephone rang. Connely told the informant that the person on the telephone had some steroids and began quoting prices. Connely asked the informant how much he wished to spend, passed the information on to the individual on the telephone, and checked back with the informant to see if the price was satisfactory.

After Connely hung up the telephone, he told the informant to call later that evening if the informant still wanted the steroids. Connely told the informant that since the informant was from "in town," thus obviating any travel expenses, Connely would not charge overhead and would give the steroids to the informant for what Connely's dealer was getting for them. Connely also spoke of the price inflation in steroids and of counterfeit steroids on the market, telling the informant that

Connely was doing the informant a favor. The informant later received a message on his telephone answering machine from Connely and arranged to meet Connely on April 4, 1991, at approximately 4 p.m.

On April 4, the informant again went to Connely's dormitory room to purchase the steroids. Connely showed the informant how to tell if a box of steroids had been tampered with and instructed the informant to tear off the labels and dispose of them so that the lot numbers could not be traced. Connely also explained how the informant should use the steroids, how frequently, where to inject them, what types of needles to buy, and where to buy needles. The informant purchased three boxes of steroids from Connely, which Connely said would last 9 months.

Sometime thereafter, the informant told Connely that he was on antibiotics and asked if the steroids would still help him. Connely advised the informant not to take the steroids.

The informant again telephoned Connely on May 29, 1991. During this telephone conversation, the informant told Connely that since the informant had been sick and was using antibiotics and because he needed the money, the informant had sold the steroids he had purchased to a friend. The informant then told Connely that he was feeling better now and wished to buy some more steroids.

Connely told the informant that the steroids he was providing on this occasion were much better than those which he had sold him on April 4, explaining that the new steroids had to be mixed and that they were to be administered in the buttocks. Connely told the informant that the cost would be $160, that the new steroids would probably go fast, and that if the informant did not want them, he had two other individuals who were interested in purchasing them. However, Connely testified that he was referring to the fact that his friend had told him he had two other people who were interested in the steroids. The informant told Connely that he would buy the new steroids, and Connely replied that he would tell the other individuals that the steroids were not for sale. The informant then arranged for another purchase to take place at approximately 6:30 p.m. the same evening.

On this occasion, Connely again explained, reading from the reference guide, why the new steroids were better than the type he previously had sold to the informant. Connely again told the informant that he should dispose of the tops of the boxes so that the lot numbers could not be traced. The informant purchased three bottles of anabolic steroids. Connely wanted the informant to purchase a fourth bottle, but the informant explained that he did not have enough money with him. Connely told him to contact him within 2 weeks if he wanted the fourth bottle or it would be gone.

Connely was then placed under arrest by another police investigator. Meanwhile, the first investigator obtained a search warrant for Connely's residence. Discovered during the search was a book entitled "Anabolic Reference Guide" and the $160 the informant had given Connely.

The parties stipulated that the substance contained in the two purchases made by the informant were the controlled substance steroid testosterone, as defined in § 28-446 and Neb. Rev. Stat. § 28-405(d)(26) [Schedule III] (Cum. Supp. 1992).

III. ANALYSIS

1. Claim of Vagueness

Connely begins by claiming that §§ 28-446 and 28-447 are so vague that they do not apprise him of the proscribed conduct, thus depriving him of the constitutionally required due process of law. Specifically, he asserts that §§ 28-446 and 28-447 are vague because they make "the delivery of anabolic steroids illegal, not upon an actor's actual delivery or his intent in making the delivery but rather how the ultimate user uses the steroid." Brief for appellant at 11. Next, he contends the two statutes are vague because they fail to define "valid medical purpose." *Id.*

In order to have standing to assert a claim of vagueness, Connely must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. See, *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). However, Connely is

entitled to show that the statutes, when applied to his particular conduct, are vague. See *State v. Copple, supra*.

Adopted in 1990 Neb. Laws, L.B. 571, effective July 10, 1990, §§ 28-446 and 28-447 were repealed in 1992 and incorporated into § 28-405 and Neb. Rev. Stat. §§ 28-401 and 28-404 (Cum. Supp. 1992). 1992 Neb. Laws, L.B. 1019.

The relevant portions of § 28-447 provided: "(2) No person shall: (a) Prescribe, dispense, deliver, or administer an anabolic steroid or deliver a prescription form for an anabolic steroid to a person for human use for any purpose other than a valid medical purpose and in the course of professional practice."

Section 28-446 declared that for purposes of § 28-447, an anabolic steroid was one of seventeen specific compounds, including testosterone, "or any isomer, ester, salt, or derivative of the following that acts in the same manner on the human body except when in the form of a livestock implant." Section 28-446 further stated:

> (2) The use of an anabolic steroid for the purpose of hormonal manipulation that is intended to increase muscle mass, strength, or weight without a medical necessity to do so or for the intended purpose of improving physical appearance or performance in any form of exercise, sport, or game shall not be a valid medical purpose or in the course of professional practice.

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992). Thus, before a court can declare a statute unconstitutional, its unconstitutionality must be clearly demonstrated, *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990), and *State v. Copple, supra*, and the burden to do so rests upon the party making the claim of unconstitutionality, *State v. Garza, supra*; *State v. Sexton, supra*; *State v. Crowdell, supra*.

> The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . A statute will not be deemed vague if it

> uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .
>
> . . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

(Citations omitted.) *State v. Sprague*, 213 Neb. 581, 587-88, 330 N.W.2d 739, 744 (1983). Accord, *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987); *State v. Copple, supra*; *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984).

(a) Nature of Requisite Intent

Connely's first claim of vagueness, that §§ 28-446 and 28-447 make conduct illegal based not on the intent with which a steroid is delivered but on the use made of it, mirrors an unsuccessful argument scrutinized in cases involving drug paraphernalia legislation. *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied* 455 U.S. 1005, 102 S. Ct. 1642, 71 L. Ed. 2d 874 (1982), *reh'g denied* 456 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476.

Relevant to this inquiry was the assertion in *Casbah, Inc.* that the definition of drug paraphernalia as including " 'all equipment, products, and materials of any kind *intended for use*' " with controlled substances was impermissibly vague. (Emphasis in original.) *Casbah, Inc. v. Thone*, 651 F.2d at 559. Much like Connely, the *Casbah, Inc.* appellants argued that the statute there in question would permit prosecution of an innocent seller if the item was intended by a buyer for use with controlled substances.

In finding the paraphernalia statute to be constitutionally valid, the U.S. Court of Appeals for the Eighth Circuit declared:

> A fair reading of the statute *as a whole* indicates that the intent referred to is that of the person alleged to have

> violated the statute. What seems at first glance to be a deficiency in draftsmanship is explained by the fact that the definitional section is intended to draw four categories of persons (manufacturers, wholesalers, retailers and purchasers) within the reach of the legislation. Sections 3 and 4, in defining substantive offenses, provide clarity by linking the requirement of intent with the person whose activity is forbidden: "It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia. [Section 3.] It shall be unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia. [Section 4.]" In sum, the Nebraska statute adequately defines the mental state required to render an item drug paraphernalia and refers to the intent of the person charged with violation.

(Emphasis in original.) *Casbah, Inc. v. Thone*, 651 F.2d at 559. See *Delaware Accessories Trade Ass'n v. Gebelein*, 497 F. Supp. 289 (D. Del. 1980). But see *Gaffey v. Babb*, 50 Or. App. 617, 624 P.2d 616 (1981), *review denied* 291 Or. 117, 631 P.2d 341.

Here, a careful reading of §§ 28-446 and 28-447 in toto reveals that contrary to Connely's contention, the State must show that an accused dispensed or delivered an anabolic steroid intending that the substance would be employed in a human use other than for a valid medical purpose and in the course of professional practice. Only items meeting the statutory definition and being possessed with the requisite mental state fall within the prohibitions of the statutes. See *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991). Thus, it is immaterial whether the person to whom the steroids were dispensed or delivered had the intent to use them for human use other than for a valid medical purpose and in the course of professional practice. Indeed, there is no requirement whatsoever to show that the person to whom the steroids were delivered actually used them. Because the aforementioned sections are not impermissibly vague, and sufficient facts can be gleaned from the record to indicate Connely possessed the requisite intent, this claim of vagueness is without merit.

(b) Nature of Use for Which Delivered

Connely's second claim of vagueness, that §§ 28-446 and 28-447 fail to define "valid medical purpose," ignores the language of § 28-446(2), set forth earlier.

Although §§ 28-446 and 28-447 are certainly not models of clarity, the prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether a defendant could reasonably understand that his or her conduct was proscribed by the statute. Section 28-446(2) makes it abundantly clear that the use of an anabolic steroid with the intended purpose of increasing muscle mass or strength without a medical necessity is not a valid medical purpose. Section 28-447 states that it is a crime to dispense or deliver an anabolic steroid for human use for any purpose other than a valid medical purpose. These sections, as applied to the conduct at issue, are not so vague that persons of common intelligence must guess at their meaning and thus differ as to their application.

2. Claim of Entrapment

In making his next claim, that he was unlawfully entrapped, Connely relies solely on the holding in *Jacobson v. U.S.*, ____ U.S. ____, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). Therein, the U.S. Supreme Court reversed the defendant's conviction of receiving child pornography through the mails. Government officials had discovered the defendant's name on the mailing list of a so-called adult bookstore from which he legally ordered two magazines and a brochure depicting nude children. Shortly after the defendant's legal purchase, Congress enacted the Child Protection Act of 1984, making such purchases illegal. Over a period of the ensuing 2½ years, there occurred "repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore [defendant's] willingness to break the new law by ordering sexually explicit photographs of children through the mail." 112 S. Ct. at 1538.

The *Jacobson* Court ruled that the defendant's conviction could not stand because the "Government did not prove that [the defendant's] predisposition was independent and not the

product of the attention that the Government had directed at [the defendant over a 2½-year period]." 112 S. Ct. at 1541. The five-justice majority announced that "[w]here the Government has induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first being approached by Government agents*." (Emphasis supplied.) 112 S. Ct. at 1540.

A dissenting opinion authored by Justice O'Connor found this rule to be somewhat troubling:

> Today, the Court holds that Government conduct may be considered to create a predisposition to commit a crime, even before any Government action to induce the commission of the crime. In my view, this holding changes entrapment doctrine. Generally, the inquiry is whether a suspect is predisposed before the Government induces the commission of the crime, not before the Government makes initial contact with him.

112 S. Ct. at 1545. Furthermore, the dissent prophesied how the majority opinion would be read by relief-seeking defendants:

> The rule that preliminary Government contact can create a predisposition has the potential to be misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant's predisposition *before it ever seeks to contact him*. Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed. The Court denies that its new rule will affect run-of-the-mill sting operations . . . and one hopes that it means what it says. Nonetheless, after this case, every defendant will claim that something the Government agent did before soliciting the crime "created" a predisposition that was not there before.

(Emphasis in original.) 112 S. Ct. at 1545.

While it appears that most courts have found *Jacobson* to rest on the egregiousness of its factual setting, see, e.g., *U.S. v. Martinez*, 979 F.2d 1424 (10th Cir. 1992), *cert. denied* ____

U.S. ____, 113 S. Ct. 1824, 123 L. Ed. 2d 454 (1993), and *U.S. v. LaChapelle*, 969 F.2d 632 (8th Cir. 1992), at least two courts, both of which utilize a subjective test for determining the presence of entrapment, have read *Jacobson* as refining the entrapment standard and, because the entrapment standard is not of constitutional dimension, have refused to change their law. See, *Rivera v. State*, 846 P.2d 1 (Wyo. 1993); *State v. Delisio*, No. 91-CA-46, 1992 WL 213451 (Ohio App. Sept. 3, 1992) (unpublished opinion).

While we agree that *Jacobson* can be distinguished on the outrageousness of the government's conduct, we are persuaded by the recent holding in *U.S. v. Kussmaul*, 987 F.2d 345 (6th Cir. 1993), that *Jacobson* did not revolutionize the law of entrapment. Therein, the U.S. Court of Appeals for the Sixth Circuit, in reaffirming that for the purposes of the entrapment defense the government must prove beyond a reasonable doubt that the predisposition to commit the crime existed prior to and independent of the government's contact, rejected the notion that proof of the predisposition be obtained prior to the government's initial contact with the target of a sting operation. See, also, *State v. DeAngelo*, 113 Or. App. 192, 830 P.2d 630 (1992), *review denied* 314 Or. 391, 840 P.2d 709 (*Jacobson* does not require that government have reasonable suspicion of wrongdoing before it may afford opportunities for commission of offense). Accordingly, we need not deviate from our established test for entrapment.

We have defined entrapment as "the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense." *State v. Stahl*, 240 Neb. 501, 510, 482 N.W.2d 829, 838 (1992), citing *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced. *State v. Van Egmond*, 233 Neb. 834, 448 N.W.2d 569 (1989); *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989). See *Sorrells v. United*

States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. *State v. Van Egmond, supra*; *State v. Jones, supra*.

Using the "origin of intent" test to determine whether a defendant was in fact entrapped, we have declared that entrapment consists of two elements: (1) government inducement of the defendant to commit the offense charged and (2) a defendant's predisposition to commit the criminal act was such that he was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Stahl, supra*; *State v. Van Egmond, supra*; *State v. Byrd, supra*; *State v. Jones, supra*; *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). In the "origin of intent" test, the ultimate focus is on the defendant's predisposition to commit the crime for which the State prosecutes. *State v. Stahl, supra*; *State v. Byrd, supra*; *State v. Swenson, supra*. If the jury finds that the defendant was predisposed to commit the crime, a defense of entrapment must fail. *State v. Stahl, supra*; 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.2 (1986).

Entrapment is in the nature of an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant. *State v. Stahl, supra*; *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967). Cf. *State v. Swenson*, 217 Neb. at 824, 352 N.W.2d at 153 ("[e]ntrapment is an affirmative defense"). When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact for the jury. *State v. Stahl, supra*; *State v. Parks, supra*. The burden is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *State v. Stahl, supra*; *State v. Van Egmond, supra*.

When reviewing jury verdicts regarding the defense of entrapment, an appellate court will disturb the jury's findings only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. In other words, we must sustain the jury's verdict if, taking the view most favorable to

the State, there is evidence in the record to support it. *State v. Stahl, supra*; *State v. Parks, supra*.

The evidence establishes beyond a reasonable doubt that Connely was ready and willing to sell steroids to the informant on each of the two occasions in question. Although the informant never witnessed other sales, Connely told the informant that he, Connely, had sold steroids to other individuals. Furthermore, Connely had no difficulty in finding steroids to sell to the informant. We have written that "[r]eady access to illicit drugs is a legitimate factor for the jury to consider on the question of predisposition." *State v. Stahl*, 240 Neb. 501, 511, 482 N.W.2d 829, 838 (1992). While we recognize that the mere possession of steroids is not illegal, for the drugs have many lawful uses, Connely's knowledge of steroid sale practices and his command of the steroid vernacular uses went to the issue of predisposition, for, as we have observed, "[a] familiarity with and demonstrable orientation to the relevant activity also constitutes relevant evidence of predisposition." *Id.* Moreover, Connely's acts of informing the confidential informant of the price range of steroids and setting the price for the steroids the informant eventually purchased go to predisposition. See *State v. Van Egmond*, 233 Neb. 834, 448 N.W.2d 569 (1989).

Contrary to Connely's belief, the fact that the government, through the confidential informant, provided Connely with a favorable opportunity to do that which Connely was otherwise ready and willing to accomplish does not constitute entrapment. *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

Connely also points out that he delivered the steroids only after requested by the confidential informant. However, we have previously declared that

> law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

State v. Lampone, 205 Neb. 325, 328, 287 N.W.2d 442, 444

(1980). Accord, *State v. Stahl, supra*; *State v. Van Egmond, supra*. See *Jacobson v. U.S.*, ____ U.S. ____, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). The State, through its use of a confidential informant, did not overstep the boundary between setting a trap for the " 'unwary innocent' " and the " 'unwary criminal.' " 112 S. Ct. at 1537, quoting *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958).

Connely also contends that from the middle of February to early April, the informant asked him "a minimum of 12 to 25" times for steroids. Obviously, overpersuasion, undue pressure, or coercion may indicate a reluctance or unwillingness on the part of the defendant to participate in the proposed criminal activity and thus a lack of predisposition. *State v. Stahl, supra*; *State v. Gurule*, 194 Neb. 618, 234 N.W.2d 603 (1975). However, the confidential informant denied having approached Connely this number of times; the jury was entitled to believe whomever it chose.

3. Claim of Insufficiency of Evidence

Finally, Connely asserts the evidence is insufficient to support his conviction. As we have frequently stated, in determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992); *State v. Vance*, 240 Neb. 794, 484 N.W.2d 453 (1992); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991).

The evidence, viewed in a light most favorable to the State, establishes that on April 4 and May 29, 1991, Connely delivered

anabolic steroids, as defined in § 28-446, to the confidential informant for human use and for other than a valid medical purpose and in the course of professional practice. This is the very conduct proscribed by § 28-447.

IV. JUDGMENT

The record failing to sustain any of Connely's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

L. J. VONTZ CONSTRUCTION CO., INC., A NEBRASKA CORPORATION, APPELLEE, V. CITY OF ALLIANCE, APPELLANT.
500 N.W.2d 173

Filed April 29, 1993. No. S-90-717.

1. **Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong.
2. **Appeal and Error.** When reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings.
3. **Judgments: Appeal and Error.** The dismissal of an appeal by an appellate court operates as an affirmance of the judgment of the trial court, and it is equivalent to an affirmance of the case on its merits.
4. **Claims: Res Judicata: Appeal and Error.** A claim before a tribunal, be it an administrative agency or a municipal board, once decided and not appealed from, or if appealed and the appeal is dismissed, is res judicata and may not, as a general rule, be relitigated.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and remanded with directions to dismiss.

Walter R. Metz, Jr., of Brown & Brown, for appellant.

Arthur R. Langvardt for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

HASTINGS, C.J.

L. J. Vontz Construction Co., Inc. (Contractor), obtained a

jury verdict in its appeal of the denial of its claim against the City of Alliance (City) under Neb. Rev. Stat. § 16-726 (Reissue 1987) in which it sought damages under a contract for the construction of an asphalt-surfaced street located in Alliance. The City has appealed.

On April 28, 1983, the City and the Contractor entered into a contract whereby the Contractor agreed to construct approximately 1 mile of asphalt-surfaced road on Kansas Street in Alliance, Nebraska. The total contract consideration was $286,871.28. The parties agreed that the State Department of Roads (DOR) would act on behalf of the City and the federal government with the rights of inspection, general supervision, stopping of the work, assessing of work days, and other related items.

As originally bid, and as later required under the contract's notice to proceed, the Contractor was required to begin the project on August 22, 1983, and to complete the project within 25 working days. However, the Contractor did not begin to move equipment to the site until September 1 and did not complete the construction of its asphalt plant until October 21. The Contractor did not obtain the necessary approval of its asphalt "mix design" until November 3.

Since initial grading work had been performed by a different contractor in the fall of 1982 and the road had remained open during the winter, a preliminary survey of the site had been performed in July 1983 to determine the condition of the roadway.

Jerrold Gardner, DOR project manager, testified that after the survey was completed, he examined the road and found that no corrective action was necessary and the project was ready for construction. Gardner testified that he could see that there were ruts as a result of snow removal, but he knew that the surfacing contractor had to do subgrade stabilization and subgrade compaction, which involved putting on cohesive soil and blending it for 7 or 8 inches of depth, and that the specifications required the Contractor to reestablish the template on the project. Gardner further testified that the next survey of the area was done in late October when the Contractor was ready for curb stakes. Although the October survey revealed that

additional grade work needed to be done on about 15 percent of the project, Gardner stated that the condition of the subgrade had been what a contractor should expect to find and was perfectly normal for a road that had been under traffic for a year.

However, M.C. Schaff, a civil engineer testifying as an expert for the Contractor, stated his opinion, from studying the general specifications and the special provisions of the contract, that when the Contractor came on the job in 1983 it was entitled to expect that the subgrade was reasonably close to what it was designed to be and could expect that it would not have to cut any dirt or haul in any dirt to bring that subgrade to line and grade. Based on the record of the October survey, Schaff found that portions of the subgrade elevation varied beyond what a contractor could reasonably expect to find. He also testified that the fact that DOR issued a change order for some additional work on the subgrade in 1984 indicated to him that DOR had determined that the subgrade did not meet the limits to line and grade that it had anticipated.

The Contractor worked on the subgrade for 2 days, October 17 and 18. At that point the Contractor needed stakes to be set by DOR in order to do the final trimming. The survey revealed that the grade varied more than could be corrected with the trimming machine utilized for this operation. Gardner met with the Contractor's project supervisor, Louis Vontz, on November 1 to discuss the repair work and to negotiate a price for the additional work. Gardner decided not to execute a work order for the corrective work at that time, because no asphalt could be laid after November 1. Kenneth Gottula, construction engineer for DOR, testified that if the corrective subgrade work had been completed in the late fall of 1983 and left to lay over the winter, the freezing and thawing action during the winter months would likely have destroyed the contents of the subgrade. Although not permitted to proceed with the subgrade, the Contractor continued with curb construction until the middle of November 1983, when the project was shut down because of snow.

The necessary work order for the corrective grade work was issued in the spring of 1984, before the Contractor returned to

work on the project in May. Numerous problems caused delays in completion of the project. Asphalt work was completed on August 22, and cleanup continued until September 19. Although the project was originally scheduled as a 25-day project, the contract time allowance was overrun by 96 working days. The Contractor was granted an extension of 19 working days; 77 working days were attributed to the Contractor's failure to vigorously prosecute the work, and liquidated damages were assessed against the Contractor in the amount of $16,170. DOR, as agent of the City, issued final estimate 16, which adjusted the final contract amount due the Contractor with various additions and adjustments, some of which have been set forth above. This final figure was $321,890.58, which, it is assumed, was paid to the Contractor.

However, in an effort to recover the amount of the various deductions made and to secure additions which had been denied, and pursuant to § 16-726, the Contractor filed with the city clerk of the City on April 14, 1987, a claim for damages of $492,502.99 arising out of the contract. The claim was denied by the City on July 7, 1988, and the Contractor appealed to the district court for Box Butte County by filing its notice of appeal with the city clerk on July 26, 1988. Neb. Rev. Stat. § 16-727 (Reissue 1991) provides that

> when the claim of any person against the city . . . is disallowed in whole or in part by the council, such person may appeal from the decision of the city council to the district court of the same county by causing a written notice to be served on the city clerk within twenty days after making such decision . . . .

The Contractor then filed an amended claim with the city clerk on September 23, 1988. The amended claim was essentially the same claim as the original claim except that it included a request for an additional $32,816.73 in damages, for a total of $525,319.72. The city council denied the amended claim in a resolution dated October 6, 1988. The Contractor initiated its appeal of the denial of its amended claim by filing a notice of appeal with the city clerk on October 21, 1988.

Box Butte County District Court case Nos. 12131 and 12183, representing the appeal of the original claim and the appeal of

the amended claim respectively, were essentially the same lawsuit. The City filed pleas in abatement in both cases. On November 8, 1988, the district court ordered the Contractor to elect between the cases it had filed. On November 16, the Contractor's then attorney moved to dismiss its appeal of the original claim, case No. 12131, and the case was dismissed without prejudice by the district court on November 17.

The appeal of the amended claim, case No. 12183, was tried to a jury by present counsel, and the jury rendered a verdict in favor of the Contractor in the amount of $104,199.27. On April 26, 1990, the City filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion was overruled on July 17, 1990. The City appeals, assigning as error, in summary, that the district court erred in (1) failing to sustain the City's motion for judgment notwithstanding the verdict, since (a) upon the dismissal of its original claim against the City, the Contractor was barred from pursuing its amended claim under the theories of res judicata and collateral estoppel, (b) the court lacked jurisdiction over the Contractor's amended claim against the City, (c) the Contractor failed to state a cause of action against the City with regard to its amended claim; (2) failing to partially sustain the City's motion for judgment notwithstanding the verdict on the grounds that the Contractor waived any claim for additional compensation arising from extra work involved in constructing the median curbs because of the condition of the road grade, by virtue of its failure to file a written claim prior to commencing the work as required by contract specification § 109.05; and (3) failing to sustain the City's motion for new trial for the reason that prejudicial errors occurred at the trial which were duly excepted to, including (a) the court's failure to find that the Contractor waived any claim for additional compensation arising from extra work in construction of median curbs, by virtue of its failure to file a written claim prior to commencing the work, (b) the court's overruling the City's motion to exclude evidence of the Contractor's increased equipment-related costs because of misleading discovery responses by the Contractor, (c) the court's receiving into evidence the Contractor's financial statements for 1982-83, (d) the court's allowing Daniel Vontz to

give oral summaries of what the Contractor's records provided as to equipment-related costs, and (e) the court's allowing Daniel Vontz to testify as to his calculations of increased equipment costs of $47,083 attributable to each of the 3 months of delay it claimed the City's actions were responsible for, over the City's objections that these calculations were based upon inadmissible evidence erroneously received by the court, as described in the above assignments of error.

A civil jury verdict will not be disturbed on appeal unless clearly wrong. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992); *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). However, "[w]hen reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings." *Stack v. Sobczak, ante* p. 78, 80, 497 N.W.2d 374, 376 (1993). Whether a prior determination by an adjudicative agency is res judicata is a question of law.

The City first contends that the City's action on the original claim was a conclusive judgment against the Contractor, equating the City's action with analogous actions taken by county boards in cases such as *The State, ex rel. Clark v. Buffalo County*, 6 Neb. 454 (1877), and *State v. Baushausen*, 49 Neb. 558, 68 N.W. 950 (1896). For example, in *Buffalo County*, the relator applied for a writ of mandamus to compel the board of county commissioners to issue payment to the relator for a claim audited and allowed by the board. The county resisted the writ, arguing that the board had later reconsidered and did " 'reject, rescind, and annul' " the allowance of the claim. 6 Neb. at 459. Referring to the language of *Brown v. Otoe County*, 6 Neb. 111 (1877), the court noted that

> in the audit, adjustment, and allowance or disallowance of a claim against the county, the board acts judicially, and its judgment in the matter is conclusive, unless appealed from, or reversed on error in the mode prescribed by law. . . . And it is also a well-established doctrine of the law that the board can only exercise such powers as are especially granted to it, or as are incidentally necessary to carry into effect the powers so granted.

6 Neb. at 460. Finding that no power had been conferred by law

upon the board to review its former adjudication, the court held that the proceedings of the board rescinding the adjudication of the relator's claim were not merely voidable, but simply void.

In *Baushausen*, the court reiterated the general rule that a board can exercise only such powers as are expressly granted, or necessarily implied in those expressly granted. The court further noted that a county board "has exclusive original jurisdiction to pass upon claims, and that in so doing it exercises functions judicial in their nature. The allowance or disallowance of a claim by the board has the force of a judgment until reversed or set aside." 49 Neb. at 564, 68 N.W. at 952. However, legislation passed in 1879, relating to counties and county officers, contained language which declared that " '[t]he provisions of this subdivision shall not be so construed as to prevent the county board from once reconsidering their action on any claim, upon due notice to parties interested.' " *Id.* The court found that while more apt or appropriate language could have been employed, that section did confer upon county boards the power to reconsider their decisions made in passing upon accounts or demands against the county. In *Baushausen*, the supervisors of Sherman County had allowed a claim but later reconsidered and disallowed it. Thus, in that case, where the relators had appealed the disallowance but later dismissed the appeal, the disallowance constituted a final adjudication.

The City asserts that municipal corporations may be equated with county boards for the purposes of applying the principles discussed above, citing *Gallaher v. City of Lincoln*, 63 Neb. 339, 88 N.W. 505 (1901). Although the issue in *Gallaher* involved a ministerial action, the court did equate the two entities in holding that "when a city council or a board of county commissioners audit[s] and adjust[s] the claim of an officer whose salary is prescribed by statute or by ordinance, they act ministerially, and not judicially." 63 Neb. at 342, 88 N.W. at 505. Thus, by implication, the judicial actions of city councils and county boards may be comparable as well.

The principle that a county board can exercise only those powers that are expressly granted or necessarily implied is

equally applicable to a municipal corporation. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992); *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980). As noted in *Baushausen*, county boards have been granted the authority to reconsider their actions on a claim; this authority is now codified as Neb. Rev. Stat. § 23-138 (Reissue 1991). Conversely, Neb. Rev. Stat. § 16-726 et seq. (Reissue 1987) contained no such authority. (Section 16-726 (Reissue 1991), as amended in 1990, and related statutes are similarly lacking in authority for reconsideration of council actions.)

This court has noted that

> [i]f a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.

In re Interest of L.D. et al., 224 Neb. 249, 261, 398 N.W.2d 91, 99 (1986). See, also, *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990) (an appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken lacked jurisdiction).

Thus, in the instant case, the district court could acquire no jurisdiction of the appeal if the city council, functioning in a judicial manner in the allowance or disallowance of a claim, had no authority for reconsideration. While not explicitly denying the power to reconsider, the city council's resolution 88-34, denying the amended claim, at least suggests that reasoning obtained:

> WHEREAS, the City of Alliance on July 7, 1988, has already denied a Claim made by Vontz Construction Co., Inc., dated April 14, 1987, seeking recovery against the City under allegations of breach of the same Kansas Street improvement project contract by the City of Alliance . . . and
>
> WHEREAS, Vontz Construction Co., Inc. has pursued

its rights to appeal the denial by the filing of a Notice of Appeal . . . with the City Clerk on July 26, 1988.

NOW THEREFORE, BE IT RESOLVED that the Amended Claim made by Vontz Construction Co., Inc. . . . is hereby denied on the basis that the City Council has already acted upon and denied a claim supported by allegations making up the same purported cause of action.

PASSED AND APPROVED this 6th day of October, 1988.

The City also argues that after the dismissal of an appeal of a claim disallowed by a political subdivision board, the disallowance is final, citing *In re Estate of Marsh*, 145 Neb. 559, 564, 17 N.W.2d 471, 475 (1945), which stated the general rule that " 'the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed . . . .' " The court further noted that " '[t]he rule is upheld in a number of cases that the dismissal of an appeal by the appellate court operates as an affirmance of the judgment of the trial court . . . and that it is equivalent to an affirmance of the case on its merits.' " *Id.*

The Contractor argues that the existence of authority for reconsideration of a claim may be found in *State v. City of Minden*, 84 Neb. 193, 120 N.W. 913 (1909). In *City of Minden*, the relator had filed a claim against the city for $279.12. At a regular meeting of the mayor and council, the claim was allowed for $200, but the following day the action was reconsidered and the claim was rejected in its entirety. The court framed the question as "whether the mayor and council of a city of this class, after allowing a claim against the city, may, before such allowance is accepted by the claimant, reconsider their action and refuse to allow such claim." 84 Neb. at 194, 120 N.W. at 913. The court found that the reconsideration was proper and dismissed the relator's claim.

The City argues that *City of Minden* is inapplicable because it involved a city of the second class with a different claim disposition process than that found in § 16-726. Under the applicable statute, Comp. Stat. ch. 14, art. I, § 80 (1905), it was argued that "because the power to reconsider is not specifically granted, it does not exist." 84 Neb. at 194, 120 N.W. at 913. In

finding that reconsideration was proper, the court noted:

> While it is usual for legislative and deliberative bodies to regulate by special rule the time, manner, and by whom a motion to reconsider may be made, in the absence of such special rule on the subject, a motion to reconsider may be made at any time by any member, precisely like any other motion and subject to no other restriction. Cushing, Law and Practice of Legislative Assemblies (2d ed.), sec. 1266. Its power must, of course, be exercised with due consideration for the right of any third party who has, in reliance upon the action so rescinded, changed his position to his own disadvantage; but, before such right of third persons has accrued, a mayor and council may, if not restricted by the provisions of the charter or any rule adopted by them, reconsider previous votes and orders. 1 Dillon, Municipal Corporations (4th ed.), sec. 290. It may often happen that action may be taken in the allowance of claims against the city, which, upon subsequent consideration and in the light of further information, appears to have been improvident, ill-advised and unauthorized; and considerations of public welfare demand that the mayor and council of a city should be left free to correct such mistakes, so long, at least, as the claimant has not changed his situation to his disadvantage because of such action.

84 Neb. at 194-95, 120 N.W. at 913-14. Thus, the court did find that reconsideration was proper even in the absence of an express grant of authority. However, it should be noted that it did so in the context of a motion to reconsider made on the council's own initiative and in reconsideration of a claim which had previously been allowed. That case may also be distinguished by the fact that the allowance of a bill for less than the amount claimed was considered by the court to be an offer, which was not binding upon either party until it was accepted, and not a judgment. The court noted that the purpose of the claims statute was "to give to the governing body of the city an opportunity to audit and pay a claim deemed valid, before the city can be subject to the costs of an action to collect it." 84 Neb. at 195, 120 N.W. at 914. However, where the original claim has

been disallowed there has been no "offer," and as a result the governing body may be deemed to be acting in a judicial manner, its decision given the effect of a judgment.

Finally, the Contractor argues that since the action in the district court was an appeal, it could not have been permitted to enlarge its claim in that court beyond that upon which the City had had an opportunity to act. The Contractor contends that filing an amended claim was the only opportunity it had to clarify, correct omissions, or remedy oversights in its original claim. However, it should be noted that the claim made to the City on April 14, 1987, requested damages of $492,502.99, while the petition filed in the district court in the appeal of that claim on September 6, 1988, requested damages of $525,319.72, the exact amount of the amended claim made to the City on September 22, 1988. On October 3, 1988, the City moved to strike paragraphs 14 and 15 of the Contractor's petition, to the extent that it claimed damages beyond the amounts claimed in the claim filed with the City on April 14, 1987. In a journal entry dated October 11, 1988, the City's motion to strike was overruled by the district court.

Whether the Contractor could have amended its claim in district court is not relevant to a determination of this issue. The appeal of the claim denied was required to be tried de novo in the district court. "Such appeal shall be entered on the docket of the court, tried, and determined as appeals from justice courts . . . ." § 16-729 (Reissue 1987). However, a claim before a tribunal, be it an administrative agency or a municipal board, once decided and not appealed from, or if appealed and the appeal is dismissed, is res judicata and may not, as a general rule, be relitigated. See, generally, *In re Estate of Marsh*, 145 Neb. 559, 17 N.W.2d 471 (1945). "An unreviewed administrative hearing can preclude later litigation of the same issues." *Scott v. Mattingly*, 241 Neb. 276, 281, 488 N.W.2d 349, 351-52 (1992). "Indeed, it may be said, inasmuch as the common council, being the auditing board of the city, has passed upon and adjudicated the claim, that it is res adjudicata, and that the present common council has no power to review the judicial action of the former common council." *Beresford v. Donaldson*, 103 N.Y.S. 600, 606, 54 Misc. 138, 147 (1907).

The Contractor having dismissed its appeal of the first denied claim before the city council of the City, the decision on that claim became final and is res judicata as to a subsequent claim based on the same set of facts. Accordingly, the district court was without jurisdiction to adjudicate a claim on appeal which had become final upon the dismissal of the first appeal. The judgment of the district court is reversed and the cause remanded with directions to dismiss the Contractor's cause of action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CAPORALE, J., not participating.

CONTEMPORARY INDUSTRIES MID-AMERICA, INC., DOING BUSINESS AS 7-ELEVEN, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE, AND CITY OF NORFOLK, NEBRASKA, APPELLANT.
500 N.W.2d 525

Filed April 29, 1993. Nos. S-90-943, S-90-944, S-90-945.

1. **Constitutional Law: Equal Protection: Sales: Liquor Licenses.** Convenience stores may not be treated differently from other operations which combine the sale of alcoholic liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance.
2. **Liquor Licenses.** Belief that there are sufficient liquor licenses in existence, standing alone, does not justify the denial of an otherwise valid application for such.
3. **Ordinances: Liquor Licenses.** The authority of a city to regulate by ordinance the business of a retail licensee is limited to provisions not inconsistent with the Nebraska Liquor Control Act. Neb. Rev. Stat. § 53-147 (Reissue 1988).

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

David H. Ptak, of Ptak & Schukei, P.C., for appellant.

Michael L. Lazer, of Levy & Lazer, P.C., for appellee Contemporary Industries Mid-America.

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

BOSLAUGH, J.

These three cases are appeals by the City of Norfolk, Nebraska, from the judgment of the district court reversing orders of the Nebraska Liquor Control Commission and directing the commission to issue licenses to the applicant, Contemporary Industries Mid-America, Inc. (CIMA).

CIMA owns and operates three 7-Eleven stores in Norfolk. On February 21, 1989, CIMA filed applications for class B liquor licenses for the three stores. A class B license permits the sale of beer only, in its original package, for off-premises consumption. Neb. Rev. Stat. § 53-124(5)(B) (Reissue 1988). A hearing on the applications was held before the Norfolk City Council on March 27, 1989. After the hearing, the council passed a resolution recommending denial of CIMA's applications.

In accordance with the city's recommendation, the commission denied the licenses to CIMA. In each of its orders, the commission found that CIMA complied with the first three parts of Neb. Rev. Stat. § 53-132(2) (Reissue 1984), which governs the issuance of liquor licenses. However, the commission determined that CIMA did not meet the requirements of subsection (2)(d) of § 53-132 and stated that the issuance of the licenses was not required for "the present or future public convenience and necessity." See *id.* In each case, the commission based this finding "upon the following specific findings of fact": (1) "[t]he local governing body's recommendation of denial" and (2) "[t]he local governing body's consistent policy of not approving licenses to this type of establishment."

The Lancaster County District Court reversed the decisions of the commission on appeal. After reviewing the proceedings before the Norfolk City Council and the commission, the district court held that the findings of the commission that the issuance of each license sought by CIMA was not required by the present or future public convenience and necessity were unsupported by competent, material, and substantial evidence

in view of the entire record and were therefore arbitrary and capricious. The commission was ordered to issue the three licenses to CIMA.

These appeals were filed during a "window" period in which license applications and appeals were governed by statutory law as it existed prior to the 1986 legislation held unconstitutional in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). Subsequent liquor control legislation, specifically 1989 Neb. Laws, L.B. 781, has also recently been declared unconstitutional by this court. See *Kwik Shop v. City of Lincoln, ante* p. 178, 498 N.W.2d 102 (1993). Our decision in these cases is controlled by the decisions in the recent similar cases *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993); *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993); and *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992). Decisions of the Nebraska Liquor Control Commission are reviewed first by appeal to the district court. Our scope of review on appeals of this type from the district court is de novo on the record. See, *Hy-Vee Food Stores, supra*; *Gas 'N Shop, supra*.

Our review in these cases is limited to the record that was made before the commission, including the testimony and exhibits from the Norfolk City Council hearing. The qualifications to be met by a license applicant are provided in § 53-132. This statute provides in relevant part:

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

or will be required by the present or future public convenience and necessity.

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

(a) The recommendation of the local governing body;

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

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

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

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

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

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

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

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

We agree with the findings of the commission that CIMA has met the conditions in § 53-132(2)(a), (b), and (c). Thus, we must determine whether CIMA has met the conditions in subsection (2)(d) of the statute. To do this, we must apply the evidence to the factors listed in § 53-132(3).

Our analysis in these cases is very similar to that made in the recent case *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992). In *Gas 'N Shop*, this court also considered an application for a liquor license in the City of Norfolk. The evidence presented in *Gas 'N Shop* is substantially similar to the evidence presented in the present case. In fact, the findings of the Norfolk City Council recommending denial of the liquor licenses were identical to the findings in these cases. As was stated in *Gas 'N Shop*:

The city's recommended denial was influenced by its

> conviction that there already existed a sufficient number of liquor licenses in the city, that liquor sales should be a distinct and separate business operated apart from other business activities, and that issuing the license in question would set a precedent in contravention of the aforementioned separate and distinct policy.

241 Neb. at 907, 492 N.W.2d at 13.

Evidence introduced at the commission hearing in *Gas 'N Shop* which was also introduced at the commission hearing in the present cases included a public opinion poll which showed that a majority of the Norfolk citizens polled were of the view that the city had enough off-sale liquor outlets and that convenience stores should not be allowed to sell alcoholic beverages. Undisputed evidence that the population of the City of Norfolk is increasing was also admitted.

All three of the 7-Eleven stores involved in these cases are located on major east-west thoroughfares in the City of Norfolk. All are located in commercial and business districts.

Evidence was introduced at the hearing before the commission with regard to the existing liquor licenses in the Norfolk area. Of the outstanding licenses, 28 permit the sale of all types of alcoholic liquors in their original packages for consumption on or off the licensed premises, 5 permit the sale in their original packages of all types of alcoholic liquors for consumption off the licensed premises, 2 allow the sale of beer for consumption on the premises, and 1 permits the sale of all types of alcoholic beverages for consumption on the premises. Within a 1-mile radius of the 7-Eleven store located at 101 Norfolk Avenue, there are eight licenses which permit the sale of all types of alcoholic liquors in their original packages for consumption either on or off the premises. Within a 1-mile radius of the 7-Eleven located at 101 Omaha Avenue, there are three licenses of the type just described. Within a 1-mile radius of the 7-Eleven located at 1220 Benjamin, there are four licenses which permit the sale of all types of alcoholic liquors in their original packages for consumption on or off the premises, two licenses that permit the sale of all types of alcoholic liquors in their original packages for consumption off the premises, and one license that permits the sale of beer only for consumption

on the premises. At the time of the hearing before the commission, there were no class B liquor licenses, the type sought by CIMA, in the City of Norfolk.

Several church groups sent signed petitions to the commission protesting the issuance of the liquor licenses; however, there is no evidence of a citizens' protest as contemplated by § 53-132(3)(b).

All three of the 7-Eleven stores are located in well-traveled areas. At least 8,545 and as many as 12,666 vehicles pass the various 7-Eleven locations on a daily basis. However, there is nothing in the record that indicates the level of traffic would increase should the licenses be granted.

As in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992), the chief of police of Norfolk expressed concern that there would be a potential for a lack of sufficient law enforcement should the liquor licenses be granted. However, no evidence was introduced that supported this concern. In contrast to the concern over the potential for adequate law enforcement, CIMA offered evidence of its education program for its employees that deals with applicable liquor laws. The mandatory program is designed to teach 7-Eleven employees techniques designed to prevent the sale of alcoholic beverages to minors. The program also informs the public of the stores' policy of checking ages of customers seeking to purchase alcoholic beverages.

The City of Norfolk argues that the 7-Eleven located at 101 Omaha Avenue is 210 feet from the nearest wall of a Norfolk school, in violation of a local ordinance which prohibits the sale of alcoholic liquor within 300 feet of a school. However, Neb. Rev. Stat. § 53-177 (Reissue 1988), with certain exceptions, permits a liquor license to be issued for the sale at retail of any alcoholic liquor more than 150 feet from any church, school, hospital, or home for the aged. The authority of a city to regulate by ordinance the business of a retail licensee is limited to provisions not inconsistent with the Nebraska Liquor Control Act. Neb. Rev. Stat. § 53-147 (Reissue 1988).

The city ordinance in question is ineffective because it is inconsistent with the provisions of the Nebraska Liquor Control Act. There is no other evidence in the record that

indicates any other restrictions would preclude the issuance of the liquor licenses. Further, the record contains nothing that indicates a problem with the sanitation or sanitary conditions on or about the licensed premises.

As in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992), we conclude that the foregoing evidence does not establish that granting the licenses sought would be other than in the public interest. The 7-Eleven stores owned and operated by CIMA have had repeated requests from their customers to sell beer. The record in this case establishes that the conditions of subsection (2)(d) of § 53-132 are satisfied and that the issuance of the liquor licenses will serve the present or future public convenience and necessity. The district court correctly reversed the decisions of the commission. The judgment of the district court is affirmed.

AFFIRMED.

EV. LUTHERAN GOOD SAMARITAN SOCIETY, DOING BUSINESS AS ST. LUKE'S GOOD SAMARITAN VILLAGE, APPELLANT, V. BUFFALO COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

500 N.W.2d 520

Filed April 29, 1993. No. S-90-1050.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present

evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

4. **Taxation: Property: Charities.** Property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes.
5. **Taxation: Property.** The primary or dominant use of the property, and not an incidental use, is controlling in determining whether a property is exempt from taxation.
6. _____: _____. The encouragement of tenants to participate in religious services or to attend other religious services off-premises would not in and of itself constitute the rental of apartments as exclusive for religious purposes or be capable of being deemed sufficient to overcome a county board of equalization's finding that the primary purpose of the rentals was to furnish low-rent housing, which is not entitled to exemption from taxation as property owned and used exclusively for religious purposes.
7. **Courts: Judgments: Appeal and Error.** When the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision.
8. **Administrative Law.** A county board of equalization is an administrative agency of the county.
9. **Constitutional Law: Administrative Law: Legislature.** As an administrative agency, a county board of equalization has no authority to determine the constitutionality of an act of the Legislature.
10. **Constitutional Law: Legislature: Appeal and Error.** A constitutional challenge to an act of the Legislature may be raised initially on appeal from a decision of a county board of equalization.
11. **Actions: Pleadings.** When there are multiple causes of action pleaded in civil proceedings, they should be designated numerically.
12. **Taxation: Appeal and Error.** An appeal to the district court concerning a decision of a county board of equalization is a trial de novo, but only the tax liability questions raised before the board of equalization are questions for adjudication by the district court in its appellate jurisdiction.
13. **Taxation: Valuation: Appeal and Error.** A district court, acting in its appellate capacity, is without power to adjudicate a question of uniformity and proportionality or any other factual question when such question or questions have not been presented to the county board of equalization.
14. **Jurisdiction: Appeal and Error.** When an initial appellate court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, a higher appellate court also lacks power to adjudicate the merits of the claim.

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

Kenneth F. George, of State, Yeagley & George, and Eugene T. Hackler and Robert C. Londerholm, Sr., of Hackler, Londerholm, Hinkle, Corder, Martin & Hackler, for appellant.

John L. Jelkin, of Duncan, Duncan, Jelkin & Walker, for appellees.

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

FAHRNBRUCH, J.

In this appeal, the Evangelical Lutheran Good Samaritan Society (Society) claims that the district court erred when it granted a summary judgment in favor of the Buffalo County Board of Equalization (Board), in which judgment the court found that Society is not exempt from paying property taxes on 32 independent living units or apartments which are a part of St. Luke's Good Samaritan Village, located in Kearney, and personal property used in connection therewith.

Society also claims that the district court for Buffalo County erred when it dismissed "Count II" of Society's second amended petition because the State Tax Commissioner was not named as a defendant. In "Count II" of its second amended petition, Society claimed, for the first time on appeal, that it was discriminated against because its property was not treated the same, i.e., given tax-exempt status, as are other similarly owned and similarly used properties in Nebraska.

This is the second time that the property tax exemption status of Society's property has been before this court. In the first case, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988) (*Ev. Luth. Soc. I*), this court held that the primary use of Society's property was for low-cost housing and that Society had failed to meet its burden of proof to establish by the evidence that its use of the apartment complex was exclusively for charitable purposes. This court reversed the district court's finding that Society's apartment complex was tax-exempt. The earlier case involved the tax years 1985 and 1986.

Society claims that the tax years involved in the case under consideration here are 1987 and subsequent years. Neither an application for tax exemption nor an affidavit for continued tax exemption was timely filed for the year 1987. Because the application for tax exemption was not filed until after August

15, 1987, the only tax year involved here is 1988. See Neb. Rev. Stat. §§ 77-202.01 and 77-202.03(2) and (4) (Reissue 1990). Without timely compliance with § 77-202.03, neither a county board of equalization nor a court could consider a tax-exemption claim for the year 1989 and subsequent years. As applicable here, when tax-exempt status is granted a property, such exemption shall continue for a period of 4 years. The 4-year period begins with years evenly divisible by four. In each intervening year occurring between application years, the organization or society which filed the granted exemption application must file an affidavit with the county assessor before January 1 certifying that the ownership and use of the exempted property has not changed during the year. § 77-202.03. Obviously, Society's property could not be considered for exemption for 1989 and subsequent years because an affidavit of future ownership and use of the property would not comply with § 77-202.03.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which

prevents a judgment as a matter of law for the moving party. *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993).

SUMMARY JUDGMENT

Here, there is no genuine issue of material fact. The uncontroverted facts are the same as they were in *Ev. Luth. Soc. I*, with one addition, that Society again formally became an affiliated agency of the American Lutheran Church and the Lutheran Church in America, which bodies merged into the Evangelical Lutheran Church of America in 1988.

In *Ev. Luth. Soc. I*, 230 Neb. at 141, 430 N.W.2d at 505-06, citing *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961), we held that "[p]roperty which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes." No additional facts have been presented in this case to challenge that holding.

In the case under consideration, Society has also alleged that the property is being utilized exclusively for religious purposes and is therefore exempt from property tax. See Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1990). We have interpreted this statute to mean that the primary or dominant use of the property, and not an incidental use, is controlling in determining whether a property is exempt from taxation. See *Christian Retirement Homes, Inc. v. Board of Equalization*, 186 Neb. 11, 180 N.W.2d 136 (1970).

When asked by the Board in an interrogatory to describe any changes in the religious use of its apartments since 1986, Society responded:

> Although the plaintiff Society, has always considered its activities to be in furtherance of its religious mission and religious purpose since its founding by Lutheran ministers and laymen in 1922, the Society did become formally re-affiliated as an "affiliated" agency of the American Lutheran Church and the Lutheran Church in America, in 1986, which bodies later merged into the Evangelical Lutheran Church of America in 1988. This formalizes and

> establishes the use of the subject property as being in direct furtherance of the religious mission of the Lutheran Church (ELCA) acting through this arm of the Church. The residents in the apartments are encouraged to participate in the various religious services and activities conducted on the premises of the overall Village property, and are also assisted in attending other religious services and programs upon request.

As the district judge properly pointed out:

> This statement appears to be the only evidence in support of a religious purpose for the [Society] offered in the evidence submitted on the Application for Summary Judgment. Unfortunately for [Society] the mere allegation of affiliation does not tend to prove or establish the "furtherance of the religious mission of the Lutheran Church."

The interrogatory and Society's response were received in evidence at the summary judgment hearing.

As a matter of law, the encouragement of tenants to participate in religious services or to attend other religious services off-premises would not in and of itself constitute the rental of the apartments as exclusive for religious purposes or be capable of being deemed sufficient to overcome a county board of equalization's finding that the primary purpose of the rentals was to furnish low-rent housing, which is not entitled to exemption from taxation as property owned and used exclusively for religious purposes. The record fails to reflect any evidence that Society's apartments are owned or used primarily or dominantly for religious purposes.

Society directs our attention to the supplemental transcript containing the "Report on Pretrial Conference," to which is attached a list of witnesses and an outline of their expected testimony along with a list of exhibits to be presented at trial. Society did not present this or any other evidence at the hearing on the Board's motion for summary judgment. Nonetheless, Society claims that the district court erroneously entered summary judgment based solely upon the four exhibits entered into evidence at the hearing. Society argues that in doing so, the court shifted the burden of proof onto Society, the nonmoving

party.

After the Board presented facts entitling it to judgment as a matter of law, Society had the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the Board. Society failed to present any evidence at the hearing. The trial court was correct in granting summary judgment in favor of the Board.

MOTION TO DISMISS

Although we disagree with the trial court's reasoning that the Tax Commissioner is a necessary party to the action, we conclude that the district court was correct in granting the Board's motion to dismiss "Count II" of the second amended petition.

When the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision. *Wymore v. Wymore*, 239 Neb. 940, 479 N.W.2d 778 (1992). As applicable here, the statutes contemplate involvement of the Tax Commissioner only at the commissioner's discretion. See Neb. Rev. Stat. §§ 77-202.04 and 77-202.06 (Reissue 1990).

In "Count II," Society alleges, in summary, that comparable properties owned by similar organizations in the State of Nebraska are exempt from taxation. As a result, Society claims that the Board's decision denying it tax-exempt status violated Society's (1) right to equal treatment under the law as guaranteed by article VIII, § 1, of the Nebraska Constitution, and (2) right to equal protection as provided by the 14th Amendment to the U.S. Constitution.

ANALYSIS

A county board of equalization is an administrative agency of the county. *Speer v. Kratzenstein*, 143 Neb. 310, 12 N.W.2d 360 (1943). As an administrative agency, a county board of equalization has no authority to determine the constitutionality of an act of the Legislature. See *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993). That being true, a constitutional challenge to an act of the Legislature may be raised initially on appeal from a decision of a county board of equalization. See *Metropolitan Utilities Dist. v. Merritt Beach*

Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

In the appeal under consideration, neither of the complaints contained in "Count II" of Society's second amended petition on appeal embrace a constitutional challenge to a legislative act. It is noted that the designation of "Count II" is foreign to the nomenclature used in this state's civil procedure to designate a cause of action. When there are multiple causes of action pleaded in civil proceedings, they should be designated numerically as "First Cause of Action," etc. Although Society attempts to set forth two causes of action in this case, it has pleaded but one, i.e., that Society's property is tax-exempt. "Count I" sets forth one theory of recovery. "Count II" merely recites additional theories or alleged factual reasons for recovery. See *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). Taken in the context of the appeal in this case, the complaints embrace factual questions or reasons why Society claims its property should be exempt from taxation. That being true, these factual questions or reasons for granting tax-exempt status to Society's property should have been raised initially before the Board. Since they were not, they could not be raised in Society's appeal to the district court.

An appeal from a denial of exemption from taxation for real or tangible personal property is made pursuant to § 77-202.04 and Neb. Rev. Stat. §§ 77-1510 and 77-1511 (Reissue 1990). Under § 77-1511, an appeal to the district court concerning a decision of a county board of equalization is a trial de novo, *but only the tax liability questions raised before the board of equalization are questions for adjudication by the district court in its appellate jurisdiction. Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). See, also, *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987) (a district court, acting in its appellate capacity, is without power to adjudicate a question of uniformity and proportionality or any other factual question when such question or questions have not been presented to the county board of equalization).

Since the district court, acting as an appellate court, lacks the power, that is, jurisdiction to adjudicate the questions raised in "Count II" of Society's second amended petition on appeal, a

higher appellate court also lacks the power to adjudicate those complaints. See *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal., supra.* The district court was correct in dismissing the complaints in "Count II" of Society's appeal, not for the reason the district court gave, but for the reasons hereinbefore set forth.

The judgment of the district court for Buffalo County is affirmed.

AFFIRMED.

UNIVERSAL ASSURORS LIFE INSURANCE COMPANY, APPELLEE, V. BERTHA HOHNSTEIN, APPELLANT, AND ELIZABETH A. HALSTEAD, APPELLEE.

500 N.W.2d 811

Filed April 29, 1993. No. S-91-047.

1. **Divorce: Intent: Appeal and Error.** After the time for appeal has passed, the meaning of a dissolution decree is determined as a matter of law from its language; neither what the parties thought the decree meant nor what the judge intended is of any relevance.
2. **Divorce: Liability: Debtors and Creditors.** A dissolution decree does not change a dissolution party's liability to a creditor.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
4. **Insurance: Contracts: Words and Phrases.** As used in Neb. Rev. Stat. § 44-370 (Reissue 1988), the phrase "person holding a policy" describes the owner of the insurance policy.
5. **Insurance: Contracts.** Neb. Rev. Stat. § 44-370 (Reissue 1988) grants the owner of a life insurance policy the right to change the beneficiary unless the appointment of the beneficiary was made irrevocable.
6. _____: _____. The owner of a life insurance policy need not be the insured, that is, the person whose death obligates the insurer to pay under the policy.
7. **Summary Judgment.** Summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law.

8. **Summary Judgment: Evidence.** A movant for summary judgment has made a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial; at that point, the burden of producing evidence shifts to the party opposing the motion.
9. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
10. **Insurance: Contracts.** When the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
11. _____: _____. When a clause in an insurance contract can be fairly interpreted in more than one way, there is ambiguity.
12. **Contracts: Appeal and Error.** The construction of a contract is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court.
13. **Insurance: Contracts: Intent.** The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.
14. **Insurance: Contracts.** In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

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

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

James R. Hancock, of Hancock & Denton, P.C., for appellee Halstead.

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

CAPORALE, J.

I. STATEMENT OF CASE

The death of the decedent, David A. Halstead, obligated the plaintiff-appellee interpleader, Universal Assurors Life Insurance Company, to pay benefits under the provisions of three separate certificates of credit life insurance it had issued in favor of First State Bank, Scottsbluff, Nebraska, and others. Both the decedent's mother, the defendant-appellant claimant, Bertha Hohnstein, and the decedent's former wife, the defendant-appellee claimant, Elizabeth A. Halstead, demand the residual proceeds, that is, the amount of benefits exceeding

the sums Universal remitted to the bank. Having paid the residual proceeds into court, Universal was dismissed from the action, and the cause then proceeded to adjudication upon the reciprocal motions for summary judgment filed by the two claimants. The district court overruled the mother's motion and sustained the former wife's motion. The mother's three assignments of error merge to assert that the district court erred in so ruling. We affirm.

II. FACTS

On August 10, 1988, the decedent and the former wife indebted themselves to the bank and, for a single premium, purchased the three aforementioned certificates of insurance, which were issued under and pursuant to an agreement between Universal and the bank entitled "Debtor-Creditor Group Master Policy Single Premium Term Life Insurance - Non-Participating." The master policy provides, in pertinent part:

> [Universal] will pay, subject to all terms and conditions of this policy, to the [bank] the amount of insurance in force hereunder on the life of such Debtor at the time of such death, to reduce or extinguish the unpaid indebtedness and where the amount of insurance exceeds the unpaid indebtedness, the excess amount will be paid to a beneficiary other than the [bank], if living, named by the insured Debtor or to the estate of the insured Debtor.

Each of the three certificates named the decedent as "Insured Debtor," the former wife as "Insured Joint Debtor," and the bank as "Irrevocable Creditor Beneficiary." In an area denominated "Second Beneficiary," each certificate reads:

> David A. Halstead - Beneficiary Elizabeth A. Halstead
> Elizabeth A. Halstead - Beneficiary David A. Halstead
> James D. Halstead.

The last named individual, born January 6, 1986, is the minor child of the debtors.

On November 16, 1989, the former wife filed a dissolution of marriage action which resulted in a decree of dissolution being entered on February 2, 1990. Through incorporating by reference the decedent's and the former wife's property

settlement agreement, the decree provides, in relevant part:

> The [former wife] and [the decedent] will keep all items of personal property currently in their respective possession. Each party will hold the other harmless from any liability upon the personal property in their possession.
>
> [The decedent] shall receive the title and possession of the [marital residence] and [the former wife] will sign a Quitclaim Deed to [the decedent] regarding said property. [The decedent] shall hold [the former wife] harmless from any liability arising from any encumbrance upon said real property.

The decree makes no specific references to the debt owed the bank or to the Universal certificates, nor does it relate the insured debt to the marital residence.

Following the entry of the dissolution decree, the decedent, on August 6, 1990, issued a notarized letter directed to Universal, which referenced the three certificates of insurance and recited: "Because of my divorce, I hereby authorize you to change the beneficiary designations on the above [certificates] from my [former wife] to my mother . . . ."

The decedent died August 10, 1990, as a result of injuries sustained in an accident. After Universal paid the bank the amount of the unpaid debt, there remained benefits totaling $6,067.10 due under the three certificates.

III. ANALYSIS

We begin by noting that although each certificate names the Halstead child as some sort of beneficiary, he was not made a party to this action. As a consequence, this litigation does not affect any interests he may have in the matter.

1. Effect of Dissolution Decree

The decedent's mother asserts that because the marital residence was awarded to the decedent subject to the liability for any encumbrance thereon, for which liability he was obligated to hold the former wife harmless, the decedent became the sole owner of the insurance certificates and could do with them as he chose. Such, however, is not the case.

In the first place, as noted in part II, the decree in no way ties the insured debt to the marital residence. In reviewing the res

judicata effect of dissolution decrees in later actions, we have declared:

> "[N]either what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant."

Metropolitan Life Ins. Co. v. Beaty, 242 Neb. 169, 173, 493 N.W.2d 627, 630 (1993). Accord *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

But even if the decree were to have related the debt to the marital residence, it only orders the decedent to hold the former wife harmless from the liability; it does not, nor could it, relieve the former wife of liability to the bank.

Although it appears we have not heretofore been called upon to rule on the effect of a dissolution decree upon a dissolution party's liability to a creditor, we have held that a contract for the lease of school land could not be altered by a dissolution decree and made enforceable against the other parties to the lease. *Kidder v. Wright*, 177 Neb. 222, 128 N.W.2d 683 (1964); *State v. Kidder*, 173 Neb. 130, 112 N.W.2d 759 (1962). Moreover, in *Baker v. Baker*, 201 Neb. 409, 267 N.W.2d 756 (1978), this court held that a dissolution court could not affect the rights of the transferees of gifts who were not before the court. We now specifically adopt the holdings of numerous other jurisdictions that a dissolution decree does not change a dissolution party's liability to a creditor. *Bourdon v. Bourdon*, 119 N.H. 518, 403 A.2d 433 (1979); *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Arneson v. Arneson*, 38 Wash. 2d 99, 227 P.2d 1016 (1951); *Stevenson v. Stevenson*, 680 P.2d 642 (Okla. App. 1984); *Wileman v. Wade*, 665 S.W.2d 519 (Tex. App. 1983); *Glasscock v. Citizens Nat. Bank*, 553 S.W.2d 411 (Tex. App. 1977); *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 328 S.E.2d 840 (1985) (review allowed at 314 N.C. 662, 335 S.E.2d 321; however, ex-wife withdrew her appeal as a party to the further appeal to the North Carolina Supreme Court, 318 N.C. 505, 353 S.E.2d 225). Thus, the former wife remained personally liable to the bank.

2. RIGHT TO CHANGE BENEFICIARY

Neb. Rev. Stat. § 44-370 (Reissue 1988) provides:

> A life insurance company may provide that the amount to become due under a policy shall be paid in installments to a beneficiary therein named. . . . Any person *holding a policy* in any such company may, without the consent of the beneficiary, unless the appointment of such beneficiary be irrevocable, either sell and surrender the same to the company, or pledge or assign the same as security for a debt . . . or, with the consent of the company, he may change his beneficiary unless the appointment of such beneficiary be irrevocable.

(Emphasis supplied.)

The task at this point is to determine what is meant by the statutory phrase "person holding a policy." As a question of statutory interpretation, the matter is one of law in connection with which we, as an appellate court, have an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State v. Saulsbury, ante* p. 227, 498 N.W.2d 338 (1993); *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993).

> The party who enters into the contract of insurance or assurance with the insurer or assurer is called the "insured" or "assured." There is some authority that the person contracting with the insurer is the "insured" while the beneficiary of the policy is the "assured." This distinction is not recognized in modern insurance law under which the terms "insured" and "assured" are regarded as synonymous except when the particular wording of the policy requires the making of such a distinction. The "insured" in a life insurance policy means the person whose life is insured and whose death matures the obligation of the insurer to pay.

2A George J. Couch, Cyclopedia of Insurance Law § 23:1 at 769-70 (2d ed. 1984).

The Kansas Supreme Court, after citing from a part of the above-quoted section in Couch's treatise, wrote:

> The policies, read in their entirety, use the term *insured* to refer to both the one whose life is insured and the owner of the policy. The term is thus ambiguous where these entities are two different people. We hold [the deceased wife] purchased the policies of insurance on the life of her [deceased] husband . . . for the specific purpose of preventing the proceeds of the policies from becoming a part of [his] estate. We therefore hold the [deceased wife's estate] is entitled to the proceeds from the policies of insurance on [the deceased husband's] life.

(Emphasis in original.) *Lightner v. Centennial Life Ins. Co.*, 242 Kan. 29, 36-37, 744 P.2d 840, 845 (1987).

We thus determine that as used in § 44-370, the phrase "person holding a policy" describes the owner of the policy and that § 44-370 therefore grants the owner of a life insurance policy the right to change the beneficiary unless the appointment of the beneficiary was made irrevocable. It is also clear that the owner need not be the insured, that is, the person whose death obligates the insurer to pay under the policy.

3. OWNERSHIP STATUS OF DECEDENT AND FORMER WIFE

Although the dissolution decree, without distinguishing between tangible and intangible items, awarded the decedent and the former wife the personal property then in the possession of each, neither claimant established which of the dissolution parties had possession of the certificates when the decree was entered. We therefore need not concern ourselves with what the situation might have been had the record done so.

In so saying, we do not overlook that summary judgment is properly granted only when the record discloses that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the movant is entitled to judgment as a matter of law. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., ante* p. 351, 500 N.W.2d 520 (1993); *First United Bank v. First Am. Title Ins. Co.*, 242 Neb. 640, 496 N.W.2d 474 (1993). However, neither do we overlook that a movant for summary judgment has made a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were

uncontroverted at trial. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., supra*; *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993). At that point, the burden of producing evidence shifts to the party opposing the motion. See, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal., supra*; *Overmier v. Parks, supra*. As there is no other evidence on the matter, the question of who owned the insurance is answered solely by the language of the certificates and the master policy under which they were issued. There thus can exist no genuine issue of either law or material fact in that regard.

In studying the relevant language, we also recall that an insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. When a clause can be fairly interpreted in more than one way, there is ambiguity. See, *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992); *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.*, 238 Neb. 531, 471 N.W.2d 438 (1991).

We must also remember that like the interpretation of a statute, the construction of a contract is a matter of law, which we review in like manner. *Northern Bank v. Federal Dep. Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993); *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

The first two certificates provide for joint decreasing life insurance, which the master policy defines as insurance on the life of the insured debtor, the original amount of which decreases progressively in accordance with a stated formula. The master policy also provides:

> (3) In no case shall more than one person be insured on account of any one indebtedness except where insurance is provided for Decreasing Life Insurance-Joint Debtor. If more than one name appears on the Certificate of Insurance as "Insured Debtor", the first named insured debtor be [sic] the insured Debtor.
>
> (a) When Decreasing Life Insurance-Joint Debtor is provided, the Debtor and Joint Debtor shall be the "Insured Debtor" jointly.

Consequently, although a wrong or an incomplete form of the verb "to be" is utilized in the above-quoted paragraph (3) of the master policy, the language nevertheless makes clear that as the decedent and the former wife were joint debtors who purchased decreasing life insurance, they were joint insureds.

Moreover, because the bank is named as the irrevocable creditor beneficiary on a joint debt of the decedent and the former wife, and the premium for the coverage was a single one, the decedent and the former wife were not only the joint insureds, they were also joint owners of the insurance provided. Consequently, as to these two certificates, the terms of § 44-370 prevent a change in beneficiary except by the joint act of the two owners.

The third certificate was also issued to the decedent and the former wife as the joint insured debtors, but rather than providing joint decreasing life insurance, as do the first two certificates, the third certificate provides level life, joint debtor life insurance. The master policy defines level life insurance as insurance on the life of the insured debtor, at all times to be equal to the amount of insurance selected on the certificate. It specifies the rate at which to compute the single premium required for "Level Life Insurance Joint Debtor" as follows:

> a product of the rate per $100.00 of the initial amount of such Debtors Level Life insurance becoming effective hereunder multiplied by the number of months of the period over which his indebtedness is to be repaid said rates being:
>
> Level Life Insurance Debtor Only: $ 1.18
> Level Life Insurance Joint Debtor: $ 1.97

Obviously, providing a premium rate for level life insurance for joint debtors is inconsistent with the earlier mentioned provision of the master policy which permits joint debtors to obtain only decreasing life insurance.

Notwithstanding this inconsistency and resultant ambiguity, the master policy provides for, and the decedent and the former wife were charged, a premium for level life insurance as joint debtors. This resulted in a charge somewhat less than twice as high as the premium for level life insurance on a single debtor.

We have oft held:

> The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. . . . In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 869, 468 N.W.2d 105, 115 (1991). See, also, *Central Waste Sys. v. Granite State Ins. Co.*, 231 Neb. 640, 437 N.W.2d 496 (1989); *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988).

Under those rules, the payment of a premium based upon joint insurance would foreclose Universal from denying joint coverage to the decedent and the former wife. Since the master policy and the third certificate must be construed to provide joint coverage, we hold that both the decedent and the former wife were insureds and that as joint debtors and joint purchasers of the insurance, they were the coowners of the insurance created by the third certificate.

IV. JUDGMENT

There being no genuine issue concerning any material fact or the ultimate inferences deducible therefrom, and the former wife being entitled to judgment as a matter of law, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND L. MARTIN, APPELLANT.

500 N.W.2d 512

Filed April 29, 1993. No. S-91-546.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on suppression of evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence.

2. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless such determination is clearly erroneous.
3. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
4. **Confessions.** In determining whether a confession or statement is voluntary, a court must make its assessment based on an examination of all the circumstances surrounding the confession or statement.
5. _____. A defendant's confession may be involuntary and inadmissible if obtained in exchange for a promise of leniency.
6. **Constitutional Law: Confessions: Police Officers and Sheriffs: Prosecuting Attorneys.** A police officer's promise or representation that a defendant's cooperation will be brought to the prosecutor's attention does not, by itself, render the defendant's confession or statement involuntary and, therefore, constitutionally inadmissible in the defendant's trial.

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

Deborah D. Cunningham for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

SHANAHAN, J.

Raymond L. Martin was convicted of the first degree murder of Mathew Mallory, the second degree assault on Valentine Marrufo, and two counts of using a firearm to commit those felonies and was sentenced to life imprisonment for the murder conviction and to imprisonment for terms of years for the other felony convictions. Martin contends that his confession was involuntary and should have been excluded because his confession resulted from the interrogating police officer's promise of leniency in exchange for Martin's confession.

I. FACTUAL BACKGROUND

On September 18, 1990, Mathew Mallory and Valentine Marrufo drove from Sioux City, Iowa, to Omaha to attend an M.C. Hammer concert. Mallory and Marrufo became lost in Omaha and stopped at a gas station to ask for directions to the

Omaha Civic Auditorium, the site of the concert. At the gas station, they asked an unidentified man who was using the phone to show them how to get to the auditorium. After the man hung up the phone, he got into the car with Mallory and Marrufo. The unidentified man saw that Mallory and Marrufo were drinking whiskey from a bottle, and, according to Marrufo, the man "asked us if that's all we do. And he was telling about — telling us where we could get some drugs. Said we were going that way anyway."

The trio drove to an area of Omaha where the unidentified passenger got out of the car and walked away. Mallory and Marrufo then got out of the car; approached a group of individuals gathered in front of a residence; and, after asking the group "[who's] got it?", said: "All we want is $300 worth of powder." At some point, some members of the group believed that Mallory and Marrufo might be police officers. A man from the group proceeded to frisk Marrufo for weapons. After more conversation, Marrufo told Mallory that "there's something wrong here," and as the two started to return to their car, shots rang out. Before Marrufo was able to put the car between himself and the source of the shots, a bullet struck Marrufo once in his left leg as he stood near the car's trunk. Mallory, who was trying to reach the car's passenger door, was unprotected by the car and was shot in his back and then in his chest as he was apparently spun around by the impact from a bullet or bullets. Marrufo managed to climb into the driver's seat. Mallory, bleeding from his mouth, nose, and chest, fell into the passenger seat and slumped onto Marrufo's shoulder. Marrufo drove to a nearby gas station, where he summoned help. Mallory later died from his wounds. An autopsy revealed that Mallory had been struck by four bullets; he was hit once in his chest, once in his back, and twice in his left leg.

II. MARTIN'S CONFESSION

Martin, who was then 19 years old, was arrested on September 19, 1990, and was taken to Omaha police headquarters for interrogation. On arrival at the police station, Martin, who was not free to leave and who had not received the *Miranda* warning or admonition, was questioned by Det. Paul

Briese and another officer for approximately 25 minutes, during which time Martin denied that he had shot Mallory or Marrufo. The officers left the interrogation room for about 10 minutes, and when they returned, Martin was read the *Miranda* warning. On resumption of the interrogation, Martin continued to deny any involvement in the shootings. However, Briese and another officer continued to press Martin for an inculpatory statement. The officers told Martin that three eyewitnesses, Brett Whitaker, Calvin Scott, and Johnny Ray, had said that Martin was responsible for shooting Marrufo in the leg. The interrogating officers told Martin:

> These three people are going to make statements against you in court and it's going to leave you all alone and you're going to get caught up in a whirlpool where they're all going to finger you, so the best thing you can do is tell the truth as to what occurred to the best of your knowledge.

For more than an hour, despite being urged to confess, Martin repeatedly denied any part in the shooting. Finally, Martin, during tape-recorded questioning, admitted his involvement in the incident as follows:

> I wasn't gonna shoot none of 'em, you know, so I picked up the gun and I aimed the gun at the car and when I pulled the trigger it didn't go off, and it was like, ah, .22 pump, and I pumped the gun again and the bullet fell out and I shot then and I shot at the car

at which point

> Brett [Whitaker] grabbed the gun from me after I did that and he was about to shoot but Johnny Ray grabbed the gun from me and . . . the one he was on the passenger's side at the front of the car and Johnny just started shootin' 'em all in the back and in the chest or in the legs.

III. THE SUPPRESSION HEARING

At the pretrial hearing for suppression of Martin's confession, Briese, on direct examination, denied promising Martin anything "in terms of what charges would or wouldn't be filed" if Martin confessed. On cross-examination, Briese was again questioned about any promise in exchange for Martin's confession:

Q. All right. Now with respect to what was told between you and my client, did you ever indicate to him it was best to save yourself? Basically, "People are telling on you, you're going to go down by yourself unless you tell the truth"?

A. Yes. He had to tell the truth.

. . . .

Q. Did you tell him to — to cooperate and tell what his involvement was because if he did, he would not be charged with murder, he would strictly be charged with assault and use?

A. No, sir, absolutely not.

. . . .

Q. After the statement was given, did you indicate to my client that you would tell the prosecutor that Mr. Martin had cooperated?

A. Yes, sir.

At the suppression hearing, Martin testified in his own behalf:

Q. During the time that you were talking with Officer Briese, did Officer Briese make any promises or threaten you in any way to give any kind of statements?

A. When I got down to the station, he stated that it would be—it would be necessary that I tell the truth because it was three other friends of mine stating that I was involved in the shooting and that if I didn't want to go down for the murder, that I should tell the truth and that I will probably be charged with first-degree assault and use of a weapon.

Q. When does he say this in relationship to this taped statement that we have? Is it before, after, when?

A. Before.

Q. All right. Were you shown any paperwork by Officer Briese when you were in this interrogation room?

A. Yes.

Q. What were you shown?

A. I was shown a yellow copy of the charges that Johnny Ray was charged with.

Q. All right. Did you have any conversation with

Officer Briese with respect to Johnny Ray's charges?

A. I stated to him that those was some serious charges and that I don't want no charge like that.

Q. What did he say when you told him that?

A. He said, "If you don't cooperate, that's what you will be charged with."

Q. So after that was said, did you cooperate?

A. Yes.

Q. Did you give a statement?

A. Yes.

Q. Did Officer Briese at any time indicate to you that if you talked about what you knew happened, that you would just be charged with assault and use of firearm?

A. Yes.

Q. Based upon what he indicated to you, you went ahead and told your involvement; is that correct?

A. Yes.

At the conclusion of the hearing, the court denied Martin's suppression motion.

IV. MARTIN'S JURY TRIAL

Brett Whitaker, a witness for the State, testified that he was in the group approached by Marrufo and Mallory and heard Martin say, "I'm going to jack 'em." According to Whitaker, "jack" or "jack-move" means to rob someone of money. Whitaker further testified that he saw Martin leave the group; go into a nearby house; and, carrying a rifle, return to the group, where Martin said to Mallory and Marrufo, "Give it up." Martin raised the rifle and fired twice at Mallory and Marrufo. Whitaker also testified that after Martin fired the rifle twice, Johnny Ray took the rifle from Martin's hand and continued firing at Mallory and Marrufo.

Another witness for the State, Calvin Scott, testified that he was watching TV in a nearby house when Martin entered, got a rifle, and told Scott that there were "two guys out there who wanted some dope" and that "he was going to make a jack-move on them." Martin then took the rifle and left the house. Shortly afterward, Scott heard two gunshots, but was unable to see who fired those shots. According to Scott,

"jack-move" means to rob or steal money by force.

Briese, on cross-examination, was again questioned about what he had told Martin prior to the confession:

> Q. Okay. Did you ever tell him that it would be best for him if he cooperated?
>
> A. Yes, sir.
>
> Q. Did you promise him that you would talk to the prosecutor on the case and make the prosecutor aware of his cooperation.
>
> A. Yes, sir.

When the State sought to introduce Martin's confession, Martin objected "on the grounds of fourth, fifth, sixth amendments, due process, voluntariness, together with state constitutional grounds and federal constitutional grounds." The trial court overruled Martin's objection and allowed the jury to hear Martin's tape-recorded confession.

Martin took the stand in his own defense and testified that Whitaker, not Martin, had brought the rifle from a nearby house and deposited that rifle close to the group that included Martin. Martin further testified that during the conversation about purchasing drugs, Mallory went to the rear of the car, where it appeared as though Mallory was going to open the trunk and obtain a weapon of some sort. Therefore, according to Martin, he shot the rifle twice. When he first pulled the trigger, the rifle did not fire. Martin then pumped the rifle, which ejected one bullet and chambered another. Next, Martin shot the rifle twice while aiming at "the car and the ground." According to Martin, he was "shooting, not to shoot at them, but to scare them away." Martin also denied making any comment concerning a "jack-move."

A jury found Martin guilty of first degree murder, second degree assault, and two counts of using a firearm to commit those felonies.

In a separate trial, Ray, one of those mentioned by Briese during Martin's interrogation, was also found guilty of charges based on the shootings of Mallory and Marrufo. Ray's convictions were affirmed by this court in *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992).

V. ASSIGNMENTS OF ERROR

Martin assigns two errors, which may be summarized: (1) Martin's statement was obtained in violation of the privilege against self-incrimination, see U.S. Const. amends. V and XIV, and (2) his confession or statement was involuntary and, therefore, should have been suppressed and excluded to accord due process in Martin's trial.

VI. SELF-INCRIMINATION

In his appellate brief, Martin does not discuss his first assigned error, admission of his confession in violation of his privilege against self-incrimination. Apparently, Martin contends that his confession was constitutionally inadmissible because he was not advised of his privilege against self-incrimination until 25 minutes after commencement of his interrogation. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred." *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 861, 491 N.W.2d 341, 350 (1992). Accord *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991). See, also, Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Moreover, we note that Martin did not make any inculpatory statement before he received the *Miranda* warning or admonition. Consequently, we do not consider Martin's first assignment of error.

VII. VOLUNTARINESS OF CONFESSION

1. STANDARD OF REVIEW

> In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.

State v. Thomas, 240 Neb. 545, 547, 483 N.W.2d 527, 530

(1992). Accord, *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). "[W]hether a defendant's statements resulted from an officer's promise is a question of fact." *State v. Haynie*, 239 Neb. 478, 487, 476 N.W.2d 905, 912 (1991). Accord *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992). "At a hearing to suppress evidence, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence." *State v. Blakely*, 227 Neb. 816, 820, 420 N.W.2d 300, 303 (1988). Accord *State v. McCurry*, 228 Neb. 841, 424 N.W.2d 364 (1988). See, also, *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988). In reviewing a trial court's ruling on suppression of evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence. See *State v. Blakely, supra*. Therefore, "[a] district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless such determination is clearly erroneous." *State v. Norfolk*, 221 Neb. 810, 820, 381 N.W.2d 120, 127-28 (1986). See, *State v. Ray, supra*; *State v. Haynie, supra*.

2. VOLUNTARINESS OF A CONFESSION

The general standard for determining voluntariness of a confession is expressed in *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Accord, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

Furthermore, as aptly noted in *Rogers v. Richmond*, 365 U.S. 534, 540-41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961), due

process precludes admissibility of involuntary confessions

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Therefore, the Due Process Clause of U.S. Const. amend. XIV, see *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and the due process clause of Neb. Const. art. I, § 3, see *State v. Bodtke, supra*, preclude admissibility of an involuntary confession.

In determining whether a confession or statement is voluntary, a court must make its assessment based on an examination of all the circumstances surrounding the confession or statement. See, *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (disapproving the "however slight" test of *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)); *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992); *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992).

In *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), this court concluded that a defendant's confession may be involuntary and inadmissible if obtained in exchange for a promise of leniency. Subsequent to *Porter*, this court, in *Ray*, again considered the issue of voluntariness of a confession in relation to a promise of leniency. As previously mentioned, Ray was one of those implicated in the murder of Mathew Mallory, the same homicide victim as in Martin's case. In his appeal, Ray contended that his confession was involuntary as the result of the interrogating police officer's promise of leniency in exchange for Ray's confession. The interrogating officer in *Ray* was Det. Paul Briese, the same officer who questioned Martin. At the suppression hearing reviewed in *Ray*, Briese gave the following testimony:

> "Q. What did you say to him?
>
> "A. That it would be best for him to be truthful with me

at this point so we can get this matter resolved and find out exactly what happened.

"Q. Did you tell him his cooperation would be noted and brought to the attention of anyone?

"A. Yes, sir.

"Q. What did you tell him?

"A. I told him that his cooperation and his truthfulness in this matter would be taken to the county attorney's office.

"Q. Anything else?

"A. No. . . ."

241 Neb. at 555, 489 N.W.2d at 561. At Ray's trial, Briese also testified: " 'I make no promises or any suggestions or anything like that. I just told him what I would do: I would take his story to the prosecutor.' " 241 Neb. at 556, 489 N.W.2d at 562. On cross-examination, Briese responded to further inquiry concerning his expressions to Ray:

"Q. Okay. And you told him it would be better for him if he told you what happened?

"A. Told him it would be better for him if he told the truth.

"Q. You told him it would be better if he cooperated?

"A. Right. . . ."

Id.

In concluding that Ray's confession was voluntary and constitutionally admissible, this court stated in *Ray*:

"Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not . . . make a subsequent confession involuntary." *People v. Boyde*, 46 Cal. 3d 212, 238, 758 P.2d 25, 39, 250 Cal. Rptr. 83, 97 (1988), *aff'd* 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). . . .

. . . .

A defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a benefit in exchange for the statement. . . .

The benefit offered to a defendant must be definite in order to render his statement involuntary. . . .

> If the benefit is offered in exchange for testimony, and the offer is definite, then the confession is involuntary and must be suppressed. In *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984), the county attorney told the defendant that if the defendant told the truth, the county attorney would recommend that the defendant be sentenced on the instant crime concurrently with the unrelated sentence the defendant was then serving. In *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979), the police officer interrogating the 15-year-old defendant told the defendant that if he confessed, the officer would try to get the case transferred to juvenile court. In both cases, this court held the confessions thereby obtained were involuntary and improperly admitted.

241 Neb. at 559, 562-64, 489 N.W.2d at 563, 565-66.

> For purposes of determining voluntariness of a confession, a "promise" is an offer to perform or withhold some future action within the control of the promisor, in circumstances where the resulting action or inaction will have an impact upon the promisee. A promise is not the same thing as a prediction about future events beyond the parties' control or regarded as inevitable. The issue, then, is whether, from the perspective of the defendant, [a police officer's] statements included a promise of a benefit which, in the defendant's understanding, the [officer] could either grant or withhold.

United States v. Fraction, 795 F.2d 12, 15 (3d Cir. 1986).

We, therefore, focus on Briese's statement and promise to Martin that Briese would "make the prosecutor aware of [Martin's] cooperation" and "would tell the prosecutor that Mr. Martin had cooperated" with the officers. The question is whether Briese's expressions were a promise that Martin, in a possible prosecution, would receive some legal benefit in exchange for the confession.

In *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), we considered the question whether a deputy sheriff's promise to inform the prosecutor that Robertson was assisting in a homicide investigation rendered Robertson's subsequent confession involuntary and, therefore, constitutionally

inadmissible. In *Robertson*, we stated:

> We have considered circumstances similar to the case at hand and have addressed this very question by answering that a promise to inform a prosecuting authority about a declarant's cooperation is not an improper inducement producing involuntariness. . . . Under the circumstances the deputy's statement or remark to Robertson that her cooperation in the investigation would be made known to a prosecutor did not in and of itself render Robertson's statement involuntary.

(Citations omitted.) 219 Neb. at 788, 366 N.W.2d at 433. See, also, *State v. Muenchau and Brown*, 209 Neb. 552, 308 N.W.2d 824 (1981) (a defendant's cooperation in making a statement would be readily apparent to the prosecutor; hence, no benefit was offered to the defendant in exchange for making the statement). A prosecutor, anticipating use of a defendant's confession or inculpatory statement as evidence and in assessing whether the confession or statement was voluntary, would quite likely consider all circumstances surrounding the confession or statement, including the defendant's cooperation, irrespective of a police officer's promise to tell the prosecutor about the defendant's cooperation. Thus, a police officer's promise or representation that a defendant's cooperation will be brought to the prosecutor's attention does not, by itself, render the defendant's confession or statement involuntary and, therefore, constitutionally inadmissible in the defendant's trial.

Courts in several other jurisdictions have acknowledged the preceding rule that a police officer's mere promise to inform a prosecutor regarding a defendant's cooperation does not, without more, render the defendant's confession or statement inadmissible. See, e.g., *State v. Beckley*, 157 Vt. 446, 600 A.2d 294 (1991); *Layne v. State*, 542 So. 2d 237 (Miss. 1989); *Baynard v. State*, 518 A.2d 682 (Del. 1986); *Beasley v. United States*, 512 A.2d 1007 (D.C. 1986); *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986); *State v. Adkison*, 175 W. Va. 706, 338 S.E.2d 185 (1985); *State v. Whitsel*, 339 N.W.2d 149 (Iowa 1983); *State v. Vernon*, 385 So. 2d 200 (La. 1980); *Plant v. State*, 724 P.2d 536 (Alaska App. 1986); *Rowland v. State*,

460 So. 2d 282 (Ala. Crim. App. 1984); *U.S. v. Mizyed*, 927 F.2d 979 (7th Cir. 1991); *U.S. v. Leon Guerrero*, 847 F.2d 1363 (9th Cir. 1988); *Williams v. Johnson*, 845 F.2d 906 (11th Cir. 1988); *United States v. Fraction, supra*; *United States v. Baldacchino*, 762 F.2d 170 (1st Cir. 1985); *Rachlin v. United States*, 723 F.2d 1373 (8th Cir. 1983); *United States v. Hart*, 619 F.2d 325 (4th Cir. 1980); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980); *United States v. Posey*, 611 F.2d 1389 (5th Cir. 1980); *United States v. Cone*, 354 F.2d 119 (2d Cir. 1965).

Although Briese expressly promised that he would inform the prosecutor concerning Martin's cooperation, Briese did not specifically state or, as far as we can see, imply that Martin would legally benefit from Martin's confession or statement regarding the Mallory homicide and the assault on Marrufo. We realize that Martin, at his pretrial suppression hearing, testified that Briese had told him that just the assault and firearms charges would be filed against Martin in exchange for his confession. However, the district court obviously disbelieved and rejected Martin's testimony. In reviewing the result of Martin's suppression hearing, this court does not reweigh the evidence or resolve conflicts in the evidence pertaining to the requested suppression. See *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). Consequently, in order that we reach the conclusion that Briese's promise to mention Martin's cooperation rendered Martin's confession or inculpatory statement inadmissible, we would have to hold, as a matter of law, that every promise to tell a prosecutor that a defendant had cooperated with police officers is the representation that the prosecutor will treat the defendant more favorably in disposing a criminal charge against the defendant. We cannot make such a quantum leap in the law pertaining to constitutional admissibility of a defendant's confession. We allow for the possibility that under certain circumstances, a promised benefit might be inferred, but we find nothing in the circumstances surrounding Martin's confession that leads us to any reasonable inference and ultimate conclusion that Briese's promise was actually a promise that Martin would legally benefit from his confession or inculpatory statement. For that reason, we are unable to state that the district court was clearly erroneous in its

decision that Martin's confession was constitutionally admissible in Martin's trial. We, therefore, affirm the district court's judgments entered on Martin's convictions.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KURT A. HOHENSTEIN, RESPONDENT.

500 N.W.2d 191

Filed April 29, 1993. No. S-93-317.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, FAHRNBRUCH, and LANPHIER, JJ.

PER CURIAM.

A disciplinary complaint against respondent, Kurt A. Hohenstein, was filed with the Counsel for Discipline of the Nebraska State Bar Association.

Respondent, an attorney admitted to the practice of law in Nebraska, was retained to represent four individuals in regard to a motor vehicle accident. Respondent failed to deposit the proceeds from the settlement of this case in a proper client trust fund account, as required by Canon 9, DR 9-102(A), of the Code of Professional Responsibility. Respondent admits that through mismanagement or otherwise, he allowed the accounts which contained the settlement proceeds to become overdrawn to the extent that the balance was less than the clients' interest in the accounts.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1992), respondent filed a voluntary surrender of license with this court. Respondent freely and voluntarily waives all proceedings against him in connection with the pending disciplinary complaint. Respondent knowingly admits that he has violated DR 9-102(A). He also freely and voluntarily consents to an order of disbarment and waives any right to notice,

appearance, or hearing prior to entry of the order.

Accordingly, respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

COUNTY OF RED WILLOW, NEBRASKA, APPELLEE, V. CITY OF McCOOK, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, JAMES E. SCHNEIDER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH L. CONROY, DECEASED, ET AL., APPELLEES.

499 N.W.2d 531

Filed May 7, 1993. No. S-90-1266.

1. **Real Estate: Special Assessments: Collateral Attack: Fraud: Jurisdiction.** The right to collaterally attack a special assessment on the basis of fraud, fundamental defect, or lack of jurisdiction generally is extended only to owners of the affected real property.
2. **Real Estate: Security Interests: Liens: Deeds: Title.** All persons claiming an interest in or lien upon real estate are bound to take notice of the recitals in a duly recorded deed in the chain of title of their grantor.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the case as to factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
4. **Real Estate: Special Assessments: Mortgages: Collateral Attack: Standing.** A mortgagee of a property against which a special assessment has been levied has no standing to collaterally attack that assessment.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Judgment vacated, and cause remanded with directions.

Daylene A. Bennett, of Burger, Bennett & Green, P.C., for appellant.

James E. Schneider, of Schneider & Griffin, P.C., pro se.

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

HASTINGS, C.J.

The City of McCook appeals a judgment of the district court holding that its special assessment for paving along the front of a portion of Block 22, Four Corners Addition to the City of McCook, Nebraska, was void. We vacate the judgment and remand the cause with directions.

This action was commenced on May 3, 1989, by the plaintiff, County of Red Willow, to foreclose upon certain tax sale certificates. MIC Enterprises, Inc., a now dissolved corporation, was the owner of record of the subject real property.

Appellant, the City of McCook, was the owner of a lien for special assessments against the real property, levied March 1, 1982. MIC Enterprises did not contest the assessment, either in compliance with Neb. Rev. Stat. §§ 14-548 and 14-813 (Reissue 1991) or otherwise.

Appellee James E. Schneider, personal representative of the estate of Joseph L. Conroy, deceased, was the owner and holder of a real estate mortgage on the property which was recorded on September 7, 1983. Schneider and the City of McCook are two of the multiple defendants possessing an interest in the real estate involved.

In December 1980, the City of McCook passed and the following month duly recorded ordinance No. 1587, which created paving district No. 332. This paving district included the following-described real estate which is the subject of this action:

> [A part of Block 22, Four Corners Addition to the City of McCook, Red Willow County, Nebraska, more particularly described as a] tract commencing at the intersection of the west line of U. S. Highway No. 83 and the north line of "J" Street West; thence West along the north line of "J" Street West a distance of 441 feet to a point; thence North 150 feet to a point; thence East along a line parallel to and 150 feet North of the north line of "J" Street West to the west line of U. S. Highway No. 83; thence South to the point of beginning.

The MIC Enterprises property described above, which is the subject of this action, is situated at the northwest corner of the

intersection of U.S. Highway 83 north and West J Street in McCook.

In January 1982, assessments were fixed on the paving district. The Conroy estate, more than a year later, on August 31, 1983, accepted from MIC Enterprises and recorded a mortgage on the property. The county's attorney, who was also the abstractor who performed the title search for the Conroy estate, had signed a Nebraska Uniform Abstracter's Certificate on March 29, 1982, covering the subject property, which certificate bore the notation "Special Assessments: None." The abstract did not disclose the existence of the paving district, which, however, was a matter of record.

In 1989, the County of Red Willow filed this action to foreclose certain tax sale certificates for general taxes, and the City of McCook was both a party defendant and cross-petitioner because of the unpaid inferior lien for special assessments, which amounted to $24,534.35, including interest, as of January 1990.

In its answer and cross-petition, the City of McCook alleged the levy and assessment of special assessments in paving district No. 332 in the amount of $13,305.72; that the amount then due, including interest accrued to May 31, 1989, was $22,708.27; that the owner of record title to the real estate involved was defendant MIC Enterprises; and that the special assessments constituted a lien on said real estate inferior only to the lien of general real estate taxes. The city prayed for an accounting of the amount due on said special assessment and, upon failure of the defendant MIC Enterprises to pay the amount found due, that the city's lien be foreclosed.

Appellee Schneider, personal representative of the estate of Joseph L. Conroy, who, it had been alleged in the petition of the County of Red Willow, was the owner and holder of the mortgage previously alleged, filed his answer to the City of McCook's cross-petition, alleging that the subject property was not specially benefited to the extent of the levy imposed by the City of McCook and that the levy was therefore arbitrary, constructively fraudulent, and void.

In its reply to Schneider's answer, the City of McCook alleges that Schneider lacks standing to participate in these

proceedings because he is not a real party in interest and that his action is barred by the doctrine of res judicata, there having been no timely appeal of the levy as provided for by Neb. Rev. Stat. § 19-2423 (Reissue 1991).

Trial was had, and there was considerable evidence adduced as to the issue of benefits to the property, which we need not examine because we decide this case on the issue of standing.

The district court found generally in favor of the plaintiff, County of Red Willow, holding that the county's taxes on the property in question had been duly and legally assessed; that the taxes had been allowed to become delinquent prior to the filing of the petition, remained so on the date of the decree, and had not been discharged by the defendants or anyone having an interest in the real estate; and that the county was entitled to a foreclosure of respective liens of the various defendants for the amounts due thereon: $781.67 per defendant for the county taxes and interest and $78.17 (10 percent of the amount due) per defendant for attorney fees.

The court further found that the special assessments against the property were void, as the property could not be specially benefited by the paving of the street. The City of McCook appeals.

For the purpose of this opinion, we consider the errors alleged by the City of McCook to be that the district court determined that a mortgageholder has standing to collaterally attack a special assessment against real property and that a mortgageholder who obtains an interest in the subject property after the assessment and recording thereof may still have standing to collaterally attack a special assessment.

The City of McCook asserts, first, that as a general matter of law, a mortgageholder has no standing to collaterally attack a special assessment and, second, that even if a mortgageholder has a general standing to collaterally attack a special assessment, that mortgageholder must have acquired an interest in the subject property prior to the assessment and recording thereof. Thus, the city contends, the Conroy estate did not have standing to collaterally attack the city's special assessment.

The city is accurate in its assertion that the right to

collaterally attack a special assessment on the basis of fraud, fundamental defect, or lack of jurisdiction is extended only to owners of the affected real property. See, *Grube v. City of Ogallala*, 223 Neb. 640, 392 N.W.2d 380 (1986); *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977); *Midwest Development Corp. v. City of Norfolk*, 192 Neb. 475, 222 N.W.2d 566 (1974); *Wead v. City of Omaha*, 124 Neb. 474, 247 N.W. 24 (1933).

A *property owner* may collaterally attack a special assessment only for the limited purposes of fraud, actual or constructive, a fundamental defect, or want of jurisdiction. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989); *Grube v. City of Ogallala, supra*. The *property owner* who attacks a special assessment as void has the burden of establishing its invalidity. *Grube v. City of Ogallala, supra*; *Burlington Northern, Inc. v. City of McCook*, 204 Neb. 543, 283 N.W.2d 380 (1979). Where it is alleged and proven that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and may be subject to collateral attack. *North Platte, Neb. Hosp. Corp. v. City of North Platte, supra*; *Grube v. City of Ogallala, supra*; *Nebco, Inc. v. Speedlin, supra*; *Midwest Development Corp. v. City of Norfolk, supra*; *Wead v. City of Omaha, supra*.

The record owner of the property, MIC Enterprises, has effectively been eliminated from these proceedings through default judgments and is no longer an active part of this appeal. As owner, the now dissolved corporation retains, at least in theory, its right of redemption, but for all practical purposes is merely an observer in this controversy. Mortgagee Conroy estate's interest in the property as a lienholder is junior to the county's tax certificates. The estate took its interest in the property subject to the assessment, and despite the fact that the abstractor failed to find and disclose the encumbrance of the special assessment, such was a matter of public record, and the mortgagee must be held to constructive notice of the city's assessment.

All persons claiming an interest in or lien upon real estate are

bound to take notice of the recitals in a duly recorded deed in the chain of title of their grantor. *Albers v. Kozeluh*, 68 Neb. 522, 94 N.W. 521 (1903); *Hubbard v. Knight*, 52 Neb. 400, 72 N.W. 473 (1897).

Where a property *owner* has notice that his property is to be assessed for benefits by reason of a public improvement, and the law affords him an opportunity to appear and protest and, if aggrieved by the action of the authorities, to appeal to the courts, but he neglects to avail himself of such provisions, he may not thereafter, in a collateral proceeding, attack the validity of such assessment, except for fraud, actual or constructive, a fundamental defect, or entire want of jurisdiction. *Penn Mutual Life Ins. Co. v. City of Omaha*, 129 Neb. 733, 262 N.W. 861 (1935); *Wead v. City of Omaha, supra*. See *Nebco, Inc. v. Speedlin, supra*. Since the property owner (MIC Enterprises) did not avail itself of the opportunity to appeal through the statutory provisions of §§ 14-548 and 14-813, it is necessary to question whether the mortgagee qualifies as a "property owner." In *First Federal v. West Richland*, 39 Wash. App. 401, 693 P.2d 171 (1985), the Washington Court of Appeals held that under Washington's lien theory laws, a security interest in a leasehold estate was not sufficient to constitute "property ownership" for the purpose of entitling the lienor to object to a local improvement district (LID) assessment. The Washington statute, while not limiting who may object to the imposition of an assessment, permitted only "owners" of an affected property to prevent a city from proceeding with a LID assessment. The court hinged its decision upon the holdings of several courts:

> In *Gibler v. Mattoon*, 167 Ill. 18, 47 N.E. 319 (1897), it was held that a special assessment judgment is a judgment in rem against the property assessed; and, as such, persons who are not shown by the record to be the owners of that property have no standing to object. *Accord, Waukegan v. Drobnick*, 123 Ill. App. 2d 465, 259 N.E.2d 402 (1970). In *Middlesboro v. Evans*, 261 Ky. 303, 305, 87 S.W.2d 352, 353 (1935), that court held the term "property owner" as used in a Kentucky LID statute "means the holder of the legal title, as distinguished from mortgagees, and was not

> intended to include a mere lienholder." This was found to be so because a mortgagee has a lien only to secure the payment of a debt, and the LID improvements enhanced the value of the property, which in turn increased the value of the lienholder's security. . . . We conclude a security interest in a leasehold estate does not make [the mortgagee] "owners of the property" so as to support its objection to the LID assessment.

39 Wash. App. at 405-06, 693 P.2d at 174.

Mortgagees have also failed to acquire owner status for the purpose of requiring actual notice of tax sale. In *First Savings & Loan Assn. v. Furnish*, 174 Ind. App. 265, 367 N.E.2d 596 (1977), the Court of Appeals of Indiana held, inter alia, that due process did not require that a mortgagee be given actual notice, rather than constructive notice, of a tax sale—unless the mortgagee is in possession of the property. The court commented that

> [i]t is understandable why actual notice has not been extended to mortgagees. Most mortgagees are in the business of lending money, and as professional money lenders prudence requires them to be aware of conditions involving their collateral. Normally they can be expected to protect their interests by keeping records of the mortgagor's discharge of his obligations, such as payments of taxes, insurance, principal and interest installments.

174 Ind. App. at 274, 367 N.E.2d at 601.

The weight of case law indicates that a mortgagee does not meet the requirement of ownership of affected property necessary to challenge a special assessment as invalid. We are not inclined to move from that position, and we hold that for the purpose of collaterally attacking a special assessment, it must be done by a property owner, the holder of the legal title to the real estate, as distinguished from mortgagees or other lienholders. This mortgagee accepted the mortgage with constructive notice that the city's assessment had been imposed and recorded. At no point has the record owner voiced an objection to the assessment.

We find that appellee Schneider, personal representative of

the estate of Joseph L. Conroy, as holder of the mortgage on the subject property, does not have standing to challenge appellant City of McCook's special assessment, and we need not reach the city's other assignments of error. The district court improperly held that appellee Schneider had standing to collaterally attack the special assessment.

In an appeal of an equity action, an appellate court tries the case as to factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992); *Hartford v. Womens Services, P.C.*, 239 Neb. 540, 477 N.W.2d 161 (1991).

We hold that a mortgagee of a property against which a special assessment has been levied has no standing to collaterally attack that assessment. Accordingly, the lien of the City of McCook is a valid lien in the amount of $24,534.35 as of June 26, 1990, together with interest from that date, in which amount judgment is directed to be entered including costs of the action, subject only to the priority of the lien of the County of Red Willow, and the remaining liens described in the decree of the district court follow the lien of the City of McCook in the order of priority previously determined.

The judgment is vacated and the cause remanded to the district court with directions to enter a decree consistent with these findings.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

RICHARD ALLEN PARO, APPELLEE AND CROSS-APPELLANT, V. FARM & RANCH FERTILIZER, INC., A CORPORATION, AND KERRY W. JOHNSON, APPELLANTS AND CROSS-APPELLEES.

499 N.W.2d 535

Filed May 7, 1993. No. S-91-076.

1. **Trial: Jurors.** Jurors may be permitted to take notes if the parties agree that the jurors may take notes.

2. **Rules of Evidence.** Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.
3. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
4. _____: _____. Instructions are not erroneous if, when read together and taken as a whole, they correctly state the law, adequately cover the issues, and are not misleading.
5. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it.
6. _____: _____. A jury's verdict will not be disturbed unless it is clearly wrong.
7. **Trial: Witnesses: Appeal and Error.** The trial court is given discretion in determining whether or not a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion.
8. **Motor Vehicles: Highways: Right-of-Way.** A motorist traveling on a street or highway protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that a driver about to enter from the nonfavored street will come to a full stop, look both to the right and to the left, maintain a proper lookout for the safety of himself and others traveling on the streets, and yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the motorist at the stop sign moves his vehicle into or across the intersection.
9. **Attorneys at Law: Witnesses.** An attorney should not assert his or her personal opinion as to the credibility of a witness when appearing in his or her professional capacity before a tribunal.
10. **Trial: Attorneys at Law: Appeal and Error.** The latitude allowed attorneys in argument during the trial of a case lies within the discretion of the trial court, and in the absence of prejudice resulting from misconduct in argument, that is no ground for reversal.
11. **Juries: Appeal and Error.** Although an invitation to jurors to put themselves in the place of a party is improper argument, it is not a ground for a reversal unless the jury was prejudicially affected by the remark.
12. **Trial: Appeal and Error.** The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion.

Appeal from the District Court for Garden County: JOHN D. KNAPP, Judge. Affirmed.

Terrance O. Waite and Todd R. McWha, of Murphy, Pederson & Waite, for appellants.

John A. Wolf and Joel G. Lonowski, of Shamberg & Wolf, and David T. Schroeder, of Kelly & Schroeder, for appellee.

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

BOSLAUGH, J.

This action arose out of a motor vehicle accident that occurred at about noon on December 22, 1987, at an intersection of county roads in Garden County, Nebraska.

The plaintiff, Richard Allen Paro, was driving his 1975 Chevrolet pickup truck in a southerly direction. The defendant Kerry W. Johnson was driving a 1975 Ford 2½-ton truck owned by the defendant Farm & Ranch Fertilizer, Inc., in an easterly direction. The Farm & Ranch truck was loaded with fertilizer. Both roads were two-lane gravel roads, but the north-south road was protected by stop signs. It is undisputed that the Farm & Ranch truck did not stop at the stop sign before entering the intersection, but "rolled" through the intersection at about 5 miles per hour.

There is a hill north of the intersection, the crest of which is approximately 300 feet from the intersection. According to the plaintiff, when he reached the crest of the hill, he saw the Farm & Ranch truck approaching the intersection from the west. When the plaintiff was about 200 feet north of the intersection, it became apparent to him that the defendant Johnson was not going to stop at the stop sign, so the plaintiff applied his brakes in an effort to avoid the accident. At that time, the plaintiff was traveling at 45 or 50 miles per hour. The accident occurred when the front of the plaintiff's truck collided with the left rear portion of the Farm & Ranch truck. As a result of the collision, the plaintiff's truck was destroyed and the plaintiff sustained personal injuries to his leg, back, hands, and head. The plaintiff now has a 5-percent permanent impairment to his lower left leg.

The case was submitted to a jury, which returned a verdict for the plaintiff in the amount of $35,000. The defendants appeal and assign as error the trial court's (1) allowing testimony of the plaintiff and his wife regarding loss of consortium after the accident but before their marriage; (2) overruling the defendants' motion to permit note-taking by the jurors; (3) not admitting into evidence or allowing for impeachment purposes the "Claim for Benefits" form and other tendered portions of

Department of Labor records; (4) not permitting a Department of Labor employee to testify; (5) giving instruction No. 18, since it did not mention contributory or comparative negligence; (6) giving both instructions Nos. 18 and 6, since they were conflicting; (7) not setting aside the jury's verdict, since it was excessive and not supported by sufficient evidence; (8) not allowing the testimony of lay witnesses regarding the speed of the plaintiff's vehicle; (9) denying the defendants' motion for sanctions, equitable relief, and taxation of costs for an earlier mistrial they claim was caused by the plaintiff; (10) failing to find the plaintiff guilty of contributory negligence; (11) overruling objections to counsel's expressions in his closing argument of personal beliefs as to credibility of witnesses and asking the jurors "to put [themselves] or their families" in the plaintiff's place; and (12) failing to grant the defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

The plaintiff cross-appeals and assigns as error the trial court's denial of his motion for sanctions.

With respect to the defendants' first assignment of error, the evidence is that the plaintiff and his present wife were not married at the time of the accident. The petition did not request damages for loss of consortium, and the trial court did not instruct the jury concerning loss of consortium. Furthermore, the plaintiff's wife did not testify as to loss of consortium. On direct examination, the plaintiff's wife testified as to the plaintiff's condition following his injury, when his condition improved, and how long he was out of work.

The only objection by the defendants during her testimony was made after she was asked if she and her two boys depended upon the plaintiff prior to the accident for income and support. The plaintiff's wife responded affirmatively, and the defendants' objection was overruled.

The defendants were not prejudiced by this evidence, and because there was no request, no testimony, and no instruction concerning loss of consortium, the defendants' assignment of error is without merit.

Relying on *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990), the defendants claim that the trial court erred in denying

their request that the jury be allowed to take notes. In *State v. Kipf*, this court held that jurors are permitted to take notes if the parties agree that the jurors may take notes and that such notes may be used during deliberations, but will be treated confidentially between the jurors and not preserved for review on appeal.

In the present case, since the parties did not agree as to the jurors' taking notes, the trial court did not err in denying the defendants' request.

The defendants' next two assignments of error relate to the trial court's refusal to admit into evidence a Claim for Benefits form from the Nebraska Department of Labor and other tendered Department of Labor documents as well as testimony by a Department of Labor employee. The defendants claim the exhibits and testimony were necessary to impeach the plaintiff's prior testimony that he was unable to work prior to April 1988.

The defendants were permitted to use the Claim for Benefits form during cross-examination of the plaintiff, but the trial court refused to admit it and the other Department of Labor records as well as testimony by its employee into evidence because their prejudicial effect was too great in light of their probative value.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); Neb. Rev. Stat. § 27-403 (Reissue 1989). A trial court's ruling concerning § 27-403 will not be disturbed on appeal unless there has been an abuse of discretion. *Brown, supra.*

Because the defendants were able to use the Claim for Benefits form during cross-examination of the plaintiff and because he admitted that he had stated to the Department of Labor that he was physically able to work since January 22, 1988, they were not prejudiced by the trial court's decision to exclude the exhibits and testimony from an employee of the Department of Labor, and the trial court did not abuse its discretion in excluding the evidence.

The defendants' next two assignments of error relate to the

trial court's instructions Nos. 18 and 6. The defendants argue that instruction No. 18 is improper because it does not mention contributory or comparative negligence and, therefore, conflicts with instruction No. 6, which does instruct on contributory and comparative negligence.

The record shows that at the instruction conference, the defendants objected to instruction No. 6, but did not object to instruction No. 18. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992).

The instructions, including instructions Nos. 18 and 6, when read together and taken as a whole, correctly state the law, adequately cover the issues, and are not misleading. The defendants' assignments of error relating to the jury instructions are without merit.

The defendants contend that the trial court erred in not setting aside the jury's verdict as excessive and not supported by the evidence.

> [I]n determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury's verdict will not be disturbed unless it is clearly wrong.

Maloney v. Kaminski, 220 Neb. 55, 62, 368 N.W.2d 447, 454 (1985).

When the evidence is viewed in the light most favorable to the plaintiff, the record shows the plaintiff had special damages totaling approximately $9,386. In addition, the plaintiff testified that he was self-employed as a hunting and trapping guide and before the accident worked approximately 50 days a year at a rate of $75 a day. The plaintiff returned to work in April 1988, but he has been unable to engage in trapping, hunting, and guiding activities because of pain in his lower leg.

The plaintiff was 43 years old at the time of trial. The plaintiff testified in detail concerning the pain he has from his leg and how it interferes with his daily activities and work. The evidence supports the jury's verdict, and that verdict is not

clearly wrong.

Next, the defendants argue that the trial court erred in not allowing the testimony of lay witnesses regarding the speed of the plaintiff's vehicle at the time of the accident. They claim their case was prejudiced because the defendant Johnson and Steven Cochran were not permitted to give their opinions regarding the speed of the plaintiff's vehicle at the time of the accident.

The trial court is given discretion in determining whether or not a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion. *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

Johnson testified that he did not even see the plaintiff's vehicle until the Farm & Ranch truck was one-third of the way through the intersection. Cochran testified that he saw the plaintiff's vehicle a half mile prior to the plaintiff's cresting the hill north of the intersection, but did not see the plaintiff crest the hill. Because the trial court could find that these witnesses did not have adequate opportunity to observe the plaintiff's truck before the accident, the trial court did not abuse its discretion in refusing to permit Johnson and Cochran to express their opinions regarding the plaintiff's rate of speed at the time of the accident.

The defendants' 10th assignment of error argues that the trial court erred in not finding the plaintiff guilty of contributory negligence. The defendants assert that the plaintiff failed to keep a proper lookout by traveling at an excessive speed through a blind intersection.

A motorist traveling on a street or highway protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that a driver about to enter from the nonfavored street will come to a full stop, look both to the right and to the left, maintain a proper lookout for the safety of himself and others traveling on the streets, and yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the motorist at the stop sign moves his vehicle into or across the intersection. *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103

(1986).

In this case, the plaintiff, who, according to his testimony, was driving within the speed limit on the road that was protected by stop signs, had the right to assume that the defendant Johnson, whom he observed approaching the stop sign, would stop and yield the right-of-way. The plaintiff had no reason to anticipate danger until it was apparent that the Farm & Ranch vehicle would enter the intersection without stopping, and it was then too late to avoid an accident. Under the circumstances, the jury could find the plaintiff was not guilty of contributory negligence.

The defendants contend that the trial court erred in overruling objections to the plaintiff's attorney's statements in his closing argument of personal beliefs concerning the evidence or the credibility of witnesses and asking the jurors "to put [themselves] or their families" in the plaintiff's place. There was no objection to most of the statements about the personal beliefs of counsel.

The defendants complain that the plaintiff's counsel's expressions of his personal beliefs regarding the witnesses' credibility, the opposing counsel's theory of the case, and the value of the plaintiff's damages caused an excessive verdict, thereby prejudicing the defendants' case.

It is true that an attorney should not assert his or her personal opinion as to the credibility of a witness when appearing in his or her professional capacity before a tribunal. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991). However, in this case, there was only one instance, which was not objected to by the defendants, where the plaintiff's statement might be interpreted as an expression as to the credibility of the defendant Johnson.

While the plaintiff's attorney was discussing Johnson's reason for rolling through the intersection instead of stopping at the stop sign, the attorney stated: "[T]he reason I [Johnson] roll it is because if you stop, you can't start up fast enough with these loaded trucks to get away from these cars coming over the hill. I don't believe that but that is what he said."

The latitude allowed attorneys in argument during the trial of a case lies within the discretion of the trial court, and in the

absence of prejudice resulting from misconduct in argument, that is no ground for reversal. *Harmon Cable Communications, supra.* The trial court did not err in overruling the defendants' request for a mistrial based on the plaintiff's attorney's statements as to his personal beliefs.

The defendants also contend that their case was prejudiced by statements of the plaintiff's counsel inviting the jurors to put themselves in the place of the plaintiff. The defendants claim the following statements by the plaintiff's attorney improperly invoked the "Golden Rule" argument:

> The instructions that you just heard the judge tell you means that my man has to be negligent, Rick has to be negligent, and to be negligent he must do something that a reasonable person wouldn't do. And what are the facts? Put yourself in his place.
>
> Mr. Waite: Objection, Your Honor, that is a golden rule argument. That is improper.
>
> The Court: Overruled.
>
> Mr. Wolf: Thank you, Your Honor.
>
> What does he do, he comes over the hill, he sees this vehicle coming and I think you have to use some common sense. . . . I think he did what a reasonable person would do and I think he did what any of you would do if you were faced with the same situation . . . .
>
> . . . .
>
> That is what he did, he tried to avoid the accident, he did the best he could and he hit him, but the point of it is the person that put it all there was Mr. Johnson, and I will tell you another thing, he has gone through that intersection hundreds of times, he knows it's dangerous and what is his reason to you why he rolls through there? To minimize his exposure. Well, if you follow that rationale, then he would be a lot better off just going through there at a hundred miles an hour and he wouldn't even be in the intersection as long. But I hate to see you or one of your family members just coming down that hill at the wrong time —
>
> Mr. Waite: Objection, Your Honor.
>
> The Court: Overruled.

While an invitation to jurors to put themselves in the place of a party is improper argument, it is not a ground for a reversal unless the jury was prejudicially affected by the remark. *Edwards v. Lacy*, 412 S.W.2d 419 (Mo. 1967). See, also, *City of Phoenix v. Boggs*, 1 Ariz. App. 370, 403 P.2d 305 (1965); *Halpin v. Pekin Thrifty Drug Co.*, 79 Ill. App. 2d 153, 223 N.E.2d 708 (1967); *Fisher v. Williams*, 327 S.W.2d 256 (Mo. 1959); *Thorpe v. Zwonechek*, 177 Neb. 504, 129 N.W.2d 483 (1964); *Boyd v. Pernicano*, 79 Nev. 356, 385 P.2d 342 (1963).

In *Thorpe*, plaintiff's counsel during closing arguments asked the jurors what the plaintiff's pain and suffering would be worth to them. This court found that the remark was "so closely interwoven with discussion as to what a reasonably prudent person would award for such damages that we fail to see any prejudicial error." *Id.* at 514-15, 129 N.W.2d at 490.

In the present case, although the remarks made by the plaintiff's attorney were improper, they appear to be interwoven with the reasonable person standard applied to the determination of the issues in this case and under the circumstances in this case resulted in no prejudicial effect. Accordingly, the trial court did not abuse its discretion in overruling the defendants' objections and request for a mistrial based upon the remarks made by the plaintiff's attorney. See *Harmon Cable Communications, supra.*

Since the defendants have failed to specifically argue in their brief their 12th assignment of error, which is a general assignment, we do not consider it. See *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

Finally, we address both the defendants' and the plaintiff's assignment of error concerning the trial court's denial of both parties' motions for sanctions.

The first trial of this action ended in a mistrial on May 10, 1990, when the plaintiff's attorney, while examining the defendants' accident reconstructionist, read portions of field notes of a former reserve deputy sheriff who investigated the accident. The field notes had not been offered into evidence and had not been provided or disclosed to the defendants' counsel prior to the trial; however, they had been on file at the sheriff's office prior to the trial, and there is some evidence which

suggests that defendants' counsel knew about them. The plaintiff's attorney did not discover the third page of the field notes until the first day of trial.

Following the mistrial, the plaintiff's counsel contacted the officer who had investigated the accident, and he indicated that prior to trial he received a call from an attorney for one of the other parties, and he told that attorney that he had taken measurements, had made notes of them, and had filed them with the accident report.

Both parties filed motions for sanctions after the second trial. The trial court found neither party was entitled to sanctions against the other because all counsel were somewhat derelict in not timely discovering the measurement page of the investigating officer's report.

The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991). We do not believe the trial court abused its discretion in refusing to order sanctions against either party.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

Inasmuch as there was no objection to the statement of plaintiff's counsel arguably commenting on the credibility of one of the defendants, I do not concern myself with that aspect of the case other than to direct attention to Canon 7, EC 7-24, of the Code of Professional Responsibility (improper for lawyer to express personal opinion as to credibility of witness).

However, there was an objection to the imploration of plaintiff's counsel that in judging the negligence of the defendants, the jurors consider what they would have done had they been in the plaintiff's place and reflect upon the consequences of their, or their family members', being in the vicinity of the driving defendant at the wrong time. This, as the majority found, constituted an improper argument. But the majority then concludes that the impropriety was not prejudicial.

In reaching that conclusion, the majority relies on *Thorpe v. Zwonechek*, 177 Neb. 504, 129 N.W.2d 483 (1964). As the

majority correctly outlines, in that case this court concluded that as the argument therein that the jurors should consider what plaintiff's pain and suffering would be worth to them was " 'so closely interwoven with discussion as to what a reasonably prudent person would award,' " there was no prejudice. However, the *Thorpe* opinion does not detail the argument, and we thus cannot determine what the *Thorpe* court considered as constituting such a close interweaving.

But whatever may have been involved in *Thorpe*, the argument here does not relate the defendants' liability to the doing or failure to do that which a reasonably careful person in similar circumstances would or would not do. Rather, the argument improperly and contrary to well-settled law ties the defendants' liability to what the jurors would like to see done should they or members of their families be confronted with the situation in which the plaintiff found himself.

I certainly understand and accept that the latitude allowed one during the trial of a cause rests in the discretion of the trial court and that in the absence of prejudice resulting therefrom, misconduct in argument is not a ground for reversal. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991). But see Canon 7, DR 7-102(A)(2), of the Code of Professional Responsibility (improper for lawyer to knowingly advance defense not warranted by existing law).

In any event, implicit in the majority's analysis is the determination that the trial court was wrong in failing to sustain the defendants' objection to the improper argument and that it thus abused its discretion in the latitude it permitted plaintiff's counsel. With that implication I obviously agree, but just as obviously, I part company with the majority's conclusion that the trial court's erroneous ruling resulted in no prejudice to the defendants. The record simply does not support that determination.

I would therefore reverse, and remand for a new trial.

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

HELEN R. KOZENY, APPELLANT, V. FRANKLIN W. MILLER, APPELLEE.

499 N.W.2d 75

Filed May 7, 1993. No. S-91-111.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. _____: _____. A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
3. _____: _____. A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
5. **Negligence: Evidence.** In order to recover under the doctrine of the last clear chance in this state, there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident.
6. **Jury Instructions: Appeal and Error.** All the 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.
7. **Negligence: Pedestrians.** Although a pedestrian may have a perfect right to be where he is, nevertheless, he is bound to exercise reasonable care for his own safety.
8. **Directed Verdict.** A directed verdict is proper only when reasonable minds cannot differ and can draw only one conclusion from the evidence.
9. _____. A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed.

10. **Motions for New Trial: Appeal and Error.** The district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion.

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

Robert M. Slovek, of Sodoro, Daly & Sodoro, for appellant.

Thomas J. Culhane and David A. Hecker, of Erickson & Sederstrom, P.C., for appellee.

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

BOSLAUGH, J.

This case arises out of a truck-pedestrian accident that occurred in Omaha, Nebraska, at about 9 a.m. on May 28, 1986.

At the time of the accident, the plaintiff, Helen R. Kozeny, was walking south through an alley that runs between 23d and 24th Streets. She was on her way to work at Merker Realty Company, whose office is on L Street just west of the alley. The accident occurred when the plaintiff was struck by a pickup truck operated by the defendant, Franklin W. Miller. Miller was backing the truck from a parking stall west of the alley. Miller backed at an angle to the northeast, intending to then go forward south to L Street. There is about a 5-foot dropoff along the east edge of the alley. A retaining wall runs along the east edge of the alley, but does not extend above the surface of the alley.

Kozeny entered the approximately 20-foot-wide alley from the north and was walking in a southerly direction when she noticed Miller's vehicle preparing to back out of the parking stall. Kozeny stopped walking after she saw Miller's vehicle start to back out of the parking stall. Miller's vehicle backed across the alley in a northeasterly direction, stopping 5 to 10 feet from Kozeny. After stopping, the vehicle started to back again. Kozeny testified that in an attempt to avoid being struck after seeing the vehicle back in her direction a second time, she moved forward southerly along the east side of the alley in an attempt to squeeze through a 2-foot space between the retaining

wall and the rear bumper of Miller's truck. When asked at trial why she walked southerly to avoid being hit, Kozeny testified: "Yes, because I had no choice. The wall was on the left, and um, I didn't know to what extent he was going to back; and I was fearful of crossing the alley." Kozeny was struck in the head by the side of the truck and was knocked over the retaining wall and fell about 5 feet. As a result of the accident, Kozeny suffered a laceration to her head, a fractured vertebra, and injuries to the lower spine which resulted in a hemilaminotomy and diskectomy.

Miller testified that he saw Kozeny in the alley as he was getting into his truck. He testified that before backing, he looked for Kozeny. Miller further testified that his customary practice before backing his vehicle was to look into the rearview mirrors mounted on the right and left sides of his truck and to look over his shoulder. On this occasion, before backing the vehicle the first time, Miller testified that he looked into his right rearview mirror, into his left rearview mirror, back to the right mirror, and then back over his shoulder. Miller testified that he assumed Kozeny was behind his vehicle. After initially backing the truck, Miller stopped to determine whether the truck had cleared the vehicle parked next to him. After determining that he had not cleared the vehicle on his left, Miller again began to slowly back the truck. Miller acknowledged that before backing the second time, he looked only in his left rearview mirror. When asked why he did not follow his customary procedure of looking in both rearview mirrors and over his shoulder when he backed the second time, Miller testified, "I figured, if somebody was there, they'd have seen me backing." Miller immediately stopped backing his vehicle when he saw in his left rearview mirror Kozeny's leg fly up in the air.

At the close of the evidence, the plaintiff moved for a directed verdict on the issue of the defendant's liability. This motion was overruled. The trial court also refused the plaintiff's requests to instruct the jury on last clear chance and sudden emergency. The plaintiff's objection that there was insufficient evidence to instruct the jury on her contributory negligence was also overruled by the trial court.

The case was submitted to the jury on issues of negligence and contributory negligence.

The jury returned a 10-2 verdict in favor of the defendant. After the plaintiff's motions for judgment notwithstanding the verdict and new trial were overruled, she filed this appeal.

On appeal to this court, the plaintiff assigns numerous errors which she contends require that the judgment of the trial court be reversed and that she be given a new trial. Summarized, the assignments of error are that (1) the trial court erred by failing to instruct the jury on the sudden emergency and the last clear chance doctrines; (2) the trial court erred in giving inconsistent jury instructions, specifically that the trial court instructed the jury that the plaintiff, as a pedestrian, had the right-of-way, while separately instructing that the plaintiff and the defendant had equal status as users of the alley in question; (3) there was insufficient evidence of the plaintiff's contributory negligence, and the trial court erred by instructing the jury on this issue; (4) the trial court erred by failing to direct a verdict on liability on the plaintiff's behalf; (5) the court erred in sustaining the defendant's motion in limine, preventing the plaintiff from impeaching the defendant's testimony regarding the adequacy of his vision; (6) the trial court erred in denying the plaintiff's motion for leave to amend to add additional parties; and (7) the trial court erred by failing to sustain the plaintiff's motions for judgment notwithstanding the verdict and new trial.

In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993). A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Id.*

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party. *Id.*

The plaintiff's first assignment of error is that the trial court

erred by failing to instruct the jury on the sudden emergency and the last clear chance doctrines. At the close of the evidence, the plaintiff requested the trial court to instruct the jury on both the sudden emergency and the last clear chance doctrines. The plaintiff argues that the facts of this case clearly support the giving of the requested instructions. The trial court refused to give either of the requested instructions.

> "To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction."

Renne v. Moser, 241 Neb. 623, 631, 490 N.W.2d 193, 199 (1992).

NJI2d Civ. 3.09 recommends no instruction on sudden emergency should be given. The comments to NJI2d Civ. 3.09 suggest that since the sudden emergency doctrine is simply a restatement of the general duty of care, no instruction on sudden emergency should be given. This court has previously held that the giving of an independent sudden emergency instruction is not warranted in a negligence action. See *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991).

NJI2d Civ. 3.23 recommends no instruction on last clear chance be given either. It appears from the record that an instruction on last clear chance was properly refused by the trial court.

In *Laird v. Kostman*, 229 Neb. 114, 425 N.W.2d 607 (1988), this court reaffirmed the requirements necessary to invoke the last clear chance doctrine:

> "In order to recover under the doctrine of the last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is

> invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident."

Id. at 119, 425 N.W.2d at 610, quoting *Whitehouse v. Thompson*, 150 Neb. 370, 34 N.W.2d 385 (1948). The *Laird v. Kostman* court also noted that "[i]n order to submit the doctrine to the jury there must be competent evidence to sustain each of the foregoing elements . . . and the issue must have been raised by the pleadings." *Id.* at 119, 425 N.W.2d at 610. The court further noted: "The doctrine has no application unless the person claiming its benefit puts himself in the position of admitting that immediately before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care." *Id.* at 119, 425 N.W.2d at 611.

In the case at bar, the plaintiff did not plead the last clear chance doctrine in her amended petition, nor did she plead any facts which would raise the doctrine as an issue. Specifically, the plaintiff made no allegation that her situation was the result of her own negligence.

The record shows that the contributory negligence of the plaintiff was a contributing factor in the accident. There was nothing that prevented the plaintiff from standing still when she was stopped 5 to 10 feet behind the defendant's truck. If necessary, she could have stepped back to the north to avoid the defendant's truck if that had been necessary. Thus, the trial court properly refused to submit the doctrine of last clear chance to the jury. The plaintiff's first assignment of error is without merit.

The plaintiff's next assignment of error is that the trial court erred in giving inconsistent jury instructions, specifically that the trial court instructed the jury that the plaintiff, as a pedestrian, had the right-of-way, while separately instructing that the plaintiff and the defendant had equal status as users of

the alley in question. The plaintiff argues that instructions Nos. 18 and 19 were inconsistent with the law of Nebraska as the law was stated in instruction No. 14. Specifically, instruction No. 14 provided: "Nebraska statutes provide that a person who moves a parked vehicle must wait until it can be moved with reasonable safety and must yield the right of way to all other vehicles and pedestrians affected by such movement." Instruction No. 18 provided: "Unless otherwise provided by law, the right of pedestrians to use alleyways is equal to that of drivers. Among other things, this means that both pedestrians and drivers must act as reasonably careful persons would with respect to their own safety and the safety of others." Instruction No. 19 provided:

> The right of a pedestrian to the lawful use of a street or highway is in all respects equal to that of a person driving an automobile, but each person or vehicle on the street or highway must so exercise his right to use it as not to injure others and must exercise such caution as an ordinarily prudent person would exercise under like circumstances. In other words, the rights of pedestrians and motor vehicles on a public street or highway are equal, and each is obliged to act as a reasonably prudent person would with respect to the movements of the other. A person having the right of way is nevertheless obligated to exercise ordinary care for his own safety and to avoid an accident.

The plaintiff argues that it was logically inconsistent to instruct the jury in instruction No. 14 that the plaintiff had the right-of-way, while instructions Nos. 18 and 19 stated that the plaintiff and the defendant were equal in their right to use the alley in question.

All the 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. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992).

Instruction No. 14 correctly states the law of Nebraska as set forth by Neb. Rev. Stat. § 39-639 (Reissue 1988). The text of

instruction No. 19 has previously been approved by this court. See *Holly v. Mitchell*, 213 Neb. 203, 328 N.W.2d 750 (1982). The language used in instruction No. 18 is taken from NJI2d Civ. 7.15 and is also supported by *Holly v. Mitchell, supra* (right of pedestrian to lawful use of a street is equal to that of driver).

The jury instructions are not inconsistent with each other. These instructions correctly point out that both the plaintiff and the defendant had an equal right to the use of the alley and that the defendant had to yield the right-of-way to the plaintiff if she would have been affected by his movement. However, this does not negate the fact that the plaintiff was still obligated to exercise ordinary care for her own safety.

Jury instructions Nos. 14, 18, and 19 correctly state the law and are not inconsistent with each other. There is nothing in the record that indicates that the jury was confused or misled by these instructions. The plaintiff has failed to show she was prejudiced in any way by the use of these instructions. Accordingly, this assignment of error is without merit.

The plaintiff's next two assignments of error are that the trial court erred by instructing the jury on the issue of her contributory negligence and that the trial court erred by failing to direct a verdict on liability against the defendant on her behalf. The plaintiff argues that there was insufficient evidence on the issue of her contributory negligence to support sending this issue to the jury. However, the record does contain evidence from which a jury could find contributory negligence on the part of the plaintiff. Specifically, Kozeny testified that she moved from her stationary position into the path of the moving vehicle when she attempted to walk through the narrow space between the rear of the truck and the east edge of the alley. This court has previously stated that "although a pedestrian may have a perfect right to be where he is, nevertheless, he is bound to exercise reasonable care for his own safety." *Ybarra v. Wassenmiller*, 206 Neb. 164, 172, 291 N.W.2d 725, 729-730 (1980). See, also, *Holly v. Mitchell, supra*. Since there was evidence from which the jury could find the plaintiff guilty of contributory negligence, the trial court properly submitted this issue to the jury.

The plaintiff also argues that at the close of the evidence, the trial court should have directed a verdict in her favor based on the law as stated in § 39-639. This statute provides: "No person shall move a vehicle which is stopped, standing, or parked without yielding the right-of-way to all other vehicles and pedestrians affected by such movement, and in no event until such movement can be made with reasonable safety."

A directed verdict is proper only when reasonable minds cannot differ and can draw only one conclusion from the evidence. *Lambert v. City of Columbus*, 242 Neb. 778, 496 N.W.2d 540 (1993). A trial court should direct a verdict as a matter of law only when the facts are conceded or undisputed. *Id.* In the present case, there were genuine questions of fact with regard to the defendant's negligence and the plaintiff's contributory negligence, which were proper considerations for the jury. Accordingly, the trial court properly denied the plaintiff's motion for directed verdict and properly submitted the case to the jury for consideration of these issues.

The plaintiff's next assignment of error is that the court erred in sustaining the defendant's motion in limine, preventing the plaintiff from impeaching the defendant's testimony regarding the adequacy of his vision. During his testimony at trial, Miller denied having any problems with his vision which may have impaired his ability to operate and back his vehicle. Prior to trial, the court sustained Miller's motion in limine, which prevented Kozeny from inquiring into a subsequent traffic citation and two subsequent accidents in which Miller was involved. In this case, the trial court did not abuse its discretion by sustaining the defendant's motion in limine. Miller's subsequent traffic citation and accidents were not relevant to the accident in question due to the fact that Miller testified that he had seen Kozeny in the alley prior to backing his vehicle. There may be many reasons why a driver fails to see another vehicle before an accident. Even if the evidence of the subsequent citation and accidents were somehow deemed to be relevant, it appears likely that the prejudicial nature of such evidence would outweigh its probative value. The evidence would therefore be properly excludable under Neb. Rev. Stat. § 27-403 (Reissue 1989).

Prior to trial, the plaintiff sought to add the National American Insurance Company as an additional party defendant due to a dispute with regard to underinsured motorist coverage. The trial court denied the motion. The plaintiff argues that the trial court erred in denying her motion for leave to amend to add National American Insurance Company as an additional party. The trial court's reasons for denying the motion are not clear from the record. However, it does not appear that the trial court abused its discretion by denying the motion. The liability issues between the plaintiff and the defendant were fully litigated at trial. Kozeny's underinsured motorist coverage with National American Insurance Company was not a factor necessary for the determination of liability against Miller. Accordingly, National American Insurance Company was not a necessary party to this action. In view of the verdict of the jury, this issue is now moot. This assignment of error is without merit.

The plaintiff's final assignment of error is that the trial court erred by failing to sustain her motions for judgment notwithstanding the verdict and new trial. The district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion. *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993).

Based on our review of the record and the plaintiff's assignments of error, it appears that the trial court did not abuse its discretion by denying the plaintiff's motion for new trial. We have previously determined that the trial court correctly refused to direct a verdict in favor of the plaintiff. Therefore, the trial court's refusal to sustain the plaintiff's motion for judgment notwithstanding the verdict is also correct.

In the case at bar, the evidence was sufficient for the jury to find in favor of the defendant. Accordingly, the jury verdict was not clearly wrong, and the judgment must be affirmed.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

NEBRASKA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, A NONPROFIT CORPORATION, APPELLANT, V. SCOTTS BLUFF COUNTY BOARD OF EQUALIZATION, APPELLEE.

499 N.W.2d 543

Filed May 7, 1993. No. S-91-142.

1. **Taxation.** For tax-exempt status pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1990), property must (1) be owned by educational, religious, charitable, or cemetery organizations; (2) be used exclusively for educational, religious, charitable, or cemetery purposes; and (3) not be (a) owned or used for financial gain or profit to either the owner or user, (b) used for the sale of alcoholic liquors for more than 20 hours per week, or (c) owned or used by an organization which discriminates based on race, color, or national origin.
2. **Taxation: Appeal and Error.** In an appeal from a district court's judgment on the question whether property is tax-exempt, an appellate court determines a tax exemption question 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 material issues of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another.
3. **Taxation: Presumptions.** Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction.
4. **Taxation.** Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
5. **Taxation: Words and Phrases.** In reference to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1990), exclusive use means the primary or dominant use of property, as opposed to incidental use.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

M. Douglas Deitchler and John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Dave Eubanks, Deputy Scotts Bluff County Attorney, for appellee.

Robert B. Crosby, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska Catholic Conference.

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

LANPHIER, J.

The Nebraska Annual Conference of the United Methodist Church (United Methodist) appeals the decision of the district court for Scotts Bluff County which affirmed the denial of tax-exempt status by the Scotts Bluff County Board of Equalization (Board) to a Scottsbluff parsonage owned by United Methodist. We reverse and remand with directions.

FACTUAL BACKGROUND

United Methodist is operated as an itinerant ministry, a system of regular pastoral rotation in which every pastor agrees to go where sent by the bishop. Ministers are rotated between local churches. District superintendents appointed by the bishop to assist in the overall administration of the United Methodist ministry supervise churches in a particular district.

Under this itinerant system, a Methodist minister can expect to be relocated every 5 to 8 years, and district superintendents are replaced by the bishop at least every 6 years. To facilitate this mobility, United Methodist owns numerous parsonages which provide housing for the pastors and superintendents while they are serving a particular community. There are nine such parsonages in Nebraska, each of which houses one of the church's district superintendents. The superintendents are required by United Methodist to live in these parsonages as a condition of their employment.

The parsonage at issue was built and is owned by United Methodist; for more than 20 years it has housed the northwest district superintendent of the church. The northwest district superintendent supervises the total United Methodist ministry of 25 pastors and 38 churches in the Nebraska Panhandle. In addition to his supervisory role in the administration of the United Methodist ministry, the superintendent has normal pastoral duties. He delivers sermons at the various churches in his district some 25 weeks of the year, provides pastoral support to district clergy and their families, and stands ready to substitute for pastors who are unable to minister to their congregation. Rev. Loren Mullins, the current superintendent for the northwest district, has lived in the Scottsbluff parsonage since his appointment in 1987.

In 1990, the United Methodist district committee on superintendency began to rent office space in downtown Scottsbluff for Reverend Mullins. The office is open from 8:30 to 11:30 a.m. and is used exclusively to produce the district newsletter, maintain current records on district churches, and keep current with the superintendent's correspondence. The rest of Reverend Mullins' activities, including administrative duties, preparation of sermons, theology study, church activities, counseling, church meetings, prayer meetings, recruiting of additional pastors, and storage of records and equipment, take place at an office maintained at the parsonage. The parsonage is also used by United Methodist to accommodate visiting clergy, speakers, and dignitaries.

The parsonage has continuously applied for, and received, tax-exempt status in the past, and on December 27, 1989, application was made by United Methodist for continued tax exemption. The 1990 application was disapproved by the Board, however, based on a determination that the religious use of the parsonage had changed, solely because part of the business office was moved downtown. The decision was appealed to the district court for Scotts Bluff County pursuant to Neb. Rev. Stat. § 77-202.04 (Reissue 1990), where, after a trial de novo, the district court affirmed the Board's actions. It is from this decision that United Methodist appeals.

ASSIGNMENTS OF ERROR

United Methodist claims that the district court erred in (1) denying continuing tax-exempt status to the parsonage, because the parsonage is owned by a religious organization and is used exclusively for religious purposes; (2) directing its attention toward the superintendent's use of the property rather than United Methodist's use of the parsonage; and (3) denying tax-exempt status to the parsonage contrary to prior Nebraska Supreme Court decisions.

STANDARD OF REVIEW

Applicable in this appeal are the Nebraska Constitution and the specific statute authorizing exemption of property from taxation. The Constitution provides that the Legislature "by general law may exempt [from taxation] property owned by

and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Neb. Const. art. VIII, § 2. Pursuant to this provision, the Legislature has chosen to exempt property from taxation if the property is

> owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates . . . based on race, color, or national origin.

Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1990).

In an appeal from a district court's judgment on the question whether property is tax-exempt, an appellate court determines a tax exemption question 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 material issues of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

USE OF THE PARSONAGE

To assist in determining exemption eligibility under § 77-202(1)(c), the Nebraska Department of Revenue has promulgated regulation 42-006, 316 Neb. Admin. Code, ch. 42, §§ 006.01 through 006.05 (1943), which provides that an exemption is to be allowed only if the property at issue meets all five of the following criteria: (1) The property must be owned by an educational, religious, charitable, or cemetery organization (regulation 42-006.01); (2) the property must be used *exclusively* for religious, educational, charitable, or cemetery purposes (regulation 43-006.02); (3) the property must not be used for financial gain or profit to either the owner

or user (regulation 43-006.03); (4) the property must not be used for the sale of alcoholic liquor for more than 20 hours per week (regulation 43-006.04); and (5) the property must not be owned or used by an organization which discriminates in membership or employment based on race, color, or national origin (regulation 43-006.05).

There is no dispute in this case concerning the facts. The Board readily admits that the parsonage satisfies the ownership requirement and agrees that the property is not used for financial gain, for the sale of alcohol, or by a discriminatory organization. The only point of contention is whether the use made of the parsonage constitutes "exclusively" religious use of the property as required for tax exemption under § 77-202(1)(c).

Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction. *Bethphage Com. Servs. v. County Board, supra.* Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961). However, this does not mean that statutory language should not receive a liberal construction to carry out the express legislative intent. *Id.*

In reference to § 77-202(1)(c), this court has held that exclusive use means the primary or dominant use of property, as opposed to incidental use. An exemption will not be lost if the property claimed to be exempt is used in an incidental manner that is not educational, religious, charitable, or cemetery use, as long as the predominant or primary use of the property is one or more of the exempt uses. *Bethphage Com. Servs. v. County Board, supra*; *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). See, also, *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932). Therefore, the only matter to be determined here is whether the parsonage's exclusive or primary use is religious.

This is the first opportunity for this court to address the question of whether a cleric's use of a parsonage constitutes exclusive religious use for exemption purposes. However, in

Doane College v. County of Saline, the college president's residence was at issue in the context of tax exemption for educational use. The residence, like the parsonage, was furnished to the president without charge, and he was required to live there as part of his employment contract. Reverend Mullins maintained an office outside of the house, but used one room of the residence, as did the president, as an office where he could work apart from his regular office hours. There are other similarities between the use of the parsonages by United Methodist and the use of the president's house in *Doane College v. County of Saline*. For example, the president's home was used as housing for prospective faculty members and foreign visitors. Finally, the president's home was also used for meetings, conferences, and receptions. In light of these factors, this court found:

> The evidence in this case establishes that the president of the college lives in the official residence provided him, not as a matter of personal convenience and advantage but because it is necessary in the discharge of his duties. We think that the primary or dominant use of this property is for educational purposes and the district court was correct in holding it to be exempt.

Id. at 12, 112 N.W.2d at 250.

The rule in *Doane College v. County of Saline* is one applied to parsonages by numerous other jurisdictions. See, *Our Savior Lutheran v. Dept. of Revenue*, 204 Ill. App. 3d 1055, 562 N.E.2d 1198 (1990); *Seventh-Day Adventists v. Bd. of Tax Com'rs*, 512 N.E.2d 936 (Ind. Tax 1987); *McKenzie v. Johnson*, 98 Ill. 2d 87, 456 N.E.2d 73 (1983); *N. D. Conf. A. of 7th-D. Adv. v. B. of C. Com'rs*, 234 N.W.2d 912 (N.D. 1975); *McCreless v. City of San Antonio*, 454 S.W.2d 393 (Tex. 1970).

The record before us shows that the parsonages are an essential part of the Methodist church, both in their day-to-day activities and within the overall scheme of the itinerant ministry of the Methodist church. The special role parsonages play in the Methodist ministry requires that consideration be given to United Methodist's unequivocal use of the parsonage in the furtherance of its religious purpose. This court has defined "religious purpose" as the following:

> "Prayer is always worship. Reading the Bible and singing may be worship. * * * If these exercises of reading the Bible, joining in prayer and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance." *People v. Board of Education*, 245 Ill. 334, 339. See *State v. Scheve*, 65 Neb. 853.
>
> The conclusion follows that neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed, is an essential element of a "religious use," nor a necessary prerequisite to and of an "exclusive religious purpose."

Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. at 594-95, 241 N.W. at 96. It is clear that the Scotts Bluff parsonage is used "to promote the objects and purposes of a faith" and would therefore fall under the above definition.

Conversely, the Board contends, in substance, that since United Methodist has rented a downtown office for Reverend Mullins which he uses 3 hours a day, the myriad religious activities occurring at the parsonage are merely incidental to the use of the property as a residence. We cannot agree. As the Supreme Court of Oklahoma stated in *Immanuel Baptist Church v. Glass*, 497 P.2d 757 (Okla. 1972), and in the companion case of *Eastwood Baptist Church v. Glass*, 497 P.2d 761 (Okla. 1972), when it exempted from taxation a number of parsonages:

> " 'It does not require a resort to the rule of liberal construction to hold that property acquired, owned, and used as is this property, is used exclusively for religious purposes within the meaning of the Constitution and statute. The exemption authorized by the Constitution is not restricted to property used exclusively for public worship, but embraces all property exclusively—that is, primarily—used for religious purposes. . . .' "

497 P.2d at 759. Reverend Mullins' use of the parsonage cannot be distinguished from the president's use of the residence in

Doane College v. County of Saline. The issue is whether the parsonage is being owned and used exclusively for religious purposes. The record shows it is being so used. The Board's contention is therefore without merit.

CONCLUSION

When viewed in light of Neb. Const. art. VIII, § 2, and § 77-202(1)(c), a parsonage owned by a church, which parsonage houses a pastor who is engaged in full-time ministerial work, which parsonage is provided to him for the convenience of the church and parishioners, and which parsonage serves numerous religious purposes, is property used exclusively for religious purposes and exempt from taxation. Accordingly, we reverse the court's decision and remand the cause with directions that the district court order the Scotts Bluff County Board of Equalization to exempt the United Methodist property from taxation and refund any taxes which have been paid on the property since the Board's denial of exemption.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATIONS A-16027, A-16028, A-16031, A-16032, A-16033, A-16036, A-16038, A-16039, A-16600, A-16603, AND A-16606.

UPPER BIG BLUE NATURAL RESOURCES DISTRICT, APPELLANT, V. CITY OF FREMONT ET AL., APPELLEES.

499 N.W.2d 548

Filed May 7, 1993. No. S-92-024.

1. **Constitutional Law: Administrative Law: Statutes: Waters.** When, pursuant to Neb. Rev. Stat. § 37-435(3) (Cum. Supp. 1992), the Department of Water Resources consults with the Game and Parks Commission and denies an application for intrabasin and interbasin diversions of unappropriated water based on the commission's opinion, the aggrieved applicant has been sufficiently affected by the statute to challenge its constitutionality.
2. **Constitutional Law: Waters.** Sections 4, 5, and 6 of article XV of the Nebraska Constitution are not self-executing.

3. **Constitutional Law: Statutes: Legislature: Public Purpose.** It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.
4. **Legislature.** Whether or not legislation is in the public interest is generally a question for legislative determination; however, under the guise of regulation in the public interest, the Legislature may not impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory.
5. **Constitutional Law: Waters.** Neb. Rev. Stat. § 37-435(3) (Cum. Supp. 1992) does not violate the provisions of Neb. Const. art. XV, §§ 4, 5, and 6.

Appeal from the Department of Water Resources. Former opinion modified. Motion for rehearing overruled.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Lyle B. Gill, Fremont City Attorney, for appellee City of Fremont.

George E. Svoboda and Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellees Lower Platte North Natural Resources District and National Audubon Society.

James E. Doyle IV, of Cook, Wightman & Doyle, for appellee Central Platte Natural Resources District.

Bridgitt B. Erickson, Platte County Attorney, for appellee County of Platte.

BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ., BLUE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Upper Big Blue Natural Resources District (Big Blue), in its motion for rehearing, has asked us to reconsider our holding in *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993). In that opinion, we reviewed a decision of the director of the Department of Water Resources, denying Big Blue's applications for intrabasin and interbasin diversions of unappropriated waters from the Platte and Blue Rivers. Having fully discussed the salient facts in our first opinion on this case,

we turn to Big Blue's arguments, discussing only those facts relevant to our analysis.

Although in our previous opinion we considered, and rejected, Big Blue's constitutional challenges to two interbasin-transfer statutes, we did not address its challenge to a third statute, Neb. Rev. Stat. § 37-435(3) (Cum. Supp. 1992). We declined to consider that challenge because we held that Big Blue was not affected by the statute. It is that holding that Big Blue asks us to reconsider.

Upon further deliberation, we conclude that Big Blue is correct; its interest was sufficiently affected by the statute to entitle it to raise a constitutional challenge. We thus withdraw the inconsistent portions of *In re Applications A-16027 et al., supra*, and address the constitutionality of § 37-435(3). Our original holding regarding the challenge to § 37-435(3) rested on the existence of a 1987 amendment to the statute. The pertinent language at issue in § 37-435(3) (Reissue 1978), as in effect at the time of the applications, provided:

> All other state departments and agencies shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of sections 37-430 to 37-438 by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434, and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. [*For purposes of this subsection, state agency shall mean any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.*]

(Language of 1987 amendment shown in brackets and emphasized.)

In our original opinion we found that the amended language

was intended to remove the requirement that a natural resources district consult with the Nebraska Game and Parks Commission (Game Commission) on matters concerning endangered species before obtaining a water permit. Based on this finding, we held that Big Blue was not affected by § 37-435(3) (Cum. Supp. 1992) and consequently declined to determine the constitutionality of the statute.

Big Blue correctly notes that although it was not required to consult with the Game Commission under the amended version of § 37-435(3), the same could not be said for the Department of Water Resources. Big Blue argues that because the department's director was required to consult with the Game Commission, did so, and denied Big Blue's application based, in part, on the biological opinion resulting from this required consultation, Big Blue was sufficiently affected by § 37-435(3) to properly challenge its constitutionality.

Appellees Lower Platte North Natural Resources District and the National Audubon Society contend that we need not reach the merits of Big Blue's argument because the director denied the application based on factors independent of § 37-435(3). These appellees maintain that the director's findings themselves, which focused on the public interest factors enumerated in Neb. Rev. Stat. § 46-289 (Reissue 1988), provided the basis for denial. They thus argue that this court should decline to pass on the constitutionality of § 37-435(3) because it was not necessary for the proper disposition of the director's decision to deny the application.

The language of both § 46-289 and the director's order belies this theory. Section 46-289 requires the director, when deciding whether to grant or deny an application, to *balance* the benefits to the applicant's basin and the state against the adverse impacts to the state and the basin of origin. Furthermore, § 46-289 mandates that in the order denying or granting the application, the director must specify the reasons and must document the decision by reference to any source utilized in the decisionmaking process. Therefore, to the extent the director considered the Game Commission's opinion under the factors outlined in § 46-289, § 37-435(3) is brought into play as a source for balancing the statutory factors.

The director, when discussing in his order the effect of the project on the pallid sturgeon, burying beetle, and prairie fringed orchid, obviously considered and relied on the Game Commission's 1990 consultation opinion regarding endangered species. See *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993). Nothing in the language of § 46-289 indicates that a finding based on any one factor or set of factors will mandate a denial of an application. Thus, the argument that denial was required even without considering § 37-435(3) is without merit.

Having determined that Big Blue's interest was sufficiently affected by § 37-435(3) to allow Big Blue to challenge the statute, we now consider the merits of the constitutional challenge. In its appeal, Big Blue challenged the constitutionality of § 37-435(3) on essentially the same grounds it had challenged Neb. Rev. Stat. § 46-288 (Reissue 1988) and § 46-289. Big Blue argued that the three statutes impermissibly limited or altered its substantive right to divert unappropriated waters for irrigation purposes as guaranteed by Neb. Const. art. XV, §§ 4, 5, and 6. Consequently, much of the constitutional analysis applied to the other two statutes in our earlier opinion is germane to our analysis of § 37-435(3).

We first note, as we did in *In re Applications A-16027 et al., supra*, that §§ 4, 5, and 6 are not self-executing. Therefore, our task is to determine whether the challenged statute permissibly implements and effectuates the policies found in the relevant constitutional provisions. The pertinent constitutional language is found in § 6: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied *except when such denial is demanded by the public interest*." (Emphasis supplied.)

In *Lenstrom v. Thone*, 209 Neb. 783, 789-90, 311 N.W.2d 884, 888 (1981), this court held:

> It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the

reasonable mind.

Whether or not legislation is in the public interest is generally a question for legislative determination; however, under the guise of regulation in the public interest, the Legislature may not impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory. *McGraw Electric Co. v. Lewis & Smith Drug Co., Inc.*, 159 Neb. 703, 68 N.W.2d 608 (1955), *modified on other grounds* 160 Neb. 319, 68 N.W.2d 608.

In the legislative declaration to the Nongame and Endangered Species Conservation Act (NESCA), of which § 37-435(3) is a part, the Legislature stated that "nongame, threatened, and endangered species have need of special protection and . . . it is *in the public interest* to preserve, protect, perpetuate, and enhance such species of this state through preservation of a satisfactory environment and an ecological balance." (Emphasis supplied.) Neb. Rev. Stat. § 37-432.01 (Cum. Supp. 1992). The stated legislative intent behind NESCA is to conserve wildlife species for human enjoyment, for scientific purposes, and to ensure their perpetuation as viable components of their ecosystems, as well as to assist in the protection of endangered species pursuant to the federal Endangered Species Act. Neb. Rev. Stat. § 37-432 (Reissue 1988).

In consideration of these legislative declarations and statements of intent, and the unchallenged constitutionality of the federal Endangered Species Act, this court would be hard pressed to hold that there is a clear and palpable absence of a public purpose in state legislation which protects endangered species. See *Lenstrom, supra*. Section 37-435(3) provides for the establishment and implementation of conservation programs to effectuate the protection of endangered species as a public interest. The Legislature's determination of a public interest and the corresponding implementing statutes are not unreasonable, arbitrary, discriminatory, or confiscatory. The limitations that § 37-435(3) places on the diversion of unappropriated waters permissibly effectuate the provisions of Neb. Const. art. XV, §§ 4, 5, and 6.

Finding nothing in § 37-435(3) that is inconsistent with the

mandates of the applicable constitutional provisions, we hold that the statute, as challenged, is constitutional. Big Blue's arguments to the contrary are meritless. Therefore, the motion for rehearing is overruled, and our former opinion is modified to the extent it is inconsistent with our decision today.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

THOMAS M. SCHUESSLER, APPELLEE, V. BENCHMARK MARKETING AND CONSULTING, INC., APPELLANT.

500 N.W.2d 529

Filed May 14, 1993. No. S-90-1074.

1. **Constitutional Law: Actions.** There is no constitutional right to have civil proceedings stayed pending the outcome of a criminal investigation.
2. **Courts: Actions.** Courts inherently possess the power to stay civil proceedings when required by the interests of justice.
3. **Actions: Proof.** The burden of establishing that a proceeding should be stayed rests on the party seeking the stay.
4. **Trial: Appeal and Error.** When the moving party seeks to stay a trial, the decision of whether to grant the motion is vested in the discretion of the trial court, and its decision will not be overturned on appeal absent an abuse of that discretion.
5. **Trial.** In deciding whether to stay a trial, the trial court should balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that proceeding will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof.
6. **Corporations: Self-Incrimination.** A corporation has no right to invoke the privilege against compulsory self-incrimination.
7. **Corporations: Employer and Employee: Self-Incrimination.** Because the constitutional privilege against compulsory self-incrimination is personal, a corporation may not assert its employees' privilege on their behalf.
8. **Employment Contracts: Termination of Employment: Good Cause.** A contract for a definite term may not lawfully be terminated prior to the expiration of that term without good cause.
9. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of an employment contract, the burden of proving the existence of the employment contract and all the facts essential to the cause of action is upon the person who asserts the contract.

10. **Employment Contracts: Breach of Contract: Good Cause: Proof.** In an action for breach of an employment contract, the employee must initially prove the existence of the contract, its terms and his compliance with them until his discharge, the employer's breach, and damages. Having done so, the burden then shifts to the employer to come forward with evidence that good cause existed for discharging the employee. If the employer produces sufficient evidence, the employee may rebut, and if in controversy, the issue goes to the trier of fact; however, the ultimate burden of proving wrongful termination remains with the employee.
11. _____: _____: _____: _____. In an action for breach of an employment contract, the employee proves absence of good cause simply by carrying the ultimate burden on the issue.
12. **Termination of Employment: Good Cause.** Whether good cause existed for discharging an employee is a question of fact.
13. **Appeal and Error.** In determining whether the evidence is adequate to support the trial court's factual decision in a civil case, we consider the evidence in the light most favorable to the successful party, resolving every controverted fact in that party's favor and giving that party the benefit of every reasonable inference deducible from the evidence.
14. **Termination of Employment: Evidence: Good Cause.** Because posttermination evidence of employee misconduct is necessarily discovered after an employee has been terminated, it can hardly be said to have provided a reason or "cause" for the termination.
15. **Termination of Employment: Evidence: Damages.** Posttermination evidence of employee misconduct may limit the employee's recovery in a wrongful discharge case.
16. **Termination of Employment: Evidence: Damages: Proof.** Once an employee has established a case of wrongful discharge, the employer may limit recovery by using posttermination evidence to prove employee misconduct which would have resulted in the justified termination of the employee.
17. _____: _____: _____: _____. When seeking to limit an employee's wrongful discharge recovery through the use of posttermination evidence, the employer bears the burden of proving the misconduct and its ramifications.
18. **Termination of Employment: Good Cause: Words and Phrases.** "Good cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.
19. **Termination of Employment: Evidence: Damages: Proof.** If an employer proves, through posttermination evidence, that the employee engaged in pretermination misconduct that would have resulted in the justified termination of the employee, the employee may not recover wrongful discharge damages.
20. **Evidence: Damages: Appeal and Error.** In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be

disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

21. **Termination of Employment: Proof.** The employer bears the burden of proving that a wrongfully discharged employee, in the exercise of reasonable diligence, could have obtained other employment.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Virgil J. Haggart, Jr., of Daub & Haggart, for appellant.

Robert F. Peterson, of Laughlin, Peterson & Lang, for appellee.

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

WHITE, J.

Benchmark Marketing and Consulting, Inc. (Benchmark), appeals the district court's judgment in favor of Thomas M. Schuessler for wrongful discharge from employment. The court awarded Schuessler damages of $167,089.93, as well as attorney fees and costs. We affirm in part, and in part reverse and remand for further proceedings.

On April 10, 1989, when he was fired by Benchmark's owner and president, David Haggart, Schuessler was Benchmark's vice president and chief operating officer. Schuessler's employment contract covered the period from January 1 to December 31, 1989. His compensation included a salary of $2,000 per week, plus a bonus of 35 percent of Benchmark's net profits. Benchmark operated a telemarketing business which placed luxury car owners in touch with prospective buyers. The fee for this service was often charged to the buyer's credit card.

After being fired, Schuessler brought suit for wrongful discharge. Benchmark cross-petitioned, seeking damages for, among other things, Schuessler's alleged breach of his employment contract. Prior to trial, federal agents raided Benchmark's offices, seizing the company's records and equipment. At the time of trial, a federal investigation of the company for mail and wire fraud was pending. The company twice moved the trial court to stay Schuessler's case, arguing

that a proper defense in the wrongful discharge suit would require disclosure of facts that might be incriminatory in the federal criminal investigation. The district court overruled both motions. After the court overruled the first motion to stay, Benchmark dismissed its cross-petition against Schuessler.

At trial, Schuessler established that he had met the sales quotas required by his contract and offered other evidence that he had complied with his contractual obligations. Benchmark alleged several reasons for Schuessler's termination, including (1) sexual harassment of at least one female employee, (2) Schuessler's unauthorized pay increase for a subordinate employee, (3) Schuessler's personal use of company time and equipment, and (4) Schuessler's failure to properly supervise the employees under his control.

The district court found that Schuessler had not acted in a manner warranting termination by Benchmark. The court further found that Schuessler had carried out his responsibilities with due diligence and in the best interests of Benchmark. The court awarded Schuessler damages of $167,089.93, attorney fees of $1,406.82, and costs. Benchmark then instituted this appeal.

Benchmark first asserts that the district court erred by refusing to stay the proceedings pending the outcome of the federal criminal investigation. Schuessler, Benchmark notes, was contractually responsible for training and supervising the telephone salespersons and for "maintaining the integrity of Benchmark in sales presentation." Benchmark argues that if the salespersons did indeed make misrepresentations to customers, it would indicate that Schuessler had not met his contractual obligations, and would thereby prevent his recovery for wrongful discharge. However, Benchmark reasons, such a showing might also subject the company and its employees to criminal sanctions. Benchmark concludes that by requiring it to proceed to trial, the district court prevented the company from properly defending itself and thus violated its due process rights. Despite the resourcefulness of Benchmark's argument, we cannot agree that the district court abused its discretion by denying the motions to stay.

There is no constitutional right to have civil proceedings

stayed pending the outcome of a criminal investigation. *Afro-Lecon, Inc. v. U.S.*, 820 F.2d 1198 (Fed. Cir. 1987); *S. E. C. v. First Financial Group of Texas, Inc.*, 659 F.2d 660 (5th Cir. 1981); *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805 (N.D. Cal. 1989). However, courts inherently possess the power to stay such proceedings when required by the interests of justice. *Amer. Life Ins. Co. v. Stewart*, 300 U.S. 203, 57 S. Ct. 377, 81 L. Ed. 605 (1937); *Landis v. North American Co.*, 299 U.S. 248, 57 S. Ct. 163, 81 L. Ed. 153 (1936); *Afro-Lecon, Inc., supra.*

The burden of establishing that a proceeding should be stayed rests on the party seeking the stay. See, *Landis, supra*; *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983); *Dentsply Intern., Inc. v. Kerr Mfg. Co.*, 734 F. Supp. 656 (D. Del. 1990). Furthermore, when the moving party seeks to stay a trial, the decision of whether to grant the motion is vested in the discretion of the trial court, and its decision will not be overturned on appeal absent an abuse of that discretion. See, *American Life Ins. Co., supra*; *Landis, supra*; *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied* 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974). In making its decision, the trial court should balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that proceeding will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof. See, *American Life Ins. Co., supra*; *Landis, supra*; *Gold, supra*; *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), *reh'g denied* 611 F.2d 1026 (5th Cir. 1980); *General Dynamics Corp., supra*; *Gordon v. Federal Deposit Insurance Corporation*, 427 F.2d 578 (D.C. Cir. 1970).

With these general principles in mind, we turn to Benchmark's argument. Although Benchmark properly argues that the failure to stay creates, at least, the *potential* for a constitutional violation, the company paints certain constitutional protections with too broad a brush.

In its brief, Benchmark contends that its employees

"primarily, if not exclusively," possessed the information regarding possible misrepresentations by salespersons. Brief for appellant at 16. Benchmark thus argues that the trial court, by refusing to grant the stay, presented the company and its employees with a Hobson's choice: "either [the employees] present such proof, and thereby risk self-incrimination in the pending federal criminal proceedings, or they do not, and thereby prevent Benchmark from fully defending itself in [Schuessler's case]." Brief for appellant at 16.

Only Benchmark was made a defendant to this action. Thus, only Benchmark may claim that proceeding to trial unconstitutionally hindered its ability to defend itself. Furthermore, as a corporation, Benchmark has no right to invoke the privilege against compulsory self-incrimination. See, U.S. Const. amends. V and XIV and Neb. Const. art. I, § 12 (hereinafter jointly referred to as Fifth Amendment protection); *Wilson v. United States*, 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771 (1911). Accord *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970). Moreover, because the Fifth Amendment protection is personal, Benchmark may not assert its employees' protection on their behalf. See, *United States v. Dowdy*, 486 F.2d 1042 (5th Cir. 1973), *cert. denied* 415 U.S. 992, 94 S. Ct. 1592, 39 L. Ed. 2d 888 (1974); *United States v. Goodwin*, 470 F.2d 893 (5th Cir. 1972), *cert. denied* 411 U.S. 969, 93 S. Ct. 2160, 36 L. Ed. 2d 691 (1973).

Therefore, Benchmark's only viable constitutional argument focuses on the conceivable invocation of the Fifth Amendment by every party possessing the information essential to Benchmark's defense. The company contends that requiring it to proceed to trial while unable to elicit this necessary information violates its due process right to a fair trial.

Benchmark's argument is not without some precedential support. In *Afro-Lecon, Inc., supra*, the U.S. Court of Appeals for the Federal Circuit addressed the inability of a corporation to provide information because its employees invoked the Fifth Amendment. In *Afro-Lecon, Inc.*, the plaintiff corporation moved to stay *its own suit* pending completion of related criminal proceedings against it. The administrative board which heard the corporation's claim

denied the stay and dismissed the suit because the corporation had failed to answer the defendant's interrogatories and a board-ordered accounting. Vacating the judgment, the court of appeals held that it was error to refuse the stay and dismiss the suit because, inter alia, the record indicated that the Fifth Amendment would be invoked by the employees possessing the information necessary to answer the interrogatories and accounting. As our later discussion will indicate, however, *Afro-Lecon, Inc.*, is distinguishable from the case at bar.

The parties have not cited, nor has our research discovered, any cases in which a defense has been hindered in the exact way that Benchmark claims its defense has. However, several cases, including *Afro-Lecon, Inc.*, have dealt with the analogous situation of a corporation's failure, or inability, to access the information necessary to answer interrogatories. See, e.g., *Kordel, supra*; *Afro-Lecon, Inc., supra*; *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied* 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974).

Under Fed. R. Civ. P. 33(a), a corporation which receives interrogatories is to appoint an agent "who shall furnish such information as is available to the [corporation]." See, also, Neb. Ct. R. of Discovery 33(a) (rev. 1992). Analogously, if Benchmark had a similar "agent" to testify, without fear of self-incrimination, regarding any misrepresentations made by operators, Benchmark could not claim a violation of its constitutional rights, for the company's only legitimate constitutional argument is that it could not elicit the information necessary to properly defend itself. (Recall that Benchmark has no Fifth Amendment privilege and cannot assert its employees' privilege on their behalf.)

Although federal courts have noted that a corporation cannot simply appoint an agent who will invoke the Fifth Amendment—thereby giving the corporation indirect Fifth Amendment protection—those same courts have allowed a partial exception to the rule 33(a) requirement where *no* agent can be found to answer the interrogatories without incriminating himself or herself. *Afro-Lecon, Inc., supra*; *General Dynamics Corp., supra*. See *Kordel, supra* (discussing

the possible use of a protective order pursuant to Fed. R. Civ. P. 26(c) (formerly rule 30(b)). In that limited situation, the federal courts have indicated that a protective order limiting or "staying" discovery may be appropriate during the pendency of the criminal proceedings. *Kordel, supra*; *Afro-Lecon, Inc., supra*; *General Dynamics Corp., supra*.

Despite those holdings, Benchmark's situation is distinguishable from the situations requiring protective orders for corporations which cannot elicit information essential to their cases. A stay of a civil action, especially a stay of indefinite duration, is an extraordinary remedy. And, as we have already noted, the burden of establishing the need for such a remedy falls upon the party seeking the stay, here, Benchmark. See *Landis v. North American Co.*, 299 U.S. 248, 57 S. Ct. 163, 81 L. Ed. 153 (1936) (stating that the applicant for a stay must make a clear showing of "hardship or inequity" if there is a fair possibility of damage to another party). Accord *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983). A stay of indefinite length would obviously damage Schuessler. Furthermore, Benchmark has failed to meet its burden.

In the "rule 33(a)" cases, the federal courts clearly limited the protective-order exception to "extreme cases, where no corporate agent can answer the propounded interrogatories without being subject to a 'real and appreciable risk' of self-incrimination." *General Dynamics Corp.*, 481 F.2d at 1210. See, also, *Kordel, supra*; *Afro-Lecon, Inc., supra*. Applying a similar test to the case at bar, we find that Benchmark has failed to show that it could find no individual to testify as to the relevant facts, and thus has not shown inequity in being required to proceed to trial.

Benchmark's motion to stay was accompanied by an affidavit from the company's attorney. The affidavit stated:

> Because of the similarity of the evidence and issues involved in the two matters, the Defendant and its officers and employees cannot present the testimony and evidence in this action which are necessary to defend against the Plaintiff's Petition, and which are necessary to prove the Defendant's Cross-Petition, without subjecting themselves to the possibility of incrimination in the pending

criminal investigation . . . .

The mere affidavit of Benchmark's attorney, without more, simply does not provide enough evidence of inability to defend to convince us that the district court abused its discretion when it denied the stay. Benchmark's workforce comprised approximately 25 employees. Of these 25, at least 5 did not work as salespersons, the individuals most likely to be criminally responsible for sales misrepresentations. Furthermore, we have no evidence that any employees, much less all of them, would actually invoke the Fifth Amendment.

Benchmark argues that it would have been futile and a "waste of the trial court's and the parties' time" to call its employees to the stand, only to have them invoke their Fifth Amendment privilege. Yet Benchmark could have deposed the employees, or even the sales representatives, to indicate that no agent could be found to introduce the necessary evidence. Such action, although perhaps time-consuming, is hardly an undue burden, in light of Benchmark's request for a stay of the proceedings for an indeterminate period of time.

Finally, Benchmark's showing is not aided by the statement that the company's "officers and employees cannot present the testimony and evidence in this action which are necessary to defend against the Plaintiff's Petition." Because Benchmark is concerned only with eliciting the evidence necessary for its defense, the question is whether *any person* could provide the information without fear of self-incrimination. Nothing in the affidavit or record indicates that only Benchmark's employees possessed the pertinent information. This insufficient showing is further highlighted by a statement from Benchmark's brief: "The knowledge and information necessary to present this proof is *primarily, if not exclusively*, in the possession of . . . Benchmark employees." (Emphasis supplied.) Brief for appellant at 16.

We will not speculate as to what evidence might have persuaded the district court to grant the stay or what showing would persuade us that the court abused its discretion. We simply hold that based on the showing made to it, the court did not err by denying the stay. The U.S. Supreme Court made a similar determination in *United States v. Kordel*, 397 U.S. 1, 90

S. Ct. 763, 25 L. Ed. 2d 1 (1970), wherein the Court reversed a decision of a U.S. Court of Appeals which addressed the propriety of a motion to stay proceedings or defer answers to interrogatories. The Supreme Court, addressing the movants' argument that a situation might arise where no agent could answer a corporation's interrogatories without self-incrimination, stated:

> [W]e need not decide this troublesome question. For the record before us makes clear that even though the [movants] had the burden of showing that the Government's interrogatories were improper, they never even asserted, *let alone demonstrated*, that there was no authorized person who could answer the interrogatories without the possibility of compulsory self-incrimination. To the contrary, *the record shows that nobody associated with the corporation asserted his privilege at all.*

(Emphasis supplied.) 397 U.S. at 9.

Furthermore, when we balance the benefits and hardships associated with denying the stay, we again find no abuse of discretion. The potential for an extremely long delay (no criminal charges had yet been filed) weighs in favor of denial. " 'Witnesses relocate, memories fade, and persons allegedly aggrieved are unable to seek vindication or redress for indefinite periods of time on end.' " *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 809 (N.D. Cal. 1989) (quoting *In re Mid-Atlantic Toyota Antitrust Litigation*, 92 F.R.D. 358 (D. Md. 1981)). The record indicates that at the time of trial, Schuessler had only recently found substitute employment, earning much less than he had at Benchmark; thus, an expeditious resolution would clearly benefit him. The Nebraska Constitution also calls for prompt resolution of disputes: "[E]very person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered *without denial or delay*." (Emphasis supplied.) Neb. Const. art. I, § 13. Finally, it would also benefit the court not to retain a dormant case on its docket for a period that could stretch into years.

The record does not indicate that Benchmark was deprived of a fair trial by the denial of its motion to stay. We may not, and

will not, speculate as to what privileges witnesses might have asserted or what defenses counsel might have raised had they been given the opportunity. We cannot conclude, based on the record before us, that the district court abused its discretion when it determined that the case should proceed to trial.

We now turn to the merits of the action before us. Restated, Benchmark alleges that the district court erred by (1) failing to find that Schuessler did not meet his burden of establishing that Benchmark did not have good cause to terminate him, (2) failing to find that Schuessler had materially breached his employment contract with Benchmark, (3) failing to find that Benchmark had good cause to terminate Schuessler, and (4) awarding excessive damages. Because we find the record insufficient to dispose of Benchmark's third contention, we find it necessary to remand the cause to the district court for further proceedings. However, to aid the district court in those proceedings, we will discuss the remaining issues presently before us and outline the ramifications of the court's findings on remand.

A contract for a definite term may not lawfully be terminated prior to the expiration of that term without good cause. *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017 (2d Cir. 1985) (applying New York law); *Eales v. Tanana Valley Medical-Surgical*, 663 P.2d 958 (Alaska 1983); *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 605 P.2d 963 (1980). Thus, Benchmark's termination of Schuessler's 1-year contract after 4 months was impermissible, absent good cause.

We have previously set forth the relative burdens in an action for breach of an employment contract. See *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). In *Stiles*, we stated that "the burden of proving the existence of a[n employment] contract and all the facts essential to the cause of action is upon the person who asserts the contract." *Id.* at 865, 438 N.W.2d at 496 (citing *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985)). However, our application of this rule to the facts in *Stiles* requires clarification. After stating the foregoing rule, we continued: "[The employee] thus had the burden of proving his contract of employment with [the employer] *and that* [*the employer*] *breached that contract by*

firing him for other than good cause. The burden then shifted to [the employer] to prove good cause indeed existed for [the employee's] discharge." (Emphasis supplied.) *Id.*

Our statement, as the emphasized language reflects, may be perceived as improvidently assigning too great a burden to both parties in an action for breach of an employment contract. Although our statement appears to give both parties the burden of proof on the same element, that is not the case. The employee must initially prove the existence of the contract, its terms and his compliance with them until his discharge, the employer's breach, and damages. See, *Smith, supra*; *Rosecrans, supra*; *Rasch v East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985). See, also, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), *appeal after remand* 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (1988). After he has done so, the burden then shifts to the employer to come forward with evidence that good cause existed for discharging the employee. *Stiles, supra*; *Pugh, supra*. See, also, *Stoffel v. Metcalfe Construction Co.*, 145 Neb. 450, 17 N.W.2d 3 (1945). If the employer produces sufficient evidence, the employee may rebut, and if in controversy, the issue goes to the trier of fact; however, the ultimate burden of proving wrongful termination remains with the employee. *Stiles, supra*; *Pugh, supra*.

Placing the *initial* burden of proving absence of good cause on the employee would lead to incongruous results. Doing so would require the plaintiff to anticipatorily rebut the employer's justifications for the termination. Rather, the employee proves absence of good cause simply by carrying the ultimate burden on the issue. See, *Stiles, supra*; *Pugh, supra*. We now proceed to the parties' contentions.

Benchmark first alleges that Schuessler has failed in his burden of proof. We disagree.

In a bench trial of a law action where the evidence is in conflict, this court, in reviewing the judgment, will presume that the trial court decided the controverted facts in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of an appellate court to reweigh or resolve conflicts in the evidence. *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb.

592, 456 N.W.2d 474 (1990); *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988).

As previously noted, Schuessler's initial burden was to prove the existence of the contract, its terms, his compliance with those terms until his discharge, the employer's breach, and damages. See, *Smith, supra*; *Pugh, supra*; *Rosecrans, supra*; *Rasch, supra*. He has done so. The record contains a copy of the contract, evidence of damages, proof that Schuessler was discharged 4 months into the 1-year contract, and testimony, which the trial court found credible, to the effect that Schuessler had complied with the contractual terms. Furthermore, there is competent evidence to support the court's finding that Benchmark's first three grounds for terminating Schuessler did not constitute good cause. (As we will discuss later, the court failed to make a finding on Benchmark's final ground for terminating Schuessler). Based on the record before us, we cannot say that the trial court erred in determining that Schuessler satisfied his burden of proof. Benchmark's argument to the contrary is without merit.

Benchmark next contends that the trial court erred by not determining that Benchmark had good cause to discharge Schuessler. Restated, Benchmark offers four "good causes" for Schuessler's discharge: (1) Schuessler's pay increase for a subordinate worker, (2) Schuessler's alleged failure to meet his contractual duties, (3) Schuessler's excessive personal use of Benchmark's time and property, and (4) Schuessler's alleged sexual harassment of Benchmark employees. In a related argument, Benchmark argues that the court erred by not finding that Schuessler materially breached the employment contract. Directly or indirectly, the trial court found for Schuessler on each ground.

Whether good cause existed for discharging an employee is a question of fact. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). The merit behind each of Benchmark's first three arguments regarding cause thus ultimately depends on the resolution of a factual question, namely: (1) whether Schuessler's award of a bonus to a subordinate employee was impliedly authorized by Haggart, (2) whether Schuessler met his contractual responsibility of adequately training and

supervising Benchmark's sales representatives and "maintaining the integrity" of Benchmark, and (3) whether Schuessler adequately reimbursed Benchmark for his use of the company's facilities.

We find it unnecessary to set out the evidence bearing on each of these arguments. Suffice it to say that the parties offered enough conflicting evidence on each point to place each question in controversy. In its findings of fact, the district court answered each of the above-enumerated questions in the affirmative and found generally in Schuessler's favor.

A civil verdict will not be disturbed unless clearly erroneous. *Home Fed. Sav. & Loan v. McDermott & Miller, ante* p. 136, 497 N.W.2d 678 (1993). The district court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. *Id.*; *State ex rel. Grams v. Beach, ante* p. 126, 498 N.W.2d 83 (1993). Furthermore, in determining whether the evidence is adequate to support the trial court's decision, we consider the evidence in the light most favorable to the successful party, resolving every controverted fact in that party's favor and giving that party the benefit of every reasonable inference deducible from the evidence. *Home Fed. Sav. & Loan, supra*; *In re Estate of Markus*, 232 Neb. 947, 442 N.W.2d 883 (1989); *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

Based on the evidence, we cannot say that the district court erred in determining that Benchmark's first three grounds for terminating Schuessler did not constitute good cause. We thus proceed to Benchmark's final argument regarding cause.

The last of Benchmark's arguments on this issue, and the most troubling, concerns Schuessler's alleged sexual harassment of at least one of Benchmark's female employees. Benchmark contends that the alleged activities warranted Schuessler's termination and thus precluded his recovery for wrongful discharge. Based on the record before us, we cannot determine whether Benchmark's argument has merit. We therefore remand to the district court for further proceedings on this issue.

The record contains testimony from Haggart and a female employee alleging conduct by Schuessler that may constitute

sexual harassment. However, in its order the district court stated: "The Court further finds that the alleged improper conduct by [Schuessler] with [Benchmark's] female employees did not form a basis for discharge *since disclosure of such contact, if any in fact occurred, was subsequent to [Schuessler's] termination by [Benchmark]*." (Emphasis supplied.) We cannot agree with the district court that post-termination evidence of employee misconduct occurring during employment does not affect an employee's wrongful discharge recovery. (Such evidence will hereinafter be referred to simply as "posttermination evidence.")

Whether posttermination evidence may limit a wrongful discharge recovery is a question of law. We are thus obligated to reach a conclusion independent of the trial court's decision. See *Howard v. City of Lincoln, ante* p. 5, 497 N.W.2d 53 (1993); *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

Although we have not previously done so, we now hold that posttermination evidence is admissible as bearing on the employee's recovery in a wrongful discharge suit. Faced with somewhat disparate holdings in cases addressing this issue, we have chosen to apply the following rules from those holdings.

Because posttermination evidence of employee misconduct is necessarily discovered after an employee has been terminated, it can hardly be said to have provided a reason or "cause" for the termination. See, *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988); *Flanigan v. Prudential Federal Sav. & Loan*, 221 Mont. 419, 720 P.2d 257 (1986), *appeal dismissed* 479 U.S. 980, 107 S. Ct. 564, 93 L. Ed. 2d 570. But see *Leahey v. Federal Exp. Corp.*, 685 F. Supp. 127 (E.D. Va. 1988). However, such evidence may limit the employee's recovery in a wrongful discharge case. Cf., *Wallace v. Dunn Const. Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) (addressing suit based on, inter alia, alleged sexual harassment); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989) (addressing suit based on age discrimination); *Summers, supra* (addressing alleged discriminatory termination of employee). Thus, once an employee has established a case of wrongful discharge, the employer may limit recovery by

using posttermination evidence to prove employee misconduct which would have resulted in the justified termination of the employee. Cf., *Wallace, supra*; *Smith v. General Scanning, Inc., supra*; *Summers, supra*. Because the employee has already established that the contract was terminated for a reason other than good cause, and because the posttermination evidence bears only on the amount of recovery, the employer bears the burden of proving the misconduct and its ramifications. Cf., *Wallace, supra*; *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). See, also, *Summers, supra*.

Applying the foregoing rules to the case at bar, it becomes clear that the cause must be remanded for further proceedings. Because the sexual harassment, if it occurred, bears on the amount of Schuessler's recovery, the district court must make additional factual findings regarding the alleged misconduct. Although the district court found that Benchmark's final ground for terminating Schuessler had not been discovered when Schuessler was discharged, additional questions remained to be answered, namely, whether Benchmark had proved that the alleged misconduct actually occurred and, if so, whether the misconduct would justify termination. Cf., *Wallace, supra*; *Smith v. General Scanning, Inc., supra*; *Summers, supra*. If those questions are answered affirmatively, Schuessler is not entitled to recover damages.

Our holding today is in accord with many courts that have held that if posttermination evidence would justify termination, the employee may not recover any damages for the period following the actual discharge. See, e.g., *In re Nagel*, 278 F. 105 (2d Cir. 1921); *Leahey v. Federal Exp. Corp., supra*; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N.W. 901 (1903). We are cognizant, however, that at least two federal courts, in dealing with suits for discriminatory terminations, have indicated that some recovery for the postdischarge period may be appropriate. Those courts indicated that even if the after-acquired evidence would justify termination, the employee may still recover backpay for the period between the actual discharge and the time the employer discovered the misconduct. *Wallace, supra*; *Smith v. General Scanning, Inc., supra*. We choose not to adopt that rule; while these deci-

sions present persuasive reasoning on the relevancy of posttermination evidence, we find them distinguishable regarding the amount of the employee's recovery.

In those federal cases permitting prediscovery backpay, the rationale for allowing recovery appears to be that the employer should not be excused from its discrimination; i.e., the employer's liability should not depend on whether the employee also engaged in misconduct. See, *Wallace, supra*; *Smith v. General Scanning, Inc., supra*. That situation is vastly different from the simple breach of contract action now before us.

The aforementioned federal cases dealt with actions based on statutes which specifically prohibit discrimination. See, *Wallace, supra* (ruling on claims under 42 U.S.C. § 2000e (1988) and the federal Equal Pay Act of 1963, 29 U.S.C. §§ 206 and 215 (1988)); *Smith v. General Scanning, Inc., supra* (ruling on a claim under the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 through 634 (1988)). The liability associated with the employer's misconduct thus arises independently of the contract or any activity by the employee.

Breach of a contract does not give rise to the same concerns or demand the same protections as does an action based on discrimination. Even more important, however, is the fact that in the present case Benchmark's liability is predicated solely on the contract. Assuming for the moment that the sexual harassment allegations are true, Schuessler should not be able to recover damages.

Sexual harassment clearly constitutes good cause for discharge. See *Stiles*, 231 Neb. at 865, 438 N.W.2d at 496 (stating " 'good cause' for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice"). Thus, when an employer learns that an employee has sexually harassed a coworker, the employer may, employing good cause, discharge the offending employee without liability. Cf. *id.* This being the case, it would be absurd to hold that the employee may recover if his wrongdoing is *covert*. If an employer proves, through posttermination evidence, that the employee engaged in

pretermination misconduct that would have resulted in the justified termination of the employee, the employee may not recover wrongful discharge damages.

We thus remand this issue to the district court for proceedings consistent with the aforementioned rules. On remand, the court must first determine whether the alleged misconduct actually occurred. If so, the court should then determine whether Schuessler's activity would justify his termination. If both inquiries generate affirmative responses, Schuessler will not be entitled to damages for the period following his termination. However, if the court answers one of the questions in the negative, Schuessler will be entitled to recovery. Because the trial court's damages award might still apply, we proceed to Benchmark's final assignment of error, that Schuessler's original damages award was excessive.

The district court awarded Schuessler damages of $167,089.93, attorney fees of $1,406.82, and costs. The court based its award on this language of the employment contract: "Schuessler . . . will receive a salary of $2,000.00 per week . . . . In addition, Schuessler will receive a bonus of thirty-five percent (35%) of net profits of Benchmark." Although Benchmark does not dispute the court's computation of salary damages, it contends that the court erred by awarding Schuessler damages based on a bonus of $96,089.93. We disagree.

Benchmark first argues that Schuessler was entitled to no bonus because, in 1989, Benchmark had a net loss of $19,157. At trial, Schuessler presented income statements indicating Benchmark's net income from March 31 to October 31, 1989. Having no such income statements for November and December, Schuessler's bonus computation did not cover those final 2 months.

To rebut Schuessler's showing, Benchmark then introduced a federal tax return filed for 1989. The return represented a consolidated return for Benchmark and another corporation. The return indicated ordinary income of $3,321. On the bottom of the return was handwritten: "Income includes $22,478 interest income from sale of former business. Therefore, operations *lost* $19,157 for 1989."

The district court awarded Schuessler damages for loss of a bonus, basing the damages only on the period from April through October 1989. The court specifically noted that "no evidence was offered for the profit or loss of [Benchmark] for the months of November and December."

In a bench trial, the judge acts as the trier of fact. See *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990). We have consistently held that on appeal, the fact finder's determination of damages is given great deference:

> In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. . . . The amount of damages to be awarded is one solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.

Union Ins. Co., 234 Neb. at 263, 450 N.W.2d at 665-66. See, also, *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990); *Schweitz v. Robatham*, 194 Neb. 668, 234 N.W.2d 834 (1975).

Based on the record, we cannot say that the district court erred in its computation of damages. Nor can we say that the court erred when it determined that the tax return provided no evidence of *Benchmark's* profits or losses during November and December. Sufficient evidence was offered, however, to support a damages award for the period from April to October 1989.

Benchmark raises two final arguments regarding damages. First it argues that the district court failed to take into account a bonus that Schuessler was paid upon his discharge. We note that Benchmark's only evidence that this payment actually occurred was a statement by Haggart. Furthermore, the district court calculated Schuessler's bonus only for the period *following* March 31. The income statements indicate that prior to that date, Benchmark had accumulated enough income to warrant a bonus payment at least as large as the one Schuessler allegedly received. Other evidence indicates that Schuessler had received no bonus for the period preceding his termination. There is no

clear error in the court's refusal to account for the alleged payment.

Benchmark finally argues that the district court erred when it determined that Schuessler had made reasonable efforts to mitigate damages. Benchmark bore the burden of showing that Schuessler, in the exercise of reasonable diligence, could have obtained other employment. See *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). The record adequately supports the district court's finding regarding Schuessler's efforts. We cannot say that the court erred in its determination, and we thus dispose of Benchmark's final argument.

We affirm the district court's denial of Benchmark's motion to stay the proceeding. We also affirm the court's determinations that Benchmark's first three grounds for terminating Schuessler did not constitute good cause. We reverse the court's determination that posttermination evidence of employee misconduct does not affect the employee's recovery, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AMCO INSURANCE COMPANY, APPELLANT, V. TODD R. NORTON ET AL., APPELLEES.

500 N.W.2d 542

Filed May 21, 1993. No. S-91-261.

1. **Summary Judgment.** Summary judgment is to be granted only when the record discloses that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
3. **Insurance: Contracts: Proof.** The insurer bears the burden of establishing that an event falls within an exclusionary clause.

4. **Insurance: Words and Phrases.** An insured's niece is a relative of the insured.
5. **Insurance: Contracts: Words and Phrases.** For purposes of a homeowners insurance policy which does not otherwise define the phrase, "resident of the named insureds' household" means one who dwells or has an abode under the same roof as the named insureds for a duration of sufficient length so that the occupiers can be said to compose a family; the factors to be considered in determining whether that test has been met include, but are not limited to, the intent of the parties, the formality of the relationship between the person in question and the members of the named insureds' household, the permanence or transient nature of that person's residence therein, the absence or existence of another place of lodging for that person, and the age and self-sufficiency of that person.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Affirmed.

Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellees.

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

CAPORALE, J.

The plaintiff-appellant, Amco Insurance Company, seeks a declaration that the homeowners policy it issued to the defendants-appellees Todd R. and Cindy S. Norton, husband and wife, does not provide coverage for the bodily injury sustained by their niece, the defendant-appellee Kristine K. Fox. Finding that the policy does provide such coverage, the district court granted the defendants' motion for summary judgment. Amco has appealed, assigning that ruling as error. We affirm.

We begin by recalling once again that summary judgment is to be granted only when the record discloses that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See, *Viking Broadcasting Corp. v. Snell Publishing Co., ante* p. 92, 497 N.W.2d 383 (1993); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

We also bear in mind that an insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made, *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993), and that it is the insurer who bears the burden of establishing that an event falls within an exclusionary clause, *id.* and *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993).

With those precepts before us, we begin our analysis by noting that under the policy, Amco agreed to pay damages for bodily injury sustained in an accident occurring at the Nortons' dwelling, unless the injury was suffered by an insured. "Insured" is defined by the policy as consisting of the Nortons, as the named insureds, and their relatives if "residents of [the named insureds'] household."

Because the Nortons had two small children and were expecting a third, they engaged their 17-year-old niece to be a babysitter for them during the summer of 1989 until she resumed her schooling in August. During the relevant time, the niece lived and worked at the Nortons' dwelling on weekdays and an occasional Saturday, watching the Norton children and preparing meals as needed. She was paid an hourly wage, but was not charged for room or food. Initially, she shared a room with the Nortons' daughter, but soon relocated to a couch.

The niece did not take all of her clothes, jewelry, furniture, or other possessions to the Nortons', and she continued to receive mail and telephone calls at her parents' house, some 17 miles away.

The niece remained at the Nortons' dwelling on Sunday, July 2, because she was planning to ride with them to a family reunion. While waiting to make the trip, she helped the husband construct a swing set and, in the course of doing so, sustained an accidental bodily injury.

Although under the circumstances involved here one's status as an insured is dependent upon being both a relative of the Nortons and a resident of their household, the policy defines neither the word "relative" nor the phrase "residents of [the named insureds'] household."

In defining these terms, we conclude that the niece

indisputably qualifies as a relative. *Insurance Co. of North America v. Stevens*, 425 F.2d 704 (5th Cir. 1970) (nephew is a relative); *Adams v. Simpson*, 358 Mo. 168, 213 S.W.2d 908 (1948) (nieces and nephews are relatives of testator). Indeed, none of the parties claim otherwise. Thus, the resolution of this case depends upon whether the niece was, at the time of her injury, a resident of the Nortons' household.

We have previously declared that for purposes of an omnibus clause extending liability coverage to members of the named insured's household, the term "household" means " '[t]hose who dwell under the same roof and compose a family.' " *Andrews v. Commercial Casualty Ins. Co.*, 128 Neb. 496, 500, 259 N.W. 653, 655 (1935), quoting Webster's Dictionary. Accord, *Allied Mut. Ins. Co. v. Musil*, 242 Neb. 64, 493 N.W.2d 171 (1992); *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971).

We have also observed that " '[t]o reside' and its corresponding noun *residence* are chameleon-like expressions, which take their color of meaning from the context in which they are found." (Emphasis in original.) *Huffman v. Huffman*, 232 Neb. 742, 749, 441 N.W.2d 899, 904 (1989). The word "residence" has been described as being "like a slippery eel, and the definition which fits one situation will wriggle out of our hands when used in another context or in a different sense." *State v. Tustin*, 322 S.W.2d 179, 180 (Mo. App. 1959).

Our Legislature has found occasion to define "residence" for purposes of elections as "that place at which a person has established his home, where he is habitually present, and to which when he departs he intends to return." Neb. Rev. Stat. § 32-107 (Reissue 1988). Moreover, our solons have declared that in regard to special education, the "[r]esidence of a child shall mean the legal residence of the parent or legal guardian." Neb. Rev. Stat. § 79-3311 (Reissue 1987).

For purposes of a dissolution action, this court has declared that "residence is the result of or achieved by a person's physical presence and living at a location and does not require an intention to stay permanently in the location." *Huffman v. Huffman*, 232 Neb. at 749, 441 N.W.2d at 904.

And in *Allied Mut. Ins. Co. v. Musil*, we held that a son who

lived with his parents at the time of the questioned accident, whose parents maintained a room for him at their home while he attended college, who made frequent trips home during the school year, and who maintained his local checking account and local church membership was a resident of the parents' household, notwithstanding that he lived elsewhere during the months he attended a university.

But neither our statutory law nor our case law has heretofore settled upon the meaning of "resident," as used in a homeowners insurance policy which does not itself define the word. In now undertaking that task, we look to the decisions of other jurisdictions for guidance.

Citing *Hanson v. P. A. Peterson Home Ass'n*, 35 Ill. App. 2d 134, 182 N.E.2d 237 (1962), Black's Law Dictionary 1309 (6th ed. 1990) states that " 'resident' when used as a noun, means a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less, duration; it signifies one having a residence, or one who resides or abides."

The phrase "residents of the named insured's household" has been held by a Florida court to mean that a " 'resident is more than a mere visitor or transient, but lives at a place with additional attachments of such significance as to render that person a more or less consistent part of the community.' " *Puente v. Arroyo*, 366 So. 2d 857, 858 (Fla. App. 1979), *cert. denied* 376 So. 2d 75 (Fla.).

The Wisconsin Supreme Court defined "resident of the household" for purposes of a farm insurance policy in *National Farmers Union P. & Cas. Co. v. Maca*, 26 Wis. 2d 399, 408, 132 N.W.2d 517, 521-22 (1965):

> We think that one is not a resident of the household or member of the family if, even though he has no other place of abode, he comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable. If, however, the circumstances of his stay are otherwise consistent with a family or household relationship, and his stay is likely to be of substantial duration, the fact that he attempts to find employment, gaining which he would live elsewhere, would not, in our

opinion, prevent his being a resident of the household or a member of the family.

It has also been noted that "no one factor is controlling but that all of the elements must combine to a greater or lesser degree in order to establish the relationship." *Pamperin v. Milwaukee Mut. Ins. Co.*, 55 Wis. 2d 27, 37, 197 N.W.2d 783, 789 (1972).

In defining the phrase "residents of the same household," Washington courts have considered the intent of the person in question, the formality or informality of the relationship between that person and the members of the household at issue, the relative propinquity of the dwelling units, and the existence of another place of lodging for the person in question. See, *GMAC v. Grange Insurance*, 38 Wash. App. 6, 684 P.2d 744 (1984), *review denied* 102 Wash. 2d 1015; *Pierce v. Aetna Cas. and Surety Co.*, 29 Wash. App. 32, 627 P.2d 152 (1981).

A Colorado court has held that for purposes of interpreting the phrase "residents of [the insured's] household," the following factors are important: the subjective or declared intent of the individual, the formality or informality of the relationship between the individual and the members of the household, the existence of another place of lodging by the alleged resident, and the relative permanence or transient nature of the individual's residence in the household. *Iowa Nat'l Mutual Ins. v. Boatright*, 33 Colo. App. 124, 516 P.2d 439 (1973).

In determining whether an individual is a "resident of the same household," the Arizona courts consider: the individual's presence in, or absence from, the named insured's home on the date of the occurrence; the reasons or circumstances relating to the absence or presence; the relationship of the individual to the named insured; the living arrangements of the individual in earlier time periods; the individual's subjective or declared intent with respect to the place of residence; and the existence of a second place of lodging. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 151 Ariz. 591, 729 P.2d 945 (Ariz. App. 1986); *Mid-Century Ins. Co. v. Duzykowski*, 131 Ariz. 428, 641 P.2d 1272 (1982).

Wisconsin utilizes a tripartite test in applying "resident or

member of a household" where the persons in question are living under the same roof; in a close, intimate, and informal relationship; and where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship " 'in contracting about such matters as insurance or in their conduct in reliance thereon.' " *Pamperin v. Milwaukee Mutual Ins. Co.*, 55 Wis. 2d at 37, 197 N.W.2d at 788-89, quoting *National Farmers Union P. & Cas. Co. v. Maca, supra*.

The Wisconsin approach has been embraced by the courts of Minnesota, e.g., *Mutual Service Cas. Ins. Co. v. Olson*, 402 N.W.2d 621 (Minn. App. 1987), which also look to the following factors: the age of the person, whether a separate residence is established, the self-sufficiency of the person, the frequency and duration of the stay in the family home, and the intent to return. *Wood v. Mutual Service Cas. Ins. Co.*, 415 N.W.2d 748 (Minn. App. 1987).

It is obvious from the review of the foregoing decisions that "resident" is an elastic and amorphous word having different shades of meaning depending upon the context in which it is employed. Moreover, as a general rule, a person can have more than one place of residence. See, also, *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979); *Mutual Service Cas. Ins. Co. v. Olson, supra*. Those being the circumstances, we conclude that for purposes of a homeowners insurance policy which does not otherwise define the phrase, "resident of the named insureds' household" means one who dwells or has an abode under the same roof as the named insureds for a duration of sufficient length so that the occupiers can be said to compose a family. The factors to be considered in determining whether that test has been met include, but are not limited to, the intent of the parties, the formality of the relationship between the person in question and the members of the named insureds' household, the permanence or transient nature of that person's residence therein, the absence or existence of another place of lodging for that person, and the age and self-sufficiency of that person.

The record here reveals that it was the manifest intent of the parties for the niece to remain at the Nortons' dwelling only

during the summer months, and then merely during the weekdays and an occasional Saturday. That she was being compensated for her time and services casts a shadow of formality on the relationship, notwithstanding the fact that she was a relative. Furthermore, the record is barren of any evidence indicating any degree of permanence in the living arrangement. Indeed, it appears the niece took with her only those belongings necessary for her brief stays at the Nortons' dwelling and that she continued to receive her mail and telephone messages at her parents' home. Moreover, the record fails to establish that she was emancipated and was no longer dependent upon her parents for the necessities of life. Additionally noteworthy is that after her injury, the niece returned to her parents' home, not the Nortons' dwelling.

There being no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from those facts, and the defendants being entitled to judgment as a matter of law, the judgment of the district court is affirmed.

The defendants, having moved for an attorney fee and having complied with Neb. Ct. R. of Prac. 9F (rev. 1992), are awarded the sum of $3,000 to apply toward the services and expenses of their attorneys in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. EVERETT SILEVEN, APPELLANT, V. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEE.

500 N.W.2d 179

Filed May 21, 1993. No. S-91-274.

1. **Mandamus.** Mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear.
2. _____. Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested and that the respondent is legally obligated to act; the duty to act must be imposed by law and must be clear.

3. **Statutes.** A litigant who invokes the provisions of a statute may not challenge its validity.
4. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court.

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

Everett Sileven, pro se.

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

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

BOSLAUGH, J.

The relator, Everett Sileven, commenced this action on August 7, 1990, to obtain a writ of mandamus requiring the respondent, Robert M. Spire, as the Attorney General of the State of Nebraska, to turn over documents requested by the relator.

Mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear. *State ex rel. Thompson v. Alderman*, 230 Neb. 335, 431 N.W.2d 625 (1988).

Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested and that the respondent is legally obligated to act; the duty to act must be imposed by law and must be clear. *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87 (1983), *cert. denied* 463 U.S. 1214, 103 S. Ct. 3554, 77 L. Ed. 2d 1400.

On May 7, 1990, the relator wrote to the respondent, stating in pertinent part as follows:

> [T]his is to request that you or your office would review any files relative to Everett Sileven and/or the Faith Baptist Church in Louisville, Nebraska for the years 1977 through the current year of 1990.
>
> The purpose of this review would be to find any handwritten notes, telephone call logs, correspondence or any other written documents concerning the Attorney General's office requesting or cooperating with the

> Internal Revenue Service, the F.B.I. and the Secret Service in investigations of me, members or guests of the Faith Baptist Church.
>
> . . . .
>
> We are interested in any kind of information that would also be relevant to wiretaps, or surveillance by the Highway Patrol or cooperative efforts between the Highway Patrol, the Cass County Sheriff's Office and Federal Officers.

On July 16, 1990, William L. Howland, an assistant attorney general, under the respondent's name, replied to the relator denying his request. The letter stated that the information requested involved the work product of an attorney relating to litigation or involved records developed or received by law enforcement agencies constituting part of an examination, investigation, or intelligence information and was, therefore, exempt from public disclosure pursuant to Neb. Rev. Stat. § 84-712.05(4) and (5) (Reissue 1987).

On October 31, 1990, the relator filed an "Amended Petition/Motion for Mandamus with Affidavit." On November 29, a hearing was held at which was introduced an affidavit of Howland stating that while Howland was employed as an assistant attorney general, he had received information questioning the lawfulness of certain financial activities of the relator and possibly others. Based on that information, Howland had requested law enforcement officers of the Nebraska State Patrol to conduct an investigation for the purpose of determining whether a basis existed for the filing of criminal charges. Thereafter, Howland received reports from law enforcement agencies regarding the investigation.

Evidence introduced by the relator showed that Angelo Stennis, special agent for the Internal Revenue Service, testified in a federal court proceeding that the matters for which the relator had been indicted had come to light from information obtained from the Nebraska State Patrol.

Charles Phillips, an investigator for the Nebraska State Patrol, testified in the federal court proceedings that he was assigned to conduct an undercover investigation of a business meeting held by the relator on January 27, 1988. The

investigation was initiated at the request of the Nebraska Attorney General's office to determine if there was any criminal conduct.

The Attorney General's office had been contacted by Representative Virginia Smith's office, which had received a letter from a constituent about possible fraudulent activity of the relator regarding alleged investment opportunities in a machine to produce electricity, which machine was to be discussed at a seminar on January 27, 1988, at a Holiday Inn in Omaha, Nebraska.

Investigator Phillips attended the seminar, secretly tape-recorded conversations during the meeting, and acquired a packet of information regarding American Financial Services. Additionally, Investigator Phillips learned about a company doing business in Ventura, California, called Conserve Financial Services, which was allegedly offering the electric generator.

Investigator Phillips further testified that following his investigation of the January 27, 1988, meeting, he contacted the Ventura County Sheriff's Department to get further information on allegations of fraudulent business activity regarding investment in the electric generator.

At the request of the Internal Revenue Service, Investigator Phillips provided it with a packet of information on American Financial Services.

Investigator Phillips testified that reports were written regarding the January 27, 1988, meeting he had investigated. Those reports were kept at the headquarters of the Nebraska State Patrol and were not forwarded to the respondent.

The trial court ordered the respondent to specifically describe the requested documents in his possession with respect to dates, nature, and content. As to each document listed, the respondent was ordered to specify the statutory exception claimed.

On January 15, 1991, the respondent filed a list specifically describing 19 documents and enumerating the claimed exceptions. The list of documents also contained a statement indicating that the closed files of the respondent's office which predated the office's computerized system of maintaining

records could not be located after diligent search.

On February 14, 1991, the trial court ordered the respondent to furnish the relator copies of three documents to which no exceptions were claimed. As to all other documents in the respondent's custody, the trial court found that the respondent could decline to disclose such information in accordance with the exceptions in § 84-712.05.

The relator has appealed to this court from the order of February 14, 1991, and his assignments of error can be consolidated into three basic contentions. First, the relator claims that the district court erred by not using a standard different from that applicable to the general public to his request for information because he is a person in interest under Neb. Rev. Stat. § 29-3501 et seq. (Reissue 1989). Second, the relator asserts that the district court erred in concluding that the exceptions set forth in § 84-712.05(4) and (5) apply to the requested records in the possession of the respondent. Finally, the relator contends that § 84-712.05 is unconstitutional as applied to him.

The relator claims that the district court erred in concluding that the exceptions set forth in § 84-712.05(4) and (5) apply to the requested records in the possession of the respondent.

Section 84-712.05 lists records which may be withheld from the public, including the following:

> (4) Records which represent the work product of an attorney and the public body involved which are related to preparation for litigation, labor negotiations, or claims made by or against the public body, or which are confidential communications as defined in section 27-503;
>
> (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training.

A review of the list of documents filed by the respondent shows that documents 1 through 7 involve an investigation and

prosecution of violations of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. § 49-1401 et seq. (Reissue 1988 & Cum. Supp. 1992). Documents 8 through 15, 18, and 19 involve an investigation by the Nebraska State Patrol, at the request of the Nebraska Attorney General's office, into fraudulent business activities. Document 16 involves an investigation being conducted by the Missouri Attorney General's office into fraudulent activities. Document 17 is described as a Mike Royko editorial.

The respondent claimed no statutory exception to disclosure of documents 3, 11, and 17, and the trial court ordered that those documents be provided to the relator.

As to the remaining documents, they fall within the plain and ordinary meaning of the language of the exceptions in § 84-712.05(5) because they are records developed or received by law enforcement agencies as part of an investigation, and the trial court did not err in denying the relator's request for those documents.

The relator argues that he has a greater interest in obtaining the records he requested from the respondent because he was facing criminal charges in federal court. The relator claims that since he is a person in interest as defined in § 29-3514, he is entitled to review his "criminal history record information" as provided by § 29-3525.

The "criminal history record information" the relator claims he is entitled to review is defined as

> information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of issuance of arrest warrants, arrests, detentions, indictments, charges by information, and other formal criminal charges, and any disposition arising from such arrests, charges, sentencing, correctional supervision, and release. Criminal history record information shall not include intelligence or investigative information.

§ 29-3506.

The type of information defined in § 29-3506 was not requested by the relator. The review provided by § 29-3525 is limited to criminal history record information, which by

definition is not investigative information.

Neb. Rev. Stat. § 84-712 (Reissue 1987) provides: "Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in section 84-712.01, are hereby fully empowered and authorized to examine the same . . . ."

The relator sought information pursuant to § 84-712, which applies equally to all persons without regard to the purpose for which the information is sought. The information requested by the relator consists of records concerning an investigation of him and is specifically excluded from review under § 29-3506 as well as § 84-712.05(5).

Finally, the relator asserts that § 84-712.05 is unconstitutional as applied to him because he was denied his right to a fair trial in federal court without the documents he requested.

The relator's argument is without merit, because a litigant who invokes the provisions of a statute may not challenge its validity, nor seek the benefit of such statute and in the same action and at the same time question its constitutionality. See *In re Dissolution of School Dist. No. 22*, 216 Neb. 89, 341 N.W.2d 918 (1983). Furthermore, the relator did not raise this issue before the district court, and this court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. See *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993).

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF CITY OF LINCOLN, NEBRASKA. CITY OF LINCOLN, NEBRASKA, DOING BUSINESS AS LINCOLN ELECTRIC SYSTEM, APPELLANT, V. NORRIS PUBLIC POWER DISTRICT, APPELLEE.

500 N.W.2d 183

Filed May 21, 1993. No. S-91-430.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Legislature: Intent.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
5. **Statutes.** To the extent there is a conflict between two statutes on the same subject matter, the specific statute prevails over the general statute; where the general and special provisions of statutes are in conflict, the general law yields to the specific.
6. **Public Utilities: Electricity.** Absent the concurrence of the suppliers, the only means of obtaining a modification of a service area is by meeting the requirements set forth in Neb. Rev. Stat. § 70-1011 (Reissue 1990), that is, by establishing that the present supplier cannot or will not furnish adequate electrical service or that its doing so involves a wasteful and unwarranted duplication of facilities.
7. **Actions: Appeal and Error.** The law of the case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.

Appeal from the Nebraska Power Review Board. Affirmed.

Charles D. Humble and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Patrick W. Healey, of Healey Wieland Law Firm, for amicus curiae Nebraska Rural Electric Association.

Glenda J. Lanik for amici curiae League of Nebraska Municipalities and Nebraska Municipal Power Pool.

Patrick W. Healey, of Healey Wieland Law Firm, for amicus curiae Cornhusker Public Power District.

Kenneth M. Olds, of Olds and Pieper, for amicus curiae Nebraska Electric Generation and Transmission Cooperative, Inc.

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

CAPORALE, J.

I. STATEMENT OF CASE

The applicant-appellant, City of Lincoln (doing business as Lincoln Electric System), sought from the Nebraska Power Review Board a modification of the city's electrical service area so as to permit the city to supply electrical services in an area now served by the protestant-appellee, Norris Public Power District. Prior to hearing, Norris unsuccessfully moved to dismiss the application on the ground that the city had not pled facts entitling it to the relief it sought. The matter then proceeded to hearing. At the close of the city's evidence, Norris successfully moved for dismissal on the ground that the city had failed to establish facts entitling it to a modification. The dispositive assignments of error asserted by the city may be summarized as claiming that the board (1) misinterpreted the applicable statutes and (2) failed to apply the law of the case. We affirm.

II. CONTENTIONS OF PARTIES

In general, the city alleges that as the result of an annexation, it acquired planning and zoning jurisdiction beyond its corporate limits and into the subject area, where Norris presently supplies electrical services. Claiming that it must plan for and be prepared to meet the increased demand for electrical services created by the continuing urbanization of areas within its planning and zoning jurisdiction, the city asserts that its

service area must be modified under the provisions of Neb. Rev. Stat. § 70-1007 (Reissue 1990).

Norris' position is that not only did the city fail to allege facts entitling it to a modification of its service area, it failed to prove facts entitling it to such.

III. THE RECORD

The record establishes the city's planning and zoning jurisdiction over the subject area, which consists of approximately 6 square miles falling within Norris' service area and contains 28 consumers of Norris' electrical services.

The record further demonstrates that the city has acquired other areas previously served by Norris and integrated them into the city's system; however, considerable effort, and apparently expense, was required to conform Norris' installations to the city's standards.

For example, the city uses a three-phase circuit with cable rated at 15,000 volts capable of carrying 580 to 590 amperes. In contrast, Norris uses smaller cable capable of carrying only 200 amperes. The city typically needs between 3 to 5 years of leadtime in order to design and construct the urban electrical delivery system it uses. Optimally, the city locates its substations on 2- to 2 1/4-mile centers, looped so that the various substations back each other up in the event of breakdowns, thus avoiding losses of electrical services to its consumers. When an area has already been developed, the process of obtaining the needed rights-of-way to construct substations becomes difficult and expensive. Moreover, placing larger equipment into an existing neighborhood is disruptive. Therefore, the city prefers to begin serving an area prior to active development.

Although the contestants have been able to agree on day-to-day operational matters, Norris has refused to transfer any territory or customers to the city. It has even refused to engage in any planning with regard to future transfers until annexation has actually taken place. In the city's view, waiting until annexation or just before to engage in joint planning is too late—"the interface between an urban system and a rural system occurs better in an area of lower density than higher density." The city would like to establish a "set of mutually

agreeable items that would indicate how the parties would plan a transition from one utility to another as the area grows."

The city also adduced evidence that it has grown both in area and population and will continue to do so into the foreseeable future and that the subject area will be developed and be annexed at some unspecified future time. In comparison to peer utilities, the city "perform[s] very well" in terms of outages and does so at competitive rates. Indeed, if the city had been serving the subject area in 1989, the 28 consumers involved would have paid almost 19 percent less for their electricity. However, the city will need to acquire increased electrical capacity, and as a consequence, its average rate is more likely to increase than to decrease.

There is no evidence that Norris is unable to service the consumers in the subject area or that such service involves a wasteful and unwarranted duplication of facilities.

IV. ANALYSIS

With the foregoing background, we proceed to a consideration of each of the city's two dispositive and summarized assignments of error.

1. Interpretation of Statutes

The first of these assignments of error claims that the board misinterpreted the applicable statutes. In addition to § 70-1007, mentioned in part II above, the statutes which control the resolution of the substantive issues in this case are found at Neb. Rev. Stat. §§ 70-1005, 70-1008, 70-1010(1), and 70-1011 (Reissue 1990).

Section 70-1005 provides:

> Any supplier may at any time on or after July 1, 1964, apply to the board to establish its service area. In such case and in all cases where agreements have not been entered into, including cases arising under section 70-1008, the secretary shall give written notice to the parties involved citing them to appear at a time, not less than thirty days thereafter, and at a place specified in the notice for a hearing upon the matter of establishing the service areas concerned in the notice. The provisions of this section shall not apply to service within the corporate limits of any

municipality.

Section 70-1007 reads:

> After the hearing, the board shall make an order establishing the service areas in the matter covered by the notice. In determining any such matter, the board shall seek to carry out the policy stated in section 70-1001. It shall give such consideration as is appropriate in each case to the following:
>
> (1) The supplier best able to supply the load required;
>
> (2) The most logical future supplier of the area;
>
> (3) The desires of the supplier with respect to loads and service areas it wishes to serve;
>
> (4) The ability to provide service at costs comparable to other suppliers in the service area and the immediate costs to the ultimate consumers involved in the transfer; and
>
> (5) The ability of the supplier to cope with the problems of expanding loads and increased costs.

Neb. Rev. Stat. § 70-1001 (Reissue 1990) declares that in order to make adequate electric service available at as low an overall cost as possible, it is the policy of the State to avoid and eliminate conflict and competition among the various entities furnishing electric energy, to avoid and eliminate the duplication of facilities and resources, and to facilitate the settlement of rate disputes.

Section 70-1008 proclaims:

> In the absence of an agreement between the suppliers affected and notwithstanding the provisions of subdivisions (1) to (5) of section 70-1007:
>
> (1) Existing service areas presently designated by agreements and exhibits filed with and approved by the board, or previously ordered by the board, shall remain and be established as certified service areas.
>
> (2) A municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the board, to serve newly annexed areas of such municipality. Electric distribution facilities and customers of another supplier in such newly acquired certified service area may be acquired, in accordance with the procedure and criteria set forth in

section 70-1010 . . . .

(3) All retail power suppliers having adjoining certified service areas shall engage in joint planning with respect to customers, facilities, and services, taking into account the considerations specified in section 70-1007, including the possibility that an area may be annexed by a municipality within a reasonable period of time.

Section 70-1010(1) specifies, in relevant part:

The board shall have authority upon application by a supplier at any time to modify service areas or customers to be served as previously established. The same procedures as to notice, hearing, and decision shall be followed as in the case of an original application. Suppliers shall have authority by agreement to change service areas or customers to be served with the approval of the board.

The pertinent portion of § 70-1011 recites:

Except by agreement of the suppliers involved, no supplier shall offer electric service to additional ultimate users outside its service area or construct or acquire a new electric line or extend an existing line into the service area of another supplier for the purpose of furnishing service to ultimate users therein without first applying to the board and receiving approval thereof, after due notice and hearing under rules and regulations of the board. Such approval shall be granted only if the board finds that the customer or customers proposed to be served cannot or will not be furnished adequate electric service by the supplier in whose service area the customer is located, or that the provision thereof by such supplier would involve wasteful and unwarranted duplication of facilities.

(a) Scope of Review

Stripped to its essence, the city's position is that § 70-1010(1) requires that its application be judged under the standards set forth in § 70-1007. The gravamen of Norris' position, on the other hand, is that the board may modify an existing service area only when the conditions set forth in § 70-1011 are met.

We are thus confronted with a matter of statutory

interpretation, a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Universal Assurors Life Ins. Co. v. Hohnstein*, *ante* p. 359, 500 N.W.2d 811 (1993); *Hoesly v. State*, *ante* p. 304, 498 N.W.2d 571 (1993); *Professional Firefighters of Omaha v. City of Omaha*, *ante* p. 166, 498 N.W.2d 325 (1993). Moreover, in settling upon the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Hoesly, supra*. See, *Fecht v. The Bunnell Co.*, *ante* p. 1, 497 N.W.2d 50 (1993); *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993); *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Hoesly, supra*; *Fecht, supra*; *Curry, supra*. Further, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Fecht, supra*; *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993); *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). Finally, if there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Hoesly, supra*. See, also, *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

(b) Statutory Interplay

The city's argument begins with our declaration in *Cornhusker P. P. Dist. v. Loup River P. P. Dist.*, 184 Neb. 789, 798, 172 N.W.2d 235, 240 (1969), that "[a]rea service contracts must be respected in the furtherance of the intent of the statute

unless and until the supplier is unable to provide the service in accordance with the guidelines set out in section 70-1007 . . . ." Pointing out that § 70-1010(1) subjects an application to modify a service area to the "same procedures as to notice, hearing, and decision . . . as in the case of an original application," the city concludes that the elements of § 70-1007 are as controlling in an application to modify an existing service area as they are in an application for the initial establishment of a service area under the provisions of § 70-1005.

It is true that in *Cornhusker P. P. Dist.*, we relied upon the factors enumerated in § 70-1007 to determine whether the supplier in that case was unable to provide the service. However, in *Cornhusker P. P. Dist.*, we did not, as the city infers, hold that § 70-1007 is to be applied in modification cases on a "best provider wins" basis.

Moreover, the city's argument overlooks the effect of 1979 Neb. Laws, L.B. 223. Prior to the enactment of L.B. 223, § 70-1008 (Reissue 1976) provided:

> In the absence of an agreement between the suppliers affected and notwithstanding the provisions of subdivisions (1) to (5) of section 70-1007:
>
> (1) In the zoning area surrounding any municipality and outside the corporate limits thereof, if such municipality operates a retail system, it shall have the right to serve such zoning area at retail except as to such customers as are presently served by other suppliers. Such a municipality may acquire the facilities of other suppliers in such zoning area by negotiation.
>
> (2) In determining the service area of a municipally-owned electric system, there shall be included, as a maximum, the corporate area of the municipality, the zoning area outside the corporate limits of such municipality, and the area beyond the zoning area which is presently being served by such municipality, including not more than the area one half mile on each side of the line presently used by such municipality to serve its existing customers, except for customers presently served by other suppliers. When any new customer outside the corporate limits of any municipality and outside the

> zoning limits surrounding such municipality locates closer to electric lines owned by other suppliers in the municipal service area as provided for in this section, in case of disagreement, the question of which supplier shall serve such new customer shall be submitted to the Nebraska Power Review Board for determination under the standards set forth in section 70-1007.

Thus, L.B. 223 removed the zoning area preference previously afforded to municipalities by § 70-1008; the present language of § 70-1008 makes annexation the event which triggers a municipality's right to serve the new area. This more specific language controls over the general language of §§ 70-1007 and 70-1010(1) and thus limits the board's power to amend certified service areas to the grounds specified in § 70-1011.

It is true that subdivision (3) of § 70-1008 (Reissue 1990) provides for joint planning between "[a]ll retail power suppliers having adjoining certified service areas" utilizing "the considerations specified in section 70-1007." Upon a first reading, this provision appears inconsistent with the earlier language of § 70-1008 that in the absence of an agreement and notwithstanding the provisions of § 70-1007, existing service areas shall remain as certified service areas. It is logically impossible to consider and at the same time not consider the § 70-1007 factors. However, although not artfully drawn, the proviso requiring consideration of the § 70-1007 factors in joint planning harmonizes with the "notwithstanding" language by recognizing that the planning provision is nothing more than a nonbinding tool to be used under appropriate circumstances.

As a consequence, absent the concurrence of the suppliers, the only present means of obtaining a modification of a service area is by meeting the requirements set forth in § 70-1011, that is, by establishing that the present supplier cannot or will not furnish adequate electrical service or that its doing so involves a wasteful and unwarranted duplication of facilities.

2. Law of Case

However, the city urges in the second and last of its dispositive and summarized assignments of error that by

overruling Norris' prehearing motion to dismiss, the board determined that the city had alleged a basis for obtaining a modification of the service area under the factors set forth in § 70-1007; that the city accordingly structured the presentation of its evidence in reliance upon that ruling; and that the board was thus precluded from later ruling that the § 70-1007 factors did not apply.

It should first be noted that in the context of court trials, we have held that a pretrial motion to dismiss another's action is not a permissible pleading, but that under certain circumstances, and where by stipulation of the parties or court rule it is allowed, such a motion may be treated as a demurrer. *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987). See, also, *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991). While there may be practical difficulties which prevent the strict and literal application of certain court trial rules to proceedings such as are involved here, see, e.g., *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985), and *County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 143 N.W.2d 880 (1966), because the outcome is not affected, we need not at this time determine whether Norris' prehearing motion was a permissible pleading in this proceeding.

The city's preclusion argument is predicated on a doctrine which is closely allied to res judicata and collateral estoppel and is known as the law of the case doctrine.

> Unlike [res judicata and collateral estoppel], which involve successive suits, [the law of the case doctrine] involves successive stages of the same suit. The same policy of repose, however, underlies all. An issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage. The most usual situation for the application of the doctrine involves a second or third appeal in the same case. For instance, an appellate court may reverse and remand a case for a new trial because of alleged errors of law committed by the trial court. After a second trial there may be a second appeal in which the appellant wishes to reargue the points decided

> on the former appeal. . . .
>
> The [law of the case] doctrine operates . . . to preclude a reconsideration of substantially similar, if not identical, issues. It is not applied with the same rigor as res judicata or collateral estoppel. It does not include all questions which were present in the case and which might have been decided, but were not, and it will not be applied if considerations of substantial justice suggest a reexamination of the issue is warranted.

Milton D. Green, Basic Civil Procedure 239-41 (2d ed. 1979). See, *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735 (5th Cir. 1983); *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974); *Consumers Union of United States, Inc. v. Veterans Admin.*, 436 F.2d 1363 (2d Cir. 1971).

This analysis is consistent with *Kleckner v. Turk*, 45 Neb. 176, 63 N.W. 469 (1895), in which this court determined that a prior refusal to dismiss an action did not preclude the entry of a directed verdict in favor of the defendants. In so ruling, the *Kleckner* court noted that the later ruling involved a consideration of the evidence which had been adduced, a consideration not available at the time of the earlier ruling.

The same situation exists here. At the time of the prehearing motion, the board had before it only the city's allegations; it could not then know whether the evidence would establish either that Norris failed to meet its service obligations or that doing so did not involve a wasteful and unwarranted duplication of facilities. However, at the close of the city's evidence, the board knew that the city had failed to prove the existence of the requirements for obtaining a modification of its service area. Thus, the posthearing motion did not present an identical or substantially similar issue as did the prehearing motion. Therefore, the prehearing ruling did not preclude the posthearing ruling.

V. JUDGMENT

As the record fails to establish either of the city's dispositive and summarized assignments of error, the decision of the board is hereby affirmed.

AFFIRMED.

WHITE and LANPHIER, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. MORRISON, APPELLANT.

500 N.W.2d 547

Filed May 21, 1993. No. S-91-977.

1. **Search Warrants: Affidavits: Evidence: Probable Cause: Appeal and Error.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. The duty of an appellate court in determining whether probable cause existed at the time a search warrant was issued is to ensure that the magistrate had a substantial basis for concluding that probable cause did in fact exist. Moreover, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued.
2. **Constitutional Law: Search and Seizure.** While the Fourth Amendment protects a person's privacy interest in the contents of personal luggage, a canine sniff requires neither opening the luggage nor exposing noncontraband items and is not an unconstitutional search.
3. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress will be upheld on appeal unless the trial court's findings of fact are clearly erroneous.
4. _____: _____. In reviewing a trial court's findings on a suppression motion, an appellate court 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 motion.
5. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed.
6. **Search Warrants: Affidavits: Probable Cause: Judges: Appeal and Error.** The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, when supplemented by the omitted material, would provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant.
7. **Search and Seizure: Controlled Substances: Judicial Notice.** The Nebraska Supreme Court has taken judicial notice that substances such as LSD may be easily and quickly disposed of by merely flushing them down a toilet or drain.
8. **Search and Seizure: Search Warrants: Probable Cause: Words and Phrases.** An anticipatory search warrant is one that is issued before the item to be seized has arrived at the place to be searched. The fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed.
9. **Motions for Mistrial: Appeal and Error.** The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a

ruling will be upheld absent an abuse of that discretion.

10. **Motions for Mistrial: Proof: Appeal and Error.** A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, PAUL J. HICKMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Daniel W. Ryberg for appellant.

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

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

FAHRNBRUCH, J.

The State of Nebraska contends that the Nebraska Court of Appeals in *State v. Morrison*, 1 NCA 2262 (1992), erred in holding that evidence obtained pursuant to a no-knock search warrant should have been suppressed by the district court for Douglas County. Further review was granted by this court.

We agree with the State's position, reverse the judgment of the Court of Appeals, and remand the cause with direction to reinstate William M. Morrison's convictions and sentences.

Morrison was convicted by a district court jury of unlawful possession with intent to deliver LSD (lysergic acid diethylamide) and with unlawful possession of a controlled substance, psilocybin. He was sentenced to not less than 3 nor more than 5 years in prison for possession with intent to deliver LSD, and to not less than 1 1/2 nor more than 5 years in prison

for possession of a controlled substance, the sentences to run concurrently.

FACTS

Evidence adduced at a pretrial suppression hearing reflects that on March 26, 1991, Gerald Vajgert, a U.S. postal inspector, removed an Express Mail package addressed to William Morrison from the mail stream. Based upon his training and experience in detecting and intercepting packages containing illegal controlled substances, Vajgert withheld the package from the mail stream because (1) the package was from a known "source state" for drugs, i.e., California; (2) the package was going from an individual to an individual; (3) the labels on the package were handwritten; and (4) the ZIP Code on the return address differed from the ZIP Code of the mailing post office.

Vajgert arranged for the package to be "presented" to "Bush," a trained and experienced drug detection dog from the Omaha Police Division (OPD). Bush found where the package was hidden and started barking, scratching, and biting, which indicated the presence of contraband. After obtaining a federal warrant to search the package, Vajgert opened the package and discovered it contained approximately 2,064 hits of LSD. Vajgert described the LSD as being on 3- by 3-inch-square sheets of absorbent paper with 100 hits to the sheet.

Following this discovery, Vajgert contacted OPD's narcotics division and arranged a controlled delivery of the package. In preparation for delivery of the package to Morrison, OPD Officer Stephen Sanchelli removed from the package all but 200 hits of LSD. He testified that this action was taken so that if the drugs got away from the officers, as some had in the past, a lesser amount of controlled substances would "hit the street." Sanchelli stated that even if the 200 hits were flushed away, there were still approximately 1,800 hits preserved.

On March 27, 1991, Sanchelli applied to a Douglas County Court judge for a warrant to search Morrison's residence based on the findings during the search of the package. In his affidavit, Sanchelli stated that the "package containing the 2,064 hits of LSD will be delivered" to Morrison at his address in Omaha. A no-knock search warrant was requested because,

as stated in the affidavit, "[o]fficers know through past experience that if they were to announce themselves or their purpose that evidence being sought could be easily destroyed by flushing it down the toilet or sink." The Douglas County Court judge issued the requested warrant, authorizing officers to "enter [Morrison's] premises . . . without knocking or announcing their authority . . . ."

Shortly after a postal inspector delivered the package to Morrison, officers kicked in or rammed the door to Morrison's apartment. Morrison was arrested and charged with possession of a controlled substance, LSD, with intent to deliver. Morrison was also charged with possession of psilocybin, a controlled substance which was found by police in Morrison's apartment when police searched it. Based solely on his objection relating to the factors used by Vajgert to intercept suspicious packages, Morrison filed a motion to suppress all physical evidence seized by officers and all statements made by Morrison to law enforcement officers. After an evidentiary hearing, the motion was overruled. In his motion to suppress, Morrison made no complaint regarding the no-knock search warrant issued by the Douglas County Court judge.

Following a jury trial, Morrison was found guilty on both counts with which he was charged, and he was subsequently sentenced.

Morrison appealed his convictions to the Court of Appeals, claiming that the trial court erred in (1) overruling Morrison's motion to suppress evidence, (2) failing to permit Morrison to examine the prosecuting attorney on her vindictiveness and in permitting amendment of the information, (3) permitting hearsay testimony, and (4) overruling Morrison's motion for a mistrial based on prosecutorial misconduct. The Court of Appeals reversed Morrison's convictions after determining that service of the search warrant by a no-knock entry was improper under the circumstances of this case and that the evidence obtained thereby should have been suppressed. The Court of Appeals stated that the inference to be drawn from Sanchelli's affidavit, i.e., that all 2,064 hits of LSD were to be delivered to Morrison and were at risk of ready destruction, was misleading. The court reasoned that issuance of a no-knock search warrant

would have been unlikely had the issuing judge been aware that most of the evidence had already been detained at police headquarters and half of the remaining evidence was taped to the inside of the package. The Court of Appeals concluded that the district court erred in overruling the motion to suppress evidence seized following the service of the no-knock search warrant. We granted the State's petition for further review of the cause.

MOTION TO SUPPRESS

At the suppression hearing, Morrison challenged the issuance of (1) the federal search warrant, objecting to the underlying basis for what he termed Vajgert's "profile" for suspicious packages and to the trustworthiness and credibility of the drug dog alert, and (2) the state search warrant on the grounds that there was no basis for inclusion of a no-knock provision. The Court of Appeals determined that there was probable cause to issue the federal search warrant.

> A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. . . .
>
> . . . .
>
> The duty of an appellate court in determining whether probable cause existed at the time a search warrant was issued is to ensure that the magistrate had a substantial basis for concluding that probable cause did in fact exist. . . . Moreover, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. . . . Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued.

(Citations omitted.) *State v. Utterback*, 240 Neb. 981, 984-85, 485 N.W.2d 760, 766-67 (1992).

FEDERAL SEARCH WARRANT

Vajgert's affidavit for the federal search warrant established that he was a postal inspector trained and experienced in the investigation of the use of the Express Mail service for trafficking in narcotics and other controlled substances; that an

"Express Mail/Narcotics Profile" had been developed to detect the use of Express Mail for narcotics trafficking; that the package addressed to Morrison fit the profile and was suspicious for a number of specific reasons, including a fictitious return address in a known source state for drugs; and that Bush, a certified drug detection canine, alerted to the package, indicating the presence of a controlled substance. The affidavit also specifically explained that while under the control of his handler, Bush had correctly alerted to narcotics 106 out of 113 times and had correctly alerted 35 out of 40 times in response to requests from the postal inspection service for parcel presentations. A trial court could properly find, without being clearly wrong, that the information contained in Vajgert's affidavit constituted probable cause or reasonable suspicion founded on articulable facts for the issuance of a search warrant for the package.

Morrison's primary objection to the detention of the package centers around Vajgert's "profile" of a suspicious package. Morrison argues that there was no underlying basis for the criteria used by Vajgert. However, Vajgert testified extensively regarding his training and experience, through which he developed his criteria of suspicious packages. Vajgert explained that his duties as a U.S. postal inspector entail discovery of dangerous or controlled substances in the mails. His training included a 12-week basic postal inspector course and a course at the Express Mail Narcotics School, at which he was trained in detecting the use of the Express Mail service for the interstate trafficking of controlled substances. He stated that he specifically targets Express Mail because it has a guaranteed 24-hour delivery and because the majority of contraband cases nationally in the postal inspection service have been in the Express Mail service.

Vajgert stated that his knowledge of drugs and Express Mail was acquired through his training and experience. He testified that he has detained approximately 75 Express Mail packages, of which he searched 55 to 60. Vajgert stated that he detained the package addressed to Morrison because it fit the criteria for a suspicious package and that he then contacted Sanchelli and arranged for the package to be presented to Bush, the drug

detection dog.

In *United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970), the sole issue on appeal was whether conditions were satisfied for detention and inspection of two packages deemed suspicious by a postal clerk who subsequently called police. The court found that the warrantless detention of the packages pending investigation was justified because of the nature and weight of the packages, the fictitious return address, and the defendant's foreign license plates. The court held that the detention of the packages did not fall within the Fourth Amendment proscription of unreasonable searches and seizures of " 'persons, houses, papers, and effects.' " 397 U.S. at 252. Despite a 29-hour delay between mailing and service of the search warrant on the packages, the Court stated that "[t]he significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained." 397 U.S. at 253.

The package addressed to Morrison was sent via Express Mail and was contracted to be delivered by noon on March 26, 1991. Vajgert pulled the package from the mail stream between 8 and 10 a.m. on March 26. A federal search warrant was obtained and executed on the package by 3:15 p.m. that day. Prior to obtaining the federal search warrant, the package was taken to the police impound lot for presentation to the drug detection dog. Before the federal search warrant was executed, delivery of the package was delayed only 3 hours 15 minutes from the expected time of delivery. As in *Van Leeuwen*, the detention in this case was justified based upon Vajgert's reasonable suspicion that the package contained contraband. The privacy of the package was not invaded until a federal search warrant had been obtained. See, also, *Garmon v. Foust*, 741 F.2d 1069 (8th Cir. 1984) (actions of police officer in detaining suspicious package which had been mailed to a university student and which package was in custody of the university was a seizure of the package, but did not violate Fourth Amendment).

Morrison also questions the validity of the presentation of the package to Bush. He claims that the canine sniff in this case

constituted a warrantless search. We disagree. In *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), the Court examined police use of a drug detection dog in the context of a search of a traveler's luggage at an airport. The Court stated that *while the Fourth Amendment protects a person's privacy interest in the contents of personal luggage, a canine sniff requires neither opening the luggage nor exposing noncontraband items.* The court emphasized the nonintrusive nature of a canine sniff and the limited disclosure to officers of the contents of the luggage.

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

462 U.S. at 707. See, also, *U.S. v. Harvey*, 961 F.2d 1361 (8th Cir. 1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 238, 121 L. Ed. 2d 173. In Morrison's case, subjecting the package to a canine sniff was a nonintrusive method of verifying Vajgert's reasonable suspicion based upon articulable facts that the package contained contraband. It was not a "search" of the package within the meaning of the Fourth Amendment. Morrison's argument is without merit.

Morrison objects to the placement of the package for presentation in a drawer in which other drugs had been placed for presentation 7 to 10 times previously. Morrison complains that Bush could have been alerting to scent residue from other drugs which had been placed in the drawer in the past. Sanchelli acknowledged that in the past he had hidden drugs from Bush in a number of drawers at that location. However, Sanchelli testified that in this instance, Bush "didn't alert on those drawers. He went to the strongest odor, which was the LSD hidden in that one table drawer."

Morrison also argues that Bush was not certified in the

detection of LSD. Sanchelli testified at the suppression hearing that he had attended a 2-week course at the Rudy Drexler School for Dogs in Elkhart, Indiana, at which he learned to train drug detection dogs. He said that he was required to be recertified every year and that since his initial certification in 1988, he had been recertified three times. Sanchelli testified that he was a certified handler who knows how to train drug detection dogs and that he had certified Bush in detecting LSD.

Nonetheless, Morrison complains that Bush was not certified in detecting LSD by the Drexler school, but only by Sanchelli himself, and that Vajgert's affidavit was therefore misleading in its statement that Bush was "a certified drug detection canine from the Rudy Drexler School for Canines in Elkhart, IL [sic]." The record fails to disclose any evidence that a drug detection dog must be trained at the school or that Sanchelli was unqualified to certify Bush in detecting LSD. Furthermore, Bush had in fact been certified in a number of drugs at the Drexler school. At the time Vajgert prepared his affidavit for the federal search warrant, he suspected only that the package contained a controlled substance. That the substance later proved to be LSD, which evidence emerged after the warrant was issued, has no bearing on whether the warrant was validly issued. Considering the information and circumstances contained within the four corners of the affidavit, the trial judge was not clearly wrong in determining that the federal search warrant was properly issued.

STATE SEARCH WARRANT

In his appeal to the Court of Appeals, Morrison argued, and the Court of Appeals agreed, that there were misleading omissions in the affidavit for the state search warrant because the affidavit stated that all 2,064 hits of LSD were to be delivered to Morrison's address, when in fact over 1,800 hits had been removed, and of the remaining 200 hits, 100 had been affixed to the inside of the package. Thus, Morrison argues that the Douglas County Court judge was misled by the statement in the affidavit that the drugs mailed to Morrison could be easily destroyed by flushing them down a toilet or sink.

A trial court's ruling on a motion to suppress will be upheld

on appeal unless the trial court's findings of fact are clearly erroneous. *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993). In reviewing a trial court's findings on a suppression motion, an appellate court 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 motion. *Id.* A defendant who seeks to suppress evidence obtained pursuant to a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed. *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, when supplemented by the omitted material, would provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992).

The suppression hearing record reflects that Morrison failed to meet his burden of proving that the search warrant was invalid. Sanchelli's affidavit requesting a state search warrant stated that "the Express Mail package containing the 2,064 hits of LSD will be delivered" to Morrison at his home address. At the suppression hearing, Sanchelli acknowledged that he assisted in the removal of 1,863 hits from the package and preserved those hits as evidence. Had this information, omitted from the affidavit, been presented to the magistrate, there would still have been probable cause to issue the search warrant based on the 200 hits of LSD delivered to Morrison. Whether there were 200 LSD hits or over 2,000 LSD hits in the package to be delivered is not crucial to the issuance of the state search warrant. Possession of either number of hits is illegal, and either amount would constitute circumstantial evidence of Morrison's intent to deliver the LSD. See *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992).

No evidence was presented at the suppression hearing that 100 hits were affixed to the inside of the package to prevent easy disposal of the drug. Implicit in the trial court's denial of the motion to suppress is its finding that Morrison could indeed have easily destroyed the 200 hits of LSD delivered to him. In fact, the Nebraska Supreme Court has taken judicial notice that

substances such as LSD may be easily and quickly disposed of by merely flushing them down a toilet or drain. *State v. Meyer*, 209 Neb. 757, 311 N.W.2d 520 (1981). Had Morrison destroyed the 200 hits, he could not have been charged with possession of LSD because he at no time possessed the 1,863 hits of LSD which had been removed by police. As previously stated, evidence that 100 LSD hits were taped to the inside of the package was not presented at the suppression hearing. By the time Morrison renewed his motion to suppress, evidence had been received, without objection, that when the police arrested Morrison minutes after the package was delivered, all 200 hits of LSD that had been in the Express Mail package were found in the pocket of the bathrobe Morrison was wearing. It is noted that the sheets containing 100 LSD hits each were absorbent and smaller than a square of toilet tissue. In view of this crucial evidence, it cannot be said that the trial court, as the finder of fact, was clearly wrong in denying Morrison's motion to suppress based on omissions from the affidavit.

Morrison also claims that a no-knock search warrant was unjustified because officers could have arrested Morrison at the door when the package was delivered and, thus, the manner of serving the warrant was a pretext for searching the entire premises. This argument is without merit. Officers had a search warrant which authorized them to search Morrison's apartment for "LSD . . . its derivatives and administering instruments whether homemade or manufactured, all monies used to conduct an illegal narcotics operation, items of venue such as letters, documents and keys which would identify persons residing at or in control of [Morrison's address]." Armed with a valid search warrant, officers did not need a pretext to search Morrison's residence. Furthermore, an arrest at Morrison's front door would have required either a lone officer acting in a potentially dangerous situation or a number of officers to be present when Morrison came to the door, which would have served to alert Morrison to the situation and lessen the chance that the door would be voluntarily and peacefully opened.

Morrison did not directly attack the validity of an "anticipatory" search warrant in his motion to suppress, nor at the suppression hearing or the trial. Nonetheless, on appeal, he

assails the validity of such a warrant.

This court has not addressed the question of the validity of an anticipatory search warrant, which is "one that is issued before the item to be seized has arrived at the place to be searched." *U.S. v. Tagbering*, 985 F.2d 946, 949 (8th Cir. 1993). In *Tagbering*, the U.S. Court of Appeals for the Eighth Circuit noted that at least six other circuits have upheld such warrants, and quoted with approval *U.S. v. Garcia*, 882 F.2d 699 (2d Cir. 1989), *cert. denied, Grant v. U.S.*, 493 U.S. 943, 110 S. Ct. 348, 107 L. Ed. 2d 336, which stated that " 'the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed.' " 985 U.S. at 950. In this case, the district court was not clearly wrong in upholding the validity of the anticipatory search warrant. Morrison's argument is without merit.

Morrison's assignment of error that the trial court erred in overruling his motion to suppress is without merit.

PROSECUTORIAL VINDICTIVENESS

Morrison assigns as error the refusal of the trial court to permit examination of the prosecutor on her "vindictiveness" in amending the information to add the charge of possession of psilocybin. Entered into evidence is a letter in which a plea offer is made from the prosecutor to Morrison's attorney, the substance of which is that the prosecutor will refrain from amending the information to include the psilocybin charge if Morrison agrees to plead guilty to the charge of unlawful possession of LSD with intent to deliver. Morrison apparently rejected the offer, and the prosecutor moved to amend the information during the suppression hearing. In effect, Morrison claims that the plea offer by the prosecutor was an attempt to dissuade him from going to trial and was ultimately a ploy designed to preclude him from preserving issues he had raised in the suppression hearing because "[s]uch preservation is difficult to do by simply submitting reports." Brief for appellant at 41.

In *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989), a defendant claimed that he was denied due process of law when

the county court allowed the county attorney to dismiss a misdemeanor charge and refile a felony charge arising from the same incident. The defendant filed a plea of no contest, but argued on appeal that the county attorney's actions demonstrated a reasonable likelihood of prosecutorial vindictiveness. In affirming the conviction, this court stated that

> "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'. . . It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."

Id. at 114, 449 N.W.2d at 234-35 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)). The letter from the prosecutor to Morrison's attorney represented an attempt to persuade Morrison to plead guilty to a single charge rather than to be tried on two charges. The letter contained an offer which Morrison was free to accept or reject. The contents of the letter do not rise to the level of prosecutorial vindictiveness, and the trial court did not err in refusing Morrison the opportunity to examine the prosecutor on that issue or in allowing the information to be amended.

HEARSAY OBJECTION

Morrison objects to Vajgert's trial testimony that the return address on the package was fictitious, assigning as error that the testimony was inadmissible hearsay. In the course of explaining his criteria for detaining a suspicious package, Vajgert testified that he customarily contacts the postal inspector's office in the source city to verify the return address. Vajgert stated that the return address on the package addressed to Morrison indicated that it was from "Amy Thomas" of "1357 Leavenworth, San

Francisco, California, 94102." Vajgert then testified, over Morrison's hearsay objection, that in this case when he contacted the inspector's office in San Francisco, "[t]hey indicated to me that there is a 1300 block on Leavenworth Street in San Francisco but the address 1357 does not exist on that block. And they also indicated that the carrier was not familiar with the name of . . . Amy Thomas."

In his brief, Morrison acknowledges that this evidence was offered "in order to show what actions Vajgert then took, and not for the truth of the matter." Brief for appellant at 43. By definition, such testimony is not hearsay. See Neb. Rev. Stat. § 27-801(3) (Reissue 1989). In any event, the admission of that testimony is harmless error beyond a reasonable doubt. The testimony was admitted to show officers' justification in obtaining a search warrant for the package. The testimony was not necessary to show that Morrison was guilty of possession of LSD with intent to deliver. Without that evidence, there was other, overwhelming evidence of Morrison's guilt, including the fact that Morrison accepted the package when it was delivered, opened it, removed the LSD hits, and had them in the pocket of the bathrobe he was wearing when the search warrant was executed. Further, the evidence reflects that Morrison told a police officer that he was selling LSD to support his own habit. He also said he would have sold LSD to his friends. There was testimony that the street value in Omaha of 2,000 LSD hits was between $8,000 and $14,000. From these statements and from the number of LSD hits in the Express Mail package, prior to or upon delivery, a jury could conclude beyond a reasonable doubt that Morrison received the controlled substances with the intent to deliver them. See *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). The evidence was uncontroverted that the psilocybin was found in Morrison's apartment. From all these uncontroverted facts, a jury could conclude beyond a reasonable doubt that Morrison was guilty as charged. Any error in admitting the challenged testimony was harmless beyond a reasonable doubt. Morrison's assignment of error is without merit.

PROSECUTORIAL MISCONDUCT

Morrison moved for a mistrial after the fourth attempt by the State to elicit from witnesses a description of Morrison at the time of his arrest. Morrison argues that the prosecution was attempting to prejudice the jury by depicting Morrison as a "long hair." Brief for appellant at 45. Witnesses were not permitted to answer two of the four questions as to how Morrison's appearance at trial differed from his appearance at the time of his arrest. One of the arresting officers was twice asked at trial to describe Morrison at the time of his arrest. Included in the officer's description of Morrison after the final question was the fact that "[Morrison] had shoulder-length hair that was rubber-banded." Morrison then moved for a mistrial, which motion was overruled. The court did not admonish the jury to disregard what they had heard regarding Morrison's description.

The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

> "A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material." (Citations omitted.)
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> . . . .
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> The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice.

Id. at 673-74, 477 N.W.2d at 799.

Morrison has failed to show that the alleged errors regarding

Morrison's description actually prejudiced him. The evidence against Morrison was overwhelming. Comments regarding his long hair do not rise to a level of prejudice which would result in prevention of a fair trial.

Morrison also complains that there was a cumulative effect of inadmissible evidence which resulted in prejudicial error. In addition to evidence of Morrison's description, the evidence Morrison points to as being inadmissible includes (1) the evidence objected to by Morrison as being hearsay, which objection was without merit, and (2) questioning of a witness about Morrison's past criminal acts, the introduction of which evidence was not assigned as error by Morrison. When asked on cross-examination whether she had used LSD, the witness volunteered that she had used it one time with Morrison. Subsequently, on cross-examination she testified, without objection, that Morrison had given her the LSD she had used. This testimony was corroborative of his intent to deliver the LSD contained in the Express Mail package addressed to him. The trial court did not abuse its discretion in overruling Morrison's motion for a mistrial.

CONCLUSION

The federal and state search warrants issued in this case were valid. The trial court was correct in denying Morrison's motion to suppress evidence obtained as a result of the warrants. Morrison's remaining assignments of error are meritless. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with direction to reinstate Morrison's convictions and sentences entered by the district court for Douglas County.

REVERSED AND REMANDED WITH DIRECTION.